COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2207

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

IN THE INTEREST OF MICHAEL J.K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL J.K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Michael J.K. appeals a dispositional order adjudicating him delinquent. He claims that his statement to a police officer

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

should have been suppressed and that the evidence was insufficient to adjudicate him delinquent on allegations of both disorderly conduct and sexual assault. Michael abandoned the suppression issue by failing to present an argument to the juvenile court. This court further concludes that the evidence was sufficient to sustain the juvenile court's delinquency adjudication for disorderly conduct and sexual assault. The dispositional order is therefore affirmed.[2]

¶2 A three-count delinquency petition was filed against Michael. Count one alleged disorderly conduct on November 19, 1998, and count two alleged disorderly conduct on December 11, 1998, both contrary to WIS. STAT. § 947.01. Count three alleged sexual assault on December 11, 1998, contrary to WIS. STAT. § 948.02(2).[3] After a fact-finding hearing, the juvenile court dismissed count one and found Michael delinquent on counts two and three.

¶3 Krista K., the victim in counts two and three, testified at the fact-finding hearing that she and Michael were classmates at a middle school. On December 10, she was in science class when she overheard Michael and another boy, both seated nearby, discussing sexual subjects. Karla was embarrassed by this. Later, she was sitting with her legs apart when Michael kicked his foot up

[2] Michael also argues that the disorderly conduct and sexual assault charges are multiplicitous. The State claims, and Michael does not deny, that this argument is first raised on appeal. This court declines to consider this issue. Appellate courts generally will not decide issues that have not first been raised in the trial court. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). If the question had been raised in the circuit court, the State might have responded by way of amendment or of additional proof. *See* ***id***. Failure to raise the issue also deprives this court of the informed thinking of the trial judge on the matter. *See* ***id***.

Similarly, arguments first raised in Michael's reply brief are not considered. It is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief, *see* ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

[3] According to the fact-finding testimony, the offenses occurred on December 10.

and hit her in the inner thigh. She looked at Michael who, Karla testified, said "You liked that, huh," or something similar. Michael then reached under the desk and quickly grabbed her between her legs. Karla slapped his hand away, asked him what he was doing and then left because she was upset.

¶4 The next day, Karla reported the incident to the school liaison officer, Chad Robert Leverson. Leverson testified that he then interviewed Michael, who at first denied doing anything wrong. Eventually, Michael told Leverson that he might have touched Karla's vagina once or maybe twice. When Leverson pursued the inquiry, Michael admitted that he had touched Karla's vagina "at least once. Maybe twice."

¶5 Michael testified at the fact-finding hearing that his admissions to Leverson were untruthful and that he only made them because he thought that was what Leverson wanted to hear and would then go away.

¶6 Michael filed a motion to suppress his statements to Leverson three days before the fact-finding hearing. The juvenile court refused to adjourn the trial to hear the motion. It indicated that it would decide it in the context of the fact-finding hearing. The court invited the State to present the testimony relevant to the motion during Leverson's direct examination, and it would then decide the motion. At the close of Leverson's testimony, Michael's counsel asked for and was granted a brief adjournment to consult with his client. When the fact-finding hearing resumed, he called Michael to testify. Counsel did not ask for an opportunity to be heard regarding the suppression motion.

¶7 At the close of testimony, both counsel were given the opportunity to present arguments. Michael's attorney did not advance any argument regarding the suppression motion.

¶8 Michael contends that the trial court erred by not suppressing his statement to Leverson. First, Michael claims that he was in custody and therefore Leverson should have given him ***Miranda*** warnings.[4] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). Michael next argues that his statement was involuntary because Leverson employed actual coercion or improper police practices in obtaining it.

¶9 The juvenile court did not rule on the motion to suppress. It did not make findings of historical or constitutional facts, and Michael did not ask the court to do so. Because the juvenile court made neither finding, Michael concedes the inapplicability of the rule that when a juvenile court does not make historical facts, an appellate court will assume the juvenile court implicitly made them in support of the constitutional facts it found. Michael concludes that this court therefore has "no choice but to follow the rule of State v. West, 185 Wis.2d 68, 98, 517 N.W.2d 482 (1994), which requires the appellate court to make an independent evaluation of the historical facts based on the record where there are no findings at all to use as a basis for an appellate decision." This court disagrees.

¶10 Two circumstances distinguish ***West***. First, although the circuit court in that case did not specifically make a finding on one of the issues

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[4] While the State does not suggest that Leverson advised Michael of his ***Miranda*** rights, the record appears contradictory on this point. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). Under direct examination, Leverson testified:

> Q You didn't inform him of his rights because he was not in custody?
> A That's correct.

