COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2819-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAKER ALKHALIDI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Shaker Alkhalidi appeals from a judgment convicting him of two counts of first-degree sexual assault and from an order denying his postconviction motion. He claims that the trial court erred in finding that there was sufficient evidence to convict him and that the trial court

erroneously exercised its discretion in sentencing him to twenty years' incarceration.

Because we are satisfied that the evidence was sufficient to prove the appellant's guilt beyond a reasonable doubt, and that the trial court properly exercised its discretion at sentencing, we affirm.

I. BACKGROUND.

On the night in question Alkhalidi was staying at the home of his girlfriend, Tracey G., the mother of one of the victims, Ashley G.[1] The other victim, April C., a chum of Ashley's, was also spending the night. The girls, then eight years of age, claimed that during the course of the evening Alkhalidi forced them, in separate incidents, to fondle his penis and perform oral sex. The matter came to light the next day when the girls told Tracey G. about it before going to school. Tracey G. did not immediately confront Alkhalidi. Instead, she called the police after Alkhalidi left in the morning. Alkhalidi learned of the allegations when his brother called and told him. Alkhalidi claims that he attempted to talk to Tracey G. and explain that he had done nothing wrong before fleeing to Kentucky, apparently on the advice of his brother, where he was arrested. Alkhalidi was later charged with two counts of first-degree sexual assault.

At the court trial, both victims testified, as did Alkhalidi. The trial court found that the girls' testimony was more credible than Alkhalidi's. Relying on the testimony of the victims, the trial court determined that Alkhalidi had had

[1] The victims in this case were under the age of thirteen. The appellant's counsel failed to follow the dictates of RULE 809.19(2), STATS., and refer to the victims by initial. We caution counsel to refrain from identifying child victims in future appeals as the briefs filed in these matters become public records.

sexual contact with them for the purpose of sexual gratification, and Alkhalidi was convicted of both counts. He received a sentence of ten years on each count to be served consecutively.

II. ANALYSIS.

Evidence at Trial

Alkhalidi acknowledges that the testimony of the victims, if believed, would be sufficient to convict him as they testified that he had sexual contact with them. He argues, however, that their testimony was so "replete with inconsistencies" that the allegations are "patently incredible," particularly if one compares their trial testimony with the initial police reports.[2]

This court is obligated to affirm a 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. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). This standard applies regardless of whether it is a court trial or a jury trial. *See* ***Thomas v. State***, 92 Wis.2d 372, 384-85, 284 N.W.2d 917, 924 (1979). Determining the credibility of the witnesses and the weight to be given to the testimony of each witness is the duty of the trier of fact. *See* ***State v. Daniels***, 117 Wis.2d 9, 16, 343 N.W.2d 411, 415 (Ct. App. 1983). In order to overturn the fact finder's determination that a

[2] Alkhalidi fails to list every inconsistency he claims occurred. He invites us to both examine the entire record to discover every inconsistency and then to compare the trial testimony with Exhibit 1, the initial police report. It is not the function of the appellate court to independently search the record for the purpose of securing evidence favorable to one side or the other. That is the task of appellate counsel.

witness who gave inconsistent testimony is credible, the testimony must be inherently or patently incredible. This testimony must "conflict with the uniform course of nature or with fully established physical facts [such] that no reasonably intelligent man could give it credence." ***Davis v. State***, 93 Wis.2d 319, 324, 286 N.W.2d 570, 572 (1980) (citation and internal quotation marks omitted).

The State concedes that there are inconsistencies in the victims' testimony. The State, however, contends that their testimony was neither inherently nor patently incredible and that there was ample evidence in the record to support the trial court's findings of guilt. We agree.

