IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

FILED

July 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

**STATE OF TENNESSEE,**
Appellee

vs.

**DAVID GARY MILLSAPS,**
Appellant

No. 03C01-9409-CR-00313

MONROE COUNTY

Hon. R. Steven Bebb, Judge

(Disorderly Conduct)

FOR THE APPELLANT:

pro se at trial

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(on appeal)

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OPINION FILED: _______________________

**REVERSED AND DISMISSED**

Robert E. Burch
Special Judge

## OPINION

The defendant appeals his conviction of the offense of disorderly conduct, presenting for review the single issue of whether the evidence is sufficient to sustain a conviction of that offense.

## FACTS

Officers of the Sweetwater Police Department were dispatched to a reported disturbance at the Huddle House Restaurant. Upon arrival, the officers found nothing presently amiss. An investigation pointed to appellant as a participant in the earlier reported disturbance.

When questioned, appellant became belligerent and refused to accompany the officers outside for questioning, throwing his car keys at one of the officers. Officer Martin then "scooted" the appellant over in his booth and took him outside.

Once outside, appellant was "cussing, hollering and very belligerent". Officers Vineyard and Martin both answered affirmatively when asked if they felt appellant’s conduct to be violent or threatening.

## STANDARD OF REVIEW

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage 571 S.W. 2d 832 (Tenn. 1978). A verdict of guilt, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in testimony in favor of the State. State v. Townsend 525 S.W.2d 842 (Tenn. 1975). The presumption of innocence is thereby removed and a presumption on guilt exists on appeal. Anglin v. State 553 S.W. 2d 616 (Tenn. Crim. App. 1977). The defendant has the burden of overcoming this presumption. State v. Brown 551 S.W. 2d 329 (Tenn. 1977).

When the sufficiency of the evidence is challenged on appeal, the test is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Duncan 698 S.W. 2d 63 (Tenn. 1985); Rule 13(e), T.R.A.P.

**ANALYSIS**

T.C.A. §39-17-305 provides that the offense of disorderly conduct is committed inter alia when a person in a public place and with the intent to cause a public annoyance or alarm engages in **violent** or **threatening** behavior. This was the particular offense charged in the indictment.

The facts introduced in evidence by the State in this case and reviewed hereinabove establish that the essential elements of the statute have not been established beyond a reasonable doubt, even when viewed in their most favorable light. The appellant's actions were characterized by the officers as "belligerent" and "loud". The officer's testified to very few facts, mostly stating their conclusion that the appellant was "belligerent" or "uncooperative". When asked the direct (but leading) question of whether appellant's actions had been "violent or threatening", Officer Vineyard replied, "At sometimes, yes". In answering a similar question, Officer Martin responded, "I felt like it was, yes". These two statements comprised all of the proof offered by the State of a violation of the statute.

Belligerent actions do not rise to the level of violent or threatening. The American Heritage Dictionary of the English Language, 1969 ed. defines "Belligerent" as, "Given to or marked by hostile or aggressive behavior". This definition does not rise to the level of violent or threatening behavior, which would require an overt act or direct threat of harm. There is no proof of such acts in the record, only the conclusory answers of the

officers to improperly leading questions. In short, there are no **facts** upon which a violation of the statute can be based. If search warrants and arrest warrants must be based upon facts and not conclusions that a crime has been committed, Hughes v State 588 S.W.2d 296 (Tenn. 1979), State v Mitchell 593 S.W. 2d 280 (Tenn. 1980), the same should be true of a conviction of an element of a criminal offense beyond a reasonable doubt.

Appellant committed no act threatening toward the officers. See State v Creasy 885 S.W.2d 829 (Ct. Crim. App. 1994). The only possible threatening act was the throwing of appellant's car keys at (or to) the officer. Officer Martin described this action as "tossing". Neither officer testified that he regarded the action as menacing.

We hold that there are insufficient **facts** contained in the record nor inferences from those facts for a rational trier of fact to find appellant guilty of this offense beyond a reasonable doubt. State v. Tuggle 639 S.W.2d 913 (Tenn. 1982).

The judgement of the trial court is reversed and the case is dismissed.

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Robert E. Burch,

Special Judge

**CONCUR:**

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Gary R. Wade, Judge

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Joseph M. Tipton, Judge