

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 2002

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. 01-1886

Cir. Ct. No. 00JV1322

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF M.D.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

M.D.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

¶1 CURLEY, J.¹ M.D. appeals from a judgment adjudicating her delinquent for second-degree sexual assault of a child, contrary to WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

§ 948.02(2) (1999-2000).² M.D. contends that the victim's testimony was incredible and that the corroborating evidence was inadequate to support a conviction on the sexual assault charge. She also contends that the trial court failed to credit her with the presumption of innocence guaranteed by the Fourteenth Amendment to the United States Constitution. This court disagrees and affirms.

I. BACKGROUND.

¶2 On August 25, 2000, M.D., then age sixteen, was found delinquent of second-degree sexual assault of a child and disorderly conduct. The victim, M.R., was fifteen at the time of the incident and lived with M.D. at St. Rose Treatment Center, a residential treatment center for girls. St. Rose provides services such as counseling, education and treatment to girls struggling with drug, alcohol or behavioral problems. The facility at St. Rose consists of nine bedrooms located on the upper level, as well as a dining room, living room, activity room, kitchen and offices on the lower level. M.R. had been a resident at St. Rose since approximately May of 1998, and M.D. had lived there since May 10, 2000. M.D. and M.R. had been roommates at St. Rose for approximately one week prior to the incident in question.

² M.D. was also adjudicated delinquent for the commission of disorderly conduct contrary to WIS. STAT. § 947.01 (1999-2000). While the juvenile's notice of appeal states that she is appealing from the entire judgment, as well as from the trial court's denial of her motion to reconsider, in her brief submitted to this court, M.D. states that she "appeals only from the adjudication of delinquency for 2nd-degree sexual assault, not from the finding of disorderly conduct or from the denial of the postdispositional motion." Therefore, this court addresses only the sexual assault adjudication.

¶3 On June 25, 2000, the staff at St. Rose took a number of girls, including M.D. and M.R., swimming at a local pool. M.R. testified that when she returned from swimming, her back was sore. Later that evening, M.R. mentioned that she was sore from swimming and asked M.D. if she would massage her back. M.D. agreed. While M.R. was seated at her desk chair, M.D. rubbed her back with cocoa butter.

¶4 The two were then called for dinner and the massage ended. Between dinner and bedtime, M.R. asked M.D. if she would rub her back again later that evening. M.D. said, "Yes." At bedtime, approximately 9:30 p.m., the two girls returned to their room.

¶5 M.R. testified that after returning to their room, she reminded M.D. of the earlier agreement, and M.D. began to rub her back. M.R. stated that she was originally seated at her desk like the first time, but that M.D. suggested that the two move to a bed for comfort, which they did. The back rub continued until M.D. allegedly flipped M.R. over to her front-side, pinned her down, lifted her shirt, and began touching and licking her breasts. M.R. also testified that M.D. touched her vaginal area.

¶6 M.R. testified that she immediately told M.D. to stop and leave her alone. She said that M.D. replied, "Oh, come on, you let me get this far, let me do more." M.R. explained that she finally pushed M.D. off of her and ran downstairs to tell a supervisor. A counselor at St. Rose, Amber Sharp, testified that at 10:30 p.m., M.R. came downstairs appearing jumpy and anxious. Sharp stated that M.R. then asked to speak with her in private and proceeded to tell her that M.D. was massaging her back when she flipped her over and started touching and licking her breasts. Sharp then called her supervisor who called the police.

¶7 When the police arrived, they conducted an investigation and determined that M.D. should be arrested. Two officers went to the girls' bedroom where it appeared that M.D. was sleeping. The officers woke M.D., who became agitated and resisted the officers. The officers struggled with M.D., took her down to the ground, and eventually placed her under arrest.

¶8 At trial, M.D. also testified. She admitted that she had given M.R. a back rub before dinner. However, M.D. further stated that when M.R. asked her for the second back rub at bedtime, which she had originally agreed to give her before bedtime, she later refused because she wanted to go straight to bed. M.D. testified that she had become sleepy after taking her medication and went directly to bed at approximately 9:30 p.m. She alleged that because M.R. did not like her and did not like sharing a room with her, M.R. had concocted the entire story to get her in trouble.

¶9 In adjudicating M.D. delinquent, the trial court assessed the relative credibility of M.R. and M.D., and found M.R.'s testimony more credible. In making its credibility determination, the trial court considered a number of factors, including M.D.'s two previous adjudications of delinquency and the corroborating testimony of Sharp.