Although the girls' testimony was different in some minor respects, a review of the record reveals no inconsistencies concerning the major events. Both girls testified that the evening started with a game of chase between Ashley and Alkhalidi, with Ashley hiding from Alkhalidi underneath the bathroom sink. Ashley testified that while she was hiding there, Alkhalidi came in and urinated. April testified she saw Ashley underneath the sink and saw Alkhalidi enter and close the door. Both girls recalled that after they told Alkhalidi that Ashley had been hiding in the bathroom and saw his penis, he told them that they would see his penis again. Ashley and April also recounted that shortly thereafter, Alkhalidi separately took each of them into Ashley's closet, and when they were in the closet, Alkhalidi ordered each of them to touch his penis with their hands and mouths. They both were also consistent in their testimony that April went into the closet first, followed by Ashley. They also both related that they later witnessed Alkhalidi in the kitchen eating food and playing with his penis and that Alkhalidi came into the living room and placed his penis in Ashley's hair while he was kneeling behind her. Finally, they also were in agreement that they did not tell Ashley's mother about the assaults because Ashley initially did not want her

mother to know. Despite their recollections of different details of the events and their failure at trial to recall some details they reported earlier, their accounts reported the events in the same sequence and their recollections were consistent and credible.

In a case strikingly similar to the facts present here, where this court was confronted with a child sexual assault victim whose trial testimony contained inconsistencies, we noted:

> The child's testimony alone was legally sufficient to satisfy each element and support the jury's verdict. Apparently, the jury rejected Sharp's version of the events and resolved any inconsistencies in the victim's various statements in a manner favoring a guilty verdict. Nothing in the child's account, either directly or as related by other witnesses, was inherently or patently incredible in any way.

State v. Sharp, 180 Wis.2d 640, 659-60, 511 N.W.2d 316, 324-25 (Ct. App. 1993). Here, the trial court rejected Alkhalidi's version of the events and resolved the inconsistencies in a manner favoring a guilty verdict. Moreover, the girls' testimony was not inherently or patently incredible as nothing in their testimony "conflict[ed] with the uniform course of nature or with fully established physical facts." ***Davis***, 93 Wis.2d at 324, 286 N.W.2d at 572.

Sentencing

Alkhalidi asserts that the trial court "misused its discretion." He contends that the sentences imposed were "unduly harsh given the circumstances of the facts before the court." He claims that a twenty-year sentence was not warranted because no "sufficiency [sic] aggravated circumstances" existed. His argument that the circumstances were not aggravated is based upon his assessment that, even if you believe what the victims allege, their version of the events

"constitute[s] only brief sexual contact" and, thus, "the sentence imposed was unduly harsh."

Alkhalidi also argues that the trial court compounded its erroneous exercise of discretion by failing to consider his lack of a criminal record and by simultaneously inappropriately considering his "proclamation of innocence" in sentencing him. We disagree.

A sentence will be deemed harsh and excessive only when the sentence is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

The trial court, in the order denying the motion to modify sentence, stated:

> The defendant is entitled to maintain his innocence; however, based on the seriousness of the offenses, the defendant's background, the impact on the two eight-year[-] old victims, and the absolute need for community protection from this kind of activity, the court imposed the sentence it did. The court noted that the defendant had no prior record. It also noted that the legislature saw fit to increase the penalty from [twenty] to [forty] years for first[-]degree sexual assault. Under the circumstances, the sentences imposed are not unduly harsh or excessive.

(Citations to record omitted.)

We conclude that Alkhalidi's sentence was not unduly harsh nor excessive. Alkhalidi's crime was a serious one. He took advantage of the intimate relationship he had with Tracey G. and betrayed the trust Tracey G. placed in him by sexually assaulting the victims in the building in which both lived; indeed, in the bedroom of one of the victims. In doing so, he frightened two young girls and

robbed them of their innocence. At sentencing, the prosecutor urged the court to sentence Alkhalidi to the maximum sentence of forty years; Alkhalidi received a sentence of twenty years.

Further, Alkhalidi's argument that the trial court failed to consider his lack of a criminal record is not supported by the record. The trial court acknowledged that Alkhalidi had no criminal record. Finally, Alkhalidi's argument that it was improper for the trial court to consider his claim of innocence when sentencing is meritless. It is entirely permissible for the trial court to factor into its sentencing decision the appellant's denial of the incident. A person convicted of sexual abuse of a child who accepts no responsibility for his actions is unlikely to seek treatment. Consequently, when released, a convicted, untreated child molester poses a great risk to the community. The trial court properly exercised its discretion in sentencing.

For the reasons stated, the judgment of conviction and the order denying his postconviction motion are affirmed.

By the Court.—Judgment and order affirmed.

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