

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP405-FT

Cir. Ct. No. 2012JV17

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE INTEREST OF CHRISTINA V., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTINA V.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Christina V. appeals an order adjudicating her delinquent of disorderly conduct. Christina argues the evidence supporting her adjudication was insufficient and the circuit court simply speculated as to what happened. We disagree and affirm.

BACKGROUND

¶2 The State filed an amended delinquency petition against fifteen-year-old Christina. The petition alleged Christina had committed disorderly conduct, contrary to WIS. STAT. § 947.01(1), and second-degree reckless endangerment, contrary to WIS. STAT. § 941.30(2).

¶3 At the fact-finding hearing, eighteen-year-old Juwane Brown testified he dated Christina for three months in 2012. Approximately three weeks after breaking up, Christina and Brown each visited their friend, Quinn N.'s, house for a bonfire. Brown was at Quinn's house when Christina arrived with another friend, Lucas S. Christina was driving Lucas's car, and Lucas was in the passenger seat. Christina asked Brown to get in the car because they needed to talk. Brown testified he did not want to get in the car and he had heard rumors Christina wanted to kill him. However, Brown entered the backseat behind Lucas, and Christina drove the vehicle away from Quinn's house.

¶4 Brown testified that, after he entered the car, he told Christina she needed to stop spreading rumors about him. Christina told him to "Stop it," and Brown said, "No, just let me out of the car." Christina replied, "If you don't stop,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. This is an expedited appeal under WIS. STAT. RULE 809.17.

I'm going to shoot you.” According to Brown, Lucas then asked, “What about the gun?” Brown then reached for the door. He saw Christina reach down and produce a gun. She then pointed the gun at Brown’s temple with her right hand.² After Brown heard a “slight clicking sound” and saw Christina’s thumb move, he jumped out of the car. Brown estimated the vehicle was traveling thirty-five or forty miles-per-hour when he jumped and believed Christina was accelerating. He testified he saw only the outline of the gun and did not see its details because it was dark and the car was illuminated only by the dashboard light.³

¶5 After jumping from the car, Brown ran back to Quinn’s house and told Quinn that Christina pulled a gun on him. Brown had a scrape on his arm, but did not seek any medical attention. He then waited four days to report the incident to police. He called Christina a couple of hours before reporting the incident to ask what happened and why she did what she did. Christina told him not to come by her work or school, and not to associate with people they both knew.

¶6 Lucas testified he and Christina went to Quinn’s house because Christina wanted to talk to Brown. Christina was driving Lucas’s car. She wanted to clear things up with Brown and become friends again. Lucas explained Christina “was being nice until [Brown] wouldn’t respond ... and then later on he would.” Christina and Brown started arguing, and Brown called Christina a “whore” and a “lying fucking cunt.” Lucas mentioned the gun in the driver side door because he did not want either of them to have a gun while they were upset.

² Brown initially told police Christina had the gun in her left hand. He also originally demonstrated Christina’s actions to police with his left hand.

³ The gun was actually an Airsoft gun that fired only plastic pellets. The gun had an orange tip, had no hammer, and required the use of two hands to fire.

Christina reached down and took the gun with her left hand, put it on her lap, and then used her right hand to give it to Lucas. Lucas testified she did not lift the gun in the air or point it at Brown.⁴ Lucas put the gun in the passenger side door.

¶7 Brown then jumped out of the car as it was slowing down. Lucas, however, believed that Brown may have told them he was going to jump from the vehicle before Lucas asked Christina for the gun. Lucas thought Brown decided to jump from the vehicle to “get[] me and Christina in trouble.” When Lucas and Christina realized Brown jumped from the car, they turned around and began looking for him. Eventually, they returned to Quinn’s house and realized Brown was there.

¶8 The police also interviewed Christina and made a video recording of that interview. The tape was not played during trial, and Christina did not testify. However, the tape was admitted into evidence and the parties agreed the court could view Christina’s taped interview before making its delinquency determination. The court delayed ruling so that it could review the evidence.

¶9 In the taped interview, Christina said Lucas mentioned the gun and Brown freaked out. She slowed the car down and Brown jumped out. Christina denied touching the gun and denied pointing the gun at Brown.

¶10 On August 9, 2012, the court adjudicated Christina delinquent of disorderly conduct, but did not find her delinquent of second-degree reckless endangerment. In support of its determination, the court first noted that it had

⁴ Lucas made a statement to police that “Christina had the gun in her hand and made the comment to [Brown] that if he didn’t stop, she would shoot him.” However, at trial, Lucas testified the police made the statement and made him say “yes” or “no.” Lucas said he felt pressured by his mother, his principal, and the police during the interview.

reviewed Christina's, Lucas's, and Brown's statements and found "none ... are all that reliable." It determined Christina "had her story all concocted," Lucas had "difficulty testifying" and a "hard time really articulating himself and answering the questions directly," and Brown's version was "an embellishment of what happened."

¶11 The court then reasoned it could not adjudicate Christina delinquent of second-degree reckless endangerment because it did not believe Christina took the gun and turned around and put it within two inches of Brown's temple, which caused Brown to flee from the moving vehicle.⁵

¶12 The court stated:

What I think probably happened, and I don't have any idea whether—it's somewhat of a guess, which is part of the weakness of the case here, I think that Lucas did mention the gun because he was concerned that this was getting more heated.

I do think that Christina got the gun, and could have passed it to Lucas where [Brown] in the back seat would not have seen it; I suspect Christina couldn't resist under those circumstances flashing the gun, showing it to the back seat, to [Brown], and then giving it to Lucas.

