

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 2, 2009

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. 2009AP122

Cir. Ct. No. 2008JV109

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF MARLON M., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MARLON M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
FAYE M. FLANCHER, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ This is an appeal from a dispositional order from the Racine county circuit court finding Marlon M. delinquent of taking and driving a vehicle without the owner's consent as a party to the crime and disorderly conduct. This court affirms the decision of the circuit court.

¶2 On February 16, 2008, at about 5:35 p.m., Mandy Weimann visited the Regency Mall Cinemas in Racine to pick up some popcorn after shopping at the mall. As Mandy pulled into the Regency Mall Cinemas parking lot, she noticed "three young black males," two of which were wearing dark outerwear and one wearing a camouflage jacket, walking by the movie theater.² Mandy parked her vehicle in front of the movie theater, left the car running, keys still in the ignition, and the doors unlocked, while she ran in to get popcorn. Mandy exited the theater approximately five minutes later and found her vehicle had been taken. Mandy had not given anyone consent to drive her vehicle.

¶3 After she was unable to locate her vehicle, Mandy went back into the movie theater and notified theater personnel that her vehicle had been stolen. Theater personnel immediately called the police. While theater personnel called the police, Mandy called her brother, Dustin Weimann, and asked him to come to the mall and help look for her vehicle. Dustin, along with mall security, arrived at the theater at the same time, about five minutes after they had been called. Mall security collected Mandy's information, while Dustin went to drive around the mall parking lot to search for the stolen vehicle.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Lisette Hindman, the general manager of the Regency Mall Cinemas, also noticed three black males walking by the theater as Mandy was in the theater purchasing popcorn.

¶4 Dustin located his sister’s vehicle in another area of the mall parking lot. The vehicle was found in the middle of an aisle, without keys, and not running, but with the gear still shifted to drive.³ Dustin called Mandy and told her where the vehicle was in the parking lot.

¶5 After Mandy arrived at the location of her vehicle, Dustin began to drive around the lot again in search of the three individuals suspected of stealing the vehicle. Dustin later located three individuals at another entrance to the mall by some bushes looking “a little suspicious.” Dustin waited for the individuals to leave and walked to where they were standing to look around. Dustin located his sister’s keys a short distance from where the individuals were standing. Dustin notified his sister and the police that he had found the keys and went into the mall.

¶6 After entering the mall, Dustin walked around until he found the individuals he had seen where he found his sister’s keys. When he located the individuals, they were already being shadowed by police, and Dustin was told he could go and recover his sister’s keys. Dustin gave a similar description of the individuals as Mandy—wearing dark outerwear and one wearing a camouflage jacket.

¶7 Mall security⁴ stopped the three individuals identified by Mandy and Dustin.⁵ The three individuals were taken to the community policing office inside

³ When the vehicle and the keys were reunited, the vehicle would not start and could not be shifted back into park. The vehicle was towed to a garage the next day. It cost Mandy approximately \$270 to fix the shifter cable and \$50 for the tow.

⁴ The Regency Mall hires off-duty police officers to act as mall security guards. The off-duty officers wear their police uniforms and maintain full police powers while working at the mall, but are paid by the mall for their services.

the mall, and the Racine county police dispatch was contacted and asked to send an on-duty officer to the mall. A search of the three individuals revealed several compact discs belonging to Mandy that were taken from her vehicle.⁶ When dispatched on-duty officer, Venise T. Voss, arrived at the community policing office she placed the three individuals under arrest for operating a motor vehicle without owner's consent.⁷

¶8 After the three individuals were arrested, they all became loud, shouting obscenities at the police. Four Racine police officers and Jeffrey L. Pitt, the mall security guard, all testified that Marlon, as well as the other two individuals, were being loud, swearing, and threatening the officers. Marlon, along with the other two individuals, were removed from the mall, put into a police transport wagon, and taken to the Racine County Sheriff's Department.⁸

DISCUSSION

¶9 The issue on appeal is whether there was sufficient evidence presented at trial to support the circuit court's delinquency finding. The standard of review for sufficiency of the evidence cases is the same for both direct and circumstantial evidence. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The standard of review is whether "the evidence, viewed most

⁵ Marlon was identified by police as one of the individuals. The other individuals were Tronick M. and Larry M.

