

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 28, 2001**

Cornelia G. Clark  
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. 01-1932  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-JV-457**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE INTEREST OF TYLER W.P.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**TYLER W. P.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County:  
JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 BROWN, J.<sup>1</sup> Tyler W.P. was found delinquent by the juvenile court of criminal damage to property of over \$100 in value, as a party to a crime,

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<sup>1</sup> 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.

contrary to WIS. STAT. §§ 943.01(2)(d) and 939.05. His sole argument on appeal is that the testimony of the State's witnesses was so inconsistent and contradictory to each other as to be incredible as a matter of law. The law is, however, that even under the reasonable doubt standard of proof, the trier of fact is allowed to accept or reject inconsistent testimony. The credibility of the various witnesses and the weight attributed to each when contrasted with other witnesses is always an issue that is properly before the trier of fact. Upon review and after giving due weight to the credibility determinations of the juvenile court, we hold that the evidence here was not incredible as a matter of law and affirm.

¶2 On September 24, 2000, a citizen informed police that someone had damaged her vehicle by throwing rocks at it while it was parked behind the Highland Pub, a tavern situated near railroad tracks. An officer responding to the complaint observed that all the windows of the automobile had been shattered, apparently by using railway ballasts from the nearby tracks. There was also damage to the rear quarter panel, front fender, trunk, hood, and roof of the vehicle. The officer estimated the damage to be approximately \$2000. Investigation of the complaint led police to believe that Tyler, his twin brother and another person were the perpetrators. On December 5, a petition for juvenile delinquency was filed against Tyler. On March 2, 2001, a fact-finding hearing for Tyler and his brother was conducted pursuant to WIS. STAT. § 938.31.

¶3 Three acquaintances of Tyler's testified on behalf of the State—Rickey, Patrick and Travis. The stories were somewhat inconsistent with each other and this is what drives Tyler's appeal issue. We will review the pertinent testimony of all three witnesses.

¶4 Rickey testified that on September 23, 2000, between 2:00 and 3:00 p.m., he was with three friends at his home located one-half block from the pub. Tyler and his brother came by with another boy, also named Tyler, but whose last name was unknown to Rickey. The six of them left the house together. Rickey and another boy remarked that they were going to the railroad trestle where the boys usually hang out. But Tyler, his brother and the other Tyler responded that they were going to the pub to “go smash a car” and asked if the others wanted to “help.” Rickey said that they did not want to get into trouble. The brothers and the other Tyler then left and traveled east in a direction toward the pub. Another boy left on his own and went elsewhere. The remaining boys went to the railroad trestle where they met a boy named Cody. While at the trestle, Rickey heard windows being smashed from the direction of the pub. Afterwards, Tyler and his brother met up with the others at the trestle. The other Tyler bragged about “how it was all cool about the windows being blown out from the rocks.” One of the twins asked the rest of the boys to come back to the area of the pub. The boys refused. After leaving the trestle, Rickey and his friends went to his home while the brothers and the other Tyler headed toward the pub. While sitting on the porch, Rickey heard a second assault on what he took to be a car. Rickey knew the car in question as it had been parked at the pub for a couple of days.

¶5 Patrick’s testimony was a bit different. For example, Patrick had different kids at the house and at the trestle than did Rickey. He testified that Cody was with them at the house from the start. He further testified that two of the group left before they reached the trestle, rather than one as Rickey had averred. Patrick’s testimony is consistent with Rickey’s in that both said the group went toward the trestle, but the twins and the other Tyler split up and went toward the pub. And Patrick is somewhat consistent with Rickey in hearing glass break,

although Patrick said that they heard windows breaking while they were still en route to the trestle. Patrick is consistent with Rickey in his statement that the twins and the other Tyler then came to the trestle, but he said that it was one of the brothers who asked if they wanted to go with them and have some fun. They said “no.” Patrick is consistent with Rickey in his statement that the twins and the other Tyler then went back toward the pub on their own. But Patrick’s testimony departed from Rickey’s when he stated that, after staying at the trestle for about twenty minutes, the group began heading back and he and Rickey were able to observe the brothers and the other Tyler throwing rocks at the car, but did not hear any smashing. Patrick said he saw that the car was “all smashed up, broken windows, dents all over the place.” Finally, Patrick’s recitation is inconsistent with Rickey’s as to when the incident occurred. Patrick said that the incident occurred in the late morning, around 10:35 a.m.

¶6 The third acquaintance to testify was Travis. He said that on the day in question, he was at Rickey’s with Patrick and Patrick’s cousin, Reed. He said that the twins and the other Tyler joined the group as they were walking away from Rickey’s house, past the pub and toward the trestle. The twins and the other Tyler, however, determined to remain in the area by the pub. Travis did not remember the twins or the other Tyler saying anything to the group about smashing a car. But, as he went toward the trestle, he saw one of them throw a rock at the car. Travis looked back to see what was going on and could see the twins and the other Tyler throwing rocks at the vehicle. At the trestle, he heard no rocks being thrown. He testified that the group was at the trestle about an hour and that the twins and the other Tyler never rejoined the group at the trestle. On the way back from the trestle, Travis was able to observe a car that was “all beat up.” Travis also admitted writing a statement to officers saying he saw the three

perpetrators jumping on the vehicle. He said that the incident occurred closer to dinnertime, the evening meal.

¶7 Predictably, Tyler jumps at the inconsistencies in the stories. He points out that different people were said to be in the main group, that various people joined or left the group depending on who was testifying, that the time the incidents took place differed, that the three had different conceptions of where they were when they heard or saw the glass break, and that one boy—but not the other two—saw the perpetrators jumping on the car.

¶8 But all of that is neither here nor there. We start with the law. It is the fact finder's task, not this court's, to sift and winnow the credibility of the witnesses. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). The fact finder may believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent. *Id.* It is the function of the fact finder to determine where the truth lies in a normal case of confusion, discrepancies and contradictions in the testimony of witnesses. *State ex rel. Brajdic v. Seber*, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972).

¶9 Applying the law to the trial court's findings of fact, we see nothing amiss. The trial court remarked that Patrick and Travis testified how they actually saw the perpetrators throwing rocks at the vehicle. The trial court found that testimony to be credible. While Rickey did not actually testify that he saw the perpetrators throw rocks, he did testify that he heard it. That is not inconsistent with what Patrick and Travis saw. Furthermore, Rickey said that the perpetrators came back and remarked how cool it was to smash the glass, which incident was corroborated by Patrick's account. The trial court thus did the sifting and

winnowing. It found the common thread in all the testimony. The common thread was that all three juveniles fingered the twins and the other Tyler. All three witnesses had the perpetrators going to the pub where the car was located. All three witnesses had the perpetrators being involved in the car damage. As to these cogent facts, there was no wavering, no inconsistency. The trial court obviously felt it to be unimportant that there were discrepancies about the time of day, who was at the house, who was at the trestle and who left the group and who did not. The main thing was that three juveniles did the deed, two eyewitnesses saw it firsthand and the other was able to draw a ready inference both from the perpetrators' statement against penal interest and from the existing facts and circumstances. Those consistent facts trump any smaller inconsistencies. The evidence is not incredible as a matter of law. We uphold the trial court's finding that the evidence was sufficient beyond a reasonable doubt.

*By the Court.*—Order affirmed.

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

