COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2141 **Cir. Ct. No. 2010FO1269**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CITY OF STEVENS POINT,

PLAINTIFF-RESPONDENT,

V.

CRAIG R. TESCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Craig Tesch appeals a judgment imposing a forfeiture for violation of STEVENS POINT ORDINANCE 24.01(1), the City's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

disorderly conduct ordinance, following a bench trial on June 20, 2011.[2] Tesch, who was pro se in the circuit court and is pro se now on appeal, raises four issues, none of which have merit.

¶2 The first three issues all relate to the sufficiency of the evidence. As explained in more detail below, this court concludes that the sufficiency challenge has no merit, because it merely questions factual findings and credibility determinations made by the circuit court, to which this court must defer on appeal, absent clear error not shown by Tesch. The fourth issue relates to what Tesch asserts was bias on the part of the City's prosecutor. For the reasons stated below, this court concludes that Tesch's argument on this issue also lacks merit. Accordingly, this court affirms.

[2] This court finds no copy of STEVENS POINT ORDINANCE 24.01(1) in the record, but there is no dispute as to its contents. The court takes judicial notice, under WIS. STAT. §§ 902.01(2)(b) and 902.03(1)(a), that the ordinance, as provided online by the City of Stevens Point, states as follows:

> DISORDERLY CONDUCT. Whoever does any of the following shall suffer a forfeiture of not more than $200 and in lieu of payment assessed imprisonment for not more than sixty (60) days in the county jail.
>
> (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

Putting aside insignificant wording differences, this is the same language as appears in the state disorderly conduct statute, WIS. STAT. § 947.01.

Background

¶3 One evening in November 2010, Tesch and a second adult male exchanged blows in the parking lot at the YMCA in Stevens Point. Tesch was cited for disorderly conduct under the ordinance.

¶4 The second man testified to the following at the bench trial on the citation. After Tesch drove dangerously close behind the man, they both pulled their vehicles into the YMCA parking lot. The man asked Tesch if there was a problem, and Tesch responded, "Are you talking to me?" The man replied in the affirmative. Tesch then "turned and he stormed toward me and he hit me [in the eye]. And I hit back simply to keep from getting hit again[,] … as he was winding up to hit me again."

¶5 An exhibit showed the second man with a black eye as a result of the altercation. In addition, one of the police officers who responded to the scene testified that Tesch admitted to exchanging punches with the man.

¶6 Tesch offered a different version of events in his testimony. Tesch denied tailgating and denied striking the second man. Tesch testified that the only explanation he could think of for the man's black eye was that, when the man "threw me against [a wall], to catch my balance or something, my hand must have come out." Tesch denied admitting to a police officer that he had exchanged blows with the man.

¶7 After hearing all of the evidence and arguments presented by the parties, the court found the following. The second man "got into Mr. Tesch's face[,] about as close as he thought that Mr. Tesch got to his bumper[,] and that [the man] was angry and that he was frightening," due to his physical size. Tesch

reacted to this by swinging a bag containing items at the man, striking him in the face with the bag. This constituted "the first blow" between the two men, and was a more aggressive blow than "required" by the circumstances.[3] On this basis, the court found that Tesch violated the disorderly conduct ordinance and ordered Tesch to pay the forfeiture, plus court costs.

Sufficiency of the Evidence

¶8 Addressing first the sufficiency of the evidence, Tesch raises issues as to (1) whether incriminating aspects of the testimony of both a police officer and the second man were implausible and inconsistent, (2) whether the evidence required a finding of self-defense on Tesch's part, and (3) whether the evidence in general was sufficient to show disorderly conduct.

¶9 As to the first and second issues, Tesch's arguments are nothing more than an attempt to retry the case before this court, asking this court to re-weigh the evidence or to overturn the circuit court's credibility findings. Such arguments are not winning ones, for reasons long and firmly established:

> When reviewing fact finding, we search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. The weight and credibility to be given to testimony is uniquely within the province of the trial court. The trial court is in a far better position than an appellate court to make such determinations because the trial court has the opportunity to observe the witnesses and their demeanor on the witness stand. The trial court also

[3] It is true that the court initially stated, "I don't think that the City can prove who threw the first blow." However, it is evident from reading the entire set of findings and conclusions by the court that it ended up deciding that, while the question might be close, the court was convinced that Tesch landed the first blow.

> has a superior view of the total circumstances of the witnesses' testimony.

Covelli v. Covelli, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260 (citations omitted); *see also* WIS. STAT. § 805.17(2) (only clearly erroneous findings of fact will be set aside).

¶10 Tesch gives this court no reason to conclude that the court clearly erred in finding, based on all of the evidence, that he landed the first blow and that his conduct did not constitute self-defense. Evidence in support of those findings included the second man's testimony and the photograph of the man showing a black and "completely swollen shut" eye, as the circuit court observed.

¶11 In contrast, it is apparent that the court largely discredited Tesch's version of events, including Tesch's testimony that he did not strike the man, or did so only accidentally in attempting to defend himself, and discredited Tesch's testimony that he did not admit to exchanging punches with the man. It is also apparent that the court reasonably rejected any self-defense claim, including by finding, based on the above evidence, that Tesch's conduct in response to the second man's actions was more than what was "required" under the circumstances.

¶12 Turning to Tesch's third stated issue, whether the evidence in general was sufficient to support a citation for disorderly conduct, Tesch's argument is not well developed. In any event, it is without merit.

¶13 As indicated above, the ordinance prohibits individuals from engaging in "violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." STEVENS POINT ORDINANCE 24.01(1). Under

the plain meaning of the terms of the ordinance, there was sufficient evidence for the circuit court to conclude that this standard was met. This includes evidence that Tesch participated in an altercation in which he struck first, using more force than was necessary under the circumstances. Tesch's limited argument on this topic appears to assume, incorrectly, that this court and the circuit court must adopt Tesch's version of events in deciding whether the evidence was sufficient.

Bias

¶14 Turning to the final issue, Tesch argues that the prosecuting attorney was "biased" against him, based primarily on the undisputed fact that Tesch was tried before the second man, who was also cited for his role in the altercation. Tesch further argues that this asserted bias resulted in a due process violation, apparently because Tesch believes that the timing of the two trials put Tesch at a relative disadvantage in the preparation of his case.

¶15 The timing of the two trials, without more, falls far short of showing improper bias or a due process violation. If Tesch intends to argue that the court or prosecution improperly manipulated the court's calendaring decisions to Tesch's unfair disadvantage, he fails to point to evidence of this. Similarly, if Tesch means to argue that the prosecuting attorney acted in some unethical or unprofessional manner, he fails to point to evidence of this. Therefore, this court deems the alleged "bias" issue to be without merit.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.