

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2016

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. 2015AP140

Cir. Ct. No. 2014CV188

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF SOMERSET,

PLAINTIFF-RESPONDENT,

v.

MARK J. HOFFMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Mark Hoffman appeals a judgment entered against him for loitering in the Village of Somerset in violation of SOMERSET, WIS.,

ORDINANCE § 11-2-6(c)(1).¹ Hoffman argues the ordinance, as it was applied to him, is “preempted” by WIS. STAT. § 66.0409(2) and (6), and the ordinance is unconstitutional as applied to him. As a result, Hoffman contends the circuit court erred by denying his motion for summary judgment and his motion to dismiss at the close of the Village’s case.² He also claims the court erred by not giving his requested jury instructions.

¶2 We first conclude Hoffman’s argument that WIS. STAT. § 66.0409(2) preempts SOMERSET ORDINANCE § 11-2-6(c)(1) is undeveloped and decline to consider it. As to Hoffman’s claims regarding WIS. STAT. § 66.0409(6), we discern his argument to be a challenge to the sufficiency of the evidence relied upon by the circuit court to deny his motion to dismiss at the close of the Village’s evidence. With this understanding, we conclude the circuit court was required to grant Hoffman’s motion to dismiss at the close of the Village’s case as a matter of

¹ By order of the Chief Judge of the Court of Appeals, this appeal was converted from a one-judge appeal to a three-judge appeal under WIS. STAT. § 752.31(3) and WIS. STAT. RULE 809.41(1). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Both parties quote SOMERSET, WIS., ORDINANCE § 11-2-6(c)(1) and SOMERSET, WIS., ORDINANCE § 11-2-6(e)(1) in their briefs; however, the record does not contain a copy of the ordinances, and the citations that the parties provided do not contain a year to indicate which version they are citing. We consulted the Village of Somerset’s website, available at <http://www.vil.somerset.wi.us/> (last visited April 25, 2016), which provides a link to another website where the Village ordinances can be accessed, *see* MUNICODE, https://www2.municode.com/library/wi/somerset/codes/code_of_ordinances (last visited April 25, 2016). The text of SOMERSET ORDINANCE § 11-2-6(c)(1) and SOMERSET ORDINANCE § 11-2-6(e)(1) on this website is identical to that quoted by both parties and provided below.

² At the close of the Village’s case, Hoffman moved for a “directed verdict.” Technically, a “directed verdict” is appropriate only at the close of all the evidence. *See* WIS. STAT. § 805.14(3), (4); *see also James v. Heintz*, 165 Wis. 2d 572, 575 n.1, 478 N.W.2d 31 (Ct. App. 1991). We view Hoffman’s motion at the close of the Village’s case as a motion to dismiss. *See* WIS. STAT. § 805.14(2)(b).

law. Because we conclude the court should have granted Hoffman's motion to dismiss, we need not reach Hoffman's remaining arguments.

BACKGROUND

¶3 Evidence produced at the circuit court trial on Hoffman's loitering citation indicated that on July 23, 2013, Hoffman walked down a Village street around noon with a loaded, semi-automatic rifle on his back.³ Various individuals, including a crossing guard for a nearby school, saw Hoffman and reported their observations to either the police or personnel at the school. Police sergeant Thomas Sirovatka responded to the location where Hoffman was observed walking, but he did not see anyone matching Hoffman's description. Sirovatka later located Hoffman walking along the sidewalk of Sunrise Drive. Hoffman was carrying a loaded handgun on his hip in addition to the rifle on his back.

¶4 Sirovatka asked Hoffman a series of questions, including Hoffman's name, where he was walking to, where he was coming from, why he was carrying weapons, his reason for walking with firearms, and whether he had any identification with him. Hoffman refused to answer Sirovatka's questions.

