

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 1997

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. 97-1630

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF JOSEPH J.J., A PERSON UNDER THE
AGE OF 18:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH J.J.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

VERGERONT, J.¹ Joseph J.J., a minor, (date of birth
November 11, 1980) appeals from a judgment of delinquency based on findings

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

that he committed burglary contrary to §§ 943.10(1)(a) and 939.50(3)(c), STATS.; criminal damage to property contrary to §§ 943.01(1) and (2)(d) and 939.50(3)(d), STATS.; and false alarm contrary to §§ 941.13 and 939.51(3)(a), STATS. The charges arose out of a June 8, 1996 break-in and damage to property at Boscobel High School and the setting off of the school's fire alarm. Joseph was fifteen at the time. Joseph contends on appeal that the court erred when it referred to another file concerning him in making its findings and that, but for this error, there is a reasonable possibility that the outcome of the proceeding would have been different. We conclude that even if the trial court erred in referring to another file concerning Joseph, that error was harmless. We therefore affirm the judgment of delinquency.

BACKGROUND

Steven R. testified at trial that on the evening of the incident, he was in the area of Boscobel High School around 9:30 p.m. with Craig B. and John P. The boys were riding their bikes around the parking lot. Joseph came up to them and told them he had broken into the high school before and wanted to do it again and did they want to come along. They said no. Steven observed that Joseph had something under his shirt, under his arm, and saw him walk away in the direction of the high school. Before Joseph walked away, he dropped his bicycle off at Steven's house, which is near the high school.

According to Steven, soon afterwards, the three boys—Steven, Craig and John—went to the high school and saw that the glass in the backdoor was broken. Steven reached through the door and opened it and the three went inside and walked toward the office because they heard noises coming from there. Steven stated that when they got to the office, he saw the fax machine was on the

floor, some drawers were opened and Joseph was there opening drawers and looking around. Joseph left the office and a few minutes later Steven heard the fire alarm going off. Steven left the building immediately, going out one door and Craig and John went out a different door. He met the two of them near the swimming pool. As they were leaving, they noticed squad cars approaching the high school. Steven went back to his house. When Joseph came to get his bike, Steven did not see anything under Joseph's arm anymore. Steven asked Joseph why he pulled the fire alarm, or who pulled it, and Joseph said, "I did it" and "raised his hand like he was bragging about it." John was present at the time.

John testified but Craig did not. John's testimony was essentially the same as Steven's, adding certain details. John said that Joseph had a claw hammer under his shirt and he pulled it out, down his sleeve. He also testified that when Steven opened the door through the broken glass into the high school, he put his hand over his shirt so his fingerprints would not get on the door. Although Steven testified that he saw no one else in the building besides Joseph, John testified that he did see someone else, in "like a Green Bay Packers" jacket when he was in the hallway. That person was walking toward the side doors and John did not know who it was. John also testified that after the incident, in addition to Joseph's saying that he pulled the fire alarm in response to their questions, Joseph said he smashed the fax machine and threw some stuff around the office. John and Steven stayed at Steven's house for a while after Joseph left on his bicycle and then went downtown, where police officers picked them up. John estimated that the meeting with Joseph at Steven's house after the incident was short, "maybe about four minutes."

Police Officer James Reynolds testified that that evening he received a call from dispatch to go to the high school. When he arrived at approximately

10:14 p.m., the fire alarm was still going off. Officer Reynolds stated that he did not see any juveniles in the area at the time. He investigated the damage to the school, and saw that the glass in the door at the point of entry was broken inward and was on the floor. Based on his observations, no one would have been able to step around it. There was also broken glass in the office and it was his opinion that you probably could go around it because the amount of glass was small and was in large chunks. He observed holes in the office cabinets that were too small to have been caused by a fist. Officer Reynolds believed they were caused by a weapon or an implement and they were consistent with the hole a hammer would make in the cabinet. No hammer was recovered at the scene or from Joseph.

