COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2358 **Cir. Ct. No. 2015JV2**

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

IN THE INTEREST OF J. L. B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. L. B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County: ELLIOTT M. LEVINE and SCOTT L. HORNE, Judges. *Affirmed*.

¶1 SHERMAN, J.[1] J.B. appeals from an order of the circuit court[2] adjudicating him delinquent based upon a finding by the court that he committed first-degree sexual assault with a child under the age of thirteen, contrary to WIS. STAT. §§ 948.02(1)(e) and 939.50(3)(b). J.B. also appeals from the circuit court's order denying his postdisposition motion for a new trial. J.B. contends that he is entitled to a new trial because the circuit court erred in granting the State's motion to admit the victim's videotaped statement and because the evidence was insufficient to support the court's finding that he committed first-degree sexual assault. For the reasons discussed below, I affirm.

BACKGROUND

¶2 Fourteen-year-old J.B. was charged with having sexual contact with six-year-old C.O. The incident was alleged to have occurred in November 2014 while C.O. was watching a movie in the basement of a relative's home with J.B. and R.W.

¶3 Prior to trial, the State moved the circuit court for an order allowing the State to use at trial the videotaped statement of C.O., pursuant to WIS. STAT. § 908.08(3). J.B. in turn moved the court to exclude the videotape on the basis that C.O.'s statements during the interview do not show that C.O. understood the importance of telling the truth and the consequence of not telling the truth. *See* sec. 908.08(3)(c). Following a hearing on the admissibility of the recording, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

[2] The right to a trial by jury in juvenile delinquency cases has been eliminated by the legislature. *See* ***State v. Hezzie R.***, 219 Wis. 2d 848, 859, 580 N.W.2d 660 (1998).

court concluded that C.O.'s recorded statement satisfied the conditions for admissibility set forth in § 908.08(3), and the court granted the State's motion and denied J.B.'s motion.

¶4 A trial was held in November 2015, after which the circuit court found J.B. delinquent. J.B. moved the court for a new trial, arguing in part that the circuit court erred in admitting the video recording of C.O.'s statement. The court denied the motion. J.B. appeals.

DISCUSSION

¶5 J.B. contends the circuit court erred in denying his motion for a new trial on the basis that the circuit court erred in granting the State's motion to admit the video recording of C.O.'s statement. J.B. also contends that the evidence was insufficient to find him delinquent for the offense of first-degree sexual assault of a child. I address each contention in turn below.

1. Admissibility of C.O.'s Video Recorded Statement

¶6 J.B. contends the circuit court erred in granting the State's motion to admit at trial the videotaped statement of C.O. pursuant to WIS. STAT. § 908.08. An audiovisual recording of a child's oral statement is admissible into evidence if each of the following five elements is met: (1) the trial was held before the child's twelfth birthday; (2) the recording was accurate and free from excision, alteration, or distortion; (3) the child's statement was made with an understanding that false statements are punishable and of the importance of telling the truth; (4) the time, content, and circumstances of the child's statement provide indicia of trustworthiness; and (5) the admission of the statement was not an unfair surprise to the defendant. *See* sec. 908.08(1) and (3)(a)-(e). J.B. contends that the State

did not establish that C.O. understood that "false statements are punishable and of the importance of telling the truth" as required by para. (3)(c).

¶7 The admissibility of C.O.'s videotaped statement presents a mixed question of fact and law. The question of whether C.O. understood the importance of telling the truth and that false statements are punishable is generally a question of fact. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196.[3] The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). However, whether the child's videotaped statement meets the requirements of WIS. STAT. § 908.08 presents a question of law, that I review de novo. *See* ***State v. Snider***, 2003 WI App 172, ¶10, 266 Wis. 2d 830, 668 N.W.2d 784.

¶8 In establishing that a child understands that "'false statements are punishable'" and of "'the importance of telling the truth,'" the exact words of the statute need not be used. ***Jimmie R.R.***, 232 Wis. 2d 138, ¶41 (quoting WIS. STAT.

[3] In ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196, this court stated that because the videotape was available for the court's review, this court was "in as good a position as" the circuit court to determine whether the child understood that false statements are punishable and this court therefore reviewed that question de novo. In the present case, the videotape is not part of the record on appeal. All this court has is a transcription of the recorded interview. Accordingly, I am not in the same position as the circuit court to answer the question of whether C.O. understood that false statements are punishable and, therefore, do not review the issue de novo. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (where the record is not complete, we will assume that the missing portions support every fact essential to sustain the court's finding).

§ 908.08(3)). However, the words actually used must demonstrate that the child knows that telling the truth is important and that there are consequences to failing to tell the truth. *See* ***id***. This court in ***Jimmie R.R.*** found that WIS. STAT. § 908.08(3)(c) was satisfied where the questioning established that the child understood the difference between telling the truth and a lie, the child's acknowledgement that she had told the truth during the interview, and the child's affirmative answer to the following questions: "Do you know how important it is to always tell the truth? Okay, it's real important to make sure that you tell us the truth today. Can you do that?" ***Id.***, ¶¶40, 45. Although the child was not specifically questioned on her understanding that false statements are punishable, this court explained in ***Jimmie R.R.*** that the statutory provisions "the importance of telling the truth" and that "false statements are punishable" are "interrelated" and that "in most instances, a reasonable child would associate a warning about the importance of telling the truth with the related concept of untruthfulness and the consequences that might flow from such deceit." ***Id.***, ¶42.

