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May 19, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1037-CR

State of Wisconsin v. Kurt A. Willick (L.C. #2017CF931)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kurt A. Willick appeals from a judgment of conviction. He claims the evidence presented at his court trial was insufficient to support his convictions on the three charged counts of first-degree sexual assault of a child. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

Willick does not deny that sexual touching occurred with his niece when she was four or five years old between the winter of 1989 and summer of 1990. Rather, the issue before the trial court was, and on appeal is, whether or not he intentionally permitted that touching for the purpose of his sexual arousal or gratification and thus engaged in “sexual contact” with his niece.

On appeal, we will not upset a trial court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Additionally, “when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

In considering the sufficiency of the evidence,

[w]e cannot reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, “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.”

State v. Bohannon, 2013 WI App 87, ¶30, 349 Wis. 2d 368, 835 N.W.2d 262 (citation omitted).

The test is the same “whether the trier of the facts is a court or a jury.” *Krueger v. State*, 84 Wis. 2d 272, 282, 267 N.W.2d 602 (1978) (citation omitted). An appellate court “must examine the record to find facts that support upholding the [fact finder’s] decision to convict.” *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. “If any possibility exists that the trier

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

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). Whether the evidence presented at trial ultimately was sufficient to support the conviction is a question of law we review de novo. *State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

As the State points out, “[s]exual contact includes any intentional touching of the defendant’s intimate parts by the complainant if the touching was done ‘for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.’” *See* WIS. STAT. § 948.01(5) (1989-90). “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” *State v. Drusch*, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). As the State further points out, citing *State v. Traylor*, 170 Wis. 2d 393, 404, 489 N.W.2d 626 (Ct. App. 1992), “[t]o be guilty of sexual assault of a child, ‘the defendant does not have to initiate sexual contact with a child. If the defendant *allows* the contact, that is sufficient to constitute intentional touching because it indicates that the defendant had the requisite purpose of causing sexual arousal or gratification.’” “Where the defendant *permits* sexual contact initiated by a child, there is a permissible inference that the defendant sanctioned it for the purpose of sexual arousal or gratification.” *Id.* at 404.

The relevant evidence from the court trial is as follows. Officer Justin Hennlich testified that in June 2017, Willick came into the police department and confessed to having sexually assaulted his then-four or five-year-old niece approximately twenty-five years earlier. Willick

provided a written statement, which was admitted into evidence at the trial and stated in relevant part:

Approx[imately] 25 years ago I expose myself to a minor child— [H.M.] Not only that but I took advantage of her natural curiosity and allowed her to touch me, not once or twice, but on three separate occasions (3 days in a row). For perhaps ... 10 to 15 seconds each time.

After that I ceased this deviant behavior, however, by then the damage was done. I am sorry and I'm willing to accept whatever just punishment ... this calls for.

Hennlich further testified that Willick told him that he was living in a residence with his niece at the time, and when he got home from work and went into his bedroom, his niece was present when he got completely undressed. Willick told Hennlich that when his niece was looking at his penis, “[h]e asked [her] if she would like to touch it,” and she then began to do so. Willick informed Hennlich that all three incidents of touching occurred in his bedroom on three days in a row.

Willick’s niece, H.M., testified that when she was four years old and she and Willick were living in the same residence, there was an occasion where she and Willick were alone in Willick’s bedroom and Willick “undressed completely” and she “saw his penis.” Willick asked H.M. if she “wanted to touch it,” and she did so. Willick further asked her if she “wanted him to show me how ... to touch a penis,” and he then “repositioned my hand so that it wrapped around his penis,” and he then showed her how to move her hand by “demonstrat[ing] like a stroking motion.”

She testified to a second incident in which she and Willick were alone in his bedroom and she was touching his penis, and she confirmed that she was touching it in “the same way he had showed [her] the first time.” They “kind of stopped what was going on because somebody [was]

run[ning] up the stairs and down the hallway, and ... we were nervous that we were going to be discovered. So we stopped what we were doing and just listened to see if this person would come to the door, and they did not. They ran back down the hallway and back down the stairs.” H.M. continued: “Then one of us, I don’t remember which, locked the door.”

H.M. testified to a third incident in Willick’s bedroom. “He asked me if I remembered to lock the door, and that was a reference to the incident where somebody had walked down the hallway.... We verified that the door was, in fact, locked. And he exposed himself again, and I touched his penis again.” H.M. testified that “it was discussed that this was a secret.”

H.M. further testified that when she was approximately ten years old, there was an incident in which she ended up alone in the upstairs bathroom with Willick as he was getting ready on the morning of his wedding, and Willick “got kind of a little bit of a smile on his face and he looked at me and said, do you remember when you used to touch me.” She recalled another time when she called Willick when she was about sixteen years old and she said to him “why did you do that ... when I was little,” and his response was “well, you wouldn’t understand. At the time my girlfriend lived far away, and it was just really hard for me.”

Investigator Brad Spiegelhoff testified to interviewing Willick approximately a week after he had initially confessed to the sexual contact with his niece. Willick “talked about how [H.M.] grasped his penis and stroked it,” which led Spiegelhoff to believe Willick “was being gratified by it”; however, Spiegelhoff also believed that Willick was attempting to minimize the severity of the sexual interaction he had with H.M. years earlier. Related to this, Spiegelhoff specifically pointed out that in Willick’s written statement a week earlier, Willick had written that the sexual contact lasted for about ten to fifteen seconds, but during Spiegelhoff’s interview

with Willick, Willick now described it as “five seconds of contact” for the first two incidents. Additionally, related to the third incident, Willick indicated that H.M. touched his penis “of her own volition, her own choice” when she came “into the room and just put her hand down his pants and started touching his penis,” and Willick “then changed from 10 to 15 seconds to he immediately removed her hand from his pants.”

Willick also took the stand. He testified that with regard to the first incident of touching he was changing in his bedroom while H.M. was in the room, and when she stared at him in his underwear, he pulled down his underwear and revealed his penis. He added that H.M. then ran out of the room and “as she was running past ... she stuck her arm out and touched it” for just “[a] split second,” “like somebody would touch another person if you were playing tag as a child.” Related to the second incident, Willick stated that he went into the bathroom upstairs to urinate and as he was urinating,

out of the corner of my left eye, all of a sudden I saw a little movement. And it was [H.M.] ... I went into shock. [H.M.’s] face [was] six inches away from my penis.... [S]he turned her head up to my face while she was holding my penis and said, you better not pee on me. I finished urinating. And then I put my penis back in my pants.

With regard to the third incident, Willick testified that he was in his bedroom when H.M. “came up to me on the side of the bed, put her hand ... underneath my elastic sweats and touched my private part.” He indicated that he had not invited her to touch his penis.

With regard to each incident, Willick testified that he was not sexually aroused or gratified. Contradictory to H.M.’s testimony, Willick testified that he never showed or instructed H.M. on how to touch his penis and never asked her if she wanted to see or touch it. On cross-examination, Willick acknowledged that he did not include in his written statement or any of his

interviews with police anything about H.M. merely “tag[ging]” his penis or her touching it while he was urinating.

The trial court found Willick guilty on all three counts. It noted that it had observed the testimony of both H.M. and Willick and found H.M. “to be a very credible witness.” It specifically recounted H.M.’s testimony that with the first touching incident “Mr. Willick repositioned her hand to wrap it around his penis.” It referenced her testimony as to the second and third incidents of touching and that with regard to the third incident, H.M. testified that Willick asked her “if she remembered to lock the door,” “he exposed himself and she touched his penis,” and “it was discussed that this was a secret.” The court credited her testimony to the effect that Willick asked her on the morning of his wedding, when she was ten years old, “Do you remember when you used to touch me?” which the court found to be “a bizarre thing to say.” The court noted H.M.’s testimony as to calling Willick when she was about sixteen years old and asking him why he did that to her when she “was little,” and Willick replied to the effect of “you wouldn’t understand, my girlfriend lived far away, and it was really hard for me.” The court found Willick’s testimony less credible, noting that his “description of the contact has changed periodically ... first from his written statement, Exhibit 1, to his statement to Investigator Spiegelhoff, and finally to his testimony on the witness stand today where he explains away many of the statements that he made in Exhibit 1.”

On the only real issue before the trial court, and before us, that being whether Willick intentionally allowed H.M. to touch his penis for his sexual arousal or gratification, the court found that the State had met its burden of proof. The court found “[p]articularly telling” H.M.’s testimony that with the first touching incident “Mr. Willick had repositioned [H.M.’s] hand to show her how to touch his penis. I do not see an explanation for that conduct that would not

involve an intent to become sexually aroused.” The court specifically found “credible” H.M.’s statement “that on the first occasion he had shown her how to touch his penis,” and that she then “did that the next couple of times.” The court added “[i]f one of the incidents happened within the bathroom,” as Willick testified was the case with the second touching incident, “we’re still talking about a grown man having a child of four hang onto his penis while he was urinating for a period of 10 to 15 seconds. I simply don’t see a scenario in which that does not involve sexual gratification.” The court found incredible Willick’s testimony “about [H.M.] coming into a room and actually reaching down into his pants” as well as his “explanations ... as to why there is no sexual gratification.” It found Willick’s testimony to be “somewhat [of an] attempt[] to extricate himself from” his written statement to police and the interview statement he made with Spiegelhoff.

After thorough review of the record and the trial court’s findings, we conclude that Willick’s three convictions are sufficiently supported by the evidence. The trial court found H.M.’s testimony credible. It could, and did, reasonably infer from the evidence that Willick permitted H.M. to touch his penis and that he did so for the purpose of his sexual arousal or gratification.

Willick claims the evidence was insufficient to sustain the convictions because “the evidence regarding [his] intent was so patently incredible no fact finder could have found guilt,” effectively asserting that the trial court should have believed his testimony over that of H.M.’s. But, the credibility of witnesses is to be determined by the trier of fact, and where the circuit court is the trier of fact, we will not disturb its factual findings so long as they at least can be reasonably inferred from the credible evidence. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (concluding “[s]uch deference to the trial court’s determination of the

credibility of witnesses is justified ... because of ‘... the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.’” (citation omitted)). Again, the court found H.M. to be “very credible” and observed that her recollection and understanding of the events was about what could be expected of a victim who was four years old at the time of the assaults.

Moreover, the circuit court did not solely rely upon H.M.’s testimony, but also relied upon Willick’s own written statement to the police as well as his interview with Spiegelhoff. That written statement included Willick’s admission that he intentionally exposed himself and “took advantage of her natural curiosity and allowed her to touch me, not once or twice, but on three separate occasions (3 days in a row). For perhaps ... 10 to 15 seconds each time.” In that statement, Willick gave no indication that the touchings were in any way accidental, instead he described the touchings as “deviant behavior.” H.M. testified that with the first touching Willick “repositioned [her] hand so that it wrapped around his penis,” and he then showed her how to move her hand by “demonstrat[ing] like a stroking motion.” This was completely consistent with Spiegelhoff’s testimony that during his interview of Willick, Willick “talked about how [H.M.] grasped his penis and stroked it.” The evidence was more than sufficient for the trial court to reasonably infer, as it did, that Willick intentionally allowed, if not invited, H.M. to make contact with his penis for the purpose of his sexual arousal or gratification.

IT IS ORDERED that the judgment is hereby summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals