COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2586-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALBERTA P. LESSARD,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

¶1 FINE, J.[1] Alberta P. Lessard appeals from a judgment convicting her of disorderly conduct, *see* WIS. STAT. § 947.01, following a bench trial. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

I.

¶2 In November of 1999, Lessard spoke to a public meeting of the West Allis School Board. When she went up to the lectern from which she spoke, she hung over the lectern a canvas bag that she was carrying. According to one of the witnesses at Lessard's trial, something metallic in the bag "clunked." Afraid that Lessard might have a gun in the bag, the school district's business manager went over to Lessard after she was finished speaking. She was sitting in a vestibule area, sobbing with her head down. He knelt next to Lessard and asked her if she wanted him to call anyone. According to his testimony, she responded by saying "'I understand why students shoot up the schools.'" The business manager then grabbed her bag, went into a nearby room, and dialed 911. He said he did this, "Just to be safe, being over-cautious."

¶3 Lessard followed the business manager into the room and asked to use the telephone, which he permitted her to do. He testified that while they were in that room, she said to him sarcastically, "'Oh yes, there's a big gun in there.'" Sometime later, they were joined by the vice president of the West Allis school board and several other persons. She testified that Lessard said "that she was going to shoot all of us." According to the vice president, Lessard said this "at least three times." The vice president told the trial court that she was "disturbed" by Lessard's shooting comments. There was no gun in Lessard's bag.

¶4 Lessard testified, and denied saying that she would shoot anyone. The trial court in a short oral decision indicated that it credited the testimony of the school-board vice president that Lessard made the shooting threat. It was on that basis that it found Lessard guilty of disorderly conduct. Lessard claims that there is insufficient evidence to sustain the conviction.

II.

¶5 WISCONSIN STAT. § 947.01 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.

An actual disturbance need not be caused. ***State v. A.S.***, 2001 WI 48, ¶36. Threats, even if spoken softly, can be disorderly conduct, ***id.*** at. ¶¶11–17, if they can be taken as "true threats."

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.

State v. Perkins, 2001 WI 46, ¶29. *See also* ***State v. Douglas D.***, 2001 WI 47, ¶32 ("Wisconsin prohibits true threats … where such conduct tends to cause or provoke a disturbance by means of the § 947.01 prohibition on 'abusive' conduct."). The focus is not only on the words themselves, but, rather, "the full context of the statement, including all relevant factors that might affect how the statement could reasonably be interpreted." ***Perkins*** at ¶31. Additionally, the nature of the threat as a legitimate basis for imposing criminal liability varies with the harm against which a particular statute protects. ***Id.*** at ¶30.

¶6 Our standard of review from the trial court's findings of fact is quite limited: we may not overturn them unless we can conclude that they are "clearly erroneous." *See* WIS. STAT. RULE 805.17(2), made applicable to criminal

proceedings by WIS. STAT. § 972.11(1). Thus, we must accept the trial court's finding that Lessard did threaten to shoot the people in the room, and repeated the threat several times. Accepting this finding, we cannot say that Lessard's conviction has no support in the record.

> [A]n appellate court may not substitute its 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citation omitted); *see also* ***State v. Friday***, 147 Wis. 2d 359, 370–371, 434 N.W.2d 85, 89 (1989) (appellate court must accept reasonable inferences that the trial court draws from the evidence). Although Lessard argues that she did not present a then-existing danger, that is not the test. ***Douglas D.*** at ¶34 ("It is not necessary that the speaker have the ability to carry out the threat.") (applying ***Perkins*** at ¶29 to disorderly conduct). Additionally, her argument that she was provoked into "whatever level of disorderly conduct she may have engaged in, if any," is without merit; threatening to shoot someone is hardly a justified response to disrespectful treatment. *Cf.* ***Lane v. Collins***, 29 Wis. 2d 66, 72, 138 N.W.2d 264, 267 (1965) (police officer cannot provoke a person into breaching the peace and then arrest that person for disorderly conduct).

By the Court.—Judgment affirmed.

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