

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

September 21, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

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.

**No. 99-0675**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN THE INTEREST OF FREDERICK F.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**FREDERICK F.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
M. JOSEPH DONALD, Judge. *Affirmed.*

SCHUDSON, J.<sup>1</sup> Frederick F. appeals from the adjudication of delinquency and dispositional order, following a court trial, for second-degree

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(e), (3), STATS.

recklessly endangering safety, substantial battery while armed, and carrying a concealed weapon. He contends there was insufficient evidence to support the adjudication. This court disagrees and affirms.

The charges against Frederick stemmed from an attack, on Enoch A., that occurred on a Milwaukee County bus at approximately 7:40 a.m. on November 26, 1997, at or near the intersection of North 27th Street and West Highland Avenue. At the time, Frederick lived in an apartment on North 27th Street and regularly traveled to school, by bus, on the route on which the incident occurred. It was undisputed, however, that on November 26, Frederick's mother drove him to school. It was also undisputed that the school day began at 8:00 a.m., but, on November 26, Frederick did not arrive until approximately 8:30 a.m.

At trial, the State called four witnesses who identified Frederick as Enoch's assailant. Frederick called three alibi witnesses who placed him at home at the time of the assault.

Enoch identified Frederick in court and testified that Frederick attacked him and repeatedly punched and stabbed him while they were riding the bus to school. He testified that he recognized Frederick from school and also identified him from photographs a detective showed him at the hospital.

Damien P., Enoch's friend, also identified Frederick in court. Damien testified that he saw Frederick swinging a knife at Enoch and, although he did not actually see the blade enter Enoch's head, he saw blood coming from Enoch's head wound. On cross-examination, Damien also testified that he had previously identified Frederick when viewing unlabelled photographs of students shown to him by a school security aid via a computer monitor screen.

Sherman Malone, a bus passenger who knew neither Enoch nor Frederick, identified Frederick from photographs a detective showed him within an hour after the incident. He also identified Frederick in court. He testified that he had an unobstructed view of Frederick swinging a knife and stabbing Enoch.

Naomi T. testified that she identified Frederick from four photographs a detective showed her at the scene. In court, she also identified Frederick as the person she witnessed leaving the bus and fleeing the scene on foot.

Daniel F., Frederick's brother, was the first alibi witness. He testified that on the morning of the incident, he saw Frederick at home several times between 7:00 and 8:00. On cross-examination, however, Daniel admitted he did not know the date or day of the week of the incident. He also acknowledged that the first time anyone asked him to account for his brother's whereabouts on the morning of November 26, 1997, was sometime after Frederick's arrest on December 16, 1997.

Monserate Perez, Frederick's mother, testified that she drove Frederick to school on the day of the incident, after calling the school between 7:55 and 8:05 a.m. to notify personnel that Frederick was going to be late. She also testified that she and Jolanda Cannon went to breakfast together at McDonald's that morning. She admitted that because she was scared for Frederick, she lied to authorities regarding his whereabouts during the "week or two" he was hiding before his arrest.

Jolanda Cannon, who lived in an apartment above Frederick and his family, testified that she observed Frederick using the telephone in his apartment at 7:45 a.m., and again when she returned a few minutes before 8:00 a.m., on the

day of the incident. She further testified that she was in the car when Frederick's mother dropped him off at school that day. On cross-examination, however, she testified that she and Frederick's mother did not stop at any restaurant for breakfast on that date.

In its oral decision finding Frederick delinquent, the trial court commented:

[W]hen there are different witnesses testifying with respect to an alibi, it is primarily important to take notes as to their ability in remaining consistent either with respect to issues of time or location of the sequence of events.

And in reviewing the testimony with respect to the defense witnesses, ... I can't help but notice all of the inconsistencies [sic] with respect to key issues ....

....

There were just too many inconsistencies [sic] in the alibi witnesses['] testimony in order for this court to find this to be credible testimony.

When I reviewed the testimony of the State, the State's witnesses, going through them one at a time, and their testimony remained consistent with respect to what they observed in the—the incident and the time the sequence of events and the individual getting pushed off the bus.

....

... I just want to add in terms of also what played in my reasoning is the event after this incident when the police were looking for Frederick. If one has a sound alibi that is going to hold up, you just don't disappear. You state your alibi. You find your witnesses, and you make your case.

This alibi was just completely incredible, and for those reasons, this Court has found the State has met its burden of proof. I do find the juvenile delinquent.

As the parties agree, *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990), and *State v. Tarantino*, 157 Wis.2d 199, 458 N.W.2d 582

(Ct. App. 1990), summarize this court’s standard of review for a challenge to the sufficiency of the evidence. The supreme court explained:

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier 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.

*Poellinger*, 153 Wis.2d at 507, 451 N.W.2d at 757-58 (citation omitted). “‘The credibility of the witnesses and the weight of the evidence is for the trier of fact.’” *Id.* at 504, 451 N.W.2d at 756 (quoted source omitted). This court will substitute its judgment for that of the trial court only 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.” *Tarantino*, 157 Wis.2d at 218, 458 N.W.2d at 590.

Frederick contends that his alibi defense was “as credible as the evidence adduced by the prosecution” and showed that he “could not have committed the offense.” He accuses the trial court of focusing on “minor inconsistencies” in his alibi witnesses’ testimony and argues that the trial court erred by “fail[ing] to give any weight to [his] alibi defense.” He maintains that, because the trial court was bound by the jury instruction that “[i]f you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant’s innocence, you should do so and return a verdict of not guilty,” *see* WIS J I—CRIMINAL 140 (footnote omitted), the trial court was required to acquit him. Frederick, however, ignores the footnote to the instruction, which clarifies:

The rule that the evidence must exclude every reasonable hypothesis of innocence does not mean that if any of the evidence brought forth at trial suggests innocence, the jury cannot find the defendant guilty. The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence. Accordingly, the rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence which the jury believes and relies upon to support its verdict.

WIS J I—CRIMINAL 140, n.2 (quoting *Poellinger*, 153 Wis.2d at 503, 451 N.W.2d at 756). Therefore, as the State correctly notes in its brief to this court, under *Poellinger*, the “multiple eyewitness identifications of Frederick F. provide an ample basis for the trial court’s finding of guilt in this case.”

Frederick also argues that the trial court’s comment regarding his “alleged disappearance and failure to advise police of the alibi is wholly inappropriate” and violative of his “right to due process of law and a fair trial under the 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendments to the United States Constitution.” He fails, however, to cite any statutory or case law in support of this contention. Further, as the State notes, the trial court’s comment was “really no more than a logical and legally permissible observation that flight may be an indicia [sic] of one’s guilt.” See WIS J I—CRIMINAL 172 (“Evidence of the conduct or the whereabouts of a person after a crime has been committed or after that person has been accused of crime are circumstances which you may consider along with all the other evidence in determining guilt or innocence.”) (footnote omitted). The State observes:

The court never shifted any burden of proof to Frederick F., but since Frederick F. chose to put forward an alibi defense, it is perfectly logical and permissible for the trier of fact to look at the timing when such alibi information was first put forward in terms of assessing the credibility and accuracy of the alibi information.

Frederick does not reply. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

*By the Court.*—Order affirmed.

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

