STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP1037-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KURT A. WILLICK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE EMILY S. MUELLER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was the evidence at trial sufficient to support Kurt Willick's convictions for sexually assaulting his step-niece?

The circuit court answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this appeal can be decided based on the briefs and well-established legal principles.

INTRODUCTION

Willick sexually assaulted his young step-niece three times by inviting or allowing her to touch his penis. The circuit court found him guilty at a bench trial. On appeal, Willick argues that the evidence was insufficient to support his convictions. This Court should summarily affirm.

STATEMENT OF THE CASE

In June 2017, H.M came forward to report that her step-uncle, Willick, sexually assaulted her between the fall of 1990 and summer of 1991 when she was four or five years old. (R. 1:2.) The assaults happened at H.M.'s grandmother's house, where H.M. was living with her parents and with Willick. (R. 1:2.) Willick assaulted H.M. by exposing his penis to her and asking her to touch it, which she did. (R. 1:2.)

In July 2017, the State charged Willick with three counts of sexual assault of a child under age 13 based on H.M.'s disclosure. (R. 1.) Willick waived his right to a jury trial. (R. 46:3–4; 48:4.)

At a bench trial, Willick did not dispute that the sexual contact had occurred, but he disputed whether he had intentionally allowed it to happen for his sexual arousal or gratification. (R. 48:114.) The circuit court found H.M.'s testimony "very credible" and Willick's testimony not credible. (R. 48:118–20.) It found Willick guilty because "the State clearly has met its burden of proof." (R. 48:121.) It later imposed three consecutive ten-year prison sentences. (R. 47:43.)

Willick appeals his judgment of conviction. (R. 34.)

STANDARD OF REVIEW

A court reviews de novo whether evidence was sufficient to support a conviction. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. In doing so, a court applies a test that is "highly deferential" to the fact-finder. *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681.

ARGUMENT

The evidence was sufficient to sustain Willick's three convictions.

A. A defendant bears a heavy burden when challenging the sufficiency of the evidence to sustain a conviction.

A defendant "bears a heavy burden" on appeal when challenging the sufficiency of the evidence to support a conviction. *State v. Klingelhoets*, 2012 WI App 55, ¶ 10, 341 Wis. 2d 432, 814 N.W.2d 885. "It's very difficult for a defendant to convince an appellate court that the evidence presented to a jury was insufficient to support a conviction." *United States v. Meza-Urtado*, 351 F.3d 301, 302 (7th Cir. 2003). The State is not required to prove a defendant's guilt beyond a reasonable doubt on appeal. *State v. Poellinger*, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990).

When determining whether evidence at trial was sufficient to support a conviction, an appellate court "consider[s] the evidence in the light most favorable to the State and reverse[s] the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *Smith*, 342 Wis. 2d 710, ¶ 24 (quoting *Poellinger*, 153 Wis. 2d at 507). "Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it." *Id.* "[A]n appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *Id.* ¶ 36.

A jury gets to determine the credibility of witnesses, weigh evidence, and resolve conflicts in testimony. *Poellinger*, 153 Wis. 2d at 504, 506. A jury may, "within the bounds of reason," resolve conflicting inferences by adopting an inference consistent with guilt. *Id.* at 506–07. This Court must accept a jury's inference "unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 507.

B. Willick did not overcome his heavy burden on appeal.

The circuit court found Willick guilty of three counts of sexual assault of a child. (R. 26.) This crime has two elements: (1) the defendant had sexual contact with the victim, and (2) the victim was under age 13. *See* Wis. Stat. § 948.02(1) (1989–90). H.M. testified that she touched Willick's penis on three occasions when she was about four years old. Willick does not dispute that the evidence was sufficient to prove that this contact occurred when H.M. was under age 13. He does not dispute the contact; he only disputes whether it was sexual. He only argues that the evidence was insufficient to prove that this contact occurred with his intent to become aroused or gratified. He is wrong.

Sexual contact includes any intentional touching of the defendant's intimate parts by the complainant if the touching was done "for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." Wis. Stat. § 948.01(5) (1989–90). "Intent to become sexually aroused or gratified, like other forms of intent, may be inferred from the defendant's conduct and from the general circumstances of the case—although the jury 'may not indulge in inferences wholly unsupported by any evidence.'" *State v. Drusch*, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987) (citation omitted).