¶5 As Sirovatka was questioning Hoffman, police chief Douglas Briggs arrived at their location. Briggs explained to Hoffman that the department had received complaints from people who were concerned about Hoffman's behavior. He further explained to Hoffman that if he would provide them with some

³ The record contains different descriptions of the rifle including a "Colt M4A1 .223 cal. semi automatic rifle" and a .223 caliber "M1A Colt assault rifle."

information, they could go back to the people who had made the complaints and tell them whether they had anything to worry about anymore. Hoffman refused to provide Briggs with any information. Hoffman was placed under arrest. He subsequently received a citation for loitering, contrary to SOMERSET ORDINANCE § 11-2-6(c)(1).⁴ That ordinance prohibits “loiter[ing] or prowl[ing] in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.” SOMERSET ORDINANCE § 11-2-6(c)(1).

¶6 Hoffman was found guilty of loitering in municipal court. He then appealed the judgment to the circuit court, requesting a six-person jury trial. Before that trial, Hoffman moved for summary judgment, arguing SOMERSET ORDINANCE § 11-2-6(c)(1) is unconstitutional on its face and as applied to him, and the ordinance is preempted by state law as applied to him. The court denied Hoffman’s motion in a written decision, concluding summary judgment was not appropriate because genuine issues of material fact existed as to whether Hoffman was properly charged and should be convicted. The court also concluded Hoffman’s constitutional argument was underdeveloped.

¶7 During the jury trial, five citizen witnesses, Sirovatka, and Briggs testified for the Village. Four of the five citizen witnesses testified that Hoffman’s conduct—walking with a rifle on his back—alarmed them.⁵ One witness stated,

⁴ According to Hoffman’s appellate brief, he also received a citation for violating the Village’s obstruction ordinance. The record citation Hoffman provides to the obstruction citation is incorrect, and we are unable to locate a copy of the obstruction citation in the record. According to Hoffman’s brief, the obstruction citation was dismissed by the Village municipal court.

⁵ The fifth witness did not see what Hoffman was carrying, only that he had “something slung on his back.”

“Well, I mean, you see everything in the news of ... bad stuff happening, and you see something like that and it just causes red flags to go up, I guess.” Another witness explained she was alarmed “[b]ecause there were children that—lots of children that were just crossing the street, and he was going to walk past them as they were walking home.” Yet another witness explained he was alarmed because “it’s not something we’ve ever seen, and it didn’t seem natural to me in the middle of summer in the middle of the day to do that.”

¶8 All five of the citizen witnesses, however, testified they did not observe anything to give them reason to believe Hoffman had a malicious intent. Additionally, while one of the citizen witnesses believed Hoffman had a criminal intent solely because he was “[w]earing a gun,” the remaining citizen witnesses indicated they did not have any reason to believe Hoffman was going to commit a crime or had a criminal intent. Sirovatka likewise testified he did not observe anything to give him reason to believe Hoffman had a criminal or malicious intent, and he had no reason to believe Hoffman had previously been convicted of a felony or that the firearms were stolen.

¶9 Briggs testified Hoffman was not arrested for carrying a firearm. He explained:

The reason [Hoffman] was arrested was causing alarm to the public and not—you know, he didn’t give us any information to help us go back to the people and explain to them whether they had anything to be concerned enough about. The presence of a firearm is really irrelevant. It would be the same situation if he was carrying a giant sword or was dragging a vicious dog. The purpose of the arrest and the purpose of the contact was to find out whether the people in the community were—or in the area were safe.

However, when Briggs was asked on cross-examination whether Hoffman would have been arrested if he had not been carrying firearms, he responded: “No. There would have been no complaints.”

¶10 At the close of the Village’s case, Hoffman moved to dismiss the case, arguing WIS. STAT. § 66.0409(2)⁶ and (6)⁷ preempted the Village from enforcing the ordinance. The circuit court denied the motion. Hoffman then testified. Hoffman explained that on the day he was arrested, he was “out for a walk, carrying [his] firearms.” He also testified he brought a voice recorder with him that day in case he was stopped by police, and he recorded his interactions with Sirovatka and Briggs. The recording was then played for the jury. In the recording, Briggs can be heard instructing Sirovatka to place Hoffman under arrest for disorderly conduct. Briggs also can be heard telling Hoffman that he is “under arrest for being heavily armed.” Hoffman did not call any other witnesses.

