COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0076-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL C. YATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Michael C. Yates appeals from a judgment of conviction of four counts of first-degree sexual assault of a child and four counts of incest with a child and from an order denying his postconviction motion. He argues that his conviction violates the Double Jeopardy Clause of the United States Constitution, that the evidence is insufficient to support the conviction, and

that the sentence he received was an erroneous exercise of sentencing discretion. We reject his claims and affirm the judgment and the order.

¶2 In 1996 Yates was found guilty by a jury of having, as a persistent repeat offender, committed three or more acts of first-degree sexual assault against K.A.A., a three and one-half year old child. *See* WIS. STAT. §§ 939.62(2m) and 948.025(1) (1995-96).[1] The information charged that the acts occurred between April and September 1994. Because § 948.025(1) did not become effective law until April 22, 1994, *see* ***State v. Molitor***, 210 Wis. 2d 415, 421 n.3, 565 N.W.2d 248 (Ct. App. 1997), Yates's motion to dismiss was granted prior to sentencing. The trial court ruled that Yates could not be convicted on the basis of conduct that occurred before an offense known to the law was created.

¶3 Charges were refiled against Yates alleging four counts of first-degree sexual assault and four counts of incest with a child for conduct occurring in April, May, June and July 1994. For all but two of the counts, Yates was again charged as a persistent repeat offender. Yates argues that because a jury was sworn and adjudicated his culpability for acts allegedly committed between April and September 1994, the Double Jeopardy Clause of the Constitution bars the subsequent prosecution for the same conduct. *See* ***State v. Poveda***, 166 Wis. 2d 19, 21, 479 N.W.2d 175 (Ct. App. 1991).

¶4 Whether an individual has been placed in jeopardy twice for the same offense is a question of law which we review de novo. *See* ***id.*** Although double jeopardy prohibits retrial when the evidence of guilt in the first proceeding

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

is legally insufficient, it is different when a verdict is overturned for some reason other than the legal insufficiency of the evidence. *See* ***Burks v. United States***, 437 U.S. 1, 15-16 (1978). In ***Montana v. Hall***, 481 U.S. 400, 404 (1987), the Court held that "the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument." ***State v. Russo***, 70 Wis. 2d 169, 176-77, 233 N.W.2d 485 (1975), holds likewise.

¶5 The previous prosecution was dismissed because the information and the jury instruction charged a single offense not known to law. It was a defect in the information. Dismissal was not predicated on the sufficiency of the evidence related to Yates's guilt or innocence. Under ***Hall*** and ***Russo***, the refiling of charges against Yates does not violate the Double Jeopardy Clause.

¶6 Yates maintains that although the reissued charges are different in name from those charged in the previous prosecution, the reality is that the charges are for conduct for which he has already been prosecuted. He urges the use of the adage that the Double Jeopardy Clause bars any subsequent prosecution in which the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *See* ***Grady v. Corbin***, 495 U.S. 508, 521 (1990), *overruled by* ***United States v. Dixon***, 509 U.S. 688 (1993). ***Dixon*** marked the demise of the broad holding in ***Grady*** and reaffirmed what is known as the elements only test. *See* ***Dixon***, 509 U.S. at 704. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). Under the ***Blockburger*** elements only test, the subsequent charges against Yates have

elements distinct from the elements of the crime for which he was previously prosecuted. His conviction is not barred by the Double Jeopardy Clause.

¶7 We turn to consider the sufficiency of the evidence. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is the function of the jury to decide issues of credibility, to weigh the evidence and to resolve conflicts in the testimony. *See* ***id.*** at 506. "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07.

¶8 Yates challenges the first element of each of the offenses of which he was convicted—that he had sexual contact with K.A.A. He argues that K.A.A.'s testimony was inherently and patently incredible "in context of how her story has changed over time as it relates to the frequency of the conduct, as well as in the context of the delayed disclosure, where said disclosure took place, as well as her mother's overwhelming animus towards [Yates]."

¶9 Evidence is inherently incredible only when it is in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). Inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve. *See* ***id.*** Thus, that K.A.A. and her mother testified

differently about when and where K.A.A. recalled the assaults and the frequency of their occurrence does not render the evidence inherently incredible.

¶10 K.A.A.'s credibility was fully litigated at trial. Her nearly two-year delay in reporting the assaults was explored. The psychologist who evaluated K.A.A. during the 1995 custody study was not surprised that he found no evidence of sexual abuse or disclosure of such at that time. Of record was that Yates lived with K.A.A. and her mother from March until September 1994 and that K.A.A. would get into bed with Yates and her mother almost every night from April to July 1994. In one interview, K.A.A. indicated that Yates "did the gross stuff every night."

¶11 The attack on the mother's credibility was a theory of defense. The evidence that the mother had personal animus toward Yates and desired to keep custody from him created a credibility issue to be resolved by the jury. Here, the jury found the evidence to be credible and we must accept that finding. The evidence is sufficient to sustain the conviction and the finding that the assaults occurred after the effective date of the persistent repeater statute, *see* WIS. STAT. § 939.62(2m) (effective April 27, 1994), which made Yates's crimes punishable by life in prison without the possibility of parole.

¶12 With respect to sentencing, Yates argues that the trial court erroneously exercised its discretion in sentencing him to twenty- and ten-year consecutive terms of imprisonment on the first two counts of the information which were not subject to the persistent repeater enhancer. The issue is inconsequential because Yates is properly subject to the sentence of life imprisonment without the possibility of parole on the remaining counts of the information. We note that at the postconviction motion hearing the trial court

articulated its reasons for the terms imposed. The sentence is based on the facts of record and appropriate considerations.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).