COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1373

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

IN THE INTEREST OF KEVIN D.K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KEVIN D.K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

¶1 BROWN, J.[1] Kevin D.K. appeals from an order finding him delinquent of second-degree sexual assault by use of force, contrary to WIS. STAT. § 940.225(2)(a), and second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2). Kevin argues that the State failed to meet its burden of proof as to all elements of each offense beyond a reasonable doubt. He further argues that the evidence presented at trial was so insufficient in probative value and force that, as a matter of law, no reasonable trier of fact could find guilt beyond a reasonable doubt. We disagree and affirm.

FACTS

¶2 Mary R., who was sixteen years of age when the incidents occurred, and Cheane C., who was then fifteen years of age, were employees at McDonald's in Cedarburg, where Kevin was also employed. Mary testified that Kevin touched her breasts on two occasions. She further testified that on a third occasion, he pinned her against a wall, put his forearm across her chest, and with his other hand, reached up her shirt to touch her breasts and then reached down her pants and underwear and placed his hand directly on her genitalia.

¶3 Cheane testified that on three occasions Kevin brushed his hand against her buttocks at work. She further testified that on a separate occasion, Kevin grabbed one of her breasts through her clothing.

STANDARD OF REVIEW

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Two different standards of review are relevant here. As to the first issue, whether a party has met the required burden of proof, is a question of law, which the appellate court reviews de novo. ***Brandt v. Brandt***, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988). Regarding the second issue, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. WIS. STAT. § 805.17(2). We will search the record for evidence to support the trial court's findings of fact. *See* ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

BURDEN OF PROOF ISSUE

¶5 Kevin argues that the State failed in its burden of proving counts one and two of the amended petition. The first count, alleging second-degree sexual assault by use of or threat of force against Mary R., has three elements. They are as follows:

> (1) that the juvenile had sexual contact or intercourse with the victim;
>
> (2) that the victim did not consent to the sexual contact or intercourse; and
>
> (3) that the juvenile had sexual contact or intercourse with the victim by use or threat of force or violence.

See WIS JI—CRIMINAL 1208.

¶6 The second count, second-degree sexual assault of a child, arising out of the allegations by Cheane, required the State to prove the following elements beyond a reasonable doubt:

> (1) that the juvenile had sexual contact with the victim;

(2) that the juvenile had sexual contact with the victim for the purposes of becoming sexually aroused or gratified, or for the purposes of sexually degrading or humiliating the victim;

(3) that the victim had not yet attained 16 years of age at the time of the sexual contact.

See WIS JI—CRIMINAL 2105.

¶7 The first element that the State must prove beyond a reasonable doubt in both counts is that Kevin acted with intent to either:

(1) cause bodily harm to the victim;

(2) become sexually aroused or gratified; or

(3) sexually degrade or humiliate the victim.

See WIS JI—CRIMINAL 1200A.

¶8 Intent may be inferred from Kevin's conduct, including words and gestures, taken in the context of the circumstances. ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988). However, the trial court "may not indulge in inferences wholly unsupported by any evidence." ***State ex rel. Kanieski v. Gagnon***, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972). Further, when the historical record supports more than one inference, an appellate court must accept and follow inferences drawn by the trier of fact unless the evidence on which those inferences are based is incredible as a matter of law. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶9 We determine based on reasonable inferences made from Kevin's conduct and accompanying circumstances that he intended to become sexually aroused or gratified during the assaults on Mary and Cheane. On the occasion when Kevin assaulted Mary, he pinned his arm against her chest and for

approximately one minute, he felt her breasts and genitalia. Given this evidence, we hold that a very reasonable inference could be made that Kevin intended to become sexually aroused or gratified through this contact.

¶10 Minutes prior to the assault on Cheane, Kevin commented that Cheane had "big breasts." Following that comment, while both Kevin and Cheane were outside throwing cardboard away, Kevin grabbed Cheane's breast. Again, we find that a reasonable inference can be made from the conduct of Kevin, along with the preceding statement made by him, that he intended to become sexually aroused or gratified by grabbing Cheane's breast.

¶11 We also determine that a reasonable inference can be made from the circumstances that Kevin intended to sexually humiliate both Mary and Cheane. "Humiliate" is not defined in the Wisconsin Statutes, but we understand the word to mean "to reduce to a lower position in one's own eyes or the eyes of others: injure the self-respect of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1101 (1993). *See* ***State v. McCoy***, 143 Wis. 2d 274, 287, 421 N.W.2d 107 (1988) (this court can refer to a recognized dictionary for the common and approved meaning of words).

¶12 When asked why she had taken a car ride with Kevin after the assault, Mary responded, "I figured it wouldn't happen again and I'd just forget about it. No one had to know …." A trier of fact could reasonably draw the inference that Kevin intended that causing a lower self-esteem in Mary would result in the benefit that she would keep the incident to herself.

¶13 The evidence is even stronger that Kevin intended to sexually humiliate Cheane. On days previous to the attack, Kevin had made comments to Cheane that she was a whore and that he heard she was a whore. On the same day

as the assault, Kevin made the comment about "big breasts." Given the statements made by Kevin and the circumstances surrounding the assault, this court holds that a trier of fact could reasonably infer that Kevin intended to sexually humiliate Cheane.

¶14 Count one also has an element that the sexual contact be accomplished by use or threat of force or violence. WIS JI—CRIMINAL 1208. The supreme court has instructed that the phrase "by use or threat of force or violence" is to be read in the disjunctive. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 447-54, 304 N.W.2d 742 (1981).

¶15 The record shows the use of force against Mary. Kevin put his forearm across Mary's chest while her back was against the wall, thus pinning her against the wall. With his other hand, he then groped her breasts and genitalia. Further, Mary testified that she felt scared while the assault was taking place and that is why she said nothing. The evidence supports that Kevin used force to accomplish the assault, and it is also reasonable to believe that Mary felt threatened by the circumstances of the assault as well as the conduct of Kevin.

¶16 In count one there is also an element that the victim not consent to the sexual contact. WIS JI—CRIMINAL 1208. The record is clear from the testimony of Mary that she did not consent to any of the touching by Kevin.

¶17 In count two, there is the element that the victim has not yet reached the age of sixteen at the time of the sexual contact. WIS JI—CRIMINAL 2105. Kevin raises no dispute concerning this element.

SUFFICIENCY OF EVIDENCE ISSUE

¶18 As to this issue, our discussion of the burden of proof issue provides the answer to this argument. We reviewed the record. We are convinced that the findings of fact were not clearly erroneous. We affirm.

By the Court.—Order affirmed.

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