COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 26, 1996

No. 95-2676-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID W. PENDER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

LaROCQUE, J. David Pender appeals a judgment of conviction for obstructing an officer and disorderly conduct. He maintains that the trial court erred by refusing to give a jury instruction that police provocation is a defense to disorderly conduct. This court has examined the evidence in a light most favorable to Pender, and concludes that it does not establish grounds to claim a defense of provocation to disorderly conduct. The judgment of conviction is therefore affirmed.

The trial court has broad discretion in instructing the jury, which extends to the choice of language and emphasis so long as it fully and fairly informs the jury of the rules of law applicable to the case. ***State v. Morse***, 126

Wis.2d 1, 6, 374 N.W.2d 388, 390 (Ct. App. 1985). A defendant is not entitled to a jury instruction on his theory of defense if it is not supported by the evidence. *See* ***State v. Bjerkaas***, 163 Wis.2d 949, 954, 472 N.W.2d 615, 617 (Ct. App. 1991). A police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him for disorderly conduct. *See* ***Lane v. Collins***, 29 Wis.2d 66, 72, 138 N.W.2d 264, 267 (1965).

This court concludes that Pender failed to show an evidentiary basis for an instruction on the provocation defense. The criminal complaint charged Pender with disorderly conduct in a public place. The trial evidence shows that the disorderly conduct in question began almost immediately after an Appleton police officer approached Pender on a public sidewalk to deliver and explain two traffic citations. The conduct continued as Pender and the officer walked up Pender's driveway. At the instructions conference at the conclusion of the evidence, the trial court denied the State's request to amend the complaint to permit the State to include Pender's disorderly conduct after he was no longer in a public place, i.e., in the enclosed hallway or porch.

In light of the preceding limitation upon the charge of disorderly conduct, Pender cannot base his request for a provocation instruction upon a claim that the officer illegally entered the hallway. Pender's only grounds to assert a defense was the officer's act of following him onto a private driveway.

Under the circumstances presented at trial, the officer's entry upon the driveway did not provide a defense to the disorderly conduct. The evidence discloses that Appleton patrolman Kevin Wilkinson knew from Department of Motor Vehicle records that Pender's driving privileges were revoked when he saw Pender driving a vehicle on the evening in question. When he followed the vehicle, he observed it accelerate rapidly and pull into a parking lot. He observed the driver, whom he recognized as Pender, run into the back door of the residence. Wilkinson explained that his law enforcement training taught him to deliver a traffic citation personally and explain its consequences, especially the court date and the appearance requirement.

Several hours before the incident in question, Wilkinson pounded on Pender's door fifty to seventy-five times and called for Pender in an

unsuccessful attempt to contact him. Similar attempts shortly thereafter were similarly unsuccessful. A couple of hours later, Wilkinson observed Pender walking along a public sidewalk toward home. The officer exited his squad and approached Pender, with traffic citations in hand, stating: "David, I have a couple of citations here for you." Pender "was instantly very loud and profane." Pender questioned how he could receive a ticket for a driving offense when he had been in a tavern for the past four hours. Wilkinson testified: "He was extremely excited, yelling, very loud, profane. ... [H]e flared up. ... He kept screaming at me and would start to walk away." As the officer followed Pender for approximately seventy-five feet onto the driveway, Pender continued "[y]elling and swearing at me."

Wilkinson was not engaged in either a search or a seizure. The mere fact that Wilkinson may have traveled onto Pender's private driveway in the process of his duties is not a provocation. Pender erroneously contended that Wilkinson's conduct constituted a violation of his Fourth Amendment right against illegal search and seizure. Consistent with Wilkinson's training, § 345.27, STATS., directs an officer to inform the person charged with a traffic offense of information regarding convictions that may result in revocation or suspension of that person's operating privilege, as well as any demerit points. This court concludes that the trial court properly exercised its discretion when it refused the provocation instruction.

By the Court. – Judgment affirmed.

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