COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0464 **Cir. Ct. No. 01JV00029A**

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

IN THE INTEREST OF JOSEPH J.H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH J. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: DANE F. MOREY, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Joseph H. appeals from an order denying his motion to vacate his delinquency adjudication for engaging in sexual contact or sexual

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

intercourse with a person who had not attained the age of thirteen years, contrary to WIS. STAT. § 948.02(1). On appeal, Joseph argues the trial court's order should be reversed for the following four reasons. First, he claims the court improperly assessed Joseph's credibility by giving significant weight to his inability to sustain eye contact while being questioned and how he looked down throughout the proceeding. Second, the court allowed Linda B. to testify to hearsay for which no hearsay exception was offered nor proper foundation laid for its admission. Third, trial counsel was ineffective for failing to present additional evidence in existing reports of numerous inconsistencies in Austin B.'s statements as well as prosecution witnesses. Fourth, the State did not meet its burden to prove the allegations beyond a reasonable doubt. We reject all of these arguments and affirm the trial court's order.

BACKGROUND

¶2 Joseph was alleged to be delinquent for violating WIS. STAT. § 948.02(1). At the fact-finding hearing, several witnesses were called. Those relevant to this appeal involve the testimony of Austin, the victim; Joseph, Austin's stepbrother; and Linda, Austin's stepmother.

¶3 Austin testified that he told people Joseph was "hurting his privates." When asked where Joseph was hurting him, Austin responded "My dick and butt." A videotaped interview of Austin describing the sexual contact was also entered into evidence. Joseph testified he never touched Austin or threatened him with any sexual contact. Over defense counsel's objection, the State impeached Joseph's credibility by eliciting that he previously lied to a police officer who was investigating a theft unrelated to this case. Joseph admitted he did not initially tell the truth to the officer because he did not want to get in trouble. Linda, Austin's

stepmother, testified she saw Austin and his stepbrother Brandon on a bed with their pants down to their knees. Brandon was lying on the bed and Austin was kneeling behind him. Linda testified Austin said he was going to "stick his dick in Brandon's butt." She then testified she asked him "Why? And where did you learn something like that?" Defense counsel objected to the question on the grounds the answer called for hearsay. The court overruled the objection, and Linda testified, "He told me that [Joseph] did it to him all the time when he was at Mom's."

¶4 Notwithstanding inconsistencies in Austin's account of the sexual contact, the trial court found Joseph delinquent for the charged offense. The court stated:

> [A]ssessing the credibility is the big job in a case such as this.
>
> And I find the testimony of Austin credible. I observed him in the videotape very carefully. And I have also observed him here in court very carefully.
>
> … And the Court, as finder of fact, finds that he is credible and was speaking honestly.
>
> The Court does not believe that [Joseph] was being honest and straightforward. He avoided eye contact with even the questioner. He was kind of looking down all the time. He has been doing that throughout the testimony in the courtroom. It's natural. Nobody his age wants to admit something like this happened.

Joseph then filed a post-adjudication motion to vacate the delinquency or in the alternative to dismiss the action. The court denied the motion and Joseph appeals.

Discussion

¶5 Joseph first argues the court erred by giving significant weight to his courtroom demeanor during the fact-finding hearing in assessing his credibility. At the conclusion of the fact-finding hearing, the trial court stated it did not believe Joseph because he was unable to make eye contact while being questioned and was looking down when others were being questioned in the courtroom. At the post-adjudication hearing, Joseph established this was his usual behavior. Accordingly, Joseph concludes the trial court erred in its credibility determination of Joseph. We disagree.

