COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2360-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY D. GRITZ,

DEFENDANT-APPELLANT.

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

SNYDER, P.J. Anthony D. Gritz was convicted of two counts of disorderly conduct in violation of § 947.01, STATS. Both convictions were also subject to repeater enhancements. *See* § 939.62, STATS. Gritz claims on appeal that: (1) his First Amendment rights were violated when he was convicted of one count of disorderly conduct for verbally challenging the arresting officers; (2) there was insufficient evidence to convict him of disorderly conduct; and (3) the

trial court erred when it admitted evidence of a prior conviction. We conclude that the totality of the circumstances must be considered in assessing whether Gritz's conduct toward the officers was disorderly and, when viewed in this light, whether his conduct "tends to cause or provoke a disturbance." *See* § 947.01. We also conclude that admission of the other acts evidence was a proper exercise of discretion and affirm the judgment.

STATEMENT OF FACTS

The charges for disorderly conduct stemmed from an incident at the home of Gritz's wife, Carole. Their son, Anthony, was mowing the lawn at Carole's mobile home when Gritz, who was intoxicated, approached his son with a large stick and threatened to kill him and anyone else in the trailer home. Anthony ran inside the mobile home and the police were called. When the police arrived, Gritz continued to be very argumentative and threatened one of the officers. Gritz was arrested and transported to the police station.

At a jury trial the State offered the testimony of Anthony and Carole to prove the elements of the first count of disorderly conduct. In addition, the State also successfully brought a motion to admit other acts evidence of prior criminal conduct by the defendant pursuant to § 904.04(2), STATS. The State argued that the evidence of Gritz's criminal past should be admitted "for purposes of proving motive, intent, mental condition of the defendant and to counter an attack on the credibility of witnesses." The trial court concluded that the other acts evidence was permissible to show the victims' knowledge of Gritz's past behavior. The court stated that knowledge of other acts was relevant because it would have made the family "more or less apprehensive about [Gritz's] conduct on a given occasion, more or less likely to be disturbed, to try to defend themselves, or to do other disruptive conduct as a reaction to his behavior."

In order to prove the elements of disorderly conduct for the second count, the State offered the testimony of the arresting officers. One officer testified that Gritz told him that "he could knock me on my ass any time." The officer further added that Gritz also "glared at me and said he can't wait to meet me on the street or in a bar." Another officer testified that Gritz "appeared to be intoxicated and he also appeared to be highly agitated and somewhat violent." Gritz also made several profane comments.

After deliberations, the jury found Gritz guilty of both counts of disorderly conduct. He was later sentenced to consecutive maximum prison terms of three years on each count. Gritz now appeals.

DISCUSSION

Verbal Challenges to Law Enforcement

Gritz first contends that the conviction for disorderly conduct which was based upon his profanity-filled verbal challenges to the police officers at the time of the arrest violates his First Amendment right to free speech. Because this issue involves a question of constitutional law, it will be reviewed independently of the conclusion of the trial court. *See* ***State v. Bangert***, 131 Wis.2d 246, 283, 389 N.W.2d 12, 30 (1986).

Not all forms of speech are protected under the First Amendment. The United States Supreme Court has stated that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an

immediate breach of the peace." ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 571-72 (1942).

Additionally, the Wisconsin Supreme Court has stated that "[c]onstitutionally protected rights, such as freedom of speech and peaceable assembly are not the be all and end all. They are not an absolute touchstone. The United States Constitution is not unmindful of other equally important interests such as public order." ***State v. Zwicker***, 41 Wis.2d 497, 509, 164 N.W.2d 512, 518 (1969). In ***Zwicker***, the supreme court upheld Wisconsin's disorderly conduct statute against a First Amendment constitutional attack.

In this case, Gritz was not convicted of disorderly conduct solely because he used profanity and "fighting" words. Disorderly conduct is not a law which prohibits speech generally. It is a law which requires a combination of conduct and circumstances that tends to provoke a disturbance. Here, Gritz's speech and agitated behavior in the presence of arresting police officers tended to provoke a disturbance. A police officer testified that Gritz told him that "he could knock me on my ass any time." The officer further added that Gritz "kind of glared at me and said he can't wait to meet me on the street or in a bar." Such comments, under the totality of the circumstances, were comments tending to provoke or cause a disturbance. Gritz also made several profane comments. Under ***Chaplinsky***, profane comments and "fighting" words are not protected by the First Amendment. *See* ***Chaplinsky***, 315 U.S. at 572.

Gritz's argument that the First Amendment protects profanity and "fighting" words when they are directed at police officers is without merit. Gritz relies upon the Supreme Court case of ***Lewis v. City of New Orleans***, 415 U.S. 130 (1974), in which a New Orleans ordinance prohibiting "obscene or

opprobrious language" towards police officers was held facially invalid because it was susceptible of overbroad application. Gritz also relies on ***City of Houston v. Hill***, 482 U.S. 451 (1987), in which a Houston ordinance prohibiting the interruption of any police officer during the execution of his or her duty was likewise held invalid because it was overbroad in violation of the First Amendment.

