

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2003

Cornelia G. Clark
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. 03-0377-CR

Cir. Ct. No. 01-CM-3050

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV/III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RALPH OVADAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Ralph Ovadal appeals a judgment finding him guilty of disorderly conduct, and an order denying his motion for a new trial and recusal of the trial court judge. Ovadal argues (1) the court's findings are not supported by the evidence; (2) his conduct constituted speech protected by the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

First Amendment; and (3) the trial judge was biased. We disagree and affirm the judgment and order.

BACKGROUND

¶2 Mazomanie Beach, located on the Wisconsin River in Dane County, is operated by the Department of Natural Resources. For several years, Ovadal has been part of a group protesting nudity at the beach. The group protests at the beach's parking lot, located a mile and a half from the beach. The beach is not visible from the lot.

¶3 On May 28, 2001, Ovadal and a group of five to ten people were protesting in the parking lot. Nancy Erickson parked her car in the lot. When she exited the car, she was approached by a member of the group who offered her a gospel tract. Erickson responded by directing expletives at him. The commotion drew Ovadal's attention. Erickson apparently threatened or pretended to threaten to lift her top and expose herself. She also performed a dance, which Ovadal describes as twisting her hips, holding her hands in the air, and sticking out her tongue.

¶4 Ovadal and the group began shouting at Erickson, calling for her to repent as well as calling her a "whore," "harlot" and "Jezebel," among other things. Most of the shouting came from Ovadal. The shouting continued for approximately six minutes while Erickson unloaded her car to go to the beach. A warden who was present in the parking lot asked the group to stay back and give Erickson room.

¶5 Erickson later filed a complaint against Ovadal and he was charged with disorderly conduct. Ovadal pled not guilty and waived his right to a jury trial.

¶6 A trial to the court took place on February 1, 2002. Erickson testified she felt intimidated, singled out, upset, and frightened. Three video recordings of the incident were admitted into evidence. After testimony, the court requested briefs from the parties before making its decision. A written decision followed on April 24. The court found Ovadal guilty of disorderly conduct.

¶7 Ovadal filed motions for a new trial and for recusal of the trial court judge. The motions were denied. Ovadal was ordered to pay a fine of \$1,000. In a postconviction motion, Ovadal renewed his requests for a new trial and for recusal. The court denied the motions.

DISCUSSION

A. Findings of Fact

¶8 Ovadal first claims the evidence does not support the court's findings of fact. The trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Our role is to search the record for evidence to support the findings of fact reached by the trial court. *Johnson v. Merta*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

¶9 Ovadal argues that the videotapes contradict many of the trial court's findings. Ovadal quotes numerous excerpts from the court's written decision, and then states how the videotapes show otherwise. However, he argues facts not found by the trial court. The question before us on appeal is limited to reviewing

the findings of the trial court, and whether those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶10 In any event, we are not persuaded that the videotapes contradict Erickson’s testimony in any significant way. We see no purpose in responding to each and every little contradiction argued by Ovadal.² By way of illustration, however, Ovadal speaks of Erickson’s actions towards Ovadal and the members of his group, and argues the court was erroneous in its finding that Erickson did not taunt them. However, with the exception of the very end of Erickson’s dance, the actions Ovadal characterizes as taunting occurred before any videotaping began.

¶11 Erickson testified that Ovadal was five feet away from her while he was shouting at her. Ovadal disputes this and claims the videotapes clearly show that Ovadal never approached closer than seven or eight feet away from Erickson. Therefore he claims that the court’s finding that Ovadal was “within a few feet” from Erickson is clearly erroneous. We do not see any significant difference between five and eight feet in the context of these events. It certainly is not significant enough to cause the court’s finding of a distance of a few feet to be clearly erroneous.

¶12 As a final example, the court found that Ovadal and his group “created a small semicircle around [Erickson], shouting and yelling continuously at her for over six minutes, and in essence, backed her up against her automobile.” Ovadal, however claims the videotapes show Erickson “at all times had complete

² *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

freedom of movement.” The court’s characterization is based on its impression of Erickson’s testimony and the videotapes. We also have reviewed the transcripts and the videotapes and conclude that the evidence supports the court’s findings.

¶13 Erickson testified at trial, as did Ovadal and two other members of the group. Because the court was the finder of fact in this case, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness’ testimony. *Plesko v. Figgie Int’l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). The court gave greater credibility and weight to Erickson’s testimony. The trier of fact is in a far better position than an appellate court to make this determination because it has the opportunity to observe the witnesses and their demeanor on the witness stand. *Pindel v. Czerniejewski*, 185 Wis. 2d 892, 898-99, 519 N.W.2d 702 (Ct. App. 1994). Ovadal, in essence, asks us to second-guess the decision of the trial court regarding the credibility of the witnesses and the videotapes. We cannot and will not do so.

