COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1437 **Cir. Ct. Nos. 01 JV 653, 01 JV 653A**

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

IN THE INTEREST OF BRITTEN A.B.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRITTEN A.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Britten A.B. appeals from the amended dispositional order adjudging him delinquent of physical abuse of a child and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

disorderly conduct, both as party to a crime, following a court trial. He argues that: (1) the charges should have been dismissed because the State failed to timely file the delinquency petition; (2) the trial court's decision finding him guilty "was not supported by the weight of the evidence"; and (3) convictions for both physical abuse of a child and disorderly conduct, party to the crimes, violate his double jeopardy rights. This court rejects his arguments and affirms.

I. BACKGROUND

¶2 According to the delinquency petition and portions of the trial testimony, on December 14, 2000, Michael, five years old, was staying at the home of relatives where Britten, his twelve-year-old uncle, was living. Michael was playing with Britten and three of Britten's brothers, Brushae, Jordan, and Jovan, who ranged in age from eight to eleven. When the four boys became irritated with Michael, they grabbed his arms and legs, stepped on his stomach, covered and then duct-taped his mouth, and then burned his penis and scrotum, and one of his legs, with a cigarette lighter. As a result, Michael suffered first-degree burns.

¶3 Between January 31 and February 5, 2001, a delinquency petition charging Britten and his brothers was prepared but, due to administrative fumbles following the reassignment of the assistant district attorney who had reviewed the case, the petition was not filed. When, on March 16, 2001, that mistake was discovered, a new petition was prepared and filed.

¶4 Britten was tried on charges of being party to the crimes of first-degree sexual assault, physical abuse of a child, and disorderly conduct. The trial evidence consisted of testimony both implicating and potentially exculpating him. The court had to sift through prior statements from Michael and one of his uncles,

alleging that Britten was the primary perpetrator who actually burned him, and their testimonial recantations. The trial court acquitted Britten of the sexual assault charge, concluding that the evidence had not proven "the requisite elements of sexual degradation or sexual humiliation," but convicted him of the other two offenses.

II. DISCUSSION

A. Timeliness of the Petition

¶5 Britten argues that the case should have been dismissed with prejudice because the delinquency petition was not timely filed as required by WIS. STAT. § 938.25(2)(a). Britten contends, as he did before the trial court, that he was prejudiced by the filing delay because, during that period of delay, his mother was murdered and she would have been a "key exculpatory witness." The trial court denied the defense motion to dismiss, concluding: "If this child was involved in this behavior …, there are issues that need to be addressed in this child's life. So the suggestion because somebody put [the petition] in the wrong place in the DA's office I should dump this case, I just don't buy it." The trial court was correct.

¶6 The most salient facts are undisputed: (1) the State had until February 5, 2001 to timely file the petition; (2) the State prepared a petition charging Britten by February 5 but inadvertently failed to file it; (3) the State learned of its error on March 16, prepared a new petition, and filed it on March 20, 2001; (4) Britten's mother was shot on February 26, and survived on life-support until March 24, 2001, when she died.

¶7 Where, as here, the State fails to timely file a delinquency petition under WIS. STAT. § 938.25, a court still may exercise jurisdiction over the subsequently filed petition upon "a showing of good cause …, taking into account the request or consent of … the parties, the interests of the victims and the interest of the public in the prompt disposition of cases." WIS. STAT. § 938.315(2). As we have explained, in determining whether a court may proceed on a tardy petition:

> [T]he best interest of the child is the paramount consideration. We are to liberally construe the juvenile code to effect its objectives and to serve this end.…
>
> In addition to the paramount consideration of the best interest of the child, we conclude that additional relevant factors to a "good cause" determination are: (1) that the party seeking the enlargement of time has acted in good faith; (2) that the opposing party has not been prejudiced; and (3) whether the dilatory party took prompt action to remedy the situation.

State v. F.E.W., 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988) (citations and footnote omitted). In this appeal, Britten does not allege that the State acted in bad faith or failed to take prompt action once it discovered its mistake; he argues only that he has been prejudiced by the delay.

¶8 Britten maintains that Michael's mother would have testified that she did not believe Michael's allegation and thought that he was exaggerating. He contends, therefore, that he was prejudiced by the filing delay because "the testimony of the mother would have been enough to dismiss the charges … or not find him guilty beyond a reasonable doubt." Britten's claim fails for two equally compelling reasons.

