COURT OF APPEALS
DECISION
DATED AND RELEASED

June 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1846-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW HODGE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J. and Dykman, J.

PER CURIAM. Andrew Hodge appeals from a judgment of conviction for sexually assaulting a child. The issues are whether: (1) there was sufficient evidence of sexual gratification to convict; (2) the trial court erroneously exercised its discretion in precluding impeachment evidence of the victim's juvenile adjudications; (3) the trial court erroneously exercised its discretion in admitting impeachment evidence of the defense witnesses' prior

convictions; and (4) the trial court lessened the State's burden of persuasion by modifying the standard jury instruction on reasonable doubt.

We conclude that: (1) there was sufficient evidence to convict; (2) Hodge failed to preserve his objection to the preclusion of impeachment evidence; (3) the trial court properly exercised its discretion in admitting evidence of the prior convictions of the defense witnesses; and (4) Hodge waived his challenge to the modified jury instruction. Therefore, we affirm.

FACTS

The State presented evidence that the victim, Fawn R., 15 years old at the time, spent the night with a friend, Shannon, and John and Andrew Hodge.[1] Fawn testified that she, Shannon and John slept in a small basement room with three beds. At 4:00 in the morning Fawn was awakened by Andrew "crawl[ing] into bed" with her. Fawn pretended to be asleep and Andrew undid her pants and "played with" her vagina and breasts for approximately an hour. Although Fawn was frightened, she did not say anything or cry out to Shannon, who Fawn believed had passed out from drinking. Andrew left when someone called to him, but returned about two hours later. Although Fawn was lying on her side, facing away from Andrew, he "played with [her] butt" and then reached over to fondle her breasts and vagina. This continued for about ten minutes until an alarm clock rang and Andrew left. Later, Fawn woke Shannon to tell her what had happened. At trial, Shannon denied that Fawn had slept there that night and explained that she must have wanted to retaliate against Andrew because he had "refused her [advances]." Andrew also denied that Fawn had spent the night with them.

LAW

Conviction for sexual assault of a child requires proof, beyond a reasonable doubt, that the defendant had sexual contact with a child. Section 948.02, STATS. Section 948.01(5), STATS., defines the relevant type of "sexual

[1] Shannon is engaged to John, who is Andrew's brother.

contact" as an intentional touching for the purpose of "sexually arousing or gratifying the defendant."

"Intent to become sexually aroused or gratified, like other forms of intent, may be inferred from the defendant's conduct and from the general circumstances of the case--although the jury `may not indulge in inferences wholly unsupported by any evidence.'" ***State v. Drusch,*** 139 Wis.2d 312, 326, 407 N.W.2d 328, 334 (Ct. App. 1987) (citation omitted). "We view the evidence most favorably to the conviction and will overturn the verdict only if the evidence `is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***Id.*** at 325, 407 N.W.2d at 334 (citation omitted).

SUFFICIENCY OF THE EVIDENCE

Andrew contends that there was no evidence that he had contact with Fawn to become sexually aroused. We disagree. Fawn testified that Andrew got into her bed twice and "played with" her breasts and vaginal area, first for an hour and then for ten minutes. This inappropriate conduct in Fawn's bed supports the jury's inference that Andrew intended to become sexually aroused. The duration of these contacts also negates that they were inadvertent. There is ample evidentiary support for the jury's verdict.

Andrew also contends that Fawn's testimony was incredible.[2] However, questions of credibility are determined by the fact finder, and this court will not disturb that determination if more than one reasonable inference can be drawn from the credible evidence. *See* ***In re the Estate of Dejmal,*** 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980) (the fact finder is in a superior

[2] Specifically, Andrew asserts that it is incredible that Fawn would allow this fondling to occur for over an hour and then recur, without disturbing Shannon and John, sleeping in the next bed. "This court will only substitute its judgment for that of the trier of fact 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, 590 (Ct. App. 1990). We conclude that Fawn's testimony is not "patently incredible," nor does it "conflict[] with the laws of nature." ***Id.***

position to the reviewing court "to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony"). The jury was presented with two versions of the incident. The jury believed Fawn, whose testimony provided evidentiary support for the verdict. Consequently, we will not disturb that verdict.

PRECLUDING IMPEACHMENT EVIDENCE OF VICTIM'S PRIOR JUVENILE ADJUDICATIONS

The defendant sought to impeach Fawn with evidence of prior juvenile adjudications. The trial court summarized defense counsel's sidebar assertion that he "had information regarding prior juvenile adjudications of both this witness and ... Shannon ... and asked whether or not he may inquire into those." The trial court denied the request under § 906.09(4), STATS.

