COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1296-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY S. TENNANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

ANDERSON, J. The only issue on appeal is the sufficiency of the evidence to support Jeffrey S. Tennant's convictions for endangering safety by use of a weapon, § 941.20(1)(a), STATS., and disorderly conduct, § 947.01, STATS. We affirm the convictions because we conclude that a reasonable trier of fact could be convinced of Tennant's guilt beyond a reasonable doubt by the probative and credible evidence presented at trial.

As the result of a domestic abuse incident involving his wife, Tennant was originally charged with one felony count of injury by the negligent handling of a dangerous weapon, § 940.24, STATS., and one felony count of threat to injure, while armed, §§ 943.30(1) and 939.63(1)(a)3, STATS. Tennant ultimately faced a bench trial on the endangering safety and disorderly conduct misdemeanors for which he was convicted and a felony count of robbery for which he was acquitted.[1] In this direct appeal, Tennant contends that "the evidence adduced at trial is insufficient as a matter of law to support the court's verdicts finding him guilty" of both counts.

Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We shall affirm a conviction if we can conclude that the trier of fact, acting reasonably, could be convinced beyond a reasonable doubt by evidence it is entitled to accept as true. *See* ***State v. Teynor***, 141 Wis.2d 187, 204, 414 N.W.2d 76, 82 (Ct. App. 1987). When there are inconsistencies between witnesses' testimony, it is the task of the trier of fact to determine both the credibility of each witness and the weight to be given to the testimony. *See* ***State v. Toy***, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985). We shall not assess the credibility nor weigh the evidence. Nor shall we substitute our judgment for that of the trier of fact, unless "the evidence supporting the jury's verdict conflicts with

[1] The procedural history of this case is immaterial to Tennant's challenge to the sufficiency of the evidence and will not be recounted in this opinion.

nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993).

The elements of endangering safety by use of a weapon, § 941.20(1)(a), STATS., include (1) that the defendant operated or handled a dangerous weapon; (2) that the defendant operated or handled a dangerous weapon in a manner constituting criminal negligence; and (3) that such criminal negligence on the part of the defendant endangered the safety of another person. *See* WIS J I–CRIMINAL 1320. Tennant does not dispute that the kitchen butcher knife he held was a dangerous weapon.[2] He does argue that all the evidence shows is that he approached his wife with a knife, but that he did not brandish it in a way that was likely to kill or significantly injure her.

Tennant focuses his argument on the inconsistencies between his wife's testimony and a statement she gave the investigating officer on the night of the assault and a statement she submitted in support of a petition for a domestic abuse temporary restraining order. He contends that his wife's testimony does not support the conclusion that he handled the knife in a manner that created a substantial and unreasonable risk of injury to his wife.

We reject Tennant's invitation to accept his wife's trial testimony over two statements given concurrently with the assault. Although Tennant's wife changed her story at trial, the trial court, as the finder of fact, was not obliged to accept this altered testimony. The trial court was free to accept her former

[2] Section 939.22(10), STATS., defines a "dangerous weapon" as any "device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm."

testimony. *See* ***Sharp***, 180 Wis.2d at 659, 511 N.W.2d at 324 ("Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, [the fact finder] determines the credibility of each witness and the weight of the evidence."). One reason the trial court could have rejected the altered testimony is that a victim of domestic abuse "may change her story in an attempt to exonerate her abuser." ***State v. Bednarz***, 179 Wis.2d 460, 463, 507 N.W.2d 168, 170 (Ct. App. 1993).

