

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2008

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. 2007AP2307-CR

Cir. Ct. No. 2005CF266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL SCOTT LONG,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for St. Croix County:
EDWARD F. VLACK, III, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Long appeals judgments convicting him of false imprisonment and second-degree sexual assault as a persistent repeater. He argues that the State presented insufficient evidence as to both counts and that the persistent repeater penalty enhancer should not apply because a prior

Minnesota conviction is not comparable to a serious felony in Wisconsin. We reject these arguments and affirm the judgments.

¶2 Long approached the front desk at a hotel wearing white spandex shorts and asked the desk clerk, Bobbi D., if the spandex was supposed to be revealing. She responded it was supposed to be tight. Long then requested that she accompany him to a nearby breakfast room. There, he asked her to rate his penis. Long asked if he could hug her, and Bobbi D. answered “No” and started to back away. Long then grabbed her and held her tightly and forcefully from the front and from behind, with his clothed penis touching her buttocks, inner thigh and groin area. Long then went across the room and pulled down his pants, exposing his penis. Bobbi D. turned away and left the room.

¶3 Long argues that the State failed to prove the sexual contact was “by use of force” and without Bobbi D.’s consent. He also argues that the State failed to prove false imprisonment because it presented insufficient evidence of nonconsent and that he confined or restrained Bobbi D.

¶4 When reviewing the sufficiency of the evidence, this court defers to the jury. *See State v. Wilson*, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). This court must review the evidence most favorably to the State and conviction, and may reverse a conviction only if, as a matter of law, no trier of fact could reasonably find guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is the jury’s function to resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the evidence. *Johnson v. State*, 55 Wis. 2d 144, 147, 197 N.W.2d 760 (1972).

¶5 The State presented sufficient evidence to establish that Long used force to make sexual contact with Bobbi D. She testified that Long held her “very tight” with both arms to the point that she could not move. The jury reasonably found that Long used force as a means of making sexual contact.

¶6 Likewise, Bobbi D.’s testimony constitutes sufficient evidence to support the finding that Long confined or restrained her. One confines or restrains another if he deprives her of freedom of movement or compels her to remain where she does not want to remain. *See* WIS JI—CRIMINAL 1275 (2006). Bobbi D.’s testimony provides sufficient evidence to support the verdict.

¶7 As to both of the charges, Bobbi D.’s testimony also establishes that she did not consent to the sexual contact or being restrained. Long relies on inconsistencies in her testimony and prior inconsistent statements. The jury found Bobbi D.’s testimony credible. The jury, not this court, determines the credibility of witnesses and the weight to be accorded their testimony. *See Johnson*, 55 Wis. 2d at 147.

¶8 Finally, the trial court properly applied the persistent repeater enhancement to Long’s sentence. A persistent repeater is one who has been convicted of a serious felony on two or more separate occasions prior to the serious felony for which he is currently being sentenced. *See* WIS. STAT. § 939.62 (2005-06). Long contends a Minnesota burglary conviction would not have constituted a serious felony in Wisconsin because the crime he committed after an illegal entry would have constituted fourth-degree sexual assault in Wisconsin, a misdemeanor. Burglary is committed by a person who illegally enters with intent to commit a felony.

¶9 The trial court appropriately applied *State v. Collins*, 2002 WI App 177, ¶23, 256 Wis. 2d 697, 649 N.W.2d 325, when it examined Long’s conduct in the Minnesota incident and concluded the offense would have been a second-degree sexual assault and a burglary if the acts had occurred in Wisconsin. In the Minnesota incident, Long entered an elevator dressed in tight spandex pants and a T-shirt, explaining to the women in the elevator that he lost a bet. He asked their opinion about whether he looked big in spandex pants. When the women left the elevator, he asked if he could look at himself in the mirror in their apartment. Once inside, he asked them to hug him and to rate the size of his penis. He then went into a bedroom and told one of the women he wanted to masturbate. When she told him he could not, he left. He returned carrying a thong and entered the apartment without knocking or otherwise obtaining permission. He went into the bathroom and came out wearing the thong, went into a bedroom and began to masturbate. He then told one of the women she had a “nice butt” and asked if he could see it because it would help him “get hard.” When she refused, he pulled down her pants and grabbed her buttocks.

¶10 These acts would constitute a second-degree sexual assault and burglary if committed in Wisconsin. Second-degree sexual assault includes sexual contact by use of force. The phrase “by use of force” includes forcible contact or force used as the means of making contact. See *State v. Bonds*, 165 Wis. 2d 27, 32, 477 N.W.2d 265 (1991). Forcibly pulling down the victim’s pants and grabbing her buttocks constitutes sexual conduct by use of force. The illegal entry into the apartment to commit this felony constitutes burglary. Therefore, the trial court properly applied the Minnesota crimes to establish the persistent penalty enhancer.

By the Court.—Judgments affirmed.

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

