

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III
CASE NO. 2015AP902

RECEIVED

09-11-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

DAVID J. REIDINGER,
Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION IN
EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE KRISTINA M. BOURGET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Kelly A. Mandelstein
Wisconsin State Bar No. 1084549
Assistant District Attorney
Eau Claire County District Attorney's Office
721 Oxford Avenue
Eau Claire, WI 54703
(715) 839-4828

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| ISSUE PRESENTED FOR REVIEW | 1 |
| POSITION ON ORAL ARGUMENT AND PUBLICATION | 1 |
| STATEMENT OF FACTS | 2 |
| ARGUMENT | 4 |
| CONCLUSION | 8 |
| CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8) | 9 |
| CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) | 10 |
| CERTIFICATE OF MAILING | 11 |
| APPENDIX | 12 |

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

| | |
|--|-----|
| <i>Stanley v. Georgia</i> 394 U.S. 557, 89 S. Ct. 1243 (1969) | 7 |
| <i>Reno v. American Civil Liberties Union</i> 521 U.S. 844, 117 S. Ct. 2329 (1997) | 7-8 |

WISCONSIN

| | |
|--|-----|
| <i>Monroe County. v. Kruse</i> 76 Wis. 2d 126, 130, 250 N.W.2d 375 (1977) | 6 |
| <i>Madison v. Geier</i> 27 Wis.2d 687, 690, 135 N.W.2d 761 (1965) | 4-5 |
| <i>State v. Hughes</i> 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621 (1999) | 5 |
| <i>City of Oak Creek v. King</i> 148 Wis. 2d 532, 436 N.W.2d 285 (1989) | 5 |
| <i>State v. Werstein</i> 60 Wis. 2d 668, 211 N.W.2d 437 (1973) | 5 |
| <i>State v. Maker</i> 48 Wis. 2d 612, 180 N.W.2d 707 | 5 |
| <i>Cemetery Services v. Department of Regulation and Licensing</i> 221 Wis. 2d 817, 586 N.W.2d 191 (Ct. App. 1998) | 7 |

STATUTES

| | |
|---------------------------------------|---|
| WIS. STAT. § 947.01 | 4 |
| WIS. STAT. § 809.83 | 2 |
| WIS. ADMIN. CODE § UWS 18.11(2) | 4 |

OTHER SOURCES OF LAW

| | |
|--|---|
| WIS – JI CRIMINAL 1900 (DISORDERLY CONDUCT § 974.01) | 5 |
|--|---|

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III
CASE NO. 2015AP902

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

DAVID J. REIDINGER,
Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION IN
EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE KRISTINA M. BOURGET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED FOR REVIEW

- I. WAS THE EVIDENCE SUFFICIENT TO CONVICT
REIDINGER OF DISORDERLY CONDUCT?

TRIAL COURT ANSWERED: YES.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinion nor oral argument are necessary in this case. The issue presented is adequately addressed in the brief and under the rules of appellate procedure, publication of this decision is not appropriate because this is a one-judge appeal. *See* Rule 809.23(1)(b)(4), Wis. Rules of Appellate Procedure, 2013-2014.

STATEMENT OF FACTS¹

On December 14, 2014, David Reidinger was cited by Officer Edward Lancour for Disorderly Conduct after complaints he was viewing pornographic material in the library. R. Doc. 11, 9:20-25; 12:1-5. A court trial was held on April 6, 2015. *Id.* at 1:9-11. At the trial, witnesses Shannon Riley, Rachel Grant, Sierra Hoover, Officer Lancour and Officer Amanda Henry testified. R. Doc. *Id.* at 2:3-15.

Grant testified that on December 14, 2014, she and her roommate, Sierra Hoover, were doing homework at a table in the library when they saw a man watching pornographic material on the computer right next to them. *Id.* at 5:19-20; 6:1-13. Grant testified she reported this conduct to the library front desk. *Id.* at 6:2-13. Hoover testified that on December 14, 2014, she was studying in the library when she observed Reidinger viewing pornography on the computer near her. *Id.* at 7:16-25; 8:1-10. Hoover also testified she watched Reidinger a few times and clearly identified what he was watching as pornographic material. *Id.* at 8:11-15. Hoover testified her roommate reported this information to the library front desk and that law enforcement arrived in response to the incident. *Id.* at 8:16-

¹ The State of Wisconsin notes Reidinger's failure to cite to the record in his statement of facts which he refers to as a "Sequence of Events" and also notes Reidinger's overall lack of compliance with the rules of appellate procedure. In addition to the lack of record citations, Reidinger's brief also ignores the following statutory requirements: 1) no table of contents; (2) no table of authorities; and 3) no certifications.