Under cross-examination, he testified:

> Q You did give him ***Miranda*** Warnings?
> A Correct.

presented, voluntariness of consent to search, it nevertheless made a ruling denying West's motion to suppress. The supreme court thus had a decision to evaluate based upon the record. Moreover, it is apparent that West at least argued to the circuit court that she did not voluntarily consent to a search of her apartment. Michael filed a generalized motion to suppress, but did not advance arguments in support of the motion to the juvenile court.

¶11 On appeal, issues raised but not briefed or argued are deemed abandoned. ***Reiman Assocs. v. R/A Adver.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). Akin to this rule for purposes of trial court proceedings is the principle that a party must raise an issue with some prominence to allow the court to address the issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). In this case, Michael filed a generic suppression motion with the juvenile court. There is nothing in the record to indicate that the juvenile court would not have permitted Michael to address the motion after Leverson testified. Michael had ample opportunity to argue the custody and voluntariness issues at the close of evidence, but did not. He did not ask the court to make findings and rule on his motion. Indeed, in his argument he referred to the circumstances under which his inconsistent statement was given only in the context of arguing to the court that his fact-finding testimony was more credible. This court concludes that Michael's failure to argue his motion—to relate the evidence to the applicable law—constituted abandonment of the custody and voluntariness issues in the juvenile court. This court therefore declines to review these issues on appeal. *See* ***Zeller v. Northrup King Co.***, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985).

¶12 Michael next argues that the trial court's findings are insufficient as a matter of law to support a delinquency adjudication for disorderly conduct. The

gravamen of his argument appears to be that the juvenile court used the same facts to find that Michael committed both disorderly conduct and sexual assault. The court may not do this, he contends, because the disorderly conduct statute "describes a very minor offense against the public peace and good order[5] … rather than an offense against the interests of individual citizens." This, Michael argues, "radically" distinguishes disorderly conduct from violations under WIS. STAT. § 948.02, which he properly describes as the extremely serious offense directed "against the most important and intimate private interests of children."

¶13From these propositions, Michael asserts that "[t]o construe disorderly conduct as a lesser included offense of a sexual assault of a child, as one must do if the trial court's analysis is correct, is to denigrate the extreme seriousness of child sexual assault by equating the two offenses." He further argues that because this is an absurd and statutorily inharmonious result, the conclusion is compelled that the "findings of the trial court are insufficient as a matter of law to support a finding of delinquency on count 2 …."

¶14 Michael's major premise, that the juvenile court found disorderly conduct based on the sexual assault evidence, is not supported by the record.[6] Therefore, the argument he advances is without support and merit. During its closing argument, the State referred to Michael's attempt to embarrass Karla by

[5] Michael cites ***State v. Maker***, 48 Wis. 2d 612, 180 N.W.2d 707 (1970), for this proposition. He does not provide a page cite. Nowhere in ***Maker*** does the supreme court characterize disorderly conduct as a "very minor offense." To the contrary, the opinion's author, Justice Robert Hansen, intimated that the disorderly conduct statute was important to maintaining order in society and avoiding anarchy. *See* ***id.*** at 614.

[6] This court's failure to analyze the legal syllogism that Michael contends follows from his faulty premise is not a concession that it has merit. It is rather a result of Michael's failure to provide authority to support the argument to its ultimate conclusion. This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 546 n.3, 292 N.W.2d 370 (Ct. App. 1980).

discussing sexual subjects, the kicking incident and the sexual contact. The court focused primarily on the elements of sexual assault because they were the primary subject of both counsels' arguments. It nevertheless also distinguished between the evidence of disorderly conduct and that concerning the sexual assault:

> [A]fter speaking as rudely as he did about private matters, after kicking her and touching her with his leg or foot in the upper thigh, he grabs her in the crotch after saying something on the order of, "you know you liked that, didn't you."

Michael does not claim that either vulgar language that would tend to provoke a disturbance or unexpectedly kicking a person on the inner thigh is insufficient proof of disorderly conduct. Nevertheless, this court is satisfied that either of these incidents, or their combination, support the juvenile court's disorderly conduct adjudication. Because Michael's keystone premise that the trial court used the same evidence to support both adjudications is inaccurate, the balance of his argument falls. The juvenile court's findings were not insufficient as a matter of law.

By the Court.—Order affirmed.

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