COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2659 **Cir. Ct. No. 2013CV1123**

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

CITY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

STEPHEN W. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JENNIFER DOROW, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Stephen Green appeals from a municipal forfeiture entered after a jury found him guilty of disorderly conduct on the grounds that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Green disobeyed a police officer's lawful order that he leave Walmart.[2] Green's main contention is that the First Amendment protected his right to disobey the officer's order. This argument fails. We affirm.

Facts

¶2 Green was cited for disorderly conduct because he refused a police officer's order to leave the scene of a disturbance that his friend was causing in Walmart. Three officers were dispatched in response to "a report of a disorderly female customer who may have shop lifted and … was yelling and screaming and exposing her breasts" in the front of the store near the restrooms. During the incident, a Walmart manager noticed that Green appeared to be recording the events with his cell phone and told Green to stop because Walmart prohibits videotaping in its stores. Green did not stop recording and was asking the manager questions about what was going on. The manager reiterated that Green must stop recording or leave.

¶3 One of the officers noticed "this argument that was starting to ensue" between Green and the store manager and asked Green to stop recording or leave the store. Green kept recording. The officer repeated his instruction to Green to leave the store, but Green refused and said he would not leave until the woman did. The officer then "placed [his] hand on [Green's] back gently" and began escorting him out, but Green stopped and refused to exit the building. The officer again repeated his order, this time warning Green that he would be arrested if he refused to leave. Again Green refused. Finally the officer told Green that if Green

[2] Green received a guilty verdict on the citation in municipal proceedings and timely appealed to the circuit court for a jury trial de novo.

did not leave before the officer counted to five, the officer would arrest him. Green stayed and was arrested.

¶4 On cross-examination, the officer explained that he arrested Green for two reasons: first, because he disobeyed a lawful order to leave the premises and, second, because his argumentative conduct with the Walmart manager and the officer was causing a scene. The officer also testified that in his experience when dealing with a disturbance of the peace sometimes a friend who is standing nearby becomes violent too, and this was also a "potential concern" with Green.

¶5 The Walmart manager testified that there are over two hundred cameras recording activities in the store. Portions of Walmart camera recordings of the incident in question were played for the jury.

¶6 Green attempted to introduce into evidence WIS. STAT. § 101.123, which prohibits smoking in particular locations and includes a definition of "public place." Green argued that the statute was relevant because "things are held differently between a public place and a private place" as to the legality of recording. The court barred any questioning about the statute because Green failed to demonstrate how it was relevant.

¶7 In his own testimony Green stated that he was "nothing but respectful to the officers" and that he was recording to "make a record" of the incident in case "someone got hurt, whatever." On cross-examination, Green admitted that he repeatedly refused to exit the store when instructed to do so and that he understood the officer's warnings. The court denied Green's request to refer to some notes and case law while testifying.

¶8 The court granted in part the City's motion to modify the jury instructions defining "disorderly conduct." The City had proposed the following sentence: "Defiance of a police officer's order to move is 'otherwise disorderly conduct' if the order is lawful." Green argued that his case did not fit the "very specific circumstances" where that rule applies, such as where someone was blocking traffic or disrupting courthouse business. The court "accommodate[d] the defense request" by changing the sentence so that it said that defying the order to move "***may***" be disorderly conduct (instead of "is" disorderly conduct). The court however denied Green's request to change that wording to "may or may not," pointing out that it would be "superfluous" and that the approved instruction was clear. During the instruction conference the court also noted that the circumstances of Green's case "did not involve any type of exercise of free speech" or First Amendment issue because Green merely was attempting to record police interaction on Walmart's private premises in violation of Walmart's rule prohibiting recording.

¶9 The six-person jury returned a unanimous guilty verdict. Green appeals.

Analysis

¶10 On appeal Green chiefly argues that the citation violates his First Amendment rights because "filming police officers performing their responsibilities fits the First Amendment," citing ***Glik v. Cunniffe***, 655 F.3d 79 (1st Cir. 2011). He claims that he should have been permitted to rely on the definition of public place from WIS. STAT. § 101.123 in support of that argument. He also asserts that the circuit court erred in denying his request to bring certain

papers to the witness stand and denying his request to replace "may" with "may or may not" in the jury instruction. All of Green's arguments fail.