B. Freedom of Speech

¶14 Ovadal next argues that his speech was protected by the First Amendment. Whether Ovadal’s speech is protected is a question of law that we review independently. *See Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 19-20, 580 N.W.2d 156 (1998).

¶15 Ovadal maintains that street preaching and sidewalk evangelizing are protected even if loud and boisterous. Ovadal is correct that this type of speech is protected. *See Edwards v. South Carolina*, 372 U.S. 229, 233 (1963). Here, however, Ovadal’s actions amounted to more than just speech. He approached Erickson, and the group formed a semi-circle around her. Ovadal continued shouting at Erickson for over six minutes and refused to move back

when the warden asked him to. This was non-speech conduct. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (“[W]hen ‘speech’ and ‘non-speech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.”).

¶16 The State argues that Ovadal’s comments amounted to fighting words and therefore are not protected. While many forms of speech are protected under the First Amendment, “fighting words” are not. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). “Fighting words” are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *State v. Zwicker*, 41 Wis. 2d 497, 510, 164 N.W.2d 512 (1969) (quoting *Chaplinsky*, 315 U.S. at 571). “[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* Further, “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” *Chaplinsky*, 315 U.S. at 571-72 (citation omitted).

¶17 Ovadal repeatedly shouted at Erickson that she was a whore, harlot, and Jezebel. In fact, in just over six minutes, he used these terms over thirty times. This is easily characterized as resort to epithets and personal abuse, which inflict injury “by their very utterance.” His words were relentlessly directed specifically at Erickson. Ovadal’s statements had nothing to do with an exposition of ideas. Instead, they were abusive fighting words and are not protected by the First Amendment.

C. Judicial Bias

¶18 Ovadal last claims the court was biased and “exhibited animus towards the defendant and his witnesses.” Ovadal contends the court “seemed intent on sustaining all objections lodged by the district attorney to defense evidence” while overruling defense objections to what Ovadal broadly calls “irrelevant testimony.” Evidentiary rulings are discretionary, and therefore we review them under an erroneous exercise of discretion standard. *State v. Hammer*, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. We must affirm a discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Ovadal does not show how the rulings were in contradiction to the rules of evidence. We have reviewed the record and see nothing to show that the court’s rulings were based on anything other than an appropriate application of the rules of evidence. There was therefore no erroneous exercise of discretion.

¶19 Ovadal also contends the court skewed its findings because of its bias against Ovadal. Primarily, Ovadal argues the court did not correctly characterize and take into account Erickson’s actions when it made its decision. However, Ovadal does not explain how the court’s characterization of Erickson affected the outcome of the trial. The elements of disorderly conduct include: (1) “engag[ing] in ... boisterous, unreasonably loud or otherwise disorderly conduct ...”; and (2) “which ... tends to cause or provoke a disturbance” WIS. STAT. § 947.01. Erickson’s actions are irrelevant to a showing that the elements of disorderly conduct are satisfied.

¶20 Further, the court was the trier of facts in this case. As such, it was required to form impressions based on the testimony and the record. “The rule in Wisconsin is that the [fact finder], as the ultimate arbiter of credibility, has the power to accept one portion of a witness’ testimony, reject another portion and assign historical facts based upon both portions.” *O’Connell v. Schrader*, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988) (citation omitted). The court then makes its decision based on the impressions it forms from the evidence. We cannot overturn the court’s decision simply because Ovadal disagrees with the court’s characterization of the events. The court was not biased, but merely performing its function as the trier of fact in this case.

¶21 Finally, Ovadal argues the court in its decision cited the transcript attached to the criminal complaint, which was not part of the record and therefore could not form a basis for the decision. The State concedes that the court “probably should not have done that” and we agree. *See State v. Oppermann*, 156 Wis. 2d 241, 246 n.2, 456 N.W.2d 625 (Ct. App. 1990) (the complaint is not evidence); WIS JI—CRIMINAL 145 (the complaint is not evidence). However, the court had before it, among other things, the witnesses’ testimony, the videotapes, and briefing by the parties. Consequently, any reference to the transcript attached to the criminal complaint is harmless error because it did not affect the outcome of the trial because other evidence was more than sufficient to allow the court to come to its decision. *See State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (“The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction.”).

¶22 Ovadal also claims the court went outside the record when it stated that Ovadal had protested at the beach in the past. However, Erickson testified she had seen Ovadal there previously, and Ovadal himself testified that he had

protested there “a lot of times.” There was, therefore, evidence in the record upon which the court relied when it made statements regarding Ovadal’s previous protests at the beach.

By the Court.—Judgment and order affirmed.

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