

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 12, 2007**

David R. Schanker  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP749-CR**

**Cir. Ct. No. 2005CF420**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**VICTOR DELVALLE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Victor Delvalle appeals from a judgment convicting him of incest. The victim was a sixteen-year-old relative, F.D. He contends that the evidence was insufficient to support the jury's guilty verdict, and

that the trial court erred by allowing into evidence excerpts from a videotaped interview with F.D. We affirm.

¶2 F.D. is cognitively disabled and at the time of the trial functioned at a first-grade level. She is also hearing impaired and testified with the aid of a sign language interpreter. During much of her testimony her answers reflected confusion and misunderstanding, and when questions were repeated she frequently contradicted herself. For example, she offered contradictory information as to the time and place of the assault. However, she fairly consistently testified that during the incident Delvalle touched her breasts and vagina under her clothes.

¶3 Over Delvalle's objection, the court allowed the State to present limited portions of a taped interview in which F.D. described the assault to a social worker before the State commenced this prosecution. The State offered the taped excerpts as prior consistent statements to rebut the charge of recent fabrication or improper influence or motive, under WIS. STAT. § 908.01(4)(a)2. (2005-06),<sup>1</sup> and the trial court admitted them as such. Delvalle objected on the grounds that he was not accusing F.D. of recent fabrication. Delvalle also objected that F.D.'s taped comments extended beyond matters raised in her testimony and addressed additional sexual contact with Delvalle. In response, the prosecutor agreed to edit the tape to omit all such comments from the portions played to the jury, and then informed the court and counsel of precisely which excerpts from the videotape she would play.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The State introduced no physical evidence of sexual contact, and no other witness testified to independent knowledge of the contact. Essentially, the case was F.D.’s word against Delvalle’s. The jury resolved that credibility contest in F.D.’s favor despite the inconsistencies in her testimony.

¶5 We will reverse a jury’s verdict for insufficient evidence only if the evidence, viewed most favorably to the State, is so inadequate that no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have reasonably inferred from the evidence that the defendant was guilty, we will affirm the verdict even if we believe the jury should not have found guilt based on the evidence before it. *State v. Shanks*, 2002 WI App 93, ¶24, 253 Wis. 2d 600, 644 N.W.2d 275.

¶6 There was sufficient evidence to support Delvalle’s guilty verdict. As a general rule, a victim’s testimony is sufficient in and of itself to convict the defendant of a sexual offense. *See Thomas v. State*, 92 Wis. 2d 372, 384, 284 N.W.2d 917 (1979). However, where the victim’s testimony “bears upon its face evidence of its unreliability,” corroborating evidence is necessary. *Id.* (citation omitted). In Delvalle’s view, F.D.’s testimony carried evidence of unreliability, and corroborating evidence was therefore necessary, because she appeared confused and gave contradictory and vague answers to many questions. However, *Thomas* places the rule in the context of cases where the victim’s testimony was “intrinsically improbable and almost incredible.” *Id.* (quoting *Donovan v. State*, 140 Wis. 570, 571, 122 N.W. 1022 (1909)). In *Thomas*, the court applied it to circumstances where the victim was not only cognitively disabled, but testified that she did not independently remember sexual contact with the defendant, and was just repeating what the prosecutor and her mother told her to say. *See*

*Thomas*, 92 Wis. 2d at 375-77. Here, F.D. made no such statements. Nothing she said about the contact with Delvalle was improbable or incredible. She plausibly described the sexual contact that occurred, and her account of it varied only in the details. Nothing in her testimony suggested that she had been coached. We therefore apply the broader rule that the reviewing court will reject the jury's determination of weight and credibility only if the testimony in question is inherently or patently incredible. *Id.* at 381-82. F.D.'s testimony and statements in evidence were not inherently or patently incredible and consequently were, by themselves, sufficient evidence of guilt if believed.

¶7 The taped interview excerpts were admissible evidence. The court admitted them after concluding that they contained prior consistent statements admissible to rebut a charge of improper motives.<sup>2</sup> However, in significant respects what F.D. said on tape was inconsistent with parts of her trial testimony. Her interview statements differed from her trial testimony on details of the sexual contact, where it occurred and how far it went. They contradicted her initial testimonial denials of sexual contact with Delvalle. F.D.'s statements were therefore admissible as prior inconsistent statements under WIS. STAT. § 908.01(4)(a)1. It is well established that we will affirm a proper result even if the trial court reaches it for the wrong reason. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶8 Delvalle also objected to the tape's admission because it contained inadmissible other acts evidence, and he now claims error on that basis as well.

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<sup>2</sup> F.D. lived with Delvalle and a theory of his defense was his assertion that F.D. fabricated her account of the sexual contact so that she could live with her father.

However, when Delvalle objected, the trial court had already declared that it would not allow other acts evidence, and the prosecutor agreed to exclude references to other acts from the portions of the tape used at trial. Delvalle made no further objection. He has therefore waived the issue of other acts evidence because he gave the trial court no opportunity to determine if the prosecutor's editing resolved the problem. *See State v. Agnello*, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (to preserve an issue for appeal, party must give opposing parties and the court adequate notice of the disputed issue and a fair opportunity to address it). In any event, any reference to other acts between Delvalle and F.D. was harmless. The issue was not how much sexual contact occurred, but whether any occurred at all.

*By the Court.*—Judgment affirmed.

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