Officer Reynolds took statements from Steven, John and Joseph, and they viewed and signed the written statements he prepared. Officer Reynolds took Joseph's statement on June 17, 1996. Joseph told the officer that he left his house at approximately 7:00 p.m. and went to Dick's Supermarket to return a video. Then he went to Quent's Liquor and purchased some items there. About 9:00 p.m., he went to Rufus' where he stayed for one to one-and-one-half hours. He went back to Dick's Supermarket and rented a Nintendo game between 9:30 and 10:00 p.m. Then he went to Chad P.'s house, talked to Chad for about five minutes and then went home.

The State put on witnesses to contradict Joseph's account to Officer Reynolds that evening. Rufus T. testified that Joseph was at his house on the evening of June 8, 1996. Rufus had previously told Officer Reynolds that the time was in the neighborhood of 7:30 to 8:00 p.m. However, Rufus testified at trial that Joseph left between 7:00 and 7:30 p.m. and that he could not estimate how long Joseph had stayed. Steven was also at Rufus' house at that time and Joseph spoke

to both of them. Chad testified that he is acquainted with Joseph and he did not see Joseph on the evening of June 8.

Quentin Hurtz, who owns a retail store in Boscobel, testified that he was working that evening and at approximately 7:10 p.m., Joseph came into his store to buy some candy and a can of soda. Joseph, according to Quentin Hurtz, stayed about ten minutes. Don Karasek, store director for Dick's Supermarket, testified that the store's records showed that at 10:20 p.m. on that evening a video entitled "Batman Returns" was checked out on Laura J.'s account (the name of Joseph's mother). Earlier that evening another tape was returned on that same account.

Joseph testified and gave an account of his activities that evening which was inconsistent with Officer Reynolds' testimony of Joseph's previous statement to him. Joseph testified that he told Officer Reynolds that he stopped to speak with Chad but that Chad was not home. Although Officer Reynolds showed him the written statement, Joseph testified that he "didn't really read the whole thing; he skimmed through it; then he signed his name." Joseph denied ever speaking to either Steven or John about breaking into the school that night or telling them that he had broken into the high school previously. He denied having his bicycle that night. He acknowledged that he told Officer Reynolds that he was at Rufus' from 9:00 p.m. and stayed there for an hour to an hour and a half, but testified that he was unsure of the time and that probably was not true, but he could not say whether he was there between 7:00 and 7:30 p.m. as Rufus had said. Joseph stated that he had not remembered that he had seen Steven at Rufus' house, but now that Rufus said so, he thought he did. From the time Joseph left Rufus' house until the time he checked out the movie at Dick's Supermarket, no one saw him.

Joseph walked to Dick's from the downtown area, went in and looked through the movies, looked through the Nintendo games, found the one he wanted and checked out Batman Returns. He estimated that he was in Dick's Supermarket about twenty-five minutes. His dad came to the video store in a car and he went home with his dad. His dad "chewed [him] out" because it was past his curfew, which was 10:00 p.m. His dad also told him that there were police officers at the high school and the fire department was there.

Joseph testified that he did return a video to Dick's earlier that evening and did not pick up another one then because he just did not feel like renting one. He thinks his family has a claw-foot hammer but he did not have one that evening. Joseph stated that he was not wearing a watch that evening and he never wears a watch so he was pretty much guessing when he gave Officer Reynolds the time estimates for that evening. However, he was sure he was at Dick's after 10:00 p.m.

Joseph testified that in June of 1996, he did not consider John and Steven his friends. They were individuals that he would speak with if he met them on the street. In April of 1996, an obscene phone call was placed from Steven's house and the person, who left the message on the answering machine, gave Joseph's name. Police officers played the tape for Joseph and asked him if he knew who it was. Joseph identified the voice as John's. Joseph cooperated with the officers and agreed to testify in court but was not required to do so.

Joseph's father confirmed that about 10:30 p.m. his son drove home with him that evening from Dick's supermarket. He testified that he drove around looking for Joseph before going to Dick's because his son was not home by 10:00 p.m. He did not recall whether Joseph had his bicycle with him but he knows that

Joseph did not ride his bicycle home; he rode in the car with him. Joseph's father stated that Joseph did not appear to him to be winded or upset and there appeared to be nothing unusual. He has a couple of claw hammers at home but he does not recall that one was missing that night and he did not see Joseph with one that evening.