From our review of the record, we find sufficient and probative evidence to support the trial court's guilty verdict on the count of endangering safety by use of a weapon. On May 29, 1997, city of Kenosha police officers responded to a domestic disturbance call from the Tennant residence. The officers' investigation, along with the victim's two statements, established that earlier in the evening Tennant's wife and three youngest children were all sleeping together. Tennant entered the bedroom with a butcher knife in his left hand, held in a stabbing motion. Tennant woke his wife up and demanded that she leave the bedroom with him so that they could talk. When she refused, Tennant poked the butcher knife into the pillow next to his wife's head. Their twelve-year-old son woke up during this confrontation and appeared frightened. Tennant then tried to grab his wife's purse which she kept hidden under the bed because she did not want Tennant taking her money or jewelry to fund his crack cocaine habit. In the struggle for the purse, Tennant's wife received several cuts to her right hand. Tennant then threw the knife on the dresser and left the room.

We are satisfied that a trier of fact could reasonably conclude from this evidence that Tennant handled the knife in a manner constituting criminal negligence when he held it in a stabbing motion, poked it into the pillow next to his wife's head and threw the knife on the dresser. Further, the trier of fact could

likewise conclude that such criminal negligence on the part of the defendant endangered the safety of another person.

We will now address the disorderly conduct charge. Wisconsin's disorderly conduct statute is straightforward. Section 947.01, STATS., 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.

The statute thus creates two elements for disorderly conduct: (1) conduct of the type enumerated in the statute; and (2) circumstances in which the conduct would tend to cause a disturbance. *See* ***City of Oak Creek v. King***, 148 Wis.2d 532, 540, 436 N.W.2d 285, 288 (1989).

Tennant contends that the evidence supports the conclusion that the two officers in his home "provoked this 'breach of the peace.'" He asserts that he was minimally cooperative and the extra exertion the police officers had to engage in to subdue him did not rise to the level of a disturbance.

The evidence, viewed most favorably to the State, shows that Tennant engaged in "otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." This part of the statute generally denominated as the "catchall clause" proscribes otherwise disorderly conduct which tends to disrupt good order and to provoke a disturbance. *See* ***id.*** at 541, 436 N.W.2d at 288.

The evidence at the trial shows that while the first officer on the scene was taking a statement from the victim, he heard noises coming through the backdoor and called for backup. The officers concluded that someone had sneaked in the backdoor and gone into the basement. The officers stood at the top

of the basement stairs and ordered whoever was in the basement to come up, but there was no response. The officers then heard noise in the basement and called down three to four more times without a response. As one officer drew his weapon and began to walk down the stairs, Tennant finally appeared at the bottom of the stairs. The officer testified that Tennant appeared "startled or just befuddled. He had a glazed look on his face. He didn't appear to be normal." Tennant refused the officers' command to get down on the ground, and the officers had to struggle with him before putting him on a couch and handcuffing him.

Contrary to Tennant's argument, this is not a case of the police officers provoking him into a breach of the peace. Nor is this a case of a mere refusal to obey a police command which does not constitute disorderly conduct. *See* ***State v. Werstein,*** 60 Wis.2d 668, 676, 211 N.W.2d 437, 441 (1973). The disorderly conduct statute emphasizes "the relatedness of conduct and circumstances" and "is no more than a recognition of the fact that what would constitute disorderly conduct in one set of circumstances, might not under some other." ***City of Oak Creek***, 148 Wis.2d at 542, 436 N.W.2d at 288. Tennant's conviction for being "otherwise disorderly" results from the inappropriateness of specific conduct because of the circumstances involved. Specifically, at 3:30 a.m. Tennant sneaks through the backdoor of his residence into the basement; and when ordered to show himself, he fails to respond until an officer has to go down the stairs with a drawn weapon. When he finally appears, Tennant is befuddled, verbally abusive and refuses to peacefully surrender. Tennant's conduct could reasonably have caused an escalation of police response that might have proven fatal.

In regard to the second element of disorderly conduct, we find that there is sufficient evidence that the conduct engaged in by Tennant, under the circumstances, did tend to cause or provoke a disturbance. "It is not necessary that an actual disturbance must have resulted from the appellant's conduct. The law only requires that the conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed." *See* ***id***. at 545, 436 N.W.2d at 290.

By the Court.—Judgment affirmed.

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