OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

November 16, 2017

To:

Hon. Craig R. Day
Circuit Court Judge
Br. 2
130 W Maple St
Lancaster, WI 53813

Tina McDonald
Clerk of Circuit Court
Grant County Courthouse
130 W. Maple St.
Lancaster, WI 53813

Jeffrey J. Kassel
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Brandon Kuhl
Kuhl Law, LLC
P.O. Box 5267
Madison, WI 53705-0267

Lisa A. Riniker
District Attorney
130 W. Maple Street
Lancaster, WI 53813

You are hereby notified that the Court has entered the following opinion and order:

2017AP97-CR State of Wisconsin v. Timothy Jason Riley (L.C. # 2015CF140)

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy Jason Riley appeals a judgment of conviction for disorderly conduct and bail jumping, both as a repeater. He also appeals an order denying his postconviction motion. Riley argues that these convictions were premised on speech that is protected by the First Amendment, and that, without his protected speech, there is insufficient evidence to support the convictions.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We reject Riley's arguments and affirm.

Riley was charged with disorderly conduct, substantial battery, and two counts of felony bail jumping, all as a repeater, after a fight that originated in a tavern. According to the complaint, Riley made "inappropriate" comments about the victim's girlfriend, which led to an altercation in the tavern. After the fight broke up, Riley and an associate subsequently attacked the victim outside the tavern. At trial, witnesses testified to the comments made by Riley while still inside the tavern that were directed at the victim's girlfriend, who was a bartender at the tavern. The victim's girlfriend testified that Riley is related to her former boyfriend and that Riley's friend had asked her if she was dating the victim. She testified that Riley later approached her at the bar and made a vulgar comment about her vagina. Riley then stated loudly, while looking directly at her, that he was planning to "take that bartender home and fuck her that night." The victim testified that he heard Riley announce that he was "going to fuck the shit out of the bartender tonight," which he interpreted as referring to his girlfriend because Riley was standing face to face with her at the time. Two other witnesses testified that they heard Riley making similar comments, with lewd terms that we need not repeat, in which he loudly announced what he intended to do to the victim's girlfriend.

A jury convicted Riley on all four counts. Riley filed a postconviction motion as to the convictions for disorderly conduct and the related bail jumping charge, arguing that the only

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

evidence supporting these convictions was speech that was protected by the First Amendment. The circuit court denied this motion on the ground that Riley's comments fell within the "fighting words" doctrine, which is a limited exception to the First Amendment. Riley appeals.

The question of whether the disorderly conduct statute can be applied to a defendant's speech is a question of law that we review de novo. ***State v. A.S.***, 2001 WI 48, ¶¶18-19, 243 Wis. 2d 173, 626 N.W.2d 712. The parties agree that this case involves the application of the fighting words doctrine, which allows a defendant to be prosecuted for "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *See* ***Cohen v. California***, 403 U.S. 15, 20 (1971) (citing ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942)).

Here, the circuit court determined that the testimony at trial established that Riley's comments, made directly to the object of his commentary, were fighting words that by their very nature tend to incite an immediate breach of the peace. The court found that the circumstances of Riley's comments "are important." Specifically, Riley made crass and lewd comments directly to the object of his commentary, who he also knew was the victim's girlfriend. Moreover, he made these comments loudly, with knowledge that the victim was nearby. Based on these circumstances, the court determined that these comments were fighting words as opposed to protected speech. Accordingly, the circuit court concluded that there was sufficient evidence to sustain Riley's convictions.

Riley makes four arguments for why his comments are protected speech that cannot be a basis for his criminal convictions. First, he made these comments in a tavern, which he argues is "an environment restricted to adults and centered on drunkenness," where "[d]istasteful speech is

common." Riley seems to be arguing that tavern patrons should have greater speech protections than the ordinary public, which would arguably give them more leeway to use provocative language in a tavern setting. We reject this argument for two reasons. First, Riley provides no legal support for the proposition that provocative language enjoys more protection in places like taverns. Indeed, it could be argued that provocative language is more dangerous in a tavern setting because people are more likely to be intoxicated. Second, even assuming without deciding that more provocative language is permissible in a tavern setting, the language used by Riley here was beyond any reasonable bound.

Second, Riley argues that his comments were a frank and crass discussion of his sexual interest and, as such, they are socially useful and deserving of protection under the First Amendment. He further suggests that comments relating to sex should be entitled to greater protection because, in his view, efforts to police sexual innuendo often stem from religious concerns. We disagree that the comments that Riley directed at the victim's girlfriend were socially useful, or that his prosecution was motivated by religious concerns. Instead, we think it is common knowledge that sexually explicit comments, like those here, directed at a woman or a man in front of that person's boyfriend or girlfriend are inherently likely to provoke a violent reaction, which places Riley's comments squarely within the fighting words doctrine. *See* ***Cohen***, 403 U.S. at 20.

Third, Riley contends that the circuit court erred because it determined that Riley's comments would be protected speech if made "discreetly." Riley argues that the fact that his offensive comments were overheard cannot be a basis for penalizing him for his speech. He draws on the example of the defendant in ***Cohen***, who, inside a courthouse, wore a jacket that read, "Fuck the Draft." *See* ***id.*** at 16. The United States Supreme Court explained that no

reasonable person would see Cohen's jacket as a "direct personal insult." ***Id.*** at 20. Because the slogan on the jacket was not directed at any particular person, the Court held that this sort of provocative speech is protected even when it is "thrust upon unwilling or unsuspecting viewers." ***Id.*** at 20-21. In contrast, the present case involves comments that were directed at the victim's girlfriend, and delivered in a manner that ensured that her nearby boyfriend would overhear them. This is not a situation in which Riley's comments were merely overheard by tavern patrons generally.

Fourth, Riley argues that the circuit court's use of the word "lewd" to describe Riley's comments suggests that his speech is being policed because it was obscene. He argues that, because his speech was not commercial in nature, his right to say obscene things is protected by the First Amendment. *See* ***Miller v. California***, 413 U.S. 15, 26-27 (1973). This argument misses the mark. Riley's comments do not deserve protection because they consisted of abusive comments directed at the victim's girlfriend, under circumstances that were likely to provoke a violent reaction. If these comments were also lewd or obscene does not weigh in favor of giving them protection.

In sum, Riley has not made any argument to suggest that the circuit court erred in applying the fighting words doctrine in this case. We therefore affirm the judgment of conviction and the order denying Riley's postconviction motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals