COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1269 **Cir. Ct. No. 01FO2795**

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

COUNTY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

JOHN P. KIERNAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

¶1 CURLEY, J.[1] John P. Kiernan appeals from the judgment entered convicting him of disorderly conduct, contrary to Milwaukee County Ordinance § 63.01 (2000). Kiernan contends: (1) the County's witnesses were not credible and, therefore, did not support the trial judge's finding; (2) even if the testimony of

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

all witnesses is considered, there was not sufficient evidence to support the trial judge's finding that the defendant was disorderly in his conduct; and (3) the Milwaukee County Ordinance violates the First Amendment protection of free speech. This court disagrees and affirms.

I. BACKGROUND.

¶2 On November 8, 2001, Kiernan escorted his wife to Mitchell International Airport, where she was catching a 9:15 a.m. flight. At Concourse E of the airport, Kiernan's wife walked through the metal detectors while her luggage was sent through a screener. Apparently she set off an alarm while passing through the metal detector. Kiernan soon discovered that his wife had set off the alarm and went to attend to her. According to Kiernan's testimony, his wife had screws in her hips and he believed that the metal screws had set off the alarm. When Kiernan went to assist his wife, he crossed over the red-line tape, which marked off a secured area, and he shouted to his wife to tell the security people about the screws in her hip.

¶3 At the same time, National Guard Specialist Timothy P. Benjamin informed Kiernan to move back behind the red-line tape. Benjamin testified that Kiernan refused to move back across the red line and became confrontational, grabbing Benjamin's jacket and telling Benjamin that *he* should get behind the red line. Benjamin testified that when he called for backup, Kiernan let go of his jacket and walked into the men's restroom.

¶4 When Kiernan left the restroom, he again began yelling and disrupting airport operations. According to Deputy Weberg, a Milwaukee County Sheriff's Deputy, Kiernan refused to show identification and made numerous threats to the deputies, offering to fight them. Deputy Weberg further testified that

Kiernan grabbed him "by the shirt, by [his] throat very tightly." Kiernan was then restrained and taken into custody.

¶5 Kiernan was issued a citation for violating Milwaukee County Ordinance § 63.01, disorderly conduct. On March 13, 2002, the trial court found Kiernan guilty of disorderly conduct and imposed a forfeiture of $150 plus costs, or, in the alternative, a two-year suspension of operating privileges.

II. ANALYSIS.

¶6 In the instant case, Kiernan first argues that the County's witnesses perjured themselves. However, Kiernan fails to offer any evidence to show that the County's evidence was false. For us to decide this issue, we would first have to develop Kiernan's argument. However, we cannot serve as both advocate and judge. *See* ***State v. Pettit,*** 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Therefore, because these issues are inadequately briefed, we decline to address them. *See* ***id.*** (stating that this court will not address issues on appeal that are inadequately briefed).[2]

¶7 Kiernan next claims that the evidence does not support the trial court's finding that his actions amounted to disorderly conduct. This court disagrees.

[2] This court pauses to note that despite Kiernan's allegation of perjured testimony, the trial court found that "the officers['] [testimony] seem[ed] to be consistent." Thus, even assuming that the evidence supported two conflicting inferences, it is the trial court, and not this court, that will decide which inference to draw. ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). Accordingly, because the inferences drawn by the trial from the testimony are reasonable, this court concludes that the trial court's findings are not clearly erroneous.

¶8 When a trial judge acts as the finder of fact where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witness's testimony. ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). Furthermore, when there is conflicting testimony, it is the finder of fact who will weigh the evidence and draw any reasonable inferences from the facts of the case. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). On review, this court will not reverse the trial court's findings unless they are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (1983).

¶9 The County carries the burden of proof and must prove through clear, satisfactory and convincing evidence that Kiernan committed the offense. ***City of Milwaukee v. Christopher***, 45 Wis. 2d 188, 191, 172 N.W.2d 695 (1969). To find Kiernan guilty of disorderly conduct, the County was required to prove:

> 1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.
>
> 2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

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¶10 First, according to two of the county's witnesses, Deputy Weberg and Specialist Benjamin, Kiernan's conduct included abusive, profane, and unreasonably loud conduct. These witnesses testified that Kiernan stated he would "kick [Deputy Weberg's] ass," called Deputy Weberg a "son of a bitch" numerous times, spoke loudly, and refused to quiet down. Second, these witnesses also testified that there were passengers in the area of this confrontation who were "absolutely [and] completely terrified" after the incident. Thus, Kiernan's violent,

unreasonably loud, and abusive conduct certainly caused some airline passengers to worry or become nervous as they passed through the checkpoint at the time of the incident. Accordingly, both elements of the disorderly conduct ordinance were satisfied.

¶11 Finally, Kiernan claims that the Milwaukee County Ordinance § 63.01 infringes upon his First Amendment right of free speech. The application of constitutional principles to a set of facts is a question of law that this court reviews *de novo*. ***A.S. v. A.S.***, 243 Wis. 2d 173, 190, 626 N.W.2d 712 (2000).

¶12 While many forms of speech are protected under the First Amendment, "fighting words" are not. *See* ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 571-72 (1942). "Fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." ***State v. Zwicker***, 41 Wis. 2d 497, 510, 164 N.W.2d 512 (1969) (quoting ***Chaplinsky***, 315 U.S. at 571). "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." ***Id.***

¶13 The language used by Kiernan included threatening and profane language. Kiernan threatened to harm Deputy Weberg and called Deputy Weberg a "son of a bitch." Kiernan's language clearly falls under the scope of "fighting words" that could have incited a breach of the peace and have little social value. This court concludes that the speech used by the Kiernan is not protected under the First Amendment's guarantee of free speech.

¶14 Based on the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

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