⁶ WISCONSIN STAT. § 66.0409(2), in relevant part, provides:

[N]o political subdivision may enact an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

⁷ WISCONSIN STAT. § 66.0409(6) provides:

Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, no person may be in violation of, or be charged with a violation of, an ordinance of a political subdivision relating to disorderly conduct or other inappropriate behavior for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried. Any ordinance in violation of this subsection does not apply and may not be enforced.

¶11 During the jury instruction conference, Hoffman asked the circuit court to modify the instructions based on the language in WIS. STAT. § 66.0409(2) and (6). The court denied Hoffman’s motion. The court indicated § 66.0409(2) did not apply because SOMERSET ORDINANCE § 11-2-6(c)(1) does not regulate the use, keeping, possessing, bearing, or transportation of firearms. The court also added: “So, for the Court to instruct the jury that the jurors can’t enact something that they haven’t enacted, to the Court, is a nullity and would have no bearing whatsoever on the jury’s consideration. Also, it’s a matter of law for the Court to determine.” As to Hoffman’s request to include jury instructions related to § 66.0409(6), the court stated it had already modified the instructions to reflect what it believed to be the language of that statute.⁸

¶12 The jury found Hoffman guilty of loitering in a unanimous verdict, and the circuit court imposed a forfeiture of \$195.90. Hoffman appeals.

DISCUSSION

¶13 Hoffman was cited for violating SOMERSET ORDINANCE § 11-2-6(c)(1), which, in full, provides:

⁸ The circuit court included an “affirmative defense” in the jury instructions, which consisted, in part, of the following:

Further, Wisconsin law does not prohibit a person from loading, carrying, or going armed with a firearm without regard to whether the firearm is loaded or is concealed or openly carried unless other facts and circumstances indicate a criminal or malicious intent on the part of Mr. Hoffman.

You are further instructed that Mr. Hoffman has been cited by the Village of Somerset for loitering and not for illegally possessing or carrying a firearm, and you should consider all of the evidence in the case to determine whether Mr. Hoffman violated the [V]illage’s ordinance of loitering.

No person shall loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself/herself or manifestly endeavors to conceal himself/herself or any object. Unless flight by the person or other circumstances makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this Section, afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him/her to identify himself/herself and explain his/her presence and conduct. No person shall be convicted of an offense under this Subsection if the law enforcement officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the law enforcement officer at the time, would have dispelled the alarm.

The Village defines loitering as “[t]o sit, stand, loaf, lounge, wander or stroll in an aimless manner or to stop, pause or remain in an area for no obvious reason.”
SOMERSET, WIS., ORDINANCE § 11-2-6(e)(1).

¶14 Hoffman does not contest that he was wandering or strolling aimlessly in a manner not usual for law abiding individuals in that he was openly carrying firearms. However, he contends he would not have been cited with this ordinance violation if he had not been carrying a firearm. He asserts WIS. STAT. § 66.0409(2) preempts the local regulation of firearms. Like WIS. STAT. § 947.01(2), which prohibits a person from being in violation of the disorderly conduct statute for carrying a firearm unless there is evidence of a criminal or malicious intent, Hoffman argues his arrest and ultimate conviction under SOMERSET ORDINANCE § 11-2-6(c)(1) solely for possessing a firearm is prohibited.

¶15 Hoffman’s argument in this regard is undeveloped, as he fails to provide any analysis of the preemption doctrine and how it should be applied in this case. He fails to articulate the basis for his claim that local regulation of firearms is preempted as a matter of statewide concern. We will not consider undeveloped arguments. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Further, even if we were to assume the preemption doctrine should be applied in this case, Hoffman completely ignores that SOMERSET ORDINANCE § 11-2-6(c)(1) does not in any way mention firearms or limit their use.

¶16 Hoffman next argues that WIS. STAT. § 66.0409(6) prohibits the Village from enforcing an ordinance that has the effect of punishing a person for “inappropriate behavior” related to carrying or going armed with a firearm. He argues the loitering ordinance at issue here was used to punish him for carrying a firearm, which the evidence establishes was the only reason people were alarmed by his behavior. He also asserts that the Village police chief testified Hoffman would not have been arrested if he had not been carrying a firearm and that there was no evidence he had a criminal or malicious intent. As a result, Hoffman claims § 66.0409(6) “preempts” the Village from enforcing SOMERSET ORDINANCE § 11-2-6(c)(1) against him.

