COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2767-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN W. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

DYKMAN, P.J.[1] This is an appeal from a judgment of conviction for disorderly conduct, contrary to § 947.01, STATS.

On July 17, 1997, John W. Moore was arrested for disorderly conduct. The facts, which we take from the criminal complaint, are that Wayne

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

Thibodeau, a security officer for the First Wisconsin National Bank at One South Pinckney Street in Madison, told a Madison detective that Moore had been asked to leave the bank building because he was on the seventh floor attempting to sell newspapers. Thibodeau had managed to get Moore down to the ground floor where he was asked to leave the building. Moore replied: "I'll give you this fucking briefcase upside the head. I'll knock you out." Moore was yelling loudly in the lobby area of the bank, disturbing other people in the lobby area.

Moore had a trial to the court on June 24, 1998. He was found guilty and sentenced to thirty days in the Dane County jail and ordered to pay various court costs. He appeals.

Moore's briefs, which are sometimes impossible to follow, set out sixteen issues. All of the issues are called either post-trial or pre-trial issues. Moore is not challenging any of the trial judge's rulings at trial. And even if he were, we would be unable to address those issues because Moore has not included a trial transcript in the record. The only transcripts that are in the record are of a November 18, 1997 pre-trial conference and a January 27, 1998 motion hearing. Perhaps there were some portions of other hearings transcribed, for Moore uses what he asserts is a quote from a September 8 transcript, and the State quotes from what it claims is the trial judge's opinion. Neither of these quotes are a part of the record, however, and we ignore them. *See* ***Dane County v. McManus***, 55 Wis.2d 413, 426, 198 N.W.2d 667, 674 (1972).

Although Moore identifies sixteen issues in his statement of issues, he only argues issues two through eleven in the body of his brief. We will therefore address only the issues argued. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

Issue (Paragraph 2). Moore notes this as a post-trial issue. Moore asks that his judgment of conviction be vacated "because of the inequality of Thibodeau interference with Wisconsin Edits operation that went directly to Tenants of First Star Plaza." He explains this as "the right of a newspaper publisher who was not selling his publication cannot be infringed by a security guard not proven to be an employee of Pinkerton Inc. or First Star Plaza." But this case is a disorderly conduct prosecution for shouting and for using indecent language in the lobby of the bank. Whether Moore had a right to sell or not sell his publications in the bank is irrelevant. Even if he had that right (and we do *not* hold that he did), he did not have the right to engage in disorderly conduct in the bank lobby.

Issue (Paragraph 3). Moore notes this as a post-trial issue. However, his contention is that the trial court erred by "letting Thibodeau give 'testimonial evidence' which became a recantation without establishing foundation or amending complaint to conform with recantation …." We are unable to determine what Moore means. He could be asserting that the trial court erred by letting Thibodeau testify, or perhaps by not concluding that Thibodeau's testimony varied from the allegations of the complaint. But this is not a post-trial matter. It pertains to something that occurred or did not occur at trial. We do not have a transcript of the trial, and we therefore do not know what happened at trial. We therefore cannot find error on this issue.

Issue (Paragraph 4). Moore notes this as a pre-trial issue. Moore moved to dismiss the complaint, and the trial court denied his motion at the January 27, 1998 motion hearing. While Moore asserts that probable cause must be based on his conduct in tenant-rented areas, he is mistaken. Under § 947.01, STATS., disorderly conduct can occur "in a public or private place." The lobby of

the Firstar Bank is either a public or a private place. When considering a motion to dismiss, we are to look to the four corners of the complaint. *See* ***Price v. Ross***, 45 Wis.2d 301, 331, 172 N.W.2d 633, 638 (1969). We have already repeated what the complaint alleged about Moore's conduct. We conclude that the complaint alleged facts sufficient to show that Moore probably committed the crime of disorderly conduct. The trial court therefore correctly denied his motion to dismiss.

Issue (Paragraph 5). Moore identifies this as a post-trial issue. However, his statement of issues suggests that he will argue that civil procedure was applicable to his case. But his actual argument focuses on First Amendment concerns. Moore provides no authority to support his assertion that civil procedure applied to his case, and we know of no authority holding that trial courts are to use rules of civil procedure in criminal trials. We cannot understand what Moore means when he writes of "Petitioner's 'legitimacy[,] regularity and normality.'" If this issue is an assertion that Moore had a First Amendment right to engage in disorderly conduct in the bank lobby, we reject that assertion. In ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 571 (1942), the court said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, and 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.

Moore's statement "I'll give you this fucking briefcase upside the head. I'll knock you out." is obscene and uses insulting or fighting words. Furthermore, loud yelling is the "unreasonably loud" conduct the court was referring to in ***State v. Zwicker***, 41 Wis.2d 497, 509, 164 N.W.2d 512, 518 (1969),

when it said: "Prohibition of conduct which has this effect does not abridge constitutional liberty."