A private investigator employed by Joseph's counsel conducted a time experiment with Joseph whereby he had Joseph run from Boscobel High School to Dick's Supermarket. It took Joseph five minutes and fifteen seconds on a very direct route. The investigator used his odometer to determine the distance and any way he did it, the distance was a half mile. No allowance was made in this experiment to have Joseph stop at Steven's house. The investigator thought "it would be faster if you rode a bicycle," but he did not conduct the experiment with Joseph riding a bicycle.

The trial court determined that Joseph had committed the charged offenses. The court found that John and Steven, as well as Joseph, were involved in the incident and that John and Steven were trying to lay all the blame on Joseph. The court found that the only way Joseph could get to Dick's Supermarket by 10:20 p.m. was on a bicycle and that Steven's and John's testimony was that he did have a bicycle. The court also found that two disinterested witnesses—Chad and Rufus—contradicted Joseph's statement to Officer Reynolds about his whereabouts that evening, and it was the inaccuracy of Joseph's statement that the court was "hanging its hat on, primarily...." The court did not find Joseph's explanation for the inaccuracy of the statement—that the officer wrote down what Joseph said incorrectly and Joseph did not read it—to be credible. The court reasoned:

Well, he knew the police officer was investigating a burglary and a theft and false fire alarm ... even at 15 years old, he—and having been involved with the law before absolutely as indicated by the Court’s file here. Since this isn’t the first case that we’ve had, he understands the importance of making a statement truly, correctly, and accurately. And the statement was extremely inaccurate, which puts his credibility in serious doubt.

Although the court did not believe the testimony of John and Steven with regard to the limits of their involvement, it found their testimony concerning their being in the building with Joseph and his going through the drawers to be credible. Their testimony was corroborated by Rufus’ and Chad’s testimony and by a neighbor’s report to the police that he saw a lot of kids running inside the school. The court also reasoned that Joseph’s checking out the video at 10:20 p.m. did not make sense, except for the fact that he needed an alibi and would have a record of that video checkout.

DISCUSSION

When a trial court sits as a trier of fact, we uphold its findings of fact unless they are clearly erroneous and give due regard to the court’s opportunity to judge the credibility of the witnesses. Section 805.17(2), STATS. We review questions of law de novo. *Ball v. Dist. No. 4, Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). When a trial court makes a legal error, we reverse the conviction unless the State establishes that there is not a reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231 (1985).

Joseph argues that, in referring to the “court’s file” as an indication that Joseph was “involved with the law before,” the trial court was considering another juvenile case file concerning Joseph, which was not in evidence, was not

subject to judicial notice, was not properly admissible as other acts evidence under § 904.04, STATS., and the disclosure of which was not supported by a conclusion that disclosure was in the interests of the juvenile or the administration of justice as required by § 938.35, STATS. This error, Joseph contends, was not harmless and the adjudgment of delinquency therefore must be reversed. The State does not contend that there was no trial court error, but argues that there is no reasonable possibility that any error contributed to the adjudgment of guilt.

It is unclear to us what “court file” the court was referring to. However, Joseph argues that it is a prior juvenile proceeding concerning him, and the State does not dispute that, so we will assume that to be true. We take the State’s failure to argue that there was no trial court error as a concession that there was. We will assume, without deciding, that it was error for the trial court to consider the existence of a prior juvenile proceeding concerning Joseph and will decide only whether the error was harmless. We conclude that it was harmless.

We begin with an analysis of the purpose for the court’s reference to the “court file.” It is clear from the context to this reference that its significance is not—as Joseph suggests in places in his brief—that Joseph had committed prior “bad acts.” Rather, the court is referring to that file because it showed that Joseph had “been involved with the law before,” and it was therefore not believable to the court that Joseph did not understand, when Officer Reynolds took his statement, that it was important to be accurate and to read the statement over carefully before signing it. We understand the court to be saying that any fifteen-year-old would know that (“even at 15 years”), and one who had had prior involvement with the law would certainly know that.