¶17 Hoffman’s use of the term preemption in this context is confusing and, again, undeveloped. Hoffman provides no preemption analysis. Instead, he argues the circuit court erred in denying his motion for summary judgment based upon a finding that there were material questions of fact. He also argues the court should have granted his motion to dismiss at the close of the Village’s case. After careful consideration, we discern Hoffman’s argument principally to be one challenging the court’s denial of his motion to dismiss at the close of the Village’s

evidence based upon a lack of sufficient evidence to convict him of loitering in light of the plain language of WIS. STAT. § 66.0409(6). In other words, he could not be convicted of loitering as defined in the ordinance if the alarm required under the ordinance was solely caused by his possession of a firearm and there was no evidence of criminal or malicious intent.

¶18 A circuit court may grant a defendant’s motion to dismiss at the close of the plaintiff’s case if “the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” See WIS. STAT. § 805.14(1); see also WIS. STAT. § 805.14(3). “Appellate courts overturn only a clearly erroneous denial of a motion challenging the sufficiency of the evidence.”⁹ *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶29, 301 Wis. 2d 109, 732 N.W.2d 792 (citing *Haase v. Badger Mining Corp.*, 2004 WI 97, ¶17, 274 Wis. 2d 143, 682 N.W.2d 389; *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 273, 580 N.W.2d 233 (1998)).

¶19 It was clear at the close of the Village’s case that, when the evidence was viewed in a light most favorable to the Village, the sole cause for any alarm related to Hoffman’s conduct was that he was walking around the Village,

⁹ Hoffman also argues the circuit court should have granted his motion for summary judgment. He argues the court erred in determining there were questions of fact for the jury on his claim that SOMERSET ORDINANCE § 11-2-6(c)(1) and its enforcement against him were preempted by state statute. Because we ultimately determine, under the facts of this case as adduced at trial, that the court should have granted Hoffman’s motion to dismiss for insufficient evidence at the close of the Village’s case based on the restrictions in WIS. STAT. § 66.0409(6), we need not address Hoffman’s summary judgment argument. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when one issue is dispositive, we need not reach the other issues raised).

particularly near a school, with an exposed rifle. As Briggs acknowledged, “[t]here would have been no complaints” if Hoffman had not been carrying the firearms. Once law enforcement was informed of the citizens’ alarm, it was required to give Hoffman the opportunity to dispel the alarm caused by his carrying a firearm.¹⁰ Law enforcement ultimately cited Hoffman for causing alarm by carrying firearms and refusing to dispel that alarm by identifying himself and explaining his conduct. However, under WIS. STAT. § 66.0409(6), no person may be found in violation of an ordinance relating to disorderly conduct or other “inappropriate behavior”¹¹ for carrying a firearm unless other facts and circumstances indicate a criminal or malicious intent on the part of the person. *See* § 66.0409(6). Because Hoffman’s citation was based on him carrying firearms and failing to dispel the alarm caused by them, the question before the circuit court in ruling on Hoffman’s motion to dismiss then became whether the Village presented any credible evidence—other than that Hoffman was carrying a firearm—upon which the jury could determine Hoffman’s actions were criminal or malicious.

¶20 The Village produced no evidence indicating Hoffman had a criminal or malicious intent while carrying a firearm, or from which a jury could reasonably reach such an inference. All five citizen witnesses and Sirovatka

¹⁰ This decision addresses whether the circuit court should have granted Hoffman’s motion to dismiss his charged violation of SOMERSET ORDINANCE 11-2-6(c)(1) for insufficient evidence at the close of the Village’s case based on the restrictions in WIS. STAT. § 66.0409(6). We do not suggest that law enforcement acted improperly or unreasonably in approaching and questioning Hoffman, or that § 66.0409(6) inhibits law enforcement from fully policing and investigating potentially dangerous or otherwise disconcerting behavior, including an individual’s carrying of a firearm in public.