II. ANALYSIS.

¶10 This court may not reverse M.D.'s adjudication of delinquency unless the evidence, viewed most favorably to the State and the adjudication, 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). In examining the sufficiency of the evidence, this court does not substitute its

judgment for that of the trier of fact merely because of conflicting evidence or because the evidence may have supported a different result. *See State v. Edmunds*, 229 Wis. 2d 67, 73, 598 N.W.2d 290 (Ct. App. 1999). Rather, the appropriate test is whether the evidence is so insufficient in probative value and force that, as a matter of law, no judge or jury could find guilt beyond a reasonable doubt. *See id.* Thus, if more than one reasonable inference can be drawn from the evidence, this court must adopt the one that supports the trial court's finding. *See Poellinger*, 153 Wis. 2d at 504 (citation omitted). Further, because the credibility of the witnesses and the proper weight of the evidence are matters for the trier of fact, *see id.*, this court will not reverse the decision unless the trial court's findings of fact are clearly erroneous. *See WIS. STAT. § 805.17(2)* (1999-2000).

¶11 M.D. argues that the victim's testimony was incredible for a number of reasons. First, she argues that the trial court should have discounted M.R.'s testimony because Sharp testified that the two girls did not always get along and had problems in the past. Second, M.D. claims that the trial court ignored M.R.'s motive for fabricating such events, *i.e.*, to rid herself of her roommate. Third, M.D. alleges that M.R.'s testimony was incredible because it varied in detail from a statement given to the police. Finally, M.D. argues that the trial court failed to accord proper weight to the fact that Sharp testified that M.R. had engaged in attention-seeking behavior in the past, including exaggerating or acting out to gain attention.

¶12 In determining the credibility of each witness and the weight to be given to their testimony, the trial court considered each of the issues raised by M.D.:

There is here a question raised about the credibility of the complainant, [M.R.] It was acknowledged by Amber Sharp in her testimony that [M.R.] does things to get attention. The question is whether she would do something like this, make an accusation like this, in order to get attention.

Credibility comes down to believability. As the finder of fact, this court is placed in a position of looking at the testimony, considering some of the factors that a jury would consider such as the interest or lack [of] interest that the witness has in the result of the trial, their conduct and appearance on the witness stand, bias or prejudice if any has been shown, clearness or lack of clearness of recollection, and the opportunity to observe and know the things about which testimony has been given. That's credibility....

....

[T]aking the fact of credibility, the fact that [M.D.] has two previous convictions, which ... are appropriately considered in weighing credibility, the fact that there was immediate reporting by [M.R.], the corroborative testimony from Amber Sharp ... would tend to be strong, corroborative evidence and reinforce the testimony of [M.R.] There is also the ... relating of the statement of you let me go this far so let me go farther.... That is the kind of thing that I don't think that a child would make up....

....

So that for all of those reasons and considering credibility here, I conclude that the testimony of [M.R.] is believable and the [c]ourt accepts that testimony. I believe that the testimony is sufficient to allow the [c]ourt to conclude that the elements of second[-]degree sexual assault were present here.

¶13 The trial court's analysis outlined the factors normally considered in assessing a witness's credibility. *See* WIS JI-CRIMINAL 300. Additionally, the trial court had the opportunity to view each witness's demeanor on the stand, weigh evidence of motive to testify falsely, consider past convictions, and look for any other indicia of reliability. In a case such as this, the trial court is in the best position to evaluate the credibility of witnesses. *See State v. Carnemolla*, 229

Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Although there may have been conflicting evidence, as pointed out by M.D., this court cannot conclude that the evidence supporting M.D.'s adjudication was so insufficient in probative value and force that, as a matter of law, no judge could have found guilt beyond a reasonable doubt. Therefore, M.R.'s testimony is not incredible as a matter of law.

¶14 M.D. also argues that the trial court denied her the presumption of innocence guaranteed by the Fourteenth Amendment to the United States Constitution. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”). In its decision, the trial court stated, “Certainly [M.D.] is the one with the most to gain or lose here.” M.D. contends that this statement demonstrates that the trial court failed to accord her the presumption of innocence. This court disagrees.

¶15 The trial court made this statement after listing the factors it considered in determining the credibility of the witnesses, including “the interest or lack of interest that the witness has in the result of the trial.” This is a proper consideration of the court in assessing credibility. See WIS JI–CRIMINAL 300 (“In determining the credibility of each witness and the weight you give to the testimony of each witness, consider ... whether the witness has an interest or lack of interest in the result of this trial.”); see also *Wilson v. State*, 184 Wis. 636, 643-46, 200 N.W. 369 (1924) (stating that a jury has the right to consider that a defendant may have a far greater interest in the result of the trial than any other witness). As such, the trial court did not deny M.D. her presumption of innocence.

¶16 Based upon the foregoing reasons, the trial court is affirmed.

By the Court.—Judgment affirmed.

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

