COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP642 **Cir. Ct. No. 2005JV1392**

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

IN THE INTEREST OF MELISSA M.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MELISSA M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

¶1 KESSLER, J.[1] Melissa M. (MM) appeals from a dispositional order in which she was adjudicated delinquent of two counts of armed robbery, threat of force, in violation of WIS. STAT. § 943.32(1)(b), and one count of attempted armed robbery, threat of force, in violation of WIS. STAT. §§ 939.32 and 943.32(1)(b), all as a party to a crime, WIS. STAT. § 939.05. On appeal, MM argues that the State failed to prove beyond a reasonable doubt that she was not coerced into participating in the armed robberies. Although the record establishes that MM has been preyed upon by at least three adult males, the trial court had before it sufficient evidence to support its conclusion that MM was not coerced into participating in these armed robberies. Consequently, we affirm.

BACKGROUND

¶2 On August 17, 2005, at approximately 2:00 a.m., one female and three adult males entered a residence at 1504 West Cleveland Avenue (Cleveland residence) in Milwaukee and robbed the occupants at gunpoint. The victims from the robbery contacted police and identified the female involved as MM, a person who had been to their residence on a number of previous occasions. One of the victims took police to MM's grandmother's house, where police obtained a picture of MM. Based upon information from MM's grandmother, at approximately 8:00 or 9:00 a.m. that same morning, police[2] located MM at the hotel where she was staying with her father. After being admitted into the hotel suite by MM and given permission to search the suite, police recovered two of the items stolen during two

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Milwaukee Police Detectives James Hensley and Luke Ardis, along with two uniformed Milwaukee police officers, were present at the hotel where MM was found.

separate robberies reported either late the evening before or early that morning: a "blue flip" cell phone, which was on the bed; and a gold chain, which was found between the mattress and box spring of the bed.

¶3 Upon finding the stolen items, Milwaukee Police Detective James Hensley, the senior officer on the scene, arrested MM and had the uniformed officers transport MM to the police station. Once MM had been processed into the system, Hensley interviewed MM and took her statement regarding the robberies, which was electronically recorded. Hensley testified that MM admitted involvement in two armed robberies that morning, the one at the Cleveland residence, and another, earlier-committed robbery.[3]

¶4 MM was charged, as a minor under the age of seventeen, with six counts of armed robbery and one count of attempted armed robbery, all as party to a crime, for two separate incidents which occurred on August 17, 2005. A delinquency hearing was conducted on October 19, 25 and 27 and November 4, 21 and 23, 2005.

¶5 Three victims from the Cleveland residence testified at the hearing. All testified that they recognized MM as one of the robbers. All testified that MM was not carrying a gun during the robbery. One of the victims, Ivan Flores Trujillo (Ivan), testified that MM "was telling [the others] where to find [the victims'] stuff." Another victim, Pasqual Flores (Pasqual) testified that MM had

[3] MM admitted being present at a robbery at a residence located at 51st and Coldspring and at the Cleveland residence. Through investigation, Hensley determined that the blue flip cell phone in MM's hotel suite was stolen during a robbery earlier the same evening at a residence on West Walker Avenue in Milwaukee. MM maintained throughout the proceedings that she had never been to the Walker Avenue residence.

told the others to "to open the closet door and to search under the bed." A third victim, Oscar Vallejo Rodriguez (Oscar), testified that MM was "ordering them where to look for money."

¶6 Hensley, on the morning of August 17, investigated an armed robbery at the Cleveland residence. He called in an identification technician to take photos at the hotel after finding that the blue cell phone was one of the items stolen at another armed robbery reported earlier the previous night. Hensley also took MM's information regarding the person MM contended coerced her into participating in the armed robberies, and after speaking by telephone with MM's father, Hensley put together a photo array containing pictures of Andrew Jackson Riley (Riley), a former prison mate of MM's father, that he then showed to MM. MM identified Riley from these photos. Hensley took a statement from MM which was recorded and was played at trial. In the recorded statement, MM stated a number of times that she did not participate in the robberies willingly, and that she was scared.

¶7 On November 4, 2005, after the conclusion of the State's case-in-chief, and upon MM's motion to dismiss, the court dismissed the first four counts relating to the earlier-committed robbery. The defense called three witnesses: Tiffany Hofer, investigator for the Wisconsin State Public Defender; Donald W. Sanford, identification technician for the Milwaukee police department; and MM.