¹¹ The Village does not appear to challenge Hoffman’s assertion that loitering constitutes “other inappropriate behavior” under the statute.

testified there was no evidence Hoffman had a malicious intent, and the only witness to testify as to Hoffman having a criminal intent did so based solely on Hoffman carrying a firearm.¹² Although Hoffman refused to identify himself to law enforcement or explain why he was carrying firearms, no officer testified Hoffman’s lack of cooperation evidenced any criminal or malicious intent. Further, the fact that Hoffman refused the opportunity to dispel the alarm caused by his carrying firearms—which opportunity the ordinance requires law enforcement to provide him—cannot, without more, transform this statutorily prohibited basis for “warrant[ing]” alarm into a violation of the ordinance. *See* WIS. STAT. § 66.0409(6) (providing “[u]nless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, no person may be in violation of, or be charged with a violation of, an ordinance of a political subdivision relating to disorderly conduct or other inappropriate behavior for loading, carrying, or going armed with a firearm”).

¶21 On appeal, the Village argues there was evidence of malicious intent based upon Hoffman’s testimony that he was carrying a tape recorder and that he did so in the event he was stopped by law enforcement. The Village argues Hoffman’s testimony showed he had a malicious intent because malicious is synonymous with spiteful, vindictive, and vengeful. The Village contends Hoffman took a tape recorder with him because he knew he would be stopped by police, as his conduct was likely to be concerning to citizens. Therefore,

¹² Notably, WIS. STAT. § 66.0409(6) provides that no ordinance relating to other inappropriate behavior may be enforced against any person for carrying a firearm “[u]nless *other* facts and circumstances that indicate a criminal or malicious intent on the part of the person apply.” (Emphasis added.) As such, the mere fact a person is carrying a firearm cannot itself be evidence of criminal or malicious intent.

according to the Village, because Hoffman's actions were aimed at provoking contact with law enforcement, his actions were spiteful, vindictive, vengeful, and—synonymously—malicious.

¶22 While we question whether a jury could reasonably infer malicious intent on Hoffman's part due only to the fact he was carrying a concealed tape recorder, we observe the Village did not present any evidence regarding Hoffman's possession of a tape recorder prior to Hoffman's motion to dismiss at the close of the Village's evidence. "When ruling on a motion to dismiss, the [circuit] court should consider only the proof that the plaintiff has offered before resting its case." *Kain v. Bluemound E. Indus. Park, Inc.*, 2001 WI App 230, ¶21, 248 Wis. 2d 172, 635 N.W.2d 640 (citing *Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740, 788, 501 N.W.2d 788 (1993)). "Our review on appeal is the same as that conducted by the [circuit] court." *Id.* Hoffman first produced evidence regarding his possession of the tape recorder after the circuit court denied his motion to dismiss, and he did so to prove he was arrested for carrying a firearm. As a result, the Village cannot now rely upon that evidence in an attempt to show a malicious intent.

¶23 Under the ordinance and WIS. STAT. § 66.0409(6), one cannot be convicted of loitering if the sole cause for alarm is carrying a firearm without evidence of criminal or malicious intent. The Village failed to prove any other cause for alarm, any criminal or malicious intent on the part of Hoffman, or any other evidence from which the jury could reasonably infer such intent. Therefore, the case should have been dismissed at the close of the Village's evidence. Because we conclude the circuit court should have granted Hoffman's motion to dismiss, we decline to address Hoffman's remaining arguments on the constitutionality of the ordinance and on the circuit court's jury instructions. *See*

State v. Blalock, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds); *see also Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when one issue is dispositive, we need not reach the other issues raised).

¶24 We therefore reverse and remand the cause to the circuit court with instructions to enter an order dismissing the case with prejudice.

¶25 We recognize that citizens may be justifiably alarmed by the open carry of firearms under many circumstances including, as here, near a school and in the vicinity of children. However, we are bound to follow the dictates of the legislature in applying WIS. STAT. § 66.0409(6).

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

