

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 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. 2007AP990-CR

Cir. Ct. No. 2005CF64

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ERIC R. VLACH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Price County:
GARY L. CARLSON, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The State appeals an order dismissing an Information charging Eric Vlach with second-degree sexual assault of a child and repeated sexual assault of a child. The circuit court dismissed the Information,

concluding that the State failed to establish probable cause at the preliminary hearing. We reverse the order and remand for further proceedings.

¶2 The complaint charged Vlach with sexually assaulting thirteen-year-old Kayla M. Kayla told one of her friends about an ongoing sexual relationship with Vlach, resulting in further investigation by the school principal, a social worker, a law enforcement officer and Kayla's mother. Kayla informed them that she had sex with Vlach eight to ten times. She gave a detailed account that included the date of the first incident, a broken condom and the fact that she was intoxicated. At the preliminary hearing, Kayla denied any sexual relationship with Vlach. She explained that she felt "humiliated" and "terrorized" in the principal's office, and told the investigators what they wanted to hear because it felt like "an inquisition." Her testimony was impeached with her prior inconsistent statements. Kayla acknowledged that she told the investigators of repeated sexual assaults, but recanted those statements.

¶3 When reviewing the sufficiency of the evidence to support a finding of probable cause, this court owes no deference to the circuit court's determination, but reviews the matter de novo. *State v. Ploeckelman*, 2007 WI App 31, ¶21, 299 Wis. 2d 251, 729 N.W.2d 784. Probable cause exists at a preliminary hearing when there is a "plausible account" that a felony was committed. See *State v. Koch*, 175 Wis. 2d 684, 704, 499 N.W.2d 152 (1993). The judge is not to choose between conflicting facts or inferences or weigh the favorable and unfavorable evidence. *Id.* at 704. The court should not delve into the credibility of the witnesses, as that is a matter left for the trier of fact. *State v. Dunn*, 121 Wis. 2d 389, 397, 359 N.W.2d 151 (1984). Rather, the court's role is to determine whether the facts and inferences drawn from them support the conclusion that the defendant probably committed a felony. *Koch*, 175 Wis. 2d at

704. A witness's prior inconsistent statement can not only impeach the witness's testimony, but is also substantive evidence if the declarant is available for cross-examination. *State v. Horenberger*, 119 Wis. 2d 237, 247, 349 N.W.2d 692 (1984).

¶4 The State presented sufficient evidence to establish probable cause to believe Vlach repeatedly sexually assaulted Kayla. The statements Kayla admitted she made in the presence of the school principal, the social worker, a detective, and her mother are sufficient to establish probable cause. Although Kayla recanted those allegations, her statements constitute substantive evidence that the sexual assaults occurred. Because the circuit court should not make a credibility determination or weigh the favorable evidence against the unfavorable evidence in deciding whether probable cause was established, it should have limited its inquiry to whether there was substantive evidence that Vlach committed a felony. The account of the incidents Kayla admitted she gave in the principal's office constitutes a plausible account of Vlach committing a felony. While Kayla's inconsistent accounts may impugn her credibility at trial, it is the jury's function to determine which of her stories is credible.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

