COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP142 **Cir. Ct. No. 2012JV599**

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

IN THE INTEREST OF ARRON A.-R.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ARRON A.-R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

¶1 CURLEY, P.J.[1] Arron A.-R. appeals the dispositional order, following a bench trial, declaring him delinquent after he was found to have

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

committed two acts of first-degree sexual assault, contrary to WIS. STAT. § 948.02(1)(c). He submits that the evidence was insufficient to support either count. In addition, regarding the second count, he argues the trial court erred in finding he committed first-degree sexual assault when the court found he only had sexual contact with S.F. and not sexual intercourse. This court concludes that sufficient evidence was presented to find that Arron committed count one of the petition alleging first-degree sexual assault. However, with regard to count two, the trial court erred in finding that Arron committed first-degree sexual assault because § 948.02(1)(c) requires a finding of sexual intercourse, not sexual contact. Consequently, the first count is affirmed and the second count is reversed and remanded to the trial court for the entry of a not guilty verdict.

BACKGROUND

¶2 On March 10, 2012, Arron, then thirteen years old, was at a local YMCA playing basketball with several others, including the victim, S.F., who was then fourteen years old. Arron and S.F. had met approximately five days earlier and had texted each other after that encounter. On the day in question, S.F. and Arron left the gym because Arron wanted to talk to S.F. S.F. testified that as they were walking down a hallway, Arron pushed S.F. into a family restroom and, once inside, pushed her into a corner, forced her to the floor and forced her to engage in penis to mouth intercourse until ejaculation. S.F. then broke away and rinsed out her mouth. While she was at the sink, Arron came up behind her, pulled down her shorts and panties, and assaulted her again. With regard to this second assault, the trial court found that "[S.F.] is unable to provide any details of that. I, frankly, doubt that there was penetration at all under these circumstances, and again, all that's required is sexual contact." S.F. testified that when she and her friend C.M. later went to the locker room, S.F. told C.M. what had happened. S.F. further

explained that her mother came to pick up the girls, and after C.M. was dropped off, S.F. told her mother what occurred and her mother contacted the police.

¶3 C.M. testified that she was with Arron and S.F. playing basketball on the day in question when Arron and S.F. left the gym for approximately thirty minutes. C.M. stated that when Arron and S.F. returned, she noticed right away that something was wrong. S.F. "looked really sad" and "had kind of a dazed look on her face." C.M. said that after S.F. and Arron returned, Arron told her that S.F. had given him a "blow job." She also testified that after their return, S.F. sat on Arron's lap and asked him if he had a "boner." Shortly thereafter, Arron showed S.F. and C.M. his penis. C.M. recounted that she and S.F. went to the locker room where S.F. told her what had happened in the bathroom.

¶4 Arron also testified. He denied leaving the gym with S.F. and he denied having any sexual contact with S.F., any sexual conversations, or exposing his penis to the girls. He could give no reason why S.F. and C.M. would make these allegations.

¶5 The police were unable to recover any physical evidence to corroborate S.F.'s complaint. There was no DNA, no semen on S.F.'s clothing, and an examination of S.F. shortly after the incident revealed no injuries to her vaginal or anal cavities.

¶6 A delinquency petition was filed claiming that Arron committed two acts of first-degree sexual assault. A bench trial was held, at which time the trial court determined that Arron was responsible for two counts of first-degree sexual assault. The trial court committed Arron to the Department of Corrections for a year, but stayed the imposition and placed him on probation for one year. This appeal follows.

ANALYSIS

¶7 Arron argues that there was insufficient evidence to support the trial court's findings that he committed two acts of sexual assault pursuant to WIS. STAT. § 948.02(1)(c). As to count one, Arron submits that there was no physical evidence corroborating S.F.'s testimony. He points out that there were no injuries found to her vaginal or anal cavities despite S.F.'s claim that Arron inserted his penis somewhere. He also points out that a UV light found no evidence of bodily fluid or ejaculate anywhere, and there was no semen found on any of the swabs sent to the lab, nor was there evidence of semen on S.F.'s underwear. Arron further notes that the location of the attack was a busy bathroom, suggesting that someone should have either heard or seen the assault had it actually occurred. He also points out that C.M. testified that after the assault S.F. sat on Arron's lap and asked him if he had a "boner." Arron argues that some might consider this odd behavior for a person claiming to have just been forced into performing fellatio.

¶8 In addition, as to count two, Arron submits that the trial court's mistaken belief that WIS. STAT. § 948.02(1)(c) encompassed sexual contact as well as sexual intercourse requires this court to reverse his conviction for that count and remand the case to the trial court so that a finding of not guilty can be entered.

¶9 The State responds that, as to count one, the trial court found S.F.'s version of the events more credible than Arron's. S.F.'s allegations were also corroborated by her friend C.M. As to the second count, the State encourages this court to either amend the dispositional order to second-degree sexual assault, found in WIS. STAT. § 948.02(2), or attempted first-degree sexual assault, found in WIS. STAT. §§ 948.02(1)(c) and 939.32. As support for its request, the State cites ***State v. Moua***, 215 Wis. 2d 511, 573 N.W.2d 202 (Ct. App. 1997), where this

court found that second-degree sexual assault was a lesser-included offense of first-degree sexual assault.

