COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 6, 1997

NOTICE

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

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No. 97-0369

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

KENOSHA COUNTY,

PLAINTIFF-RESPONDENT,

V.

MICHAEL H. HINES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed.*

ANDERSON, J. Michael H. Hines appeals from a judgment of conviction for disorderly conduct in violation of KENOSHA COUNTY, WIS., ORDINANCE § 9.09. The trial court found that Hines' use of the word "bullshit" to a ticketing officer constituted disorderly conduct. Because there is no evidence that anyone other than the employee and the manager were disturbed by

Hines, we conclude that Kenosha County failed to prove that Hines' language constituted disorderly conduct. Accordingly, we reverse.

The facts relevant to the trial court's findings are as follows. Hines had placed an order at a Wendy's drive-thru and believed that he did not receive an item he had ordered. When the register operator and the manager explained that they could not print a register receipt for his order, he became "boisterous." Hines entered the restaurant and the manager began "to write down a receipt with every item on it that he had ordered to show him what the prices were." Hines continued to swear at and belittle the manager. Although the manager did not feel threatened, he decided to call the sheriff's department.

When Deputy Scott Zweibel entered the restaurant, Hines was the only customer standing by the front counter. Zweibel approached Hines. According to Zweibel, the manager said he was willing to give Hines a handwritten receipt, but it would take a couple of minutes because they were busy. Hines explained to Zweibel that the manager had said, "[H]e didn't have a last name, he wasn't going to give his last name out," and Hines then uttered, "[T]his is bullshit." Zweibel had asked Hines to lower his voice, but when Hines said "bullshit," Zweibel told him that they were going to go outside and he placed his hand on Hines' elbow. Zweibel testified that Hines said, "[T]his is bullshit and started to pull away …." Zweibel put Hines' arm behind his back, escorted him to the squad and issued him a citation for disorderly conduct.

A trial to the court was held on January 14, 1997. The court viewed Hines' behavior, prior to Zweibel coming on the scene, as nothing more than "bad manners." However, the court found Hines' use of the term "bullshit" to be disorderly conduct because "people have a right to go into a public restaurant and

not be assaulted with that kind of language." Because Hines could reasonably foresee that others would be disrupted in their enjoyment of their meal and that would cause a disturbance, the court fined Hines $1.00 plus costs and disbursements, totaling $81.23. Hines appeals.

In ordinance cases, the county is required to prove by clear, satisfactory and convincing evidence that the defendant has committed the offense. *See* ***City of Milwaukee v. Christopher***, 45 Wis.2d 188, 191, 172 N.W.2d 695, 697 (1969). "'[U]nless the findings of the trial court are against the great weight and clear preponderance of the evidence they will not be set aside on appeal even though contrary findings might have been made with evidence in their support.'"[1] ***Id.*** (quoted source omitted). To meet this test, however, the trial court's findings "'must at least be supported by evidence sufficient to meet the burden of proof….'" ***Id.*** (quoted source omitted).

The county ordinance adopts § 947.01, STATS., which provides that disorderly conduct is committed by one who "in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under the circumstances in which the conduct tends to cause or provoke a disturbance …." The trial court found that Hines violated the ordinance when he used the term "bullshit" with the deputy.

[1] The "great weight and clear preponderance of the evidence" standard has been rephrased to state that we will not reverse a trial court's factual findings unless they are clearly erroneous. *See* ***Noll v. Dimicelli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). The two concepts are the same, however. *See* ***id.***

The evidence does not support the trial court's finding that Hines' conduct was "disorderly."[2] There is no question that Hines used profane language within the meaning of the ordinance; however, in the absence of evidence that it was uttered "under circumstances [tending] to cause or provoke a disturbance," *see* § 947.01, STATS., the finding of guilt cannot stand. First, using the term "bullshit" to a police officer is not disorderly conduct. A defendant's conduct when yelling at a police officer does not necessarily constitute disorderly conduct. *See* ***State v. Becker***, 51 Wis.2d 659, 665, 188 N.W.2d 449, 452 (1971). In fact, a person may direct opprobrious and obscene words at a police officer without guilt of disorderly conduct attaching. *See* ***Lewis v. City of New Orleans***, 415 U.S. 130, 132-34 (1974).

Moreover, the only evidence on this point is the deputy's testimony that when he walked into the restaurant and prior to Hines' use of the word "bullshit," it was quiet and the patrons were staring in Hines' direction. The deputy also testified that he did not take any statements from individual customers, he did not interview any customers and none of the customers lodged a complaint against Hines. Even under the deferential standards applicable to our review of

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[2] The County cites to ***Lane v. Collins***, 29 Wis.2d 66, 138 N.W.2d 264 (1965), and ***City of Milwaukee v. Christopher***, 45 Wis.2d 188, 172 N.W.2d 695 (1969), in support of its position. Both are readily distinguishable. The ordinance in ***Lane*** contained a separate section punishing the use of "profane … or obscene language in any public place within the hearing of other persons." ***Lane***, 29 Wis.2d at 72, 138 N.W.2d at 267. There was no requirement—as there is in the ordinance in question here—that the offensive conduct occur "under circumstances in which the conduct tends to cause or provoke a disturbance …."

Christopher is equally unavailing. The ordinance in ***Christopher*** contains the disjunctive "or" which limits the "tending to create or provoke a breach of the peace" language to those persons who engage in violent, abusive or otherwise disorderly conduct. *See* ***Christopher***, 45 Wis.2d at 189, 172 N.W.2d at 696. And in contrast to the ordinance at issue here, the separate provision in the ***Christopher*** ordinance which penalizes the use of vulgar or obscene language is not restricted by a requirement that such acts must also tend to provoke a breach of the peace. *See* ***id.***

the evidence in cases such as this, we consider that testimony to be insufficient to support a finding that Hines' conduct tended to cause or provoke a disturbance within the meaning of the Kenosha County ordinance. We conclude that the County failed to prove that Hines' language constituted disorderly conduct as defined in the ordinance.

By the Court.—Judgment reversed.

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