¶11 Green's central issue is the First Amendment issue. The City claims that Green waived this issue because he failed to cite ***Glik*** below. However, "[c]itation to additional authority and legal analysis on appeal does not constitute … advancement of a new theory on appeal." ***State v. Markwardt***, 2007 WI App 242, ¶33, 306 Wis. 2d 420, 742 N.W.2d 546. As explained above, Green did argue to the circuit court that his defiance of the police order was permissible because he wanted to record police officers performing their duties in a public place. While Green may not always have articulated his arguments using the phrase "First Amendment,"[3] the court understood Green to be making such an argument. The court pointed out that the case law that the parties had discussed in connection with the jury instructions dispute "deal with [F]irst [A]mendment challenges." The court considered Green's arguments but concluded that that "the disorderly conduct statute governs both public and private places" and that Green failed to make any viable free speech claim, as the court was "not aware of any case which would suggest that this is an exercise of free speech."

¶12 So the issue was preserved. But the circuit court got it right: there is no viable free speech defense here. ***Glik*** does not change this conclusion. ***Glik*** holds that "the First Amendment protects the filming of government officials in public spaces," in certain circumstances, subject to "reasonable time, place, and manner restrictions. ***Glik***, 655 F.3d at 83-84. The time, place, and manner of the

[3] Green did say in his opening statement, "I was doing as any good citizen would do and using my [F]irst [A]mendment right to, you know, take pictures of people being arrested to make sure things are being done right."

filming is what distinguishes Green's case from ***Glik***. Glik began filming when he saw officers making an arrest in "Boston Common, the oldest city park in the United States and the apotheosis of a public forum" and heard someone say, "You are hurting him, stop." ***Id.*** at 79, 84. Glik stood ten feet away and recorded the arrest. ***Id.*** After handcuffing the suspect, an officer confronted Glik. ***Id.*** at 80. It was in this context that "[s]uch peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." ***Id.*** at 84.

¶13 In contrast, Green was recording in a private place, Walmart, and doing so in violation of Walmart's rule. What is more, Green's defiant refusal to comply with Walmart's rule created a disturbance. It was not the recording itself that drew police attention. The officer had already noticed Green recording from "five or ten feet away" before the manager spoke to Green, but "figured if he wanted to record, go ahead and record. It doesn't bother me." What triggered the police interaction with Green was Green's arguing with Walmart's manager and refusing to either comply with the store rules or leave the store. The officer gave Green repeated chances to comply. Green's failure to do so was disruptive to the officer's ability to do his job—i.e., remove Green's combative companion from the store where she was making a scene.

¶14 In these circumstances, the circuit court correctly concluded that the First Amendment was no defense to Green's citation for defying the police officer's lawful order. *See also* ***State v. Horn***, 139 Wis. 2d 473, 486, 407 N.W.2d 854 (1987) ("If enforcement of trespass laws by the State automatically meant that private interference with speech activities became 'tinged' and was thereby transformed into governmental interference ... the enforcement of the trespass laws would cloak their activity with a free speech privilege.").

¶15 The circuit court also correctly concluded that WIS. STAT. § 101.123 was irrelevant in Green's case. Green wanted to rely on the statute to suggest that Walmart was a public forum for First Amendment purposes, but department stores and other commercial places are public only as a "byproduct" of their business functions. ***Jacobs v. Major***, 139 Wis. 2d 492, 524, 407 N.W.2d 832 (1987). In First Amendment terms they remain private places. ***Lloyd Corp. v. Tanner***, 407 U.S. 551, 569 (1972). Nothing in § 101.123 changes that rule or is relevant to it.

¶16 As for Green's desire to take certain notes and papers with him to the stand, the decision whether to allow a witness to use materials on the stand during testimony is trusted to the discretion of the circuit court. ***Berg v. De Greef***, 37 Wis. 2d 226, 234, 155 N.W.2d 7 (1967). The rule is that witnesses should testify to the relevant facts from memory and only be allowed to refer to writings to refresh their memory if necessary. ***Coxe Bros. & Co. v. Milbrath***, 110 Wis. 499, 504-05, 86 N.W.2d 174 (1901). In declining Green's request to take those papers to the stand, the court told Green he should attempt to testify from memory and let the court know if he needed the papers. This was no error.

¶17 Likewise, the question of how best to word the jury instructions is a matter of the circuit court's discretion. ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 48, 588 N.W.2d 321 (Ct. App. 1998). There was no error in determining that "may" meant the same thing as "may or may not" and was clearer.

By the Court.—Judgment affirmed.

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