COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2242-CR **Cir. Ct. No. 2009CF1967**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE C. UPTGROW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Eugene C. Uptgrow appeals a judgment convicting him of one count of second-degree sexual assault, with use of force. The issue is whether there was sufficient evidence to support the conviction. We conclude that there was sufficient evidence. Therefore, we affirm.

¶2 When reviewing the sufficiency of the evidence, we look at whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 1018, 669 N.W.2d 762, 769 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 758 (1990)). "'If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.'" ***Ibid.*** The credibility of the witnesses is a matter committed to the jury as the trier of fact. ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 125–126, 762 N.W.2d 736, 741.

¶3 At trial, the sixteen-year-old victim testified that she had known Uptgrow for a long time and called him "Uncle Mike." She was babysitting for five children from different families the night of the assault while the mothers left town on a trip. Uptgrow returned to the home between midnight and one in the morning with three additional children. The victim told the jury that after the other children were all in their bedrooms, she and Uptgrow watched television in his bedroom, which is where the big screen television in the house was located. The victim fell asleep, but woke up as Uptgrow was carrying her over to the bed, where he raped her. The victim testified that she was very upset after the assault and called her mother, who was out of town. When she finished talking to her mother, she called 911, but another child in the house disconnected the call. The victim told the jury she saw flashing lights through the window and heard a knock on the door, but was directed not to answer the door. After the police had gone, a family friend picked the victim up and took her to the hospital. The nurse who

examined the victim at the hospital testified that she found fresh injuries to the area around the victim's vaginal opening and the opening to her cervix. Looking at the evidence in the light most favorable to the State and the conviction, as we are required to do, *see* ***Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d at 1018, 669 N.W.2d at 769, the testimony of the victim and the nurse examiner was sufficient to support the jury's verdict of guilt on the charges.

¶4 Uptgrow argues that the victim's testimony was incredible because she provided conflicting accounts of what happened. He points to twelve different instances where the victim's testimony at trial was inconsistent with her prior statements to the police, her statements to the nurse at the hospital, or her testimony during the preliminary examination. For example, the victim first testified at trial that Uptgrow was wearing only boxer shorts; on cross-examination, she was asked whether she remembered telling the police earlier that he had been wearing a t-shirt and boxer shorts, to which she responded "T-shirt, boxers. Does it really matter." While this testimony was inconsistent, the inconsistency was not central to any key issue. As aptly pointed out by the State, the victim *was* consistent about the important point—Uptgrow was wearing only boxer shorts below his waist, which was relevant because it showed that Uptgrow could have easily assaulted the victim while simultaneously covering her mouth with one hand.

¶5 It is well-established that "[i]t is the jury's job to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence." ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 253, 689 N.W.2d 684, 688. "Where there are inconsistencies in the testimony of a witness …, the jury may choose to disbelieve either version or make a choice of one version rather than another." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538

N.W.2d 546, 550 (Ct. App. 1995). "Only when the evidence is inherently or patently incredible will we substitute our judgment for that of the factfinder." ***Ibid.*** While Uptown accurately points out that the victim's testimony was at times inconsistent, our review of the record shows that the victim's testimony was certainly not incredible. Therefore, we reject this argument.

¶6 Uptrgrow next contends that the evidence was insufficient because there was no physical evidence to support the victim's testimony. This argument is unavailing because the victim's testimony, alone, was sufficient to support the conviction, regardless of whether it was corroborated by physical evidence. Moreover, the physical evidence *did* corroborate the victim's testimony that an assault took place. The victim sustained fresh injuries to the area around her vaginal opening and the opening to her cervix, and male DNA was found by the nurse examiner on the button that had been ripped from the victim's pants. Although the DNA could not be specifically linked to Uptgrow, the presence of male DNA, and the victim's injuries, corroborated the victim's testimony that she had been sexually assaulted, even if it did not specifically link Uptgrow to the assault.

¶7 Finally, Uptgrow contends that the victim had a motivation to lie about the crime. He argues that "perhaps [she] made up the story about the assault as a way to get back at" one of the household members she was angry with or because she was unhappy that she had been forced to babysit. This argument is nothing but conjecture; it finds no support in the record. Therefore, we do not consider it further.

By the Court.—Judgment affirmed.

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