To be guilty of sexual assault of a child, "the defendant does not have to initiate sexual contact with a child. If the defendant *allows* the contact, that is sufficient to constitute intentional touching because it indicates that the defendant had the requisite purpose of causing sexual arousal or gratification." *State v. Traylor*, 170 Wis. 2d 393, 404, 489 N.W.2d 626 (Ct. App. 1992). "Where the defendant *permits* sexual contact initiated by a child, there is a permissible inference that the defendant sanctioned it for the purpose of sexual arousal or gratification." *Id.* However, "[t]he mere fact of a child touching an adult does not raise the inference. There might indeed be evidence in a specific case that the adult called an immediate halt to this activity." *Id.* at 404 n.2. "Absent other evidence that the event was sanctioned by the adult, the mere fact that a touching took place is not the same as 'allowing' it." *Id.*

Here, the evidence was sufficient to raise an inference that Willick allowed H.M. to touch his penis three times for the purpose of Willick's sexual arousal or gratification.

Regarding the first incident, Willick invited H.M. to touch his penis and demonstrated how to stroke it. H.M. testified that she was in Willick's bedroom when he undressed in front of her, exposing his penis. (R. 48:38–39.) Willick asked H.M. if she wanted to touch his penis, and she then touched

it. (R. 48:39.) Willick then asked H.M. if she wanted him to show her how to touch his penis. (R. 48:39.) Willick then repositioned her hand so that it was wrapped around his penis. (R. 48:39.) Willick showed her how to move her hand by demonstrating a stroking motion. (R. 48:40.) From these facts, the circuit court could rationally infer that Willick allowed H.M. to touch his penis for the purpose of his sexual arousal or gratification.

Addressing the second incident, H.M. testified that she "was touching [Willick's] penis" in his bedroom the same way that Willick had showed her to do the first time. (R. 48:41.) That testimony reasonably implied that H.M. was again engaging in a stroking motion with her hand wrapped around his penis. It thus implied that Willick was allowing H.M. to touch his penis for his sexual arousal or gratification. H.M. further testified that she stopped touching Willick's penis on this occasion because she heard someone run up the stairs and down the hallway, which made her and Willick "nervous that [they] were going to be discovered." (R. 48:41.) The person ran back down the stairs, so H.M. or Willick then locked the door. (R. 48:42.) This testimony about the unlocked door suggested that Willick was allowing H.M. to touch his penis until they thought that they might get caught.

Regarding the third incident, H.M. testified that she was in Willick's bedroom when he asked her whether she remembered to lock the door. (R. 48:42.) This question was a reference to the previous incident where someone walked down the hallway. (R. 48:42.) They verified that the door was locked, Willick exposed him penis, and then H.M. touched it again. (R. 48:42.) This sequence of events suggested that Willick allowed H.M. to touch his penis during this third incident. Willick's question about the door reasonably implied that he wanted the door to be locked during this incident so that nobody would discover H.M. touching his penis. This

inference suggests that the touching was done for Willick's sexual arousal or gratification.

Willick's question about the door being locked also suggested that he had allowed H.M. to touch his penis during the second incident. This question bolstered the inference that the second incident stopped when Willick became afraid of being caught. This inference is consistent with the notion that Willick was allowing this contact for his sexual arousal or gratification. It undercuts the notion that Willick "called an immediate halt to this activity." *Traylor*, 170 Wis. 2d at 404 n.2.

H.M.'s additional testimony further supported Willick's guilt. She testified that "it was discussed that this was a secret." (R. 48:43.) Keeping these incidents a secret implied a consciousness of guilt. H.M. also testified that when she was about ten years old, Willick "got kind of a little bit of smile on his face and he looked at me and said, do you remember when you used to touch me." (R. 48:44–45.) This question, combined with Willick's grin, suggested that he had allowed H.M. to touch his penis for his sexual arousal or gratification. It is doubtful that Willick would ask this question with a slight smile years later if the hand-to-penis contacts had been accidental grazes or unwanted on his part. When H.M. was 16 years old, she called Willick on the phone, she was upset, and she asked him, "[W]hy did you do that . . . when I was little." (R. 48:46.) Willick responded, "At the time my girlfriend lived far away, and it was just really hard for me." (R. 48:47.) This answer suggested that Willick had used H.M. for sexual gratification when she was a small child because he was unable to get sufficient gratification from his long-distance girlfriend.

