

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2006

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. 2006AP1422

Cir. Ct. No. 2005JV4

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF REBECCA C. F., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REBECCA C. F.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Rebecca C. F. appeals from an order finding her delinquent. She challenges the sufficiency of the evidence supporting the adjudication for attempted first-degree sexual assault of a child contrary to WIS. STAT. § 948.02. We conclude the evidence supports the adjudication and affirm.

Standard of Review

¶2 In order to be adjudged delinquent, Rebecca must be found to have violated a state or federal criminal law. *See* WIS. STAT. § 938.02(3m). An allegation of delinquency, like an alleged adult crime, must be supported by evidence beyond a reasonable doubt. WIS. STAT. § 938.31(1). “[I]t is axiomatic in the law that the state bears the burden of proving all elements of a crime beyond a reasonable doubt.” *State v. Schulz*, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981). We apply this same standard to determine the sufficiency of evidence to support a delinquency determination.

¶3 Evidence of delinquency may be either direct or circumstantial and is reviewed in the same manner concerning a sufficiency of the evidence challenge. *See State v. Poellinger*, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). “[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the [delinquency adjudication], is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *Id.* at 507. In reviewing the sufficiency of circumstantial evidence,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Id. at 507-08. Indeed, “[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder.” *State v. Saunders*, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶4 To prove that Rebecca committed attempted first-degree sexual assault of a child, the State had to prove that: (1) Rebecca intended to have sexual contact with the alleged victim, Joshua S.; (2) Joshua was under the age of thirteen years at the time of the alleged sexual contact; and (3) Rebecca did acts toward the commission of the crime of first-degree sexual assault of a child which demonstrate unequivocally, under all of the circumstances, that she intended to and would have committed the crime except for the intervention of another person or some other extraneous factor. WIS JI—CRIMINAL 2102, 580; WIS. STAT. §§ 939.32(3), 948.02(1). In this case, sexual contact would include Rebecca’s intentional touching of Joshua’s intimate body part or Joshua’s intentional touching of Rebecca’s intimate body part, if Rebecca intentionally caused or allowed Joshua to do that touching. WIS JI—CRIMINAL 2101A. The touching of the body part may be directly or it may be through the clothing. *Id.* Sexual contact also requires that Rebecca acted with intent to become sexually aroused or

gratified or to sexually degrade or humiliate Joshua. *Id.*; WIS. STAT. § 948.01(5)(a).²

Sufficiency of the Evidence

¶5 *Hearing Evidence.* At the time of the incidents, Joshua and Rebecca were friends. Joshua was ten years old and Rebecca was fourteen years old. Joshua testified that on July 4, 2004, Rebecca and her brother were over at his house and his mother was not home. Rebecca was lying down on a couch. She informed him that if he did not get on top of her, she would hit him with a bat. Joshua believed that Rebecca would hit him with the bat because Rebecca recently had kicked him “in the private” and made him cry. Joshua testified that when he got on top of Rebecca, she rubbed his back. Joshua, who was scared and uncomfortable, stayed in that position for about five minutes until his mother returned home.

¶6 According to Joshua, a few weeks later when the two were again home without Joshua’s mother’s supervision, Rebecca was in Joshua’s mother’s room lying down. Rebecca told Joshua to get on top of her or she would have her friends beat him up. Joshua took her threat seriously and got on top of her. For approximately the next ten minutes, Rebecca rubbed his back and tried to kiss him on his face, which made Joshua uncomfortable. When they heard Joshua’s mom return home, Rebecca pushed Joshua off of her and quickly grabbed his “private.”

² The recent amendments to WIS. STAT. §§ 948.01 and 948.02 do not change our analysis as they did not become effective and applicable until June 2006. *See* 2005 Wis. Act 430, 435, 437. Further, the amended statutes still prohibit sexual contact with a child under thirteen years of age, *see* 2005 Wis. Act 430 § 4, and the definition of sexual contact still includes the intentional touching of an offender’s intimate body part—either directly or through clothing—for the purpose of the offender’s sexual arousal or gratification, *see* 2005 Wis. Act. 435 §§ 6, 7.