Based on Reidinger's failure to follow these requirements, along with Reidinger's overall lack of argument development, the Court should dismiss the appeal under Wis. Stat. § 809.83.

20. Riley testified she was employed as a student supervisor at the McIntyre Library. *Id.* at 3:23-25. Riley testified on that on December 14, 2014, she called law enforcement after receiving a complaint that a man was watching pornography on the second floor of the library. *Id.* at 4: 1-10.

Officer Lancour testified he responded to the complaint with Officer Henry and upon arrival at the library he observed Reidinger viewing pornography on the library computer for approximately 30 seconds. *Id.* at 10: 13-19. Officer Lancour also testified how he explained to Reidinger how his conduct was causing a disturbance to the other people in the library. *Id.* at 11: 15-25. Officer Henry testified upon arrival at the library she met with the complaining witnesses about what they had observed. *Id.* at 14: 18-20. Officer Henry also testified the witnesses provided her with a photograph that they had taken of Reidinger on his computer showed open screen images of pornographic material. *Id.* at 14: 20-23. At the close of evidence, the trial court found that the State presented sufficient evidence to meet its burden of proof and found Reidinger guilty of the disorderly conduct citation. *Id.* at 17: 11-22.

Reidinger then filed a brief, arguing the trial court improperly found him guilty of the disorderly conduct citation. *See* Brief of Defendant-Appellant, pp. 1. In his brief, Reidinger also claims that the right of an adult to view legal adult material at a public library is part of an adult's basic First Amendment rights

and privacy rights, thereby implying a claim of constitution error. *See* Brief of Defendant-Appellant, pp. 1-2.

ARGUMENT

I. THE TRIAL COURT’S DECISION WAS BASED ON CLEAR, SATISFACTORY AND CONVINCING EVIDENCE AND ACCORDINGLY, MUST BE UPHELD.

The State of Wisconsin prohibits disorderly conduct on University of Wisconsin lands and violation of this section is a civil matter. *See* Wis. Admin. Code § UWS 18.11(2). Specifically, Wisconsin Administrative Code, Section 18.11(2) provides:

No person may engage 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, in university buildings or on university lands.

Wis. Admin. Code § UWS 18.11(2)(2015). This administrative code section is substantially similar to Wis. Stat. § 947.01, which criminalizes disorderly conduct as a Class B misdemeanor. *See* Wis. Stat. § 947.01 (2015).

An ordinance violation that also constitutes a violation of state criminal law must be proved by clear, satisfactory and convincing evidence. *Monroe County. v. Kruse*, 76 Wis. 2d 126, 130, 250 N.W.2d 375, 377 (1977). In ordinance violation cases, unless the findings of the trial court are against the great weight and clear preponderance of the evidence, they will not be set aside on appeal even though contrary findings may have been made with evidence in their support. *See*

Madison v. Geier, 27 Wis.2d 687, 690, 135 N.W.2d 761 (1965). When a trial judge is trier of fact, she is the sole judge of weight and credibility of testimony. *State v. Hughes*, 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621 (1999).

To prove disorderly conduct the prosecution must show: (1) the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct; and (2) that conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. Wis. II-Criminal 1900. The State need not prove that an actual disturbance resulted from the Reidinger's conduct. *City of Oak Creek v. King*, 148 Wis. 2d 532, 545, 436 N.W.2d 285, 290 (1989). Rather, the law only requires that Reidinger's conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed. *Id.*

Convictions for disorderly conduct result from the inappropriateness of certain conduct because of the circumstances involved. *State v. Werstein*, 60 Wis. 2d 668, 671-72, 211 N.W.2d 437, 439 (1973). In deciding whether a person was disorderly, the trier of fact must consider the nature of the conduct and the surrounding circumstances. *Id.* What is proper under one set of circumstances may be improper under another. *State v. Maker*, 48 Wis. 2d 612, 616, 180 N.W.2d 707, 709 (1970).

Here, the court found Reidinger's actions constituted disorderly conduct. In explaining its finding, the court specifically referenced the

circumstances in which Reidinger was viewing pornography. R. Doc. 11, 12-19. The court agreed that viewing pornography by itself is not illegal, but pointed out that when pornography was viewed in such a way that it was visible to others who may not be interested in viewing the material, such conduct is inappropriate, rude, and indecent within the meaning of the disorderly conduct rules. *Id.* at 17: 11-22. This conclusion was reached after the court had heard testimony from multiple witnesses. Reidinger points to no contrary testimony and does not challenge the credibility of any witnesses. The court also specifically found that under the circumstances of this case, Reidinger's viewing of pornography in a public space tended to provoke a disturbance to those who attempting to study in his vicinity. *Id.* at 17: 19-22. Again, Reidinger points to no contrary testimony which would undermine this finding and he does not argue that any of the court's findings were against the greater weight of the credible evidence. Accordingly, the trial court's decision should not be set aside.