Although § 906.09(4), STATS., precludes evidence of juvenile adjudications for impeachment purposes, such evidence has been admitted to demonstrate bias under ***Davis v. Alaska,*** 415 U.S. 308, 318-19 (1974).[3] An offer of proof "should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt. The offer of proof must enable the reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained." ***State v. Robinson,*** 146 Wis.2d 315, 327-28, 431 N.W.2d 165, 169 (1988) (citations omitted). Defense counsel failed to make an offer of proof to explain how the juvenile adjudications would disclose bias.[4] As a result, we have nothing to review.

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[3] In ***Davis***, the Supreme Court held that the victim's juvenile record was admissible to show bias, to ensure the defendant's rights under the confrontation clause. ***Davis v. Alaska,*** 415 U.S. 308, 318-19 (1974); U.S. CONST. amend. VI; WIS. CONST. art. I, § 7.

[4] ***Davis*** does not require cross-examination on marginally relevant topics merely because bias might be disclosed. ***Chipman v. Mercer,*** 628 F.2d 528, 531 (9th Cir. 1980) (discussing ***Davis v. Alaska,*** 415 U.S. 308 (1974), and related cases). "[T]he confrontation clause does not prevent the trial court from *weighing the offer of proof* to determine its probative value ...." ***Id.*** (emphasis added).

ADMITTING EVIDENCE OF DEFENSE WITNESSES' PRIOR CONVICTIONS

Andrew contends that the trial court erroneously exercised its discretion in admitting evidence of prior convictions of defense witnesses. Section 906.09, STATS., authorizes the use of prior convictions to impeach a witness.[5] Andrew contends that many of the convictions should have been precluded because they were only marginally relevant and did not involve dishonesty. *See* § 906.09(2), STATS. "Although convictions involving dishonesty are more probative of credibility than those that do not, Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness." ***State v. Kuntz***, 160 Wis.2d 722, 753, 467 N.W.2d 531, 543 (1991).

Defendant Andrew Hodge

Andrew had three prior convictions and moved to exclude two of them, resisting an officer and disorderly conduct, because they did not involve dishonesty. The trial court disagreed because, in its opinion, both crimes evince a disrespect for legal authority "which may also be evidence of a disregard to the seriousness of the oath that is to be taken." We conclude that the trial court properly exercised its discretion in admitting Andrew's three prior convictions.

John Hodge

Andrew's brother John contradicted Fawn's testimony that she spent the night and that there were three beds in the basement bedroom. John had three recent convictions, two for battery and one for fleeing a traffic officer. The defense moved to exclude them because they were not relevant to John's truthfulness. The trial court disagreed because battery was a repeat offense and relevant to the witness's moral turpitude and willingness to abide by the oath. Fleeing an officer also evinces disrespect for the law. We conclude that the trial court properly exercised its discretion in admitting John's three recent convictions.

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[5] However, § 906.09(4), STATS., precludes the admissibility of juvenile adjudications for impeachment purposes, as previously discussed.

Floyd Perkins

Floyd Perkins, the owner of the building, testified that it would have been "pretty hard" to fit three beds in the basement bedroom. The defense moved to exclude the majority of Perkins's twelve prior convictions because they were traffic offenses. The trial court disagreed, stating that Perkins's record shows "a continual pattern of traffic offenses and criminal behavior that remains virtually uninterrupted since 1983." Many of the traffic offenses, such as drunk driving and operating after revocation, also demonstrate "an irresponsible attitude towards the law," which, the court said, may also indicate an "irresponsible attitude to [Perkins's] oath." We conclude that the trial court properly exercised its discretion in admitting the convictions.

FAILURE TO OBJECT TO MODIFIED JURY INSTRUCTION

Andrew argues that the trial court committed plain error because it modified the standard jury instruction to lessen the State's burden of persuasion. The last paragraph of WIS J I—CRIMINAL 140 provides: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." The trial court deleted the last sentence and instead instructed, "You are to determine whether or not the State has proved beyond a reasonable doubt that the defendant is guilty as charged." Andrew's trial counsel failed to object to this modification at the instruction conference. This failure constitutes waiver. Section 805.13(3), STATS.; ***State v. McBride,*** 187 Wis.2d 409, 420, 523 N.W.2d 106, 111 (Ct. App. 1994).

We are precluded from reviewing an unobjected-to, allegedly erroneous jury instruction unless we are persuaded that it is probable that justice has miscarried, that is, that a new trial would probably produce a different result. ***State v. Schumacher,*** 144 Wis.2d 388, 401, 424 N.W.2d 672, 676-77 (1988); ***McBride,*** 187 Wis.2d at 420, 523 N.W.2d at 111-12; § 752.35, STATS. Although strict adherence to the standard jury instructions avoids challenges to ad hoc modifications, we are not persuaded that there was a substantial probability of a different result had the trial court instructed the jury without this modification.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.