¶9 The portion of C.O.'s recorded statement that is relevant to the issue of whether WIS. STAT. § 908.08(3)(c) was established is as follows:

> [Interviewer]: …when we talk in here today, … do you know that difference between a truth and a lie? Can you tell me the difference between a truth and a lie? So, if I said your shirt was green, would that be the truth or would that be a lie?
>
> [C.O.] A lie.
>
> [Interviewer]: A lie, and why would it be a lie? Cause what color is your shirt?
>
> [C.O.]: Pink.
>
> [Interviewer]: It's pink. That's right. So today can we promise just to say things that are true?
>
> [C.O.] (Shakes her head yes).

¶10 The quoted portion above establishes that C.O. understood the difference between the truth and a lie. However, nothing in the quoted portion of C.O.'s recorded interview or any part of the interview not quoted in this opinion indicates that C.O. understood that telling the truth is important or that not telling the truth might have negative consequences. Stated another way, there is no credible evidence in the record, or any evidence from which a reasonable inference can be drawn, that C.O. understood the importance of telling the truth and that there are consequences to untruthfulness. Accordingly, I conclude that the circuit court's finding that C.O. understood the importance of telling the truth is clearly erroneous. Because the circuit court was clearly erroneous in finding that WIS. STAT. § 908.08(3)(c) was established, the requirements of § 908.08(3) were not met and I therefore conclude that the court erred in granting the State's motion to admit the recorded statement.

¶11 The State argues that even if the circuit court erred in admitting the recorded statement into evidence, the error was harmless because there was independent evidence at trial supporting the court's finding that J.B. committed first-degree sexual assault. *See, e.g.*, ***Jimmie R.R.***, 232 Wis. 2d 138, ¶46.

¶12 The test for harmless error is whether there is a reasonable probability that the error contributed to the outcome of the action. ***Id.*** "A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919.

¶13 A defendant is guilty of WIS. STAT. § 948.02(1)(e) if the defendant "has sexual contact … with a person who has not attained the age of 13 years." There is no dispute that C.O. was under the age of thirteen when the sexual assault

occurred. Thus, the sole evidentiary dispute is whether J.B. had sexual contact with C.O. "[S]exual contact" for purposes of WIS. STAT. § 948.02(1) is defined as: "Intentional touching by the defendant … by the use of any body part or object, of the complainant's intimate parts," "whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." WIS. STAT. § 948.01(5)(a)1.

¶14 During the recorded interview, C.O. stated that she called her vagina "[a] private," that J.B. had "touch[ed] [her] on [her] private" with "his hand," and that J.B.'s hand had been "under" her clothes. J.B. asserts that C.O.'s statement that J.B. touched C.O. under her clothing "mak[es] it more likely [the touching was] not accidental or incidental" and that without that evidence, "there was no evidence that [J.B.] had touched C.O. in a way to obtain sexual gratification." I am not persuaded.

¶15 At trial, C.O. testified that she knew "what areas of [her] body are [her] privates." C.O. testified that those areas include her breasts, her butt, and a third area, which, from the context of C.O.'s testimony, is reasonable to infer is her vaginal area. When asked whether "anyone [had] ever touch[ed] [her] in that private area," referring to C.O.'s vaginal area, C.O. testified that J.B. had touched her on her vaginal area while she was sitting on his lap when they were in a relative's basement watching television with R.W.

¶16 R.W. testified that he, C.O., and J.B. were alone in the basement of his aunt's house watching a movie. R.W. testified that he was laying on a sofa, and that J.B. and C.O. were sitting together covered by a blanket in a chair. R.W. testified that while they were watching the movie, C.O. came to sit with him on

the sofa and whispered in his ear that J.B. "touched my wiener hole." The circuit court found that R.W.'s testimony was credible, and that R.W.'s testimony lent credibility to C.O.'s testimony. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (the circuit court is the ultimate arbiter of a witness's credibility).

¶17 J.B. does not point to any evidence that in light of his age and physical development, he could not form the intent to become sexually aroused or gratified. *See generally* ***State v. Stephen T.***, 2002 WI App 3, 250 Wis. 2d 26, 643 N.W.2d 151. I conclude that it is reasonable to infer from evidence that J.B. touched C.O.'s vaginal area while C.O. was sitting in J.B.'s lap covered by a blanket and that J.B. touched C.O. for the purpose of becoming sexually aroused or gratified. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990) (appellate court must accept fact finder's reasonable inferences). Because there was evidence, other than the videotaped statement from which it could be inferred that J.B. had sexual contact with C.O., I conclude that there is no reasonable probability that the error in admitting C.O.'s videotaped statement contributed to the outcome of the action and that the error was therefore harmless. *See* ***Jimmie R.R.***, 232 Wis. 2d 138, ¶46.

2. Sufficiency of the Evidence

¶18 J.B. next challenges the sufficiency of the evidence supporting the court's adjudication for first-degree sexual assault. J.B. argues that without C.O.'s videotaped statement, the evidence is insufficient to demonstrate that J.B. touched C.O. to become sexually aroused or gratified. As explained above, it is reasonable to infer from other evidence that J.B. had sexual contact with C.O. Accordingly, I reject this argument.

CONCLUSION

¶19 For the reasons discussed above, I affirm.

By the Court.—Orders affirmed.

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