Reidinger's only argument on appeal is that an adult has a right to view pornographic material at a public library. In support of this argument, he points to two United States Supreme Court decisions which, according to Reidinger, stand for the proposition that an adult has a right to view legal adult material at a public library. Reidinger's reliance on these cases is misplaced.

First, the State points out that beyond mere conclusory statements that he has a constitutional right to view pornography at a public library, Reidinger

fails to develop his argument in any depth. The Wisconsin Court of Appeals has specifically noted that courts need not consider inadequately briefed claims of constitutional error. *Cemetery Services v. Department of Regulation and Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). The *Cemetery Services*, court further held because constitutional claims are complicated to decide a “one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of these constitutional issues to this court.” *Id.* Accordingly, this court has no obligation to consider Reidinger’s and should dismiss his appeal on that ground alone.

However, if this court does consider Reidinger’s claimed constitutional error, the State reiterates that the cases to which he cites do not support his position. In *Stanley v. Georgia*, the U.S. Supreme Court held the First Amendment as applied to the States under the Due Process Clause of the Fourteenth Amendment prohibited making mere private possession of obscene material a crime. *Stanley v. Georgia*, 394 U.S. 557, 568, 89 S. Ct. 1243, 1249, 22 L. Ed. 2d 542 (1969). This case is clearly distinguishable because Reidinger was viewing pornography in a public library, not a private residence. *See* R. Doc. 11, 9:20-25; 12:1-5. Additionally he was not charged with a crime for merely viewing pornography. *See* R. Doc. 1. Reidinger was cited for a disorderly conduct ordinance because he caused a disturbance while viewing pornography in a public library. *See id.* at 11: 15-25. In *Reno*, the U.S. Supreme Court upheld the legality

of distribution of pornography on the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 2346, 138 L. Ed. 2d 874 (1997). Reidinger was cited for a disorderly conduct ordinance violation. *See* R. Doc. 1. He was not charged with any crimes relating to the distribution of pornography and as such, *Reno* does not support Reidinger's argument.

Contrary to Reidinger's statements, the State's research has yielded no Wisconsin case which specifically creates an affirmative constitutional right to view pornography in a public library under circumstances which disturb others. Reidinger offers no authority which actually supports his position. Accordingly, Reidinger's claim of constitutional error must fail and the trial court's decision must be upheld.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court and **AFFIRM** Reidinger's Judgment of Conviction.

Dated this 11th day of September, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,

Kelly Mandelstein

Kelly A. Mandelstein
Wisconsin State Bar No. 1084549
Assistant District Attorney
Eau Claire County District Attorney's Office
721 Oxford Avenue
Eau Claire, WI 54703
(715)839-4828

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III
CASE NO. 2015AP902

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

DAVID J. REIDINGER,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8 pages, 1,727 words.

Dated this 11th day of September, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,



Kelly A. Mandelstein
Wisconsin State Bar No. 1084549
Assistant District Attorney
Eau Claire County District Attorney's Office
721 Oxford Avenue
Eau Claire, WI 54703
(715) 839-4828

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III
CASE NO. 2015AP902

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

DAVID J. REIDINGER,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 11th day of September, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,



Kelly A. Mandelstein
Wisconsin State Bar No. 1084549
Assistant District Attorney
Eau Claire County District Attorney's Office
721 Oxford Avenue
Eau Claire, WI 54703
(715) 839-4828

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III
CASE NO. 2015AP902

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

DAVID J. REIDINGER,

Defendant-Appellant.

CERTIFICATION OF MAILING

I hereby certify, pursuant to s. 809.80 (4), Wis. Stats., that this brief was deposited in the United States mail for delivery to the Clerk of Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on **September 11, 2015**. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 11th day of September, 2015 at Eau Claire, Wisconsin.

Respectfully submitted,

Kelly Mandelstein

Kelly A. Mandelstein
Wisconsin State Bar No. 1084549
Assistant District Attorney
Eau Claire County District Attorney's Office
721 Oxford Avenue
Eau Claire, WI 54703
(715) 839-4828

SUPPLEMENTAL APPENDIX