Both the ***Lewis*** and ***City of Houston*** decisions resulted in the invalidation of statutes because they were susceptible of application to protected speech and thus were overbroad. The ***Lewis*** and ***City of Houston*** decisions do not stand for the proposition that all speech is protected by the First Amendment as a matter of law when simply directed at police officers. As the State correctly points out, the Supreme Court in ***Lewis*** did not reach the issue of whether "'fighting words' as defined by ***Chaplinsky*** should not be punished when addressed to a police officer ...." ***Lewis***, 415 U.S. at 132 n.2.

In this case, Gritz's speech was not protected. The fact that he was speaking to police officers does not shield him from conviction under § 947.01, STATS., for disorderly conduct. Section 947.01 is not a law which prohibits speech generally. Instead, it is a combination of conduct and circumstances which leads to a conviction for disorderly conduct. Here, Gritz was properly convicted because all aspects of his conduct, under the circumstances, tended to cause or provoke a disturbance.

Sufficiency of the Evidence

In a related claim, Gritz contends that the evidence supporting his conviction for this count of disorderly conduct is insufficient as a matter of law. "[I]n reviewing the sufficiency of the evidence to support a conviction, an

appellate court may not substitute its own judgment for that of the trier of fact 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, 757-58 (1990). This is our standard of review.

> Section 974.01, STATS., 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.

Accordingly, there are two distinct elements for the crime of disorderly conduct: (1) the conduct must be of the type enumerated in the statute, and (2) the conduct must be engaged in under circumstances which tend to cause or provoke a disturbance. *See* ***City of Oak Creek v. King***, 148 Wis.2d 532, 540, 436 N.W.2d 285, 288 (1989).

The evidence, viewed most favorably to the State, indicates that both of the above elements were proven. Responding police officers testified that Gritz was "highly agitated" and was using profane language. One officer testified that Gritz directed threatening comments at him. Another officer testified that Gritz "appeared to be intoxicated and ... somewhat violent."

The above conduct, in context, was abusive, profane or otherwise disorderly. Furthermore, Gritz engaged in this conduct during questioning and arrest. Under these circumstances, it is reasonable to conclude that Gritz was tending to cause a disturbance. Thus, a reasonable trier of fact could find that the standards of § 947.01, STATS., were satisfied.

Admission of Other Acts Evidence

Gritz contends that the trial court misused its discretion by improperly admitting evidence of a prior conviction. The State successfully moved to admit this evidence "for purposes of proving motive, intent, mental condition of the defendant and to counter an attack on the credibility of witnesses" with regard to the first count of the complaint. The other acts evidence included a past conviction for the attempted murder of Gritz's wife, Carole.

When reviewing issues of evidence, the proper standard of review is whether the lower court properly exercised its discretion "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Kuntz***, 160 Wis.2d 722, 745, 467 N.W.2d 531, 540 (1991) (quoted source omitted). Trial courts must apply a two-pronged test when deciding whether to admit other acts evidence. *See* ***id.*** at 746, 467 N.W.2d at 540; ***State v. Plymesser***, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). First, the court must determine whether the evidence is admissible under § 904.04(2), STATS.[1] *See* ***Kuntz,*** 160 Wis.2d at 746, 467 N.W.2d at 540. Second, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and should be excluded on grounds of "prejudice, confusion, or a waste of time." *See* § 904.03, STATS. Of course, all evidence must be relevant to be admissible. *See* § 904.01, STATS.

[1] Section 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In this case, the trial court properly admitted the other acts evidence. The court found that "the knowledge that the rest of the family would have about the defendant's prior behavior, even propensity for violence, are relevant considerations on whether the conduct would tend to cause or provoke a disturbance." The court further stipulated to the jury that "this evidence of other incidents is being received only as it pertains to the issue of the knowledge of people who were present on the 18[th] of August during the alleged conduct of the defendant." Knowledge is a proper reason for admitting other acts evidence under § 904.04(2), STATS. *See supra* note 1. Furthermore, as the court explained, the knowledge of the other acts was relevant because it would make the family "more or less apprehensive about [Gritz's] conduct on a given occasion, more or less likely to be disturbed, try to defend themselves, or to do other disruptive conduct as a reaction to his behavior." Here, the trial court properly considered the law and the facts of the case. Thus, there was no misuse of discretion with regard to the first prong of the test.

Under the second prong of the test, the court properly concluded that the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. The court reasoned that the evidence had "enormous probative value" for the limited purpose of knowledge. Furthermore, the court took sufficient measures throughout the trial to ensure that the defendant was not unfairly prejudiced. In particular, the court warned the State that the emphasis of the case was not to be on the other acts incident.

In a related claim, Gritz asserts that the trial court should have granted a mistrial. The denial of a mistrial "will be reversed only on a clear showing of an abuse of discretion by the trial court." ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). Gritz bases this argument

on his claim that the other acts evidence unfairly prejudiced him. Because of our conclusion that the evidence was properly admitted, this final issue is without merit.

By the Court.—Judgment affirmed.

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