COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP74-CR **Cir. Ct. No. 2004CF500**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVIN L. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Marvin Turner appeals from a judgment of conviction entered after a jury found him guilty of one count of armed robbery, contrary to WIS. STAT. § 943.32(1)(b) & (2) (2003-04),[1] arguing that there was

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

insufficient evidence for a jury to find him guilty beyond a reasonable doubt. Because we conclude that the jury had before it sufficient evidence from which to make a finding of guilt, we affirm.

BACKGROUND

¶2 Likeisha Williams filed a criminal complaint alleging that on January 22, 2004, Turner threatened her at knife-point in front of her three-year-old daughter and stole between seventy and eighty dollars from her. Williams was five months pregnant at the time the armed robbery occurred.

¶3 At trial, two contradictory versions of the events were presented. According to Williams, at about 8:00 p.m. on that evening, Turner (Williams's cousin), his sister Shirley Turner (also Williams's cousin) and Shirley's boyfriend, Charles Thomas, had come over to her residence to visit. She testified that although the others had been drinking alcohol, she had not. Sometime around 9:00 p.m., Williams and Shirley left for approximately five minutes to go to a store to buy soap and soda. When the women returned to Williams's home, Charles and Turner were arguing. At around 9:30 p.m., Shirley and Charles got up to leave, but Turner asked if he could stay to talk with Williams. Williams and Turner sat in her kitchen and spoke for about ten more minutes while Williams's three-year-old daughter played nearby. Turner told Williams that while in jail he had been victimized. After telling her this, Turner said he would have to kill her now that she knew. It did not appear to Williams that he was joking, and she assured him that she was not going to tell anyone. About five minutes later, after

Williams asked him to leave, and after she had given him bus fare, Turner pulled out a knife, put it to her pregnant stomach, forced her to pull down her jogging pants, and robbed her of between seventy and eighty dollars which she had in the pockets of the shorts that she was wearing underneath. Turner then took Williams to her bedroom where he rifled through her closets, tried on her shoes, then left. Williams testified that she first called her cousin Shirley, and that Shirley told her to "hurry up and call the police," which she did at about 9:55 p.m.

¶4 According to Turner, he and Williams were second cousins. They had been engaged in a sexual relationship for about two years although he had another girlfriend and she had another boyfriend. Turner testified that he went to Williams's home that night with Shirley and Charles because he was going to tell Williams that he was breaking things off with her, and to tell her that he was moving to Minnesota. He testified that Williams and Shirley left the house to buy gin, and that his argument with Charles was about which girlfriend Turner should be with—Williams or his other girlfriend. When Shirley and Charles got up to leave, Williams asked Turner if he would stay, and he did. Williams then pulled out some cocaine, and they both ingested the drug. After that, Williams wanted to have unprotected sex with him, but Turner refused. He then asked her for three dollars, which she gave him, and he went home. About two weeks later, Turner moved to Minnesota to find a new job, a place to live, and "a new lifestyle."

¶5 In addition to testimony from Williams and Turner, the jury heard testimony from Officer Anne Portnoy, the first officer to respond to the scene, and

Detective Leon Bosetti. Officer Portnoy testified, as relevant, that she had been on patrol in the area that night and responded to the dispatch of an armed robbery. She stated that she arrived at Williams's residence at about 10:01 p.m. On cross-examination, Officer Portnoy also testified that while she was waiting with Williams for the detective to arrive, she looked in the bedroom, but did not see anything out of the ordinary. She did, however, see some empty beer cans lying around the apartment.

¶6 Detective Bosetti testified that he met Williams at about 10:30 p.m. that night, and that he took Williams's statement and looked in the bedroom because she told him that Turner had been in there. Bosetti testified that in the bedroom he saw some drawers partially open and some lids partially ajar and also that there was some clothing in disarray on the floor. Based upon Williams's testimony, as well as that of Officer Portnoy and Detective Bosetti, the jury found Turner guilty of armed robbery. Turner appealed.