¶8 Hofer testified regarding her investigation of the robberies. Her investigation included:

- a conversation with Pasqual, and a short telephone contact with Oscar;

- obtaining access to the voicemail of MM's cell phone, and transcribing/translating the messages left (Hensley testified only that he noted the number of calls made and the times of the calls);

- personally locating Riley on September 18 coming out of his (and his mother's) 45th Street residence which had been identified by MM in her police interview (Hensley testified that he put out a warrant to pick up Riley, but Riley was never located by police);

- verifying with Riley's mother (who lived at the address provided by MM to the police, the same address where she claimed she was taken after the second robbery) that no police had come to her home and that no public school employee lived at her address (which contradicted Hensley's testimony that officers had gone to that address and found, he believed, that a school teacher lived there);

- on November 3, 2005, she verified with the police desk sergeant that no warrants were out for Riley (appearing to contradict Hensley's testimony that he put out an "investigative alert" which he testified was the equivalent of an "all points bulletin" for Riley's apprehension).

¶9 In her testimony at trial, and in her recorded statement, MM recounted the events of August 16-17, 2005, as follows:

- MM was forced to participate in the robberies by a man she knew as "Drew" (Riley) who was a friend of her father's;[4]

- She knew that her father owed Riley money from a car/drug transaction and knew that her father did not want Riley to know where he was staying;

- On the evening of August 16, Riley called her cell phone and told her to open the door to the hotel suite where MM was staying with her father;

- MM's father was not present in the suite when Riley called;

- MM let Riley into the suite, even though she knew that he was threatening her father and that he carried a gun in his car;

- MM did not attempt to contact the hotel desk before she opened the door or at any time during the evening or early morning hours regarding Riley.

¶10 Upon learning that MM's father was not there, Riley demanded that MM help him rob some people in order to get the money he was owed. Riley forced MM to call a house at 51st and Coldspring to see who was at home. Riley then forced MM to come with him to rob this house. She thought that they were going to her grandmother's when they left the hotel, (but she acknowledged on cross-examination that she did not state this in her recorded statement to police).

[4] MM also testified that she first knew who Riley was when her uncle worked on Riley's car in front of her grandmother's house, or because her uncle had bought drugs from him.

Riley took MM to a car where two other black males, both of whom sat in the front seat, had guns in their laps. MM tried to talk Riley into letting her out, but Riley and the driver of the car told her to shut up. When they reached the house, Riley then forced her to knock on the door, in order to get the occupants to open it. When the door opened, Riley forced MM inside and robbed the residence. Afterwards, all four got back in the car and went to the Cleveland residence. Again, Riley forced MM to go first, and MM testified that it was only after they put a gun to one of the victim's heads that she went into the closet to find the drugs, so that Riley would not kill her or the victims.

¶11 After leaving the second house, the robbers went to a duplex on 45th Street where they went into the basement to stash their guns and divide up the money, then took MM up to the second floor apartment, leaving her with a woman who was at the house. When Riley went into the bathroom, MM asked the woman the address of the house and MM called a cab. When Riley discovered that MM had called a cab, he insisted on coming with her to the hotel, bringing a bag of stolen items with him.

¶12 Upon arriving back at the hotel, MM noticed for the first time that Riley's car was parked there. On the elevator ride and in the suite, Riley touched MM in a sexual manner, which MM fought off. Once she and Riley were in the hotel suite, MM was able to leave to go down to the lobby alone, though she could not recall how she was able to leave alone. When MM returned to the suite three minutes later, she discovered Riley was gone, her father was asleep in the bedroom of the suite, and a blue cell phone and a gold chain were present. MM claimed in her recorded statement that she put the gold chain in the bed for safekeeping so she could return it to the victim the next day. MM admitted that she never tried to contact the police, even though she made a number of telephone

calls—to a friend, to her grandmother's house, to her cousin, to the taxicab company—between the time that Riley left her at the hotel and the police arrived. MM testified that she never attempted to leave the 45th Street residence when Riley was in the bathroom. None of the individuals who MM telephoned or attempted to telephone testified at the hearing.

