COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2935 **Cir. Ct. No. 2008JV31**

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

IN THE INTEREST OF JUSTIN H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JUSTIN H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Forest County: PATRICK F. O'MELIA, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Justin H. appeals an order adjudicating him delinquent. The circuit court entered the order after finding Justin guilty of two

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

counts of first-degree sexual assault of a child. Justin argues there was insufficient evidence to find him guilty and he was deprived of his due process right to notice of the charges. We affirm.

BACKGROUND

¶2 On December 3, 2008, the State filed a delinquency petition charging Justin with two counts of first-degree sexual assault of a child, his eight-year-old-cousin Sylindria T. The charges stemmed from Sylindria's disclosure that Justin forced her to perform oral sex on him on two different occasions, once at her grandmother's house and once at her father's house.

¶3 Both Sylindria and Justin testified at the fact-finding hearing. Sylindria's account differed in some respects from the report she had previously given and also varied throughout the course of her testimony at the hearing. For example, she was not clear about where the assaults occurred, or on what dates. Despite these inconsistencies, her testimony remained constant with her initial report that Justin forced her to perform oral sex on him on at least two occasions and that she threw up after the first assault. Justin denied assaulting Sylindria. He testified he recalled the incident in which Sylindria threw up, but claimed she threw up after drinking juice.

¶4 When the State rested, Justin moved to dismiss, arguing testimony established he did not assault Sylindria when the petition alleged he did. His counsel asserted, "[The petition] is what gives him notice as to what he is charged with. ... And he is charged with having committed [the assaults] at these very specific times. And we have presented [testimony that Sylindria] was nowhere near Justin during the period of time for which my client is charged."

¶5 The circuit court denied the motion. The court acknowledged the petition alleged the assaults occurred "on or about Saturday, November 29, 2008 at 6:14 p.m.," but concluded the incident report attached to the petition made clear that November 29 was actually when the assaults were reported, not when they occurred.[2]

¶6 At the close of testimony, the circuit court acknowledged there were inconsistencies in Sylindria's testimony. But it found these inconsistencies did not detract from her credibility, particularly in light of her age. The court stated it found her testimony persuasive and concluded that "her inconsistencies [were not] all that weighty when it came down to the guts of the case." It therefore found Justin guilty of two counts of first-degree sexual assault and adjudicated him delinquent.

DISCUSSION

¶7 Justin raises two arguments on appeal. First, he argues there was insufficient evidence to find him guilty of the sexual assault charges because Sylindria's testimony was fraught with inconsistencies. Although Justin frames this as a sufficiency of the evidence challenge, the substance of his argument actually disputes the circuit court's finding Sylindria's testimony was credible. We must therefore reject it. "When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to

[2] The author of the incident report wrote, "On Saturday, November 29th, 2008 at approx. 6:30 [p.m.] I ... was advised of a sexual assault complaint, and the victim and her father were in the lobby."

each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶8 Second, he argues he was deprived of his due process right to notice because he was subjected to prosecution for conduct that did not occur when the petition alleged it happened. As a preliminary matter, it is not clear to us that Justin properly preserved a due process argument for appeal. While his trial counsel stated the "petition is what gives him notice ...," he did not argue Justin's due process rights were violated by not sufficiently apprising him of the charges. Rather, it appears Justin's trial counsel moved to dismiss because the State did not prove the assaults occurred at the time charged. That is not a question of notice, but of whether the State met its burden of proof. To the extent this is the argument Justin means to raise on appeal, we do not address it. *See* ***M.C.I. Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we will not abandon our neutrality to develop arguments).

¶9 However, even assuming Justin properly preserved a due process argument, we reject it. Due process principles require that a juvenile against whom a delinquency petition has been filed be given "notice ... sufficiently in advance of scheduled court proceedings ... set[ting] forth the alleged misconduct with particularity." ***State v. Tawanna H.***, 223 Wis. 2d 572, 576, 590 N.W.2d 276 (Ct. App. 1998). The purpose of this notice is "to inform the accused of the acts he allegedly committed and to enable him to understand the offense charged so he can prepare his defense." ***State v. Wickstrom***, 118 Wis. 2d 339, 348, 348 N.W.2d 183 (Ct. App. 1984).

¶10 Here, the delinquency petition alleged that "on or about Saturday, November 29, 2008 at 6:14 [p.m.] in the Town of Lincoln, Forest County,

Wisconsin, [Justin] did have sexual intercourse with a child under the age of twelve, [Sylindria T.], contrary to sec. 948.02(1)(b), 939.50(3)(b) Wis. Stats., a Class B Felony." While there is no question the assaults did not occur on that day, the report attached to the petition describes in detail the alleged conduct underlying the charges. It stated Sylindria reported she was assaulted once at her grandmother's house and that she threw up afterwards. Justin testified he remembered this occasion and attributed Sylindria's illness to drinking juice. This shows that the petition described the incident in sufficient detail to apprise him of the incident. The petition further stated Sylindria reported a second assault that occurred "sometime during the [week preceding November 29, 2008]" and, as with the first charge, described the episode in detail. Therefore, the record does not bear out Justin's claim he did not have sufficient notice.

By the Court.—Order affirmed.

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