DISCUSSION

¶7 At issue in this case is whether there was sufficient evidence from which a jury, acting reasonably, could find Turner guilty of committing armed robbery under WIS. STAT. § 943.32(1)(b) & (2).[2] *See* ***State v. Searcy***, 2006 WI

[2] WISCONSIN STAT. § 943.32, entitled "Robbery," states:

> **(1)** Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class E felony:

App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497. When reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case:

> [A]n appellate court may not reverse a conviction 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). The test is not whether this court is convinced of the appellant's guilt beyond a reasonable doubt, but "whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." ***Searcy***, 288 Wis. 2d 804, ¶22 (citing ***Poellinger***, 153 Wis. 2d at 503-04).

¶8 Sufficiency of evidence claims are reviewed in the light most favorable to the jury's findings. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371

> (a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property; or
>
> (b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property.
>
> **(2)** Whoever violates sub. (1) by use or threat of use of a dangerous weapon, a device or container described under s. 941.26 (4) (a) or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon or such a device or container is guilty of a Class C felony.
>
> **(3)** In this section "owner" means a person in possession of property whether the person's possession is lawful or unlawful.

N.W.2d 386 (Ct. App. 1985). Assessing the credibility of a witness is properly the function of the jury or the trier of fact. ***State v. Curiel***, 227 Wis. 2d 389, 420, 597 N.W.2d 697 (1999). Only when the evidence that the trier of fact relied upon is "inherently or patently incredible" may an appellate court substitute its own judgment for that of the trier of fact. ***Id.*** To be inherently or patently incredible, testimony must be in "conflict [] with nature or fully established or conceded facts." ***Id.*** (citation omitted); ***State v. Clark***, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979).

¶9 In addition, not only is it the jury's job to determine the credibility of the witnesses and the weight of the evidence, ***Poellinger***, 153 Wis. 2d at 506, but if there is any possibility that the jury could, from the evidence presented, be convinced that the defendant is guilty, then "an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it," ***id.*** at 507.

¶10 In ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977), the State's witness, Garcia, was the only witness to testify to seeing Ruiz stab the victim. ***Id.*** at 233. Ruiz argued that Garcia's testimony was incredible because it was contrary to the testimony of other witnesses at trial. ***Id.*** at 233-34. Ruiz argued that all other witnesses, except Garcia, testified that a fight preceded the stabbing, and thus, Garcia's testimony was incredible. ***Id.*** at 234. In concluding that Garcia's testimony was not incredible, the court noted, "[t]he jury, as the judge of credibility, had the right to believe the testimony of Garcia and to

disbelieve the unanimous testimony of witnesses to the contrary." ***Id.*** (citations omitted). Furthermore, "[t]he testimony of Garcia could have been disbelieved by the jury," but, because it was not, "it supplied evidence that was sufficient to sustain the conviction of Ruiz." ***Id.*** at 235. The court stated, "[i]t is only where no finder of fact could believe the testimony that we would be impelled to conclude that it was incredible as a matter of law." ***Id.*** (citation omitted).

¶11 Two contradictory versions of the events occurring on January 22, 2004, were presented at trial. Turner contended that because Williams's testimony was contradicted by his own, Williams's testimony was patently and inherently incredible. However, testimony is not patently and inherently incredible merely because it conflicts with other testimony presented at trial. *See* ***Ruiz***, 75 Wis. 2d at 232 ("Even though there be glaring discrepancies in the testimony of a witness at trial … that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible."); ***Curiel***, 227 Wis. 2d at 421 (inconsistent testimony of two witnesses did not render one witness's testimony incredible as a matter of law). Rather, testimony is patently and inherently incredible if, as in ***Curiel***, it is either in conflict with nature or it is in conflict with fully established or conceded facts. ***Id.*** at 420.

¶12 This case meets neither criteria. There were no established or conceded facts presented by the parties that controverted the jury's findings, nor, as Turner argues, is there any part of Williams's testimony that is in conflict with

nature.[3] Instead, this is case where witnesses presented conflicting testimony[4] of the events occurring on January 22, 2004. Turner relies on that conflict to show that his testimony somehow makes Williams's testimony patently and inherently incredible. However, the weight to accord each witness and the credibility of the contradictory versions was properly a question for the jury to determine. *See* ***Poellinger***, 153 Wis. 2d at 503 ("The function of the jury is to decide which evidence is credible and which [evidence] is not and how conflicts in the evidence are to be resolved.").

¶13 Here, the jury found Williams's testimony that Turner used a knife to threaten her and then stole money more credible than Turner's account that Williams was a spurned lover who concocted a story to punish Turner for refusing her sexual advances. To reach this determination, the jury relied upon the testimony presented at trial—testimony it had "a right to believe and accept as true." ***Searcy***, 288 Wis. 2d 804, ¶22 (citation omitted). The jury could have disbelieved Williams's testimony. But because it did not, as in ***Ruiz***, Williams's testimony supplied sufficient evidence to sustain Turner's conviction.

[3] "In order to conflict with nature, testimony must present 'physical improbabilities, if not impossibilities,' or be 'intrinsically improbable and almost incredible.'" ***State v. Tarantino***, 157 Wis. 2d 199, 219, 458 N.W.2d 582 (Ct. App. 1990) (citing ***State v. Clark***, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979).

[4] "It is the function of the jury to determine where the truth lies in a normal case of confusion, discrepancies, and contradictions in testimony of a witness." ***Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972).

¶14 Turner also argues that Williams's testimony was inherently and patently incredible because it was contradicted in two key respects by the testimony of Officer Portnoy. First, Turner argues that Officer Portnoy's testimony that she "did not notice anything out of the ordinary" when she looked into Williams's bedroom contradicts Williams's testimony that Turner had been in her bedroom and rifled through her closet. Second, Turner argues that Officer Portnoy's testimony that she saw beer cans in the apartment contradicts Williams's testimony that she had not been drinking alcohol. Turner contends that this testimony "show[s] how incredible [Williams's testimony] was and that a reasonable jury could not have based a finding of guilt on [it]." We disagree.

¶15 The minor discrepancies between the testimony of Officer Portnoy and that of Williams may create an issue of credibility, but do not resolve it. "It is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent." ***Toy***, 125 Wis. 2d at 222. Here, again, is an issue of credibility as to which witness's testimony is more believable, an issue which the jury is entitled to determine. Williams testified that Turner rifled through her closet. In support of Williams's testimony, Detective Bosetti testified that he observed Williams's bedroom after he took her statement and that he saw some drawers partially open, some lids partially ajar, and some clothing in disarray on the floor. Officer Portnoy's general description of nothing appearing "out of the ordinary" in the bedroom does not create a patently incredible scenario to such an

extent that the jury could not reasonably find sufficient evidence to determine guilt on the part of Turner.

¶16 Likewise, Officer Portnoy's testimony that she saw open beer cans in Williams's apartment does not render Williams's testimony that she had not been drinking alcohol patently or inherently incredible because she readily admits that the others present in her apartment had been drinking. It was reasonable for the jury to believe that Williams, a five-month pregnant woman, would refrain from drinking alcohol even though her guests might have been doing so.

¶17 In addition, if Williams had been drinking and/or smoking crack cocaine, as Turner would have had the jury believe, it is likely that some indication would have been evident, at least to Officer Portnoy, who arrived at Williams's residence six minutes after Williams placed the 9-1-1 call and within one-half hour of the time that Turner testified he and Williams had begun smoking crack cocaine. We expect that a five-month pregnant woman exhibiting signs of intoxication or of drug use might have been noticed by an officer trained to deal with such circumstances. In fact, Officer Portnoy testified that she did have significant experience dealing with citizens that had been drinking, and that there was no indication that Williams had been drinking at the time Officer Portnoy met with her in response to the 9-1-1 call. The jury could reasonably have found from both Officer Portnoy's testimony, and the short time period between Turner's version of events and the arrival of an officer on the scene, that it was Turner's testimony that was less credible than Williams's testimony.

¶18 To resolve the issue of credibility, the jury had available to it the testimony of Williams, Officer Portnoy, Detective Bosetti and Turner. That there were some discrepancies "does not result in concluding as a matter of law that [one] witness is wholly incredible … [r]ather, the question is whether the factfinder believes one version rather than another or chooses to disbelieve the witness altogether." ***Ruiz***, 75 Wis. 2d at 232. Here, Williams's testimony was not rendered patently or inherently incredible by Turner's contradictory testimony, or by Officer Portnoy's non-specific comment as to the state of Williams's bedroom. Instead, the jury found Williams's account more credible and accordingly, found Turner guilty. We conclude that the jury had before it sufficient evidence by which to make this determination.

By the Court.—Judgment affirmed.

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