⁶ None of the compact discs were found on Marlon's person; the discs were carried by the individual identified as Tronick.

⁷ Marlon was charged as a party to the crime.

⁸ While inside the police transport vehicle, Marlon and the other two individuals continued to be loud, swearing, and threatening the officers.

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.” *Id.* “Thus, an appellate court must ‘search the record to support the conclusion reached by the fact finder.’” *State v. Schulpius*, 2006 WI App 263, ¶11, 298 Wis. 2d 155, 726 N.W.2d 706 (citing *State v. Owen*, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996)).

¶10 Circumstantial evidence is “evidence the proof of which logically leads the trier of fact to infer and conclude the actual events of an occurrence.” 10 TED M. WARSHAFSKY AND FRANK T. CRIVELLO II, WISCONSIN PRACTICE SERIES, TRIAL HANDBOOK FOR WISCONSIN LAWYERS § 14:01 (3d. ed. 2008). Moreover, circumstantial evidence “is oftentimes stronger and more satisfactory than direct evidence.” *Poellinger*, 153 Wis. 2d at 501

¶11 Searching the record, we conclude that there was enough evidence present that the circuit court could have reasonably found Marlon guilty of being a party to taking and driving a vehicle without owner’s consent⁹ beyond a reasonable doubt. First, Marlon was spotted by two witnesses, Mandy and the Regency Mall Cinemas general manager, walking with two individuals in close proximity to Mandy’s vehicle minutes before it was stolen. No other individuals were seen in the vicinity of her vehicle. Then, a short time later, Mandy’s brother spotted Marlon and the same two individuals acting suspiciously, a few feet from where the keys to Mandy’s vehicle were found. Later, when Marlon and the two individuals were apprehended, one of the individuals had in his possession

⁹ WISCONSIN STAT. § 943.23(2) states: “Except as provided in sub. (3m), whoever intentionally takes and drives any vehicle without the consent of the owner is guilty of a Class H felony.”

compact discs that had been in Mandy's vehicle. These facts, when viewed together allow a reasonable trier of fact to logically conclude that Marlon was present when Mandy's vehicle was taken.

¶12 As for the disorderly conduct charge, WIS. STAT. § 947.01 states that disorderly conduct behavior is committed by a person who “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.” Four police officers and a mall security guard witnessed Marlon being loud, swearing, and yelling threats directed at the officers. In fact, Marlon and the other two individuals were causing so much of a disturbance that a crowd formed in the mall to watch the officers escort them to the police transport wagon. We conclude the evidence was sufficient for the circuit court to convict Marlon of disorderly conduct.

¶13 Marlon argues that the two defense witnesses provide reasonable doubt upon the conclusion that he was present when the vehicle was taken. Marlon's sister, Lena Ash, and his friend, Daniel Polzin, both testified that Marlon could have been with them at the time the vehicle was taken. We are not persuaded. The circuit court, not this court, finds facts. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). Incident to the circuit court's fact-finding function, it is also the circuit court's obligation to determine the credibility of witnesses because of “the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). “Thus, the trial judge, when acting as the factfinder, is considered the ‘ultimate arbiter of the credibility of a witness,’ and his finding in that respect will not be questioned unless based upon caprice, an abuse of discretion, or an error of law.” *Johnson v.*

Merta, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980) (citation omitted). In this case, the circuit court did not abuse its discretion in determining the weight and credibility of the testimony given by the two defense witnesses.

¶14 For the above reasons, we affirm the circuit court order finding Marlon delinquent of being a party to taking and driving a vehicle without consent, and disorderly conduct.

By the Court.—Order affirmed.

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