¶6 The credibility of the witnesses is properly the function of the trier of fact. ***Gauthier v. State***, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). It is also up to the trier of fact to determine the weight to be given to the evidence and testimony presented, and to resolve any conflicts in the evidence. ***In re Curiel***, 227 Wis. 2d 389, 420, 597 N.W.2d 697 (1999); *see also* WIS. STAT. § 805.17(2) ("In all actions tried upon the facts without a jury … the court shall find the ultimate facts and state separately its conclusions of law thereon. … Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."). An appellate court will not substitute its judgment for that of the fact-finder unless the evidence the fact-finder relied upon is inherently or patently incredible. ***Gauthier***, 28 Wis. 2d at 416. Inherently or patently incredible evidence is that type of evidence which conflicts with either nature or fully established or conceded facts. ***Day v. State***, 92 Wis. 2d 392, 400, 284 N.W.2d 666 (1979). These principles limiting our review are grounded on the reasoning that the trier of fact has the "'great advantage of being present at the trial'; it can weigh and sift conflicting testimony and attribute weight to those nonverbal attributes of the witnesses which

are often persuasive indicia of guilt or innocence." ***State v. Serebin***, 119 Wis. 2d 837, 843, 350 N.W.2d 65 (1984).

¶7 The trial court's determination that Joseph was less credible than Austin because Joseph was unable to make eye contact and was constantly looking down is not inherently or patently incredible. Associating guilt with a witness's failure to make eye contact is not contrary to nature. If we were to conclude it was, we would effectively create a bright-line rule that a trier of fact cannot consider a witness's inability to make eye contact when assessing credibility. We find no authority for limiting credibility accordingly. Indeed, failure to make eye contact is a nonverbal attribute commonly considered in assessing credibility. The trial court's credibility assessment of Joseph will not be set aside.

¶8 The fact that it was later established at the post-adjudication hearing that Joseph's courtroom demeanor is explainable because he habitually looks down and fails to make eye contact with others does not eviscerate the trial court's credibility assessment of Joseph at the fact-finding hearing. Since credibility determinations are for the trier of fact, and the trier of fact can only consider evidence and observations made during trials, then credibility determinations are based on what transpires at trial. *See* ***Gauthier***, 28 Wis. 2d at 416. It was not error for the trial court to reject Joseph's attempt at the post-adjudication hearing to justify his behavior at the fact-finding hearing. *See* ***Serebin***, 119 Wis. 2d at 843.

¶9 Second, Joseph argues the trial court erred by allowing Linda to testify to hearsay statements Austin made to her without proper foundation or a valid hearsay exception. Assuming the admission of the statement was error, it was harmless.

¶10 The admissibility of evidence is subject to the circuit court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We review evidentiary questions on the basis of whether there was an erroneous exercise of discretion. ***Id.*** The circuit court has not committed an erroneous exercise of discretion if we can discern a reasonable basis for its evidentiary decision. *See* ***State v. Sorenson***, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988). If the trial court erroneously allowed inadmissible evidence entered into evidence, we then consider whether such error was harmless. ***State v. Hunt***, 2003 WI 81, ¶76, 666 N.W.2d 771. An error is harmless if it is "'clear beyond a reasonable doubt that a rational [fact-finder] would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)).

¶11 The record reflects the following examination of Austin by Joseph:

> Q: Okay. Now, you've told some people that [Joseph] tried to harm you, right?
>
> A: Yah.
>
> Q: Do you know -- What did you tell people?
>
> A: He was hurting my privates.
>
> Q: Pardon?
>
> A: He was hurting my privates.
>
> Q: Okay. What part? Do you know?
>
> A: My dick and butt.

Linda testified for the State as follows:

> Q: What, if anything, did you observe in the late afternoon or early evening hours of October 8?

> A: … And I opened the door. And they were both on the bed and had their pants pulled down to their knees. … Austin told me he was going to stick his dick in Brandon's butt. And I said, "Why? And where did you learn something like that?"
>
> ….
>
> A: He told me that [Joseph] did it to him all the time when he was at Mom's.