¶13 MM testified that she was not arrested at the hotel nor transported to the police station in handcuffs by a uniformed police officer; but rather, she came voluntarily to the police station, in Hensley's vehicle. MM testified that Ardis was mean to her, so she hung around Hensley's desk before she went into an interview room with Hensley to record a statement. MM also testified that before the recorder turned on, Hensley instructed her on what to say and not say so that the prosecutor would believe her. MM also testified that she lied to Hensley regarding her father's job.

¶14 The trial court specifically considered the following evidence and testimony as problematic: (1) that after receiving a cell phone call from Riley, before he arrived at the hotel, "she opened the door knowing that her father had been threatened by this gentleman. That concerns me for even a 15-year-old to have done that without at least calling the desk, without at least calling somebody first"; (2) that [MM]'s statements to the court that she thought they were going to her grandmother's house when she left the hotel with Riley, "obviously that didn't aline [sic]. And that's an inconsistency on [MM]'s part"; (3) that [MM] placed a call to the victim's residence prior to going over and robbing it (a police officer testified that this was to determine how many people were in the house); (4) MM's testimony that

> she forgot – this is after the robberies occurred – she forgot why she went down to the lobby and how she got down to

> the lobby with [Riley] who was allegedly trying to sexual [sic] assault her. That she forgot how that happened. I find that hard to believe. And the fact that she went back into the hotel room after going down to the lobby knowing [Riley] still may have been there[;]

and (5) the discovery of the stolen necklace in between the mattress and box spring of her bed.

¶15 The trial court specifically discussed evidence of the crimes committed and the affirmative defense of coercion. The court found that the State had proven beyond a reasonable doubt that MM had committed the three crimes charged. Her participation is not disputed here. The court then considered the affirmative defense of coercion and found that on six significant points, MM was not credible.[5] Based on this, the court found "that the state has proven beyond a

[5] The trial court specifically noted:

> In looking in coercion, I do have to say there are some problems that Melissa's case faces. Her credibility with regard to a number of the things testified to do concern me. The – again, the phone call from Mr. Riley. She then let's [sic] him in the room. Even a 10-year-old would know better than to do that. I don't find it credible that she would have let this person into her room knowing what her and her father faced with this gentleman.
>
> The phone call that was made to [one of the victims] before this 51st and Cold Spring thing, I understand that we're not dealing with that particular charge, but that leaves the Court to be concerned about Melissa's credibility in this case, what she said. That she thought they were going to the grandmother's home.
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> The fact that she doesn't remember how she got out of the hotel room, that goes again to her credibility. I would think that that would have been a major issue for her, how she escaped this mess with this guy. The fact that she goes into the lobby and then goes back into the room, to me that is the crux of the credibility issue.

(continued)

reasonable doubt that [MM] was not coerced, and [it found] her delinquent for three separate counts of armed robbery." The trial court recognized that "[MM has] been through a very difficult life," and, with no objection by the State and with agreement by the defense, ordered a psychological examination of MM for use at the dispositional hearing.

¶16 At the dispositional hearing, the trial court ordered, and stayed, one-year in the custody of the Department of Corrections, and ordered placement in a

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> Why she would have gone back into that hotel room without trying to call her father, trying to call somebody? If she believed in her father – and I don't – it wasn't really clear from the testimony the fact that she's living with her father. I know that she did say that she was afraid to say anything to her father and wake him up after this incident. But the fact that she didn't call anybody, talk to anybody while Mr. Riley was allegedly in this room waiting for her to come back, or so she thought, that's what challenges her credibility to me in a major way as far as whether she was coerced or not.
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> The fact that she doesn't call the police after this occurs, I understand she may have taken some time to attempt to think things through, but the fact that she goes back up to this hotel room and then discovers her father, doesn't wake him up, doesn't do anything, I don't find that to be credible if she wasn't involved in this case, if she wasn't involved in these robberies.
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> The chain under the mattress to me also raises a major concern. I think [the State] did take a look at this. And the fact that the chain couldn't have just been swept under the bed but was put between the mattress and box spring tends to have the Court question her credibility with regard to why that chain was there in the first place.
>
> And again, this is a case where credibility is a major issue in making a determination as to whether the state has proven beyond a reasonable doubt whether she was coerced or not.

residential treatment facility for one year.[6] MM appeals the trial court's determination that she was not coerced.

STANDARD OF REVIEW

¶17 We may not overturn 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). "We are obligated to search the record to support the conclusion reached by the fact finder." ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996).