Issue (Paragraph 6). Moore identifies this as a post-trial issue. He asserts "The invidious discrimination of Thibodeau is unique because Thibodeau acted under Common law polity. There is no public forum which allowed Thibodeau to do so!" We again are unable to understand what Moore is asserting. He speaks of the First, Fourth and Fourteenth Amendments to the Unites States Constitution, but does not explain how these amendments apply to the facts of his case. He also seems to assert that the State did not prove him guilty beyond a reasonable doubt. We cannot address this assertion because he has not included a transcript of his trial. We cannot know what, if anything, the state proved. Where an appellant fails to include a transcript, we are to assume that the record would support the trial court's judgment. *See* ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979). Perhaps Moore is confusing constitutional principles, which almost without exception limit government action and not private actions, with statutes designed to prevent discrimination on certain bases, such as race, gender and national origin. But this is not a case where the alleged discriminatory acts of the bank are on trial. It is a case to determine whether Moore did acts which constitute disorderly conduct.

Issue (Paragraph 7). Moore identifies this as a post-trial issue. He asserts that Thibodeau was without a justification to restrain trade and does not have qualified immunity. He also complains that the trial information should not have been treated, on the court's own motion, as an exhibit. We are unable to understand the latter complaint. As to Thibodeau's alleged restraint of trade and lack of qualified immunity, we are unable to discern how these principles apply in a disorderly conduct prosecution. Perhaps Moore believes that Thibodeau is an

employee of the City of Madison, Dane County or the State of Wisconsin. Though what we have of the record suggests that Thibodeau was a bank employee, we have no way to tell, because Moore has failed to include the trial transcript in the record. Nor are we able to discern how identifying Thibodeau's employer would affect Moore's guilt or innocence of the crime of disorderly conduct.

Issue (Paragraph 8). Moore identifies this as a post-trial issue. There seems to be little similarity in the statement of issue presented and the issue actually argued. Here, for instance, Moore's statement of issue number eight identifies concepts of civil trespass, unlawful solicitation, and the trial court's definition of solicitation. But paragraph eight of Moore's argument speaks to immunity exemption, political objective or non-commercial motivation, restraint of trade and conspiracies. We are unable to discern what Moore means or contends in either his statement of issues or paragraph eight of his argument. We therefore can go no further.

Issue (Paragraph 9). Moore identifies this as a post-trial issue. His statement of issues asserts that Thibodeau's identity has never been verified to be a Wisconsin registered security guard or Firstar employee. We do not have a transcript of the trial, so we cannot view the evidence concerning Thibodeau. Nor can we discern why Thibodeau's employer or registration has any relevance to this case. Thibodeau witnessed Moore's actions in the bank lobby. Moore's argument notes that Thibodeau gave "recantation" testimony. He also asserts that the State failed to prove him guilty of disorderly conduct. Without a transcript, we cannot address these issues. Apparently, Moore believes that Thibodeau's testimony must repeat the assertions of the complaint. Moore provides no authority requiring this, and we know of none.

Issue (Paragraph 10). Moore identifies this as a post-trial issue. He argues that his conviction should be vacated "for reasons of undue provocation." He also asserts concerns with a bail jumping charge. Apparently Moore was once charged with bail jumping, but the judgment of conviction at issue is only for disorderly conduct. We can see no reason why a bail jumping charge would have any relevance to Moore's disorderly conduct conviction. We interpret Moore's "undue provocation" argument to be that he was unduly provoked, probably by Thibodeau, and that this is a defense to his disorderly conduct charge. Moore provides no authority for this assertion. Section 939.44, STATS., provides for a defense of "adequate provocation," but this is available only to persons charged with first-degree intentional homicide. Without more, we conclude that "undue provocation" is not a defense to disorderly conduct.

Issue (Paragraph 11). Moore identifies this as a post-trial issue. He alleges that Firstar Plaza tenants must report crimes to the district attorney, or that Thibodeau's testimony must be discredited. He also argues that a "repeater" allegation should be reversed because the State did not have an adequate number of charges. But the "repeater" allegation was dropped by the district attorney. Thus, Moore's jail exposure was limited to one year, and his sentence was much less than that. We do not see how a dropped repeater allegation affects Moore's conviction for disorderly conduct. And we know of no reason why, at least in the context of this case, Firstar's tenants are required to report crimes to anyone. Moore has cited no authority for his assertion, and we will not undertake a search for it. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 379, 378 (Ct. App. 1980).

Issue (Paragraph 12). Moore identifies this as a post-trial issue. It appears to be another assertion concerning the repeater charge we discussed

above. Paragraph 12 in Moore's argument section of his brief is a prayer for relief. We find nothing new here.

We find nothing entitling Moore to relief from his judgment of conviction of disorderly conduct. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.