¶10 The standard for determining whether sufficient evidence supports the verdict is well established. ***State v. Watkins***, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244. This court cannot reverse the dispositional order unless the evidence, viewed most favorably to the State and the trial court's order, "'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* ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 67 (citation omitted). If any possibility exists that the factfinder could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, this court may not overturn the dispositional order, even if this court believes that the trial court should not have found him delinquent. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Furthermore, "[a] conviction may be based in whole or in part upon circumstantial evidence." ***State v. Hirsch***, 2002 WI App 8, ¶5, 249 Wis. 2d 757, 640 N.W.2d 140. Circumstantial evidence is often more probative than direct evidence; indeed, circumstantial evidence alone may suffice. *See* ***Poellinger***, 153 Wis. 2d at 501. In assessing whether sufficient evidence supports a verdict, "[f]indings 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 the witnesses." *See* WIS. STAT. § 805.17(2) (2013-14). We will therefore not upset a trial court's findings of fact unless they are clearly erroneous, nor will we reweigh evidence or assess witness credibility. ***Dickman v. Vollmer***, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. A trial court erroneously exercises its discretion when it makes an error of law. ***State v. Peters***, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991).

¶11 As to the first count, after reviewing the record and the trial court's findings, this court is satisfied that sufficient evidence was presented to satisfy the elements of the statute. WISCONSIN STAT. § 948.02(1)(c) reads: "Whoever has sexual intercourse with a person who has not attained the age of 16 by use or threat of force or violence is guilty of a Class B felony." Under WIS. STAT. § 948.01(6), sexual intercourse includes fellatio. The trial court accepted the testimony of S.F. She testified that she was pushed into a corner, forced to the floor, and forced to engage in penis to mouth intercourse until ejaculation. In addition, although C.M. was not in the bathroom during the incident, she corroborated S.F., testifying that Arron told her that S.F. had given him a "blow job." S.F. further testified that she was scared and embarrassed. This may account for her erratic behavior after the assault. Further, inasmuch as there was no vaginal intercourse, it is not surprising that there was a lack of physical evidence. Consequently, for all of the foregoing reasons, sufficient evidence supports the disposition for count one.

¶12 With regard to count two, on the other hand, it is clear that the court made a mistake of law. As noted, the trial court found that there was no "penetration," but reasoned that Arron still violated the statute because "all that's required is sexual contact." Unfortunately, the trial court was mistaken. The version of WIS. STAT. § 948.02(1)(c) in effect when the offenses were committed requires "sexual intercourse," which differs from "sexual contact." *See* WIS. STAT. § 948.01(6) (defining sexual intercourse); § 948.01(5) (defining sexual contact). Perhaps the trial court believed that first-degree sexual assault, *see* WIS. STAT. § 948.02(1)(c), included sexual contact because the statute for second-degree sexual assault, *see* WIS. STAT. § 948.02(2), includes both sexual intercourse

and sexual contact. Whatever the reason for the error, it is clear that the evidence as found by the trial court does not support the disposition.

¶13 The State urges this court to correct the trial court's mistake and amend the dispositional order to either second-degree sexual assault or attempted first-degree sexual assault, citing ***Moua*** for support. In ***Moua***, the defendant conceded that he had sexual intercourse with a teenager after they were married in a Hmong ceremony in 1991; the primary issue at trial was his wife's age. ***Id.***, 215 Wis. 2d at 513-14. The State alleged that Moua's wife was twelve when he had sexual intercourse with her. ***Id.*** at 513. Moua's defense at trial was that his wife was older than twelve when they were married. ***Id.*** at 514. At trial, some evidence supported a finding that she was twelve when she was "married" to Moua, some evidence suggested that she was actually sixteen, and other evidence—specifically, testimony from the victim's mother—put the wife as being thirteen years old when the marriage and intercourse took place. *See* ***id.*** at 514-15. Given the strength of the mother's testimony, the trial court, on its own motion, decided to instruct the jury on second-degree sexual assault. *See* ***id.*** at 517. The second-degree sexual assault statute at the time stated it was unlawful to have sexual contact or sexual intercourse with a person who had not attained the age of sixteen years. *See* WIS. STAT. § 948.02(2) (1991-92). The jury found Moua guilty of four counts of second-degree sexual assault. ***Moua***, 215 Wis. 2d at 513.

¶14 On appeal, Moua argued that second-degree sexual assault was not a lesser-included offense of first-degree sexual assault. ***Id.*** at 519. But this court found that second-degree sexual assault *was* a lesser-included offense of first-degree sexual assault. ***Id.*** at 520. Consequently, this court stated that the trial court could give a lesser-included offense instruction as long as there was a

reasonable basis in the evidence for the jury to acquit on the greater offense and to convict on the lesser offense. *See* ***id.*** at 520-21.

¶15 This case is different from ***Moua***. In this case, there was no discussion of whether the evidence supported a lesser charge before the verdict was rendered. The trial ended. The case is on appeal. It is not the role of this court to make findings. It is the function of the *circuit court* to sift through all the evidence and determine the weight it should be given. *See* ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998) (court of appeals is not a fact-finding court). In order to comply with the State's request, this court would have to make a finding that Arron's conduct constituted either an "attempt" or a second-degree sexual assault. This court declines to do either. The time to have asked the court to amend the charge was at the conclusion of the trial or by a post conviction motion. It is too late now.

¶16 Consequently, the first count is affirmed and the second count is reversed. The case is remanded to the trial court to enter a not guilty verdict to count two.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4. (2013-14).