

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1862

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARY C. RATH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

¶1 FINE, J. Mary C. Rath appeals *pro se* from a judgment convicting her of violating a provision of the Wisconsin Administrative Code by making illegal annoying telephone calls to persons on property under the jurisdiction of the Wisconsin Department of Administration. See WIS. STAT. § 16.846 (authorizing such rules and providing for penalties for their violation). Rath

contends that the evidence does not support her conviction, and that the trial judge was biased against her. We affirm.

I.

¶2 This case arises out of a relational triangle—Rath was apparently jealous that a man she had dated was dating the complainant, an employee of the public defender’s office. The woman testified that Rath called her at work in the State Office Building on Sixth and Wells Street in Milwaukee on a Friday afternoon and angrily called her a “fucking bitch.” The woman testified that she recognized Rath’s voice because of a prior face to face confrontation she had with her at an outdoor concert as well as when Rath called her on the telephone to ask her about her relationship with the man. She also testified that there was one other time when she heard Rath’s voice over the telephone.

¶3 In connection with the confrontation at the outdoor concert, the complainant, whose first name is Judy, testified that Rath came over to a group the complainant was with and asked: “Where’s Judy? Is there a Judy here?” The complainant responded, falsely, no, and Rath’s lawyer tried to make much of this during his cross-examination of the complainant:

Q When you met Miss Rath face to face at Jazz in the Park you lied to her, correct?

A I-I said, “There’s no Judy here.”

Q Will you answer my question, please?

A Yes.

Q You lied to her?

A Yes, because I was afraid--

[Rath's lawyer]: Thank you. Thank you.

Rath's lawyer also pointed out that the complainant had testified before a court commissioner in support of a request for a restraining order against Rath that she had never seen Rath "face to face." The complainant explained that "I maybe had forgotten about that time," recalling that she was nervous during that earlier testimony. Rath did not testify.

¶4 The trial court rendered an extensive, well-reasoned, and thoughtful oral decision, crediting the complainant's identification of Rath, and found her guilty. Rath contends that the complainant was not credible because she had previously denied meeting Rath face to face, and had been shown Rath's picture by a state security officer. She also claimed that the trial judge was prejudiced against her, contending—without support in the record—that a friend of the complainant had given the judge a note at the start of the proceedings. Rath also contended that the trial judge improperly permitted the complainant to "choose my fine."

II.

¶5 As an appellate court, we neither see nor hear the witnesses who testify at trial. Thus, we give substantial deference to those who do, and their resulting better ability to ascertain the facts from conflicting evidence. As the Wisconsin Supreme Court has explained:

[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757-758 (1990) (citation omitted). Stated another way, we may not overturn a trial court’s findings of fact unless those findings are “clearly erroneous.” See WIS. STAT. RULE 805.17(2), made applicable to criminal proceedings by WIS. STAT. § 972.11(1). The trial court’s crediting the complainant’s testimony that she recognized Rath’s voice was not clearly erroneous.

¶6 Rath’s additional claims of trial-court error are also without merit. First, although she claims that the trial court was prejudiced against her, the only matters of record indicate that the trial judge was extremely patient and solicitous to Rath. Thus, for example, although following the trial court’s oral decision Rath is quoted by the transcript as saying “This is ridiculous. I’m leaving,” the trial court did not hold her in contempt, as it had the power to do. See WIS. STAT. §§ 785.01(1)(a), 785.03(2). Further, as noted earlier, there is absolutely no evidence in the record that anyone handed to the trial judge a note, no less a note that had anything to do with the case. Rath was represented before the trial court by a lawyer; neither Rath—who was, at times, fairly vocal even though she did not testify—nor her lawyer made any contemporaneous objection. Finally, the trial court did not let the complainant set Rath’s fine; it permitted both the complainant

and Rath to address the court. Wisconsin law appropriately gives to victims the right to make sentencing recommendations. *See* WIS. STAT. § 972.14(3)(a).

¶7 In sum, the evidence fully supports the trial court's finding that Rath violated the code provision by making an unwarranted annoying call to the complainant, and, additionally, Rath's claims of trial-court error are baseless.

By the Court.—Judgment affirmed.

This opinion will not be published. Rule 809.23(1)(b)4, Stats.