My best guess is that that's what happened, and that [Brown], having probably from the evidence, already opened the door, or, you know, opening it, indicating that

⁵ A charge of second-degree reckless endangerment requires proof beyond a reasonable doubt that: (1) the defendant endangered the safety of another human being (2) by criminally reckless conduct. WIS. STAT. § 941.30(2); *see also* WIS JI—CRIMINAL 1347 (Apr. 2003). "Criminal recklessness" means the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. WIS. STAT. § 939.24(1). "Great bodily harm" means "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14).

he might jump out, then thinks about it, not impulsively, but I suspect the speed got slow enough that he'd made the decision to roll out.

And I think that there's even somewhat of a likelihood that he did that somewhat calculated that he could get her in trouble because she flashed this gun at him. Again, I'm speculating on what might have happened here. It doesn't rise to the level of second-degree reckless endangerment, so ... I don't find Christina guilty or adjudicate her delinquent on that charge.

¶13 The court then turned to the disorderly conduct charge, reasoning:

I do think there's enough here for a disorderly conduct, and that's because she's the one who invites him into the car. And while the argument started, and no doubt that they both participated in it, and it got more heated, it was pretty childish on both parts. She's apparently irritated because he won't answer the questions, he's moving all around, making her nervous. He gets in a car with a 15-year-old that he has to know doesn't have a license. While he thinks that—maintains that she's said that she wants to kill him. It just doesn't make any sense.

But during that type of a disturbance in the car, where they're going back and forth, it rises to the level that Lucas is concerned enough that he wants to get the gun out of play and in his hands so that nobody does anything impulsively.

I think that it's reasonable to believe that Christina did not just pick up the gun and hand it to Lucas, but rather, as I said, flashed it towards [Brown] in the back seat.

And I think that's enough to meet the elements of disorderly conduct, otherwise disorderly. Under the circumstances that then existed then, whether that actually caused Brown to jump out of the car, I don't know. But I don't think it's necessary. I think flashing the gun itself is enough to meet disorderly conduct.

¶14 At the dispositional hearing, the court placed Christina on supervision for one year with placement at her father's house.

DISCUSSION

¶15 On appeal, Christina argues insufficient evidence supports her disorderly conduct adjudication because the circuit court “based its finding on a ‘guess’ and ‘speculated’ about what happened.” Our review of a sufficiency of the evidence claim is very narrow. *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. We give great deference to the trier of fact and do not substitute our judgment “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). However, a fact-finder cannot base its findings on conjecture and speculation; reasonable inferences must be supported by facts in the record. *State ex rel. Kanieski v. Gagnon*, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

¶16 To adjudicate a juvenile delinquent of disorderly conduct, the State must prove: (1) the juvenile engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct; and (2) the juvenile’s conduct occurred under circumstances where it tended to cause or provoke a disturbance. *State v. Douglas D.*, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725; *see also* WIS. STAT. § 947.01.⁶ Under both elements, “[i]t is the combination of conduct and circumstances that is crucial in applying the statute to a particular situation.” *State v. Maker*, 48 Wis. 2d 612, 616, 180 N.W.2d 707 (1970).

⁶ WISCONSIN STAT. § 947.01 provides: “Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.”

¶17 Here, the circuit court adjudicated Christina delinquent of disorderly conduct because it determined Christina invited Brown in the car, got in an argument with him that became so heated Lucas was concerned enough to “get the gun out of play,” and then flashed the gun at Brown as she passed it to Lucas. Christina argues the court’s findings are speculative because the court only suspected she flashed the gun at Brown and the evidence does not support the court’s determination that her actions caused Lucas to be concerned about the gun.

¶18 We disagree. First, the court’s determination that Christina flashed the gun at Brown is not speculative. Although the circuit court used the phrase “it’s reasonable to believe” and made earlier musings on the subject when rendering its decision, Christina’s argument rests largely on semantics. Ultimately, the court did find as fact that Christina flashed the gun at Brown, and this determination is supported by evidence in the record.

¶19 Specifically, the record shows Brown and Lucas both testified Christina retrieved the gun. Lucas testified Christina passed the gun to him across her lap. Brown testified that, while sitting in the back seat, he saw the gun in Christina’s hand and she proceeded to point the gun at his temple. Although the court determined Brown embellished that Christina pointed the gun at his temple, the court, as finder of fact, was free to believe the portion of Brown’s testimony that Christina showed him the gun. *See State v. Paegelow*, 56 Wis. 2d 815, 822, 202 N.W.2d 916 (1973) (The trier of fact is free to believe and accept only such parts of a witness’s testimony that it deems credible.); *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985) (fact finder may believe some testimony of one witness and some testimony of another witness). By that same token, the circuit court was free to reject the portion of Lucas’s testimony that

Christina passed the gun only across her lap. *See Paegelow*, 56 Wis. 2d at 822; *Toy*, 125 Wis. 2d at 222.

¶20 Second, we reject Christina’s assertion that the evidence supports a determination that only Brown’s actions caused Lucas to become concerned about the gun. Lucas specifically testified he wanted to get control of the gun because “they were [both] arguing.”

¶21 In sum, the circuit court’s findings that Christina flashed the gun at Brown and that Christina and Brown were in an argument that became so heated Lucas was concerned enough to “get the gun out of play” are sufficiently supported by the evidence presented at trial. *See Poellinger*, 153 Wis. 2d at 507. These findings support the court’s determination that Christina committed otherwise disorderly conduct under circumstances that tended to cause a disturbance. *See WIS. STAT. § 947.01.*

By the Court.—Order affirmed.

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

