COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP914 **Cir. Ct. No. 2011JV22**

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

IN THE INTEREST OF TYLER H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TYLER H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] Tyler H. appeals an order adjudicating him delinquent of disorderly conduct. He argues his conduct did not amount to disorderly conduct. We affirm.

BACKGROUND

¶2 The State filed a delinquency petition, alleging thirteen-year-old Tyler committed disorderly conduct at his mother's house. At the fact-finding hearing, Tyler's mother, Bobbie H., testified that on August 6, 2011, Tyler was eating a salad with his mouth open near his eleven-year-old brother Ryan. Ryan asked Tyler to stop numerous times, but Tyler continued to chew with his mouth open and moved closer to Ryan. Ryan told Tyler that if he did not stop, Ryan would hit him. Ryan then hit Tyler in the back and the boys began to wrestle. Tyler moved Ryan to the ground and hit Ryan with a cast Tyler had on his arm.

¶3 Bobbie intervened and pulled Tyler off Ryan. She then attempted to hit Tyler in the back of the head to discipline him, but Tyler turned, and she struck his mouth. Tyler called Bobbie "a fucking whore" and left the house. Bobbie called the police.

¶4 The circuit court determined the "squabble" between Tyler and Ryan did not amount to disorderly conduct because:

> Nothing this Court here [sic] today is going to prevent 13 and 11 yr. olds from scrapping, whether it be over he touched me, or he's on my side, or whatever it might be. That's going to occur.
>
> Who punches who, you know, really isn't the issue. We're dealing with two juveniles.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

However, the court determined Tyler committed disorderly conduct when he called Bobbie "a fucking whore." The court reasoned:

> [W]e have an adult, a mother, that attempts to do what mothers are supposed to do, and that is break it up and gain control of the situation, and then we have Tyler's outbursts.
>
> Now, I don't care if his outburst was because his mother had disciplined him or, as she says, she unintentionally slapped him, was just trying to give him a bit of a cuff to the back of the head to say, knock it off.
>
> ….
>
> Disorderly conduct is … conduct that is either unreasonably loud, indecent, profane, boisterous, or otherwise disorderly.
>
> I think this certainly meets the definition of boisterous or profane. Some would say indecent. To use that kind of language, especially with your mother, this is not two 13-year-olds talking tough with each other.
>
> This is someone speaking to their mother, and then the rest of the requirement is, and the words be of such a nature that it would tend to cause or provoke a disturbance.
>
> It truly did. It led to the mother calling the police. It was the type of language at least where I'm from, using that language toward someone's mother would have repercussions.

The court then adjudicated Tyler delinquent.

DISCUSSION

¶5 On appeal, Tyler argues the circuit court erred by adjudicating him delinquent because his conduct did not amount to disorderly conduct. 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." To prosecute a

defendant for disorderly conduct, the State must prove two elements. ***State v. Douglas D.***, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725. First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct. ***Id.*** Second, it must prove that the defendant's conduct occurred under circumstances where it tended to cause or provoke a disturbance. ***Id.*** "An objective analysis of the conduct and circumstances of each particular case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others." ***State v. Schwebke***, 2002 WI 55, ¶24, 253 Wis. 2d 1, 644 N.W.2d 666.

¶6 Tyler first contends his language did not amount to disorderly conduct because it was provoked by his brother and mother hitting him. In support, Tyler relies on ***Lane v. Collins***, 29 Wis. 2d 66, 138 N.W.2d 264 (1965).

¶7 To the extent Tyler is relying on ***Lane*** to assert provocation is an affirmative defense to disorderly conduct, we reject his argument. In ***Lane***, an officer, who was seeing the plaintiff's ex-wife, stopped the plaintiff's vehicle and told the plaintiff not to call the officer's house. ***Id.*** at 70. When the plaintiff called the officer a "son of a bitch," the officer arrested him for disorderly conduct. ***Id.*** at 70-71. The plaintiff brought a false-imprisonment claim against the officer and the jury found in favor of the plaintiff. ***Id.*** at 68. On appeal, the officer argued the arrest was lawful as a matter of law because the plaintiff's conduct amounted to disorderly conduct. ***Id.*** at 69. The ***Lane*** court disagreed, reasoning that, even though the plaintiff's language might constitute disorderly conduct, the lawfulness of the arrest was a jury question because an officer cannot provoke a person into breach of peace and then arrest him or her for it. ***Id.*** at 72-73. ***Lane*** did not create an affirmative defense for the crime of disorderly conduct.

