COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3114 **Cir. Ct. No. 2010JV249**

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

IN THE INTEREST OF JUAN I. C., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JUAN I. C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Juan I.C. appeals a delinquency adjudication for theft. Juan argues that the evidence produced at the fact-finding hearing was insufficient to support a finding of guilt. We disagree and therefore affirm the delinquency order.

BACKGROUND

¶2 The State filed a delinquency petition against Juan I.C. for theft, alleging he stole an iPod from Max W., a classmate. At the fact-finding hearing on the petition, the State presented testimony from Max and JeVaughnte R., both high school seniors and members of the wrestling team. Juan, a sophomore with an interest in wrestling, also testified on his own behalf. On March 17, 2010, Max, JeVaughnte and Juan were gathered in the high school's upper gym prior to a wrestling match. Max loaned his iPod to Juan, who played with it for about five minutes. Everyone went downstairs for "weigh-ins," after which Juan became separated from the group.

¶3 Juan testified he left the iPod on a table in the upper gym that afternoon, and did not see it again. Max and JeVaughnte each testified that Juan indicated in the days following the wrestling match that he would either return the iPod to Max or pay him for it. Juan did not return the iPod but later agreed to pay for it.

¶4 Where the testimony was divergent, the court found that Max's and JeVaughnte's testimony was more credible than Juan's. The court determined that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-2010). All references to the Wisconsin Statutes are to the 2009-2010 version unless otherwise noted.

Max's and JeVaughnte's testimony that Juan had told them that he would return the iPod to Max or pay him for it supported a reasonable inference that Juan possessed the iPod after he testified he had left it in the gym, and found that Juan intended to permanently deprive Max of the iPod. Accordingly, the court adjudicated Juan delinquent of theft and ordered nine months of supervision. Additional facts are set forth in the discussion section.

DISCUSSION

¶5 The elements of the crime of theft under WIS. STAT. § 943.20(1)(a) are that the defendant: (1) intentionally took and carried away, used, transferred, concealed, or retained possession of movable property of another; (2) did so without the owner's consent; (3) knew the owner did not consent; and (4) intended to deprive the owner permanently of the property. WIS JI—CRIMINAL 1441. The State must prove all elements of the crime alleged in the petition beyond a reasonable doubt at the fact-finding hearing. WIS. STAT. § 938.31(1).

¶6 In evaluating the sufficiency of the evidence at the fact-finding hearing, we do not set aside findings of fact by a trial court "unless clearly erroneous." WIS. STAT. § 805.17(2). "[W]hen the trial judge acts as a finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses." ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). We view the evidence most favorably to the State and conviction, reversing only if no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶7 Juan contends that the evidence presented at the fact-finding hearing was insufficient to support a finding of guilt on the fourth element of WIS. STAT.

§ 943.20(1)(a), that he intended to permanently deprive Max of the iPod. Juan maintains the State failed to present any evidence indicating that he had retained the iPod after the evening Max had loaned it to him, and that the adjudication rests entirely on inferences drawn from the court's rejection of his version of events. We disagree.

¶8 Max provided the following testimony. Prior to the March 17 wrestling match, Max's "friends" came to the weigh-in room and told him that they had seen Juan with the iPod in the field house. After the weigh-in, Max asked a friend, Jim, and the coach whether they had seen his iPod. Max testified he looked for Juan in the field house and the gym that night but could not find him. The next day, March 18, Max asked Juan for the iPod, and Juan said he had left it in the upper gym. A janitor let Max into the upper gym, but he did not find the iPod there. Max testified that, on March 19, he asked Juan about the iPod again and Juan said "I got you," which Max understood to mean that Juan would either return the iPod or pay him for it. Approximately one week later, Max asked Juan to pay for the iPod and Juan agreed to do so.

¶9 JeVaughnte testified to the following. On the evening of the wrestling match, JeVaughnte spoke to Max about the iPod, and JeVaughnte and a friend went to look for Juan. They found him in the cafeteria, and JeVaughnte asked Juan about the iPod. Juan said he had put it upstairs in the practice room with the coach. JeVaughnte went upstairs to look for the iPod, but did not find it. JeVaughnte testified that, the next day, he asked Juan about the iPod and Juan said he would "get it back to you as soon as [he] c[ould]." JeVaughnte testified he asked Juan about the iPod on multiple occasions in the three days following the wrestling meet, and that each time Juan said he would "give it to him tomorrow [or] the next day."

¶10 Juan testified he left the iPod on a table in the upper gym when he had to leave. Two coaches were present when he left the iPod, but Juan did not inform them that he was leaving the iPod there. Juan testified that JeVaughnte did not ask him about the iPod on the night of the match, and JeVaughnte never talked to him about the iPod at any time. Juan testified he never told Max or anyone else that he would return the iPod to Max, and denies ever telling Max "I got you." Juan testified he agreed to pay Max for the iPod about two days after Max loaned it to him, but he had yet to pay Max because he did not have the money.

¶11 On the disputed issue of whether Juan repeatedly assured Max and JeVaughnte that he would either return the iPod or pay for it, the trial court found Max's and JeVaughnte's testimony to be more credible than Juan's. We must accept this determination. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (when the trial judge sits as fact finder, the trial judge is the ultimate arbiter of the credibility of the witnesses). From Max's and JeVaughnte's testimony that Juan repeatedly indicated that he would either return the iPod to Max or pay him for it, the trial court inferred that Juan was still in possession of the iPod after the time he claimed to have left it in the gym. While the evidence supports other reasonable inferences—Juan may have referenced returning the iPod because he had lost it and still hoped to find it, or was embarrassed to admit that he had lost it—we conclude that the inference drawn by the court is reasonable, and we must accept it. ***Id.*** ("When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.").

¶12 We conclude that this reasonable inference, combined with reasonable inferences that may be drawn from the fact that Juan was the last person to be seen with the iPod and from the court's rejection of Juan's version of

events, are sufficient for the court to have concluded beyond a reasonable doubt that Juan intended to permanently deprive Max of the iPod. While we may not have reached the same result on this record, we must uphold the adjudication viewing the evidence most favorably to the State and the delinquency order.

By the Court.—Order affirmed.

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