¶18 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); ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). 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. ***Curiel***, 227 Wis. 2d at 420. To be inherently or patently incredible, testimony must be in "conflict[] with nature or fully established or conceded facts." ***Id.*** (citation omitted). "We acknowledge that the trial court has no obligation to believe everything a witness says, and when the record reveals inconsistencies within a witness's testimony or between one witness and another, the court as fact finder determines the weight and credibility accorded to the

[6] We commend the trial court's efforts throughout the proceedings to take a holistic approach, to consider how MM's life circumstances affected her behavior in this case, as well as the court's efforts to ensure that MM would receive proper permanent placement in her pending CHIPS proceedings, as well as in this delinquency proceeding.

testimony." ***State v. Anson***, 2004 WI App 155, ¶24, 275 Wis. 2d 832, 686 N.W.2d 712.

¶19 In determining whether a verdict should be overturned, 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." ***State v. Searcy***, 2006 WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497 (citing ***Poellinger***, 153 Wis. 2d at 503-04). If there is any possibility that the trier of fact 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." ***Poellinger***, 153 Wis. 2d at 507.

DISCUSSION

¶20 Coercion is an affirmative defense. *See* ***Moes v. State***, 91 Wis. 2d 756, 763, 284 N.W.2d 66 (1979). WISCONSIN STAT. § 939.46(1) states:

> A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.

¶21 "The statutory defense of coercion is a complete defense to any crime except first-degree intentional homicide." ***State v. Keeran***, 2004 WI App 4, ¶5, 268 Wis. 2d 761, 674 N.W.2d 570. "'Coercion' occurs when a 'threat by a person other than the actor's coconspirator ... causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great

bodily harm to the actor or another and which causes him or her so to act.'" ***Id.*** (citing WIS. STAT. § 939.46(1)). "The coercion defense is limited to the 'most severe form of inducement.'" ***Id.*** (citing ***State v. Amundson***, 69 Wis. 2d 554, 568, 230 N.W.2d 775 (1975)). "It requires a finding 'under the objective-reasonable man test, with regard to the reasonableness of the actor's beliefs that he is threatened with immediate death or great bodily harm with no possible escape other than the commission of a criminal act.'" ***Id.*** (citation omitted).

¶22 To establish a coercion defense, a defendant "must meet the initial burden of producing evidence to support" such a defense. ***Keeran***, 268 Wis. 2d 761, ¶6.

> A defendant is entitled to a coercion defense instruction if "(1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) *the defense is supported by sufficient evidence*."

Id. (citations omitted; emphasis added). Under the fourth element of this conjunctive test, the "evidence is sufficient if a reasonable construction of the evidence, viewed in a light most favorable to the accused, supports the defendant's theory." ***Id.*** If the defendant meets this burden, the State then "bear[s] the burden of disproving beyond a reasonable doubt an asserted coercion defense under [WIS. STAT. §] 939.46." ***Moes***, 91 Wis. 2d at 766.

¶23 In its decision, the trial court considered the evidence presented.[7] The trial court applied the elements of the coercion statute to the evidence and,

[7] The trial court carefully analyzed the evidence which it found supported MM's position, the evidence which it found neither supported nor contradicted MM's position, and those statements and testimony which it found problematic.

after making its credibility determinations, concluded that the credible evidence did not support a finding that MM was coerced into participating in the armed robberies. We have reviewed the record in this case.[8] Based upon that review, we conclude that the evidence upon which the trial court relied is not "inherently or patently incredible." *See* ***Curiel***, 227 Wis. 2d at 420. Accordingly, we may not "substitute [our] own judgment for that of the trier of fact." *See* ***id***. Consequently, we affirm the trial court's determination that MM was not coerced.

By the Court.—Order affirmed.

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

[8] This court echoes the concerns expressed by the trial court that the only individual prosecuted for these robberies was clearly the least significant actor involved. Additionally, we are troubled that during the pendency of these proceedings, it appeared from the record, and more specifically from the concerns raised by the trial court on the record, that various allegations made by MM of sexual assault, statutory rape, and of her father "prostituting" her were never investigated, in spite of the trial court's finding that MM's claim that she had been sexually assaulted was true. In this context, it is particularly disturbing that only the juvenile girl, and not one of the adult men involved in this sordid affair, have been prosecuted.