

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2003

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. 02-1873-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-205

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD T. MALIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
GLENN H. HARTLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard Malin appeals a judgment, entered upon a jury's verdict, convicting him of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.08(2) (2001-02). Malin argues that the trial court erred by admitting an unsigned letter instructing Crystal H. to recant her statement

accusing Malin of sexual assault. Because the error, if any, was harmless, we affirm the judgment.

BACKGROUND

¶2 In August 2002, the State charged Malin with second-degree sexual assault of a child, arising from allegations that Malin had sexual intercourse with Crystal, then fifteen years old, on several occasions between April and August 2000. Prior to trial, Crystal made contradictory statements to her parents, a social worker and law enforcement regarding the nature of her relationship with Malin. On October 17, 2000, Crystal ultimately admitted having sexual intercourse with Malin when questioned by a police officer investigating the matter at the behest of Crystal's parents. She informed the police that there had been seven or eight sexual encounters with Malin, beginning in July 2000. At trial, Crystal testified that she hid her relationship with Malin from her parents and a social worker, believing they would report Malin to authorities.

¶3 Following her initial interview with the police, Crystal telephoned Malin, who was then living with his mother, Linda, in Arizona, and informed him of her report. Crystal testified that Malin instructed her not to say anything to anyone about their relationship. Crystal further testified that in a subsequent conversation, Linda instructed Crystal how to recant her allegations to police. On November 5, 2000, Crystal delivered a written statement to the police station, recanting her earlier statement and declaring: “[Malin] and I are the best of friends and have never been intimate at any time.” After Crystal's parents confronted her about the recantation, Crystal gave another statement to the police on November 10, in which she admitted to sexual activity with Malin but insisted that it was “consensual.” Finally, on December 6, Crystal gave another statement

to police, alleging for the first time that the sexual relationship lasted from April through August 2000. Crystal testified that she had initially attempted to minimize not only the length of the relationship, but also the number of encounters in order to protect Malin.

¶4 Crystal also recounted that she received written correspondence from Malin and Linda through her friend, Katrina S. In October 2000, Crystal received an unsigned birthday card that included, in what she believed to be Malin's handwriting, the phrases, "sweetheart, I love you," "hang in there" and "we'll be together soon." Katrina testified at trial that she subsequently received a typewritten letter addressed to Crystal and postmarked Phoenix, Arizona. Katrina delivered the letter to Crystal's mother and Crystal denied seeing the letter before the State filed the present charges against Malin. In any event, the letter instructed Crystal on how to draft a statement for police recanting her October 17 statement. Enclosed with the letter was a draft letter dated October 23, 2000, and addressed to the Tomahawk Police Department.

¶5 Linda testified that she neither wrote the letter nor told Crystal what to say to the police. Because the State failed to establish who sent the letter, Malin challenged the letter's admissibility. The trial court, however, determined that the letter was admissible "for what it is." The court concluded that the letter corroborated Crystal's account of the telephone conversation in which Linda allegedly instructed Crystal how to recant her statement to police. Ultimately, Malin was convicted upon the jury's verdict. This appeal follows.

ANALYSIS

¶6 Malin argues the trial court erred by admitting the unsigned letter into evidence. Claiming that a defendant's attempt to influence a witness

demonstrates the defendant's consciousness of guilt, Malin contends that because the State failed to establish a link between Malin and the unsigned letter, its admission was prejudicial. Specifically, Malin claims that the jury was allowed to draw an unwarranted inference of consciousness of guilt. Because we conclude that any error in admitting the letter was harmless, we decline to address whether the letter was admissible.¹ The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction." *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility is a "possibility sufficient to undermine our confidence in the conviction." *State v. Williams*, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶7 To the extent the jury may have inappropriately used the letter as evidence of Malin's consciousness of guilt, it is insignificant when compared to the overwhelming evidence of his guilt. Crystal gave clear testimony detailing the sexual activity between herself and Malin. Although her pretrial statements were inconsistent, Crystal's trial testimony clarified her reluctance in admitting the relationship to her parents and the social worker. Likewise, she explained that her recantation was made at Linda's urging. Despite Linda's testimony to the contrary, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¹ Cases should be decided on the narrowest possible grounds. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989). Therefore, if a decision on one point disposes of the appeal, the appellate court will not decide the other issues raised. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938).

¶8 Moreover, a number of witnesses observed corroborating inappropriate behavior between Malin and Crystal, including secret rendezvous and other romantic activity. Dusty Schoone, who hired Crystal as a babysitter, testified that on one occasion in which Crystal was supposed to stay overnight at Schoone's home, Malin picked Crystal up at 10 p.m. and brought her back at 7 a.m. the following morning. Schoone also testified that she often observed Malin kiss or hold hands with Crystal. Michelle Thayer testified that in discussing Crystal's relationship with Malin, Crystal once told her that she thought she was pregnant. Likewise, Katrina testified that Crystal told her she had sex with Malin and that she was in love with him. On one occasion, Katrina accompanied Crystal to meet Malin in the woods. There, she observed them kissing and noticed Crystal touching Malin in the genital area. Based on the substantial amount of evidence corroborating Crystal's allegations, we determine that the error, if any, in admitting the letter was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

