COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
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. 2008AP1010

Cir. Ct. No. 2007FO278

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

COUNTY OF RUSK,

PLAINTIFF-APPELLANT,

V.

AMY M. KERN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Reversed.*

¶1 BRUNNER, J.[1] Rusk County appeals a judgment notwithstanding the verdict, entered on the court's own motion, after a jury found Amy Kern guilty

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of an ordinance violation for allowing underage persons on a premises serving alcoholic beverages. The County contends the trial court applied the wrong legal standard to its determination and that, applying the proper standard, the jury's verdict should not have been rejected. We agree and reverse the judgment.

BACKGROUND

¶2 Deputy Mark Ohmstead testified he conducted a compliance check at Antlers tavern and discovered Ryan Follmuth and Eric Rajala, both twenty years old, playing pool with a twenty-one-year-old male. The pool table was positioned about fifteen feet from the bar, near the main entrance of the tavern, which consisted of a single room. Ohmstead testified he spoke with Amy Kern, the only bartender on duty, who told him she had not verified Follmuth's and Rajala's ages because she did not serve them any alcohol. Ohmstead recalled there were approximately twelve people in the bar. When asked whether Follmuth's or Rajala's parents were in the tavern, Ohmstead testified, "not that I am aware of." Ohmstead could not recall whether he had asked them if their parents, guardians, or spouses were present, but neither Follmuth nor Rajala told him they were and nobody identified themselves as such.

¶3 Follmuth and Rajala also testified at trial. Follmuth, a student from Stevens Point, stated he was in Rusk County celebrating his friend's twenty-first birthday and went to Antlers with that friend and Rajala. Follmuth testified he was in the bar for about an hour and that the other men with them who were twenty-one years old were drinking.

¶4 Rajala also testified he was a student from Stevens Point and had traveled to Rusk County to celebrate his friend's twenty-first birthday. Rajala

stated he left the bar with Follmuth and believed he had also arrived there with him.

¶5 Kern testified she was busy bartending and cooking when three groups of young men entered. The first group of three ordered at the bar, and she confirmed they all had recently turned twenty-one. Kern stated she saw the others come in shortly thereafter, and they were there about twenty minutes before Ohmstead walked in. She saw Follmuth and Rajala enter together, with no others. When asked whether their parents were in the bar, Kern responded, "I don't know. I don't think so" and "[n]ot that I know of."

¶6 After the jury returned a unanimous guilty verdict, the court stated it was required to order a judgment notwithstanding the verdict because the verdict was not sufficiently supported by the evidence. The court did not specify the legal standard it was applying, but it twice mentioned the County's burden of proof, that it convince the jury to a reasonable certainty by evidence that is clear, satisfactory, and convincing. The court concluded the County "didn't prove" the element that the underage person was not accompanied by his or her parent, guardian, or spouse who had obtained the legal drinking age.

DISCUSSION

¶7 The County asserts the trial court should have applied the any-credible-evidence standard. It contends application of that standard here requires acceptance of the jury's verdict. Additionally, the County argues the court was not authorized to overturn the verdict on its own motion.

¶8 When the jury has rendered a verdict and the sufficiency of the evidence to support the verdict is challenged, both trial and appellate courts apply

the any-credible-evidence standard. ***Foseid v. State Bank***, 197 Wis. 2d 772, 782-83, 541 N.W.2d 203 (Ct. App. 1995). Under that standard, "if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned." ***Id.*** at 782

¶9 We agree with the County that the trial court should have applied the any-credible-evidence standard, despite the court's incorrect labeling of its decision as a judgment notwithstanding the verdict.[2] Kern does not dispute that is the proper standard. Applying that standard, we conclude the jury's verdict should have been accepted.

¶10 Kern argues there was no direct evidence that Follmuth's and Rajala's parents, guardians, or spouses were not present at the bar because neither of them testified to the fact at trial and Ohmstead could not recall whether he had asked them. However, the jury was instructed:

> It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to a person's common knowledge and experience.

¶11 Here, there was ample circumstantial evidence from which a jury could infer Follmuth and Rajala were not accompanied by their parents, guardians, or spouses. The two were Stevens Point students celebrating a friend's twenty-first birthday. Additionally, they were part of a larger group of young men at the

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[2] The trial court similarly mislabeled its insufficiency of the evidence determination as a judgment notwithstanding the verdict in ***Foseid v. State Bank***, 197 Wis. 2d 772, 781 n.4, 788, 541 N.W.2d 203 (Ct. App. 1995). That case explained the difference between the two rulings. ***Id.*** at 781 n.4.

bar together, the rest of whom were twenty-one years old. It would be reasonable to infer this group was not out celebrating along with their parents, guardians, or spouses. Further, Kern saw Follmuth and Rajala enter the one-room bar together. Bolstered by her response that she did not think they were accompanied by their parents, a jury could infer the two did not interact with anyone Kern thought could have been their parents, guardians, or spouses. Indeed, when asked who he went to the bar with, Follmuth testified he went there with Rajala and one other friend. Neither Follmuth nor Rajala mentioned a parent, guardian, or spouse had accompanied them.

¶12 In addition, Kern testified that after Ohmstead inquired whether she had carded Follmuth and Rajala, Ohmstead took the two outside and did not return for about twenty minutes. A jury could reasonably infer that if either of the two was accompanied by a parent, guardian, or spouse, he would have mentioned it to Ohmstead. Further, given that the bar consisted of a single room, it would be reasonable to infer that Follmuth's and Rajala's parents, guardians, or spouses would have come forward if they were present.

¶13 Because we reverse based on our conclusion the evidence was sufficient to support the jury's verdict, we need not address the County's additional argument that the trial court was not authorized to reject the verdict on its own motion. *See* ***Gross v. Hoffman*****,** 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).[3]

[3] We feel compelled to address the unacceptable quality of Kern's brief. The brief misrepresents the facts of record and fails to comply with numerous rules of appellate procedure. While it is not uncommon for attorneys to overlook the occasional briefing rule, the extent of violations here is remarkable. We take this opportunity to caution counsel that similar conduct in the future is likely to result in sanctions.

By the Court.—Judgment reversed.

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