COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1064-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. CARROLL

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Reversed.*

¶1 DYKMAN, P.J.[1] James Carroll appeals from a judgment of conviction of disorderly conduct, WIS. STAT. § 947.01 (1999-2000),[2] dated

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. WISCONSIN STAT. § 947.01 provides:

(continued)

September 27, 1999. He raises several issues regarding his conviction. We conclude that the evidence is not sufficient to support his conviction. Accordingly, we reverse.

¶2 Dr. Thomas McGorey is a family physician who practices in Johnson Creek. He had been practicing for about six months when Carroll became his patient in February 1999. Dr. McGorey saw Carroll twice and had an appointment to see him on March 15. Because of an emergency surgery that he was required to attend, Dr. McGorey called Carroll on the morning of March 15 and explained that the appointment would have to be rescheduled. The telephone call was uneventful.

¶3 Carroll suffers from Crohn's disease, an inflammatory condition of the colon, which causes severe abdominal pain, chronic diarrhea, weight loss, and malnutrition. He had a history of depression and anxiety. Dr. McGorey knew this when he telephoned Carroll.

¶4 The next morning, Dr. McGorey received a page from his clinic. He called the clinic, and Rhonda Leer told him that Carroll had called, apparently upset about his appointment being cancelled. Leer also told him that Carroll had said that Dr. McGorey was not concerned about him and wanted to report Dr. McGorey to the State Medical Society. During the conversation Carroll used some profanity. Dr. McGorey called Carroll at his home, and they spoke about Carroll being upset that his appointment had been cancelled. Dr. McGorey felt

---

> 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.

that Carroll was a little upset, but "nothing out of the ordinary." He described Carroll's tone of voice as, "there wasn't anything very unusual about him." During their conversation, Carroll expressed a lot of frustration with his illness and said that he was tired of living with it and tired of the medication he was on. Toward the end of the conversation, Carroll said, "I might as well just go out and kill someone and kill myself." Dr. McGorey called the police, and Carroll was charged with and convicted of disorderly conduct. He appeals.

¶5 The test for evidence sufficiency is a strict one. We may not reverse a conviction on the basis of insufficient evidence unless 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. ***State v. Gomez***, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993). We will follow this standard by considering the elements of the offense and the evidence adduced to prove those elements, keeping in mind that we must view the evidence in a light most favorable to the State.

¶6 Although Carroll argues that his telephonic communication did not occur in a public or a private place, we reject this assertion. We can conceive of no place that is not either public or private. Dr. McGorey testified that he called Carroll at home, and spoke with him. A reasonable jury could infer that Carroll's home was a private place. Dr. McGorey testified that Carroll made the statements while at home. And the jury could infer that when Carroll called Dr. McGorey's clinic and used profanity, that Carroll was calling from his home. The evidence is sufficient to show that Carroll committed the first element of the crime of disorderly conduct.

¶7 But there is a second element to disorderly conduct. In ***City of Oak Creek v. King***, 148 Wis. 2d 532, 545, 436 N.W.2d 285 (1989), the supreme court noted that this element was that the conduct engaged in by the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance. The court explained that it is not necessary that an actual disturbance must have resulted, only that the conduct be of a type that tends to cause or provoke a disturbance, under the circumstances as they then existed. ***Id.***

¶8 WISCONSIN STAT. § 947.01 does not imply that all conduct which tends to annoy another is disorderly conduct. ***State v. Zwicker***, 41 Wis. 2d 497, 508, 164 N.W.2d 512 (1969). And in ***State v. Werstein***, 60 Wis. 2d 668, 672, 211 N.W.2d 437 (1973), the court noted the importance of a coalescing of conduct and circumstances. The court said: "In each of these cases, convictions for being 'otherwise disorderly' resulted from the inappropriateness of specific conduct because of the circumstances involved." ***Werstein***, 60 Wis. 2d at 673. Though ***Werstein*** involved conduct asserted to be speech protected by the First Amendment to the United States Constitution, the principle remains: The speech must be analyzed in light of the place it was made and the circumstances under which it was made. This is well shown in ***State v. Maker***, 48 Wis. 2d 612, 613, 180 N.W.2d 707 (1970), where the defendant performed on stage in a tavern wearing only an athletic supporter and paint on his body. The court noted: "Defendant's inferable expectation of securing an audience reaction was not disappointed." ***Maker***, 48 Wis. 2d at 618.

¶9 Had the defendant in ***Maker*** rehearsed his performance alone in the privacy of his home, though the performance would have been just as "otherwise disorderly," the circumstances in which the conduct would tend to cause or provoke a disturbance would be missing. Thus, the mere presence of defendants

in an induction center was insufficient to support a disorderly conduct conviction. ***Werstein***, 60 Wis. 2d at 673-74. The ***Werstein*** court noted: "Mere presence absent any conduct which tends to cause or provoke a disturbance does not constitute disorderly conduct." ***Id.*** at 674.