¶9 First, as the State explains, the chronology of events—the filing deadline, the actual filing, the typical timeline for processing delinquency cases, and the dates of Michael's mother's shooting and death—establish the virtual

certainty that Michael's mother would not have been available to testify even if the filing had been timely. Second, in what defense counsel characterized as a stipulation that was "exculpatory in nature," the prosecutor advised the trial court that Michael's mother would have testified that Michael "recanted to her." Thus, simply stated, Britten was not prejudiced by the unavailability of Michael's mother because, in effect, her testimony was received.

¶10 Accordingly, this court concludes that the trial court properly denied Britten's motion to dismiss the charges. Primarily focusing on Britten's best interests, the court correctly recognized that no interests would be served by "dump[ing] this case."

B. Sufficiency of the Evidence

¶11 Britten argues that the trial court's "decision" was "not supported by the weight of the evidence." In a somewhat disjointed argument, his brief emphasizes that "at no time did the victim state explicitly, under oath, that Britten was involved in burning him," that at trial the victim "stated that Britten was sleeping at the time of the attack," and that "the prosecution could not come up with witnesses in court who identify Britten as the perpetuator [sic]."

¶12 In effect, Britten is challenging the sufficiency of the evidence to support the trial court's guilty verdicts. This court applies a rigorous standard in reviewing a challenge to the sufficiency of evidence:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of

> fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, 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.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). "'The credibility of the witnesses and the weight of the evidence is for the trier of fact.'" ***Id.*** at 504 (quoted source omitted). This court will substitute its judgment for that of the trial court only when "the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

¶13 Here, the trial court had to consider trial testimony from both Michael and one of his uncles effectively recanting their prior statements implicating Britten. The court did not have to do so, however, in a vacuum; it could compare the trial testimony to the prior statements, and consider all the statements in combination with the additional circumstantial evidence. Doing so, the trial court reached well-reasoned verdicts.

¶14 As the trial court explained, "the only significant dispute" in the trial was one of "identification"—"just Jordan and Jovan did this, or … Jordan, Jovan, Britten and Brushae [did] this." Logically, the court concluded "beyond any question" that all four were involved.[2] The court explained that, quite obviously, Michael was being "tortured in a manner from which you can only infer that he

[2] Britten emphasizes that the trial court, at one point in its decision, stated: "So as to both charges, *and this really is kind of a guess*, as caveat to this, I have resolved the identification issue." (Emphasis added.) This court concedes that the trial court's comment is, at the very least, confusing and that, in isolation, it would seem to undermine the verdicts. The balance of the decision, however, reveals no guesswork; the court's resolution of the "identification" dispute was logical and solidly grounded in the evidence.

was in excruciating pain" that would have caused him "to struggle and to resist mightily." The court tried to visualize two boys, eight to ten years old, attempting to hold down Michael while, at the same time, "manipulating a lighter" and "controlling his genitals area." The court understood the virtual impossibility of that and the need for all four boys to have been involved.

¶15 The trial court also carefully considered factors affecting Michael's credibility—in his original allegation and his recantation—including "attempts to influence his testimony." The court reasonably found that Michael's allegations were credible and that his recantation was not. Britten offers no factual or legal basis on which this court could reject the reasonable manner in which the trial court weighed Michael's contradictory statements, in light of all the evidence. *See* ***Poellinger***, 153 Wis. 2d at 503 (within the bounds of reason, the fact finder may reject evidence and testimony suggestive of innocence). Therefore, this court concludes that sufficient evidence supported the trial court's two guilty verdicts.

C. Double Jeopardy

¶16 Finally, Britten argues that convictions for both physical abuse of a child and disorderly conduct, as a party to the crimes, violate his double jeopardy rights. Obviously, however, the crimes have different elements and, therefore, suggest no apparent double-jeopardy issue. *See* ***United States v. Blockburger***, 284 U.S. 299, 304 (1932); ***State v. Sauceda***, 168 Wis. 2d 486, 493-96, 485 N.W.2d 1 (1992) (articulating the "elements-only" test for measuring double jeopardy challenges). Britten elaborates only: "Given the facts of [his] case, these three statutes by implication do not require proof of an additional element of the crime because that analysis was not performed at the trial level [sic]. All of the charges seemed to be lumped with the conduct."

¶17 Britten's double jeopardy challenge is amorphous and insufficiently developed. This court need not consider "amorphous and insufficiently developed" arguments. ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

By the Court.—Order affirmed.

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