COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1996

NOTICE

No. 96-0760

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

COUNTY OF ROCK,

Plaintiff-Respondent,

v.

JOY DERONE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: J. RICHARD LONG, Judge. *Reversed*.

EICH, C.J.[1] Joy DeRone appeals from a judgment finding her guilty of disorderly conduct in violation of a Rock County ordinance. She claims the evidence was insufficient to support the finding. We agree and reverse the judgment.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

The ordinance adopts § 947.01, STATS., which provides that the offense is committed by one who, "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 ...." The trial court found DeRone guilty of violating the ordinance.

In ordinance cases, the County is required to prove by clear, satisfactory and convincing evidence that the defendant has committed the offense. ***City of Milwaukee v. Christopher***, 45 Wis.2d 188, 191, 172 N.W.2d 695, 697 (1969). And, as the County points out, "`unless the findings of the trial court are against the great weight and clear preponderance of the evidence[2] they will not be set aside on appeal even though contrary findings might have been made with evidence in their support.'" ***Id***. (quoted source omitted; footnote added). To meet this test, however, the trial court's findings "`must at least be supported by evidence sufficient to meet the burden of proof.'" ***Id.*** (quoted source omitted).

This case arose from Nicholas DeRone's complaint that late one evening while he and a companion were installing Christmas lights in front of their house in Beloit, DeRone drove by, rolled down her car window and yelled: "Nicholas, you bastard!" Both Nicholas and his companion testified at trial that this occurred.

Despite that testimony, DeRone argues that the trial court could not determine, under the applicable burden of proof, that she yelled the insult because the testimony of both her and her daughter established that, although she drove by Nicholas's home on the day in question, the yelling incident never occurred.

In situations such as this, where the evidence is in conflict, the trial court, not this court, "is the ultimate arbiter of the credibility of the witnesses."

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[2] The "great weight and clear preponderance of the evidence" standard has been rephrased to state that we will not reverse a trial court's factual findings unless they are clearly erroneous. *See* ***Noll v Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). The two concepts are the same, however. ***Id***.

Cogswell v. Robertshaw Controls Co., 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). On this record, we may not interfere with the trial court's finding that DeRone in fact called the insult to Nicholas.

DeRone contends, however, that even if the court's finding in this regard passes scrutiny, there was no evidence that her conduct was "disorderly" as required by the ordinance. She points out that there was no evidence that others heard the shout, or that either Nicholas or his companion "were in any way disturbed by the incident." There is no question that DeRone used abusive language against Nicholas within the meaning of the ordinance, but she is correct in her assertion that, in the absence of evidence that it was uttered "under circumstances [tending] to cause or provoke a disturbance," § 947.01, STATS., the finding of guilt cannot stand.

The County refers us to two cases which it says support affirmance of the trial court's decision in this case. Both are readily distinguishable.

The first, *Lane v. Collins*, 29 Wis.2d 66, 138 N.W.2d 264 (1965), was a false imprisonment action against a police officer whom the plaintiff claimed had improperly arrested him for violation of a disorderly conduct ordinance corresponding to § 947.01(1), STATS. Lane was arrested when he called the officer who stopped him for a traffic violation a "son-of-a-bitch." *Id*. at 70-71, 138 N.W.2d at 266-67. The court recognized the underlying purpose of the provisions of the ordinance proscribing abusive language: "such language tends to provoke retaliatory conduct on the part of the person to whom it is addressed [and] that amounts to a breach of the peace." *Id*. at 71-72, 138 N.W.2d at 267 (footnote omitted). The court said:

> Calling another person a "son-of-a-bitch" under charged circumstances might well constitute abusive language which is likely to have that result. The fact that the abusive language is directed to a policeman ... and is not overheard by others does not prevent it from being a violation of [the] statute or ordinance.

Id. at 72, 138 N.W.2d at 267 (footnote omitted).

The ordinance in ***Lane***, however, contained a separate section punishing the use of "profane ... or obscene language in any public place within the hearing of other persons." ***Id***. at 71, 138 N.W.2d at 267. There was no requirement—as there is in the ordinance in question here—that the offensive conduct occur "under circumstances in which the conduct tends to cause or provoke a disturbance."

The other case, ***Milwaukee v. Christopher***, 45 Wis.2d 188, 172 N.W.2d 695 (1969), is similarly unavailing, and for similar reasons. Milwaukee's disorderly conduct ordinance provided at that time:

> "Any person who shall be found intoxicated ... *or* who shall make use of any vulgar or obscene language, ... *or* who shall engage in any violent, abusive, loud, boisterous, vulgar, lewd, wanton, obscene, or otherwise disorderly conduct *tending to create or provoke a breach of the peace* ... shall forfeit a penalty...."

Christopher, 45 Wis.2d at 189, 172 N.W.2d at 696 (last emphasis added) (quoted source omitted). The defendant, considered by a police officer to be intoxicated, was being removed from a tavern when he "swore and mouthed obscenities" at the officer. He was charged with violation of the ordinance. ***Id***. at 193, 172 N.W.2d at 698.

The supreme court, while concluding that the evidence was insufficient to support a finding that the defendant was intoxicated, held that it was sufficient to support a finding that he "was guilty of disorderly conduct by reason of the abusive, vulgar and obscene language he used." ***Id***. at 196, 172 N.W.2d at 700. However, the ***Christopher*** ordinance's use of the disjunctive "*or*" limits the "tending to create or provoke a breach of the peace" language to those persons who engage in violent, abusive or otherwise disorderly conduct. Unlike the ordinance at issue here, the separate provision in the Milwaukee ordinance penalizing the use of vulgar or obscene language is not restricted by any requirement that such acts must also tend to provoke a breach of the peace.

The only evidence on this point that the County can point to is testimony that, as a result of DeRone's yelling, Nicholas's companion later discussed the incident with him, telling him they did not have to tolerate it, and that Nicholas eventually reported the incident to the police. Even under the deferential standards applicable to our review of the evidence in cases such as this, we consider that testimony to be insufficient to support a finding that DeRone's conduct tended to cause or provoke a disturbance within the meaning of the Rock County ordinance. She was, as the County states, subject to a restraining order prohibiting her from having any contact with Nicholas, but we do not see that fact as aiding the county's argument. Whatever sanctions may flow from her violation of the restraining order, the County failed to prove that her shout constituted disorderly conduct as defined in the ordinance.

By the Court.—Judgment reversed.

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