The court had before it other evidence that Joseph had been involved with an investigation of a juvenile or criminal offense. Defense counsel presented testimony of the obscene phone call and Joseph's role in that investigation after he was implicated by the caller giving his name. Joseph listened to the tape, identified the voice for the investigating officer, and agreed to testify. Thus, there is a reasonable basis in the admissible evidence from which the trier of fact could conclude that Joseph had previously given a statement to officers when there was an investigation of an offense in which he was implicated and, based on that experience, Joseph would understand the importance of giving accurate statements to an investigating officer. We also conclude that, even without evidence that Joseph had been involved in any prior investigation, a trier of fact could reasonably conclude that it was not credible that a fifteen-year-old, who knew he was being investigated in connection with criminal offenses, would only "skim" a statement he had given orally to a police officer and not "really read the whole thing" before signing it.

Joseph argues that the evidence against him was weak and, therefore, had it not been for the trial court's doubt of his credibility because of "the other court file," there is a reasonable possibility that the outcome would have been different. We do not agree with Joseph's analysis of the evidence. Although the court did not believe Steven's and John's characterization of their role, it did find their overall testimony credible. A fact-finder need not reject all of a witness's testimony because it finds certain aspects not credible, and credibility of a witness is peculiarly a matter for the trier of fact. *In re Paternity of A.M.C.*, 144 Wis.2d 621, 636, 424 N.W.2d 707, 713 (1988). As the trial court noted, the testimony of each (Steven and John) corroborated the testimony of the other in important respects and was consistent with the testimony of neutral witnesses.

Joseph's claim that his statement taken by Officer Reynolds was inaccurate, and his explanation for that, were not the only bases for disbelieving his testimony. He provided no explanation for his whereabouts between the time he left Rufus' house and the time he was at Dick's Supermarket to check out a video, a period of two hours or more: he was out, around town, but no one saw him.

Joseph emphasizes the lack of physical evidence linking him to the offenses, such as fingerprints,² the instrument used to smash the glass and produce holes in the cabinet, and the lack of glass in the shoes he gave the officer. We do not agree that the absence of this evidence makes the State's case against Joseph weak. An instrument, such as a hammer, could have been easily disposed of by Joseph immediately after the incident. We observe, moreover, that there was a credible explanation for the lack of glass in Joseph's shoes—he knew before Officer Reynolds came to collect them the next morning that an officer was coming to collect his shoes to have them examined to see if they contained glass.³

² Officer Reynolds testified that fingerprints were taken from the fax machine but they did not match with either John's, Steven's or Joseph's. He did not check to see if they matched with any of the people who worked at the school. He did not test the computer for fingerprints. Efforts to obtain fingerprints from the cabinet doors and some outside windows were unsuccessful.

³ Officer Reynolds asked another officer to pick up the shoes of suspects later in the evening of the incident. Officer Reynolds wanted Joseph's shoes because Joseph was a suspect based on information he had obtained from either Steven, John or Craig. Another officer went to Joseph's house sometime around 11:00 or 11:30 that evening and told Joseph he wanted to check his shoes for glass. That officer looked at the shoes Joseph showed him at that time but did not take them with him. After the officer left Joseph's house, Joseph heard Officer Reynolds saying on the "cop scanner" that the shoes should have been taken. The next morning Officer Reynolds went to Joseph's house and asked for the shoes Joseph wore the night before. Joseph gave him a pair of shoes that were by the backdoor in the kitchen. Joseph testified that these were the shoes he wore that evening. The shoes were sent to the crime lab and did not show any embedded shards of glass. Shoes were also taken from John and Steven and those shoes showed embedded shards of glass. (Officer Reynolds' testimony was that the shoes were "from the other individuals who testified here" and we assume that means John and Steven.) Officer Reynolds had no idea whether there was a way to remove shards of glass that were embedded in soles of shoes.

There were a number of bases in the admissible evidence on which a reasonable fact-finder could disbelieve Joseph's explanation for the inaccuracies he claimed in his statement to the police and could disbelieve his account at trial of his activities that night. There was ample testimony, excluding the referenced court file, from which a reasonable fact-finder could conclude that Joseph was guilty of the offense beyond a reasonable doubt. We conclude there is not a reasonable possibility that the court's consideration of Joseph's prior juvenile file, as an indication that Joseph knew the importance of giving an accurate statement to an investigating officer, contributed to the adjudgment of delinquency.

By the Court.—Judgment affirmed.

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