H.M.'s cousin corroborated this phone call. The cousin, B.B., testified that she was present when H.M. called Willick to confront him about his past abuse, and H.M. "was extremely emotional" during the phone call. (R. 48:54.) B.B.

testified that H.M. was not normally an emotional person. (R. 48:54.) It is unlikely that H.M. would confront Willick over the phone in a very emotional state if the prior penis contacts were not sexual abuse.

Willick's statements to police also greatly helped prove his guilt. Willick told police that he "exposed" himself to H.M. when she was "a minor child." (R. 48:22.) He said that he "took advantage of her natural curiosity and *allowed* her to touch me, not once or twice, but on three separate occasions." (R. 48:22 (emphasis added).) He said that the contact lasted "perhaps 10 to 15 seconds each time." (R. 48:22.) He later tried "minimizing" the incidents by saying that the contact lasted five seconds. (R. 48:69.) He admitted that he had "asked [H.M.] if she would like to touch" his penis. (R. 48:24.) He said that K.M. had "grasped his penis and stroked it." (R. 48:69.) He referred to his conduct as "deviant behavior" and said that he was "willing to accept whatever punishment . . . [t]his calls for." (R. 48:22.) These admissions to police strongly suggested that Willick allowed H.M. to touch his penis for his sexual arousal or gratification.

In sum, the evidence was sufficient on all three counts. Again, "[w]here the defendant *permits* sexual contact initiated by a child, there is a permissible inference that the defendant sanctioned it for the purpose of sexual arousal or gratification." *Traylor*, 170 Wis. 2d at 404. H.M.'s testimony about the assaults, Willick's statements to H.M. years after the assaults, and Willick's admissions to police sufficiently proved that he allowed H.M. to touch his penis for his sexual arousal or gratification.

C. Willick's arguments are unavailing.

In challenging the sufficiency of the evidence, Willick argues that H.M. did not remember him ejaculating. (Willick's Br. 8.) But ejaculation is not a necessary element of sexual contact. *See* Wis. Stat. § 948.01(5) (1989–90) (defining "sexual

contact"); *see also* Wis. Stat. § 948.01(6) (1989–90) (defining "sexual intercourse" and stating that "emission of semen is not required").

Willick further argues that he "testified he was not aroused nor sexually gratified by the contact." (Willick's Br. 8.) He relies on his testimony alleging the circumstances under which H.M. touched his penis. (Willick's Br. 10.) But a fact-finder can, "within the bounds of reason, reject evidence and testimony suggestive of innocence." *Poellinger*, 153 Wis. 2d at 503. The circuit court reasonably rejected Willick's exculpatory testimony, which was inconsistent with his inculpatory statements to police. (*See* R. 48:114–17, 121.)

Willick further argues that H.M.'s testimony on counts two and three "was very vague" compared to his more-detailed testimony. (Willick's Br. 10.) But "[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, 689 N.W.2d 684. The circuit court, acting as fact-finder at the bench trial, was free to believe H.M.'s testimony over Willick's.

Relatedly, Willick argues that because of H.M.'s lack of memory regarding the details of the assaults, "the evidence regarding [his] intent was so patently incredible no fact finder would have found guilt" on counts two and three. (Willick's Br. 12.) This Court must accept a fact-finder's inference "unless the evidence on which that inference is based is incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 507. Testimony is incredible as a matter of law if it "conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). H.M.'s testimony was not patently incredible under that test, and Willick does not argue otherwise. He does not even acknowledge this test.

CONCLUSION

This Court should affirm Willick's judgment of conviction.

Dated this 12th day of November 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2379 words.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 12th day of November 2020.

Electronically signed by:

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