Joshua did not tell anyone about the incident because Rebecca told him that if he did, he would “get in trouble by her.”

¶7 Joshua testified that around October 24, Rebecca was over at his house and he asked her to play video games with him in his bedroom. Joshua’s mother, who was in the living room with her friend watching the Packer game, told him that since he was headed back to his room he may as well clean it once he got there. According to Joshua, when he began to clean up his room, Rebecca laid down on his bed. Within a few seconds, Rebecca pulled her shirt up past her bra and told him to get on top of her or she would beat him up. Joshua complied and Rebecca began to kiss him on the face and rub his back. Joshua’s mother then walked in and told Rebecca to get out. Joshua testified that he was glad when his mother walked in because it meant “it was going to end and [he] wouldn’t get in trouble by Rebecca because [he] didn’t tell.”

¶8 On cross-examination, Joshua admitted telling his mother lies, including that someone had tried to kidnap him on his way to school and that Rebecca had stolen money from his mother. Joshua testified that he later told his mother the truth. Joshua indicated that he had told the lie about the kidnapping because he “wanted [his] dad to get in trouble because I wanted him to be a part of my life.”

¶9 Joshua’s mother corroborated his version of the events of October 24. She testified that while she and a friend were in the living room watching the Packer game, she told Joshua to go back to his room and clean it up. She stated that Rebecca went back to Joshua’s room with him. After it had been quiet for a while, she went back to Joshua’s room to check on the two of them. When she walked in, she saw Joshua lying on top of Rebecca. According to his mother,

“Josh got off of Rebecca, and I saw Rebecca’s shirt was up around her neck and her bra was exposed.” According to his mother, Rebecca’s bra was off-white in color. His mother told Rebecca to leave.

¶10 Rebecca testified to a different version of the three incidents. She testified that around July 4, 2004, she was seated on Joshua’s living room couch, when Joshua tried to climb on top of her. Rebecca slid out from underneath him because “it was weird.” She testified that she did not ask him to climb on top of her or threaten him with a bat. Rebecca stated that a few weeks later she was home alone with Joshua, but that she never asked Joshua to get on top of her, threatened him with bodily harm or grabbed his “private parts.”

¶11 Rebecca testified that at the end of October, Joshua’s mom invited her over to watch the Packer game. Joshua asked Rebecca to go into his bedroom to play video games, at which point his mother told him to clean his room. Rebecca laid down on his bed because there were dirty clothes on the floor. Rebecca closed her eyes to take a nap and when she opened them Joshua was straddling her, in a position suggesting that he was reaching over her, with his face “really, really close” to her face. At that point, Joshua whispered to her that he heard his mother coming. Rebecca testified that while her shirt was up just a little bit, she never lifted up her shirt exposing her bra. Rebecca testified that she did not own any off-white bras, a fact later substantiated by her mother. She also denied ever threatening, kicking or grabbing Joshua.

¶12 *Trial court’s ruling.* The trial court carefully reviewed the offered testimony and deemed Joshua’s version of events more credible. The court recognized that the evidence showed Joshua had lied in the past, but the court appreciated that Joshua had admitted telling the truth on the stand and had

provided a straightforward, nonevasive and credible explanation for telling the lie about the attempted kidnapping. The court also surmised that it was possible that Joshua “was moved by some curiosity or some sexual desire of some sort and saw an opportunity to sexually have some contact with a sleeping girl.” However, the court ultimately concluded that “the damning evidence against Rebecca” rendered her version of the events implausible and incredible.

