COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2088-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JESSICA A. KUNZE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

¶1 CANE, C.J.[1] The narrow issue presented on appeal is whether a privately owned road in a mobile home park is an area held out to the public for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

use of their motor vehicles. The trial court concluded that it was and convicted Jessica Kunze of OWI, second offense, contrary to WIS. STAT. § 346.63(1)(a). This court agrees with the trial court and affirms the judgment.

¶2 The underlying facts are undisputed. Kunze stipulated that she was operating a motor vehicle while under the influence of an intoxicant on a roadway within the mobile home park. All of the driving used by the State as a basis for the OWI charge occurred within the boundaries of the park. The only disputed issue was whether the roadway within the park was a premise held out to the public as defined by WIS. STAT. 346.61[2] and thereby subject to WIS. STAT. § 346.63.

¶3 After an evidentiary hearing, the trial court found that the park roadway was held out to the public for use of their motor vehicles. Whether a premise is held out for public use is a question of fact to be determined by the trier of fact, which in this case was the trial judge. *See* ***State v. Carter***, 229 Wis. 2d 200, 208, 598 N.W.2d 619 (Ct. App. 1999). Findings of fact shall not be set aside unless clearly erroneous. *See* WIS. STAT. § 805.17(2). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v.***

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[2] WISCONSIN STAT. § 346.61 provides:

> In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, all premises provided by employers to employes for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

State, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). It is for the trial court, not the appellate court, to resolve conflicts in the testimony. *See* ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). It is not within the province of an appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is reasonable. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.829 (1980). Appellate courts search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have but did not make. *See* ***Estate of Becker***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

¶4 In ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 860, 505 N.W.2d 448 (Ct. App. 1993), we developed a common-sense test for the application of WIS. STAT. § 346.61. The appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the premises in an authorized manner. *See* ***id.***

¶5 Applying this test to the facts of this case, this court is satisfied that there is sufficient evidence to support the trial court's finding. Although the manager of the park testified that there were "no trespassing" and "no solicitation" signs and that a fence surrounded a large portion of the park, he also testified that guests of residents, delivery and repair personnel and renters were freely granted access to the park. This park has approximately 400 mobile homes. Additionally, the Altoona City Police Department conducted as many as three general patrols of the property each day. As the State correctly noted, presumably any person who was interested in renting a space at the park would be allowed to drive on the roadways through the property to examine the spaces and meet with rental personnel. The trial court also observed that it was not just the tenants who had access to the interior of the park. It also included legitimate visitors of the tenants,

newspaper delivery people, the UPS truck, food delivery trucks such as Schwann's, repair trucks and a number of other vendors. Consequently, the trial court properly focused on the fact that "potentially" any resident of the greater Eau Claire community with a valid driver's license and access to a motor vehicle could freely use the roadway in the park in an authorized manner.

¶6 This court is satisfied that these circumstances and its reasonable inferences support the trial court's finding that the park roadway was held out to the public for use of their motor vehicles. Therefore, Kunze's conviction for the second offense of OWI is affirmed.

By the Court.—Judgment affirmed.

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