Moreover, WIS. STAT. § 939.44 provides that the defense of provocation may only be used for a first-degree intentional homicide charge.

¶8 Tyler next argues that his language did not tend to cause or provoke a disturbance. He asserts the disturbance was already ongoing when he used this language and, because he immediately left the home after calling Bobbie "a fucking whore," his language "ended, not caused, the disturbance." Tyler also contends the circuit court erred by determining his conduct caused a disturbance merely because his mother called the police.

¶9 We conclude Tyler's conduct was of the type that tends to cause or provoke a disturbance. First, we reject Tyler's argument that his language could not provoke a disturbance because a disturbance was already occurring. If that were so, any offender who joins a disturbance and whose conduct continues to tend to cause or provoke the disturbance could never be convicted despite his or her participation. However, the disorderly conduct statute only proscribes conduct that tends to cause or provoke a disturbance—there is no requirement that the prohibited conduct must also initiate the disturbance. *See* WIS. STAT. § 947.01. We will not read such a requirement into the disorderly conduct statute. *See* ***Lang v. Lang***, 161 Wis. 2d 210, 224, 467 N.W.2d 772 (1991) ("[W]e will not read extra words into a statute to achieve a specific result.").

¶10 Second, Tyler's assertion that his abusive language did not provoke a disturbance because he immediately left after he swore at his mother is a nonstarter. "The underlying reason for disorderly conduct statutes … proscribing abusive language is that such language tends to provoke retaliatory conduct on the part of the person to whom it is addressed that amounts to breach of peace." ***Lane***, 29 Wis. 2d at 71-72. That Bobbie did not retaliate against Tyler when he called

her "a fucking whore" does not mean Tyler's conduct did not "tend to provoke or cause a disturbance." *See* ***City of Oak Creek v. King***, 148 Wis. 2d 532, 545, 436 N.W.2d 285 (1989) (It is well-established that a defendant's conduct does not need to cause an actual disturbance. All that is required is that "the conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed."). Further, thirteen-year-old Tyler's departure from the family home after swearing at his mother exacerbates, not mitigates, his outburst. An enraged exit by a child would tend to disturb any parent who just disciplined that child.

¶11 Third, we agree with Tyler that an individual's conduct does not amount to disorderly conduct merely because someone calls the police—rather, the conduct still must be of the type that tends to cause or provoke a disturbance. However, in this case, the circuit court did not determine Tyler's language tended to cause or provoke a disturbance merely because his mother called the police. It also reasoned the language itself, under the circumstances Tyler used it—to his mother after she tried to break up his fight and disciplined him—tended to cause or provoke a disturbance.

¶12 Finally, Tyler relies on ***Schwebke***, 253 Wis. 2d 1, ¶30, to argue his language does not constitute disorderly conduct because it occurred during a private matter. In ***Schwebke***, our supreme court stated:

> [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person.

Id. Tyler asserts his mother was only annoyed with his behavior and there was no evidence from which the court could infer that his language would spill over and disrupt the peace, order or safety of the surrounding community.

¶13 In ***Schwebke***, the court determined the disorderly conduct statute was properly applied to the private mailings the defendant sent to three people because the letters went beyond annoyance, disturbed the recipients, and the mailings were of the type that would be disruptive to peace and good order in the community. ***Id.***, ¶32. Here, the disorderly conduct statute was properly applied to Tyler's conduct. Tyler's indecent language to his mother went beyond annoyance and was delivered after his mother pulled him off his younger brother and disciplined him for striking Ryan with his cast. Tyler's outburst did not occur solely between him and his mother—it was also witnessed by his younger brother. His abusive language is of the type that is disruptive to peace and good order in the community.

By the Court.—Order affirmed.

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