¶10 We must examine what Carroll did and the circumstances under which he did it. He arguably violated WIS. STAT. § 947.01 on two occasions. The first is when he called Dr. McGorey's clinic and complained about the rescheduling of his appointment. The evidence pertaining to this call is sketchy, probably because the person at the clinic who took Carroll's telephone call, Leer, did not testify. Dr. McGorey was relating what Leer told him. We do know, however, that during that conversation, Carroll "used some profanity." But we do not know what sort of profanity Carroll used, or the circumstances under which he used it.

¶11 WEBSTER'S COLLEGIATE DICTIONARY 930 (10th ed. 1993) describes the verb "profane" as "to treat (something sacred) with abuse, irreverence, or contempt." Using this definition, we cannot tell what circumstances existed nor what Carroll said to Leer. There is no way to test whether Carroll's conduct was disorderly. Even considering "profanity" as including gutter talk, it is not possible to determine whether the language Carroll used tended to cause or provoke a disturbance. Leer was "quite bothered by it," but ***Zwicker*** tells us that not all conduct which tends to annoy another is disorderly conduct. Without knowing what profanity Carroll used and what circumstances caused Leer to be bothered by it, we conclude that the undescribed profanity under the mostly unknown circumstances is insufficient to prove Carroll guilty of disorderly conduct beyond a reasonable doubt.

¶12 We know somewhat more about Carroll's telephone conversation with Dr. McGorey. But the same question arises: When a depressed and anxious patient tells a doctor who is treating him for a painful disease that he should just go out and kill some people and then kill himself, is that conduct which tends to cause or provoke a disturbance? We must ask what sort of disturbance would be a consequence of Carroll's statement.

¶13 We can easily envision the result of Carroll's statement—Dr. McGorey called the police and the police came to Carroll's residence and, as is obvious from this case, arrested him. So we can easily say that Carroll's statement tended to cause or provoke a referral to the police department. But the next leap is a considerable one. A call to a police department reporting a threat of homicide and suicide is not ordinarily a disturbance-provoking occurrence. It might be. We can envision the possibility of a telephone call causing a police visit that, because of a person's resistance, becomes a disturbance. But we cannot say that calls to the police tend to provoke disturbances. While a complaint of a threat to commit murder or suicide might ultimately lead to a disturbance, that is no better than a possibility. WISCONSIN STAT. § 947.01 does not read "under circumstances where it is *possible* that a disturbance might occur." (Emphasis added.) Instead, that statute speaks of tendencies, which connotes proneness, or likelihood. Likelihood, proneness, and tendency are words that connote more than possibilities.

¶14 Murder and suicide are serious matters. The legislature has enacted statutes that criminalize some threats. *See* WIS. STAT. § 940.201 (threat to witnesses); WIS. STAT. § 940.203 (threat to judge); WIS. STAT. § 940.205 (threat to department of revenue employee); WIS. STAT. § 940.207 (threat to department of commerce or department of workforce development employee); WIS. STAT. § 943.30 (threat to injure or accuse of crime); WIS. STAT. § 943.31 (threats to

communicate derogatory information); WIS. STAT. § 940.45 (intimidation of victims). Other statutes deal with the unlawful use of a telephone, *see* WIS. STAT. § 947.012, and harassment, *see* WIS. STAT. § 947.013. Had the legislature concluded that the type of threat Carroll made, under the circumstances he made it, should be a crime, it could easily have made it one. And had Carroll made the comment that he did under other circumstances, a conviction for disorderly conduct might be sustainable. But as ***City of Oak Creek*** points out, the second element of disorderly conduct "requires that the conduct be of a type which tends to cause or provoke a disturbance, *under the circumstances as they then existed*." ***City of Oak Creek***, 148 Wis. 2d at 545 (emphasis added).

¶15 We conclude that the circumstances existing when Carroll made his statement—a telephone call between Carroll and his doctor, made in an ordinary tone of voice, and except for the content, being nothing out of the ordinary, do not provide a factual background sufficient to satisfy the second element of disorderly conduct, that Carroll's conduct tended to cause or provoke a disturbance. We recognize that no disturbance occurred, and that it was not necessary that a disturbance occur. Considering that, and that we must view the evidence of the telephone call in the light most favorable to the State, we still conclude that the evidence against Carroll was insufficient to prove the second element of disorderly conduct. Accordingly we reverse the judgment of conviction dated September 27, 1999.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.