COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2450 **Cir. Ct. No. 01-JV-879**

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

IN THE INTEREST OF JAMES J.B.;
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES J.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

¶1 BROWN, J.[1] James J.B. was found delinquent after the juvenile court concluded that he had committed the offense of disorderly conduct following

[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.

a trial. His argument is that the evidence was insufficient to convict, which, in turn, is based on faulty supposition. He claims that since the juvenile court found that the victim was not credible, the court was not at liberty to find him guilty based on its own version of what happened, which version was partly based on the victim's testimony and partly based on his own testimony. Correlatively, because the juvenile court found that the victim's testimony was incredible with regards to the lewd and lascivious charge, and the same testimony would support the disorderly conduct charge, then when the court dismissed the lewd and lascivious charge because no facts supported the charge, it was duty bound to also dismiss the disorderly conduct charge as well. Because the juvenile court did not find the victim's testimony wholly incredible, only partly so, and because the law allows the court to take that part of the victim's testimony it believes to be credible and use that part in determining what it believes to be the truth of what happened, it follows that the court properly found the facts and then applied the facts to the law. We affirm.

¶2 The victim, an eight-year-old girl, testified that she was riding her bike to a friend's house, that James shouted out the window to draw her attention, that he then stuck his head and penis out the window and started saying, "ding-a-ling-a," that someone came by with a dog and he momentarily stopped and pulled down the shades, and that after the dog walker left, James resumed his previous activity.

¶3 James testified that he was changing his clothes in his bedroom and noticed a girl on the street looking at him. He lowered the shades and finished changing his clothes.

¶4 The juvenile court found that as the girl was walking her bike by James' house, James yelled out the window to get her attention. She stopped and he then proceeded to change clothes and, in the process of doing so, lowered his pants and underwear such that the girl could see him. He then pulled down the shade. The juvenile court found that the girl was credible but she embellished her story because it was obvious that someone had coached her. Thus, the court chose only to believe the part about James having yelled to get her attention and undressing such that the girl was able to see him exposed. The juvenile court was convinced that either her parents or someone else had coached her to say that more happened than was actually the case and chose to discount that part of the girl's testimony that it did not believe.

¶5 After having found the facts, the juvenile court then applied the facts to the lewd and lascivious statute. It determined that the statute prohibited a course of sexual conduct openly displayed in defiance of the usual conventions. The court was not convinced that, based on the facts, James acted in defiance of the usual conventions.

¶6 On the other hand, the juvenile court assessed the disorderly conduct statute and determined that it was designed to penalize those whose conduct has a tendency to disrupt good order and provoke a disturbance. It is based on the idea that there is behavior in an organized society which may unreasonably offend others. The juvenile court concluded that getting a girl's attention and then proceeding to change clothes with the shade open meant that the girl was disrupted from her activity and she was offended by having to witness James' act.

¶7 The basic hypothesis of James' argument is that the juvenile court found the victim to be wholly incredible and, as such, the court did not thereafter

have facts in the record to create the factual version that it did. We begin with ***State v. Toy***, 125 Wis. 2d 216, 371 N.W.2d 386 (Ct. App. 1985). There we held that it was certainly allowable for a fact finder to 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.*** at 222. That is exactly what the juvenile court did here. The court did not reject the girl's testimony in total, as argued by James. Rather, it believed some of the testimony of the girl and some of James' testimony and took from both the witnesses and the defendant those facts worthy of the court's belief. 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. *See* ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972). The juvenile court found the truth as it saw it, which is its function as a fact finder. We hold that the hypothesis for James' supposition, that the court found the eyewitness's testimony wholly incredible, is incorrect. Thus, James' argument falls. We conclude that the factual finding was not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶8 The correlative argument is a question of law. Once the facts are found, then whether those facts meet the elements of a statute is a question of law. *See* ***State v. Wisumierski***, 106 Wis. 2d 722, 734, 317 N.W.2d 484 (1982). James' argument appears to be that since the court found the victim's testimony incredible as it pertained to the lewd and lascivious charge, it could not thereafter find disorderly conduct. James maintains that "if the victim's story was believed then James would be delinquent on both charges." Again, the supposition is wrong. The court did not throw out the lewd and lascivious charge because the victim's story was inaccurate. Rather, it first found the facts and then applied those facts to the elements for each charge. While it found the facts wanting for the lewd and

lascivious charge, the court found the facts to be sufficient for the disorderly conduct charge. We now review the court's rationale.

¶9 As the facts found by the juvenile court pertained to the lewd and lascivious charge, the court apparently believed that James' actions, while inappropriate, did not amount to an outright defiance of the usual conventions recognized by society. It lacked the level of openness and brazenness that the court believed was a necessary component of the legislature's intent in drafting the statute.

¶10 But as to the disorderly conduct charge, the court determined that the girl was going about her business. She was an eight-year-old girl with a bike going to her friend's house. She was disrupted from this normal activity when James called out to her. And then, James exacerbated the situation by undressing in the girl's view, which conduct offended the girl. The court found that this conduct had a tendency to disrupt the good order by offending the sense of decency or propriety of the community. In sum, the court found that the facts, as found, were insufficient to meet the elements of the lewd and lascivious statute, but were sufficient to meet the elements of disorderly conduct. As regards this determination, we agree that the State met the burden of producing sufficient evidence for disorderly conduct for the reasons expressed by the juvenile court. Accordingly, we affirm the order.

By the Court.—Order affirmed.

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