¶13 The court observed that Rebecca had been twice found delinquent, which hurt her credibility. The court rejected the defense theory that it was “implausible or improbable that Rebecca would have chosen to commit this type of crime ... in a room when two adults are fairly close by watching TV.” The court reasoned that Rebecca had engaged in similar activities with Joshua on two other occasions and Joshua had not told on her, which would have bolstered her confidence that she would not get caught. The court also found that Joshua’s bed would not have been readily visible to Joshua’s mother. The court mentioned that Joshua is relatively small, but that Rebecca is big and strong, “definitely the dominant physical character in this instance.” Finally, the court also cited with approval Joshua’s mother’s testimony that she went back to Joshua’s room to check on the two of them because it had grown quiet. When she walked in, Joshua was lying on top of Rebecca and Rebecca’s shirt was up around her neck and her bra exposed. The court was not persuaded by Rebecca’s attempt to discredit Joshua’s mother’s testimony based on her allegedly inaccurate description of Rebecca’s bra color. From this evidence, the court concluded that Rebecca “felt that they would not be discovered and decided to take the risk for obviously purposes of sexual gratification.”

¶14 *Application of appellate sufficiency of the evidence standards to the hearing evidence.* Rebecca insists that the State failed to put forth evidence

demonstrating that she had intended to touch, or had intended to cause Joshua to touch, an intimate body part. Viewing the evidence most favorably to the court's finding, Rebecca claims the evidence showed only that she had attempted to kiss Joshua on his face and to rub his back. According to Rebecca, neither a face nor a back is an intimate body part.

¶15 Rebecca ignores Joshua's and his mother's testimony establishing that when Rebecca told Joshua to lay on top of her she had her shirt pulled up to her neck and her bra exposed. Female breasts are intimate body parts, *see State v. Forster*, 2003 WI App 29, ¶15, 260 Wis. 2d 149, 659 N.W.2d 144, and the touching of the intimate body part can take place directly or through clothing, WIS. STAT. § 948.01(5)(a).

¶16 Rebecca also seizes on the trial court's reflection that Joshua could have been moved by curiosity to have sexual contact with Rebecca and Rebecca's account was "somewhat plausible." Rebecca takes the statements out of context. Despite the court's concessions, the court ultimately rejected Rebecca's testimony as incredible, implausible and unbelievable. The trial court, as the ultimate arbiter of credibility, properly weighed the witnesses' credibility and chose between the conflicting versions of what occurred. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We will not disturb the court's carefully considered credibility determinations. We conclude sufficient evidence supports the court's finding that Rebecca intended to have sexual contact with Joshua.

¶17 Rebecca also asserts that the State failed to prove that she had committed sufficient acts making it unlikely that she would have voluntarily desisted from the commission of the crime. Rebecca points out that the previous

two incidents occurred without the parents in the home, and she had not gone further than kissing Joshua's face and rubbing his back. According to Rebecca, "There is nothing in the record to suggest unequivocally that Rebecca [] would have gone further on October 24, 2004 with Joshua['s] mother supervising from the next room of the trailer than she had gone in the past without supervision."

¶18 The evidence establishes that Joshua's mother's presence in the trailer would not have dissuaded Rebecca from committing the sexual assault. First, the trial court found that Joshua's bed was not readily visible from where his mother was watching television. Second, as the trial court pointed out, the fact that Rebecca had twice before engaged in similar conduct with Joshua and he had not told anyone, would have bolstered her confidence that she could engage in the conduct without getting caught. Finally, Rebecca's intent to cause Joshua to touch her breast for the purpose of becoming sexually aroused can be inferred from her conduct. See *State v. Shanks*, 2002 WI App 93, ¶26, 253 Wis. 2d 600, 644 N.W.2d 275. In making her argument, Rebecca ignores the fact that by the time Joshua's mother interrupted the situation on October 24, Rebecca had already gone further than she had in the past. Previously, Rebecca had threatened Joshua into lying on top of her as she kissed his face and rubbed his back. On October 24, in addition to threatening Joshua into lying on top of her and kissing his face and rubbing his back, Rebecca had raised her shirt up to her neck and exposed her bra. The evidence supports the conclusion that Rebecca had committed sufficient acts making it unlikely that she would have voluntarily desisted from committing the sexual assault.

Conclusion

¶19 In sum, we conclude sufficient evidence supports the trial court's delinquency adjudication. We affirm the court's order.

By the Court.—Order affirmed.

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