¶12 Any error in admitting Linda's last answer is harmless because Austin testified Joseph was hurting his privates, specifically his "dick and butt." This testimony is sufficient for a rational fact-finder to adjudicate Joseph delinquent for violating WIS. STAT. § 948.02(1).[2]

¶13 Third, Joseph claims his trial counsel was ineffective for failing to present additional evidence of numerous inconsistencies in Austin's prior statements and other State witnesses. We disagree.

¶14 A juvenile is entitled to effective assistance of counsel. ***In re Christopher D.***, 191 Wis. 2d 680, 710-11, 530 N.W.2d 34 (Ct. App. 1995). Joseph must show objectively his "trial counsel's performance was deficient and that this deficient performance prejudiced his defense." ***Id.*** This presents a question of law we review de novo. ***Id.***

---

[2] To adjudicate Joseph delinquent for violating WIS. STAT. § 948.02(1), the State has to prove: (1) Joseph had sexual contact or intercourse with Austin; (2) for sexual contact, that Joseph did so intentionally for purposes of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying himself, § 948.01(5); and (3) Austin was under the age of thirteen when this occurred. Regardless of Linda's hearsay testimony, the State proved Joseph violated § 948.02(1). First, Austin's testimony satisfies the first element. The trial court found the second element was met because Joseph's acts served no other purpose than for sexual gratification. And the third element is met since there is no dispute Austin is under the age of thirteen. A reasonable fact-finder would have adjudicated Joseph delinquent for violating the statute based solely on Austin's testimony that Joseph hurt his "dick and butt."

¶15 Joseph argues his counsel was ineffective for three reasons. First, Joseph claims his counsel failed to fully impeach Austin's credibility by establishing more inconsistencies in Austin's various accounts of what happened. While his counsel brought out many of these inconsistencies and contradictions, Joseph contends more should have been explored. Second, Joseph contends counsel should have offered testimony from an expert regarding background information and conclusions supportive of Joseph's innocence. These included Joseph's consistent denial of the allegations, his cooperation, his lack of history as a victim, and his behavior and performance in other areas of his life. Third, Joseph argues his counsel should have presented in more detail statements Joseph made to investigators consistently denying committing the crime.

¶16 Joseph's arguments are conclusory in nature, however, and do not show how his counsel's performance was objectively deficient or how this prejudiced his defense. Because the argument is not fully developed, we will not develop it further. *See* ***Roehl v. American Fam. Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

¶17 Joseph's fourth argument for reversing the trial court's order is that the State failed to meet its burden to prove the allegation beyond a reasonable doubt. He argues Austin's inconsistencies and contradictory statements are insufficient to allow the State to meet its burden. Because of this, Joseph argues the trier of fact really had no basis to make its decision on other than guessing which of the two children was telling the truth. We disagree.

¶18 A defendant challenging the sufficiency of the evidence used to convict him bears a heavy burden. ***State v. Schwebke***, 2002 WI 55, ¶40, 253 Wis. 2d 1, 644 N.W.2d 666. A juvenile adjudication will not be reversed 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." *See* ***id.*** 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. ***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* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). Finally, as explained earlier, because the credibility of the witnesses and the proper weight of the evidence are matters for the trier of fact, this court will not reverse the decision unless the trial court's findings of fact are clearly erroneous. WIS. STAT. § 805.17(2).

¶19 We conclude that the State has met its burden. The trial court chose between two competing accounts of what happened. Viewing the evidence in the light most favorable for adjudication, it cannot be said the evidence "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." ***Schwebke,*** 253 Wis. 2d 1, ¶40. The trial court found Austin to be very credible and his account of what happened believable. As we previously concluded, the court's credibility determination is not clearly erroneous. We are therefore bound to adopt the interpretation of the evidence that supports the trial court's findings, *see* ***Poellinger***, 153 Wis. 2d at 504, and that interpretation

supports adjudicating Joseph delinquent beyond a reasonable doubt for violating WIS. STAT. § 948.02(1). *See* note 2 at 7.

By the Court.—Order affirmed.

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