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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
Case No. 2020AP001037 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KURT A. WILLICK,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW
FROM THE DECISION OF THE WISCONSIN
COURT OF APPEALS DISTRICT II
DATED MAY 19, 2021

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

1. Was there sufficient evidence for the court to find Mr. Willick guilty of three counts of first-degree sexual assault of a child?

The court found Mr. Willick guilty and the court of appeals affirmed the circuit court decision. (App. 100a-j).

STATEMENT OF CRITERIA WARRANTING REVIEW

The decision of the court of appeals directly conflicts with Wisconsin case law. See *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). The evidence presented by the state was insufficient for a finding of guilt as to the three counts of sexual assault. Specifically, that Mr. Willick acted with the intent required by the statute. Mr. Willick has maintained that he did not intentionally allow his niece to touch him and that he did not act for the purpose of sexual arousal or gratification. The circuit court based its finding of guilt on the testimony of H.M. and gave no credence to the

testimony of Mr. Willick. Because of this, the decision of the court of appeals conflicts with *Poellinger* and thus, review should be granted pursuant to Wis. Stat. § 809.62(1)(d).

For all of the above reasons, review should be granted.

STATEMENT OF THE CASE

On July 10, 2017, Mr. Willick was charged with three counts of first-degree sexual assault of a child. (R.1, App. 103). He was accused of sexually assaulting his niece in the Fall of 1990 through the Spring of 1991 when she was about 5 years old.

Mr. Willick proceeded to a court trial where the main issue was whether or not the encounters were for the purpose of sexual gratification or arousal. On August 23, 2018, he was convicted by the court of all three charges. (R. 48:113-121, App. 107-115).

Mr. Willick was sentenced on October 22 2018 by the Honorable Emily Mueller to a total sentence of 30 years. (R. 26, App. 101-102).

Mr. Willick appealed his convictions to the Court of Appeals. On May 19, 2021, the Court of Appeals issued a

decision affirming the circuit court's findings of guilt.
(App. 100a-j).

STATEMENT OF FACTS

On June 19, 2017, Mr. Willick walked into the Waterford Police Department and asked to speak with a police officer. (R.48:18). Officer Justin Hennlich spoke with Willick who told him that he wanted to report a sexual assault. (R.48:19). Willick stated that he had committed the sexual assault about 25 years ago at his parent's house. (R.48:19-20). His parent's house was in the town of Waterford and the victim was his niece, H.M. (R.48:21). Officer Hennlich asked Mr. Willick to write out a statement of what he did. Mr. Willick wrote:

Approximately 25 years ago I exposed myself to a minor child [H]. Not only that, but I took advantage of her natural curiosity and allowed her to touch me, not once or twice, but on three separate occasions, (three days in a row) for perhaps 10 or 15 second each time.

After that I ceased this deviant behavior. However, by then the damage was done. I am sorry, and I'm willing to accept whatever just punishment . . . this calls for. (R.48:22).

Mr. Willick told the office more detail about the incidents and told him that they happened in his bedroom.

(R.48:24). H.M. was in his bedroom when he was getting dressed, she saw him naked and saw his penis and he asked her if she wanted to touch it and she did. *Id.*

He came forward now as he received a letter from his niece who said she remembered what happened and that it was still affecting her. (R.48:26).

H.M. testified. She was 32 years old at the time of the court trial. (R.48:30). She was a practicing attorney and Mr. Willick was her uncle. (R.48:32). The police contacted her in June of 2017 and interviewed her about the sexual assault. (R.48:34). She testified that she wrote an angry letter to her uncle about the sexual assault and asked that he not speak to her ever again. (R.48:36).

H.M. testified that when she was about four years old, she and her family moved in with her step-father's parents. (R.48:32). Mr. Willick was living there at that same time. (R.48:33). H.M. testified that she was in Kurt's room with him, and Kurt was undressing after getting home from work. (R.48:38-39). He undressed completely and she saw his penis. She testified that he asked her if she wanted to touch it and she did. (R.48:39). According to H.M.'s testimony Mr. Willick asked her if she wanted him to show her how to touch a penis and then he repositioned her hand

so that it was wrapped around his penis. *Id.*

On a second occasion, she was alone with him again in his bedroom and she was touching his penis. (R.48:41). H.M. testified that they stopped when they heard another kid running in the house. *Id.* There was a third occasion, where he exposed himself again to her and she touched his penis. (R.48:42). She did not recall Mr. Willick ejaculating at any of these incidents. (R.48:48-49).

H.M. testified that she remembered these events were supposed to be kept secret. (R.48:43). There were two times that these incidents were brought up to her by Kurt. On the day Kurt was getting married, she and her step-dad were in the upstairs bathroom at her grandmother's house and she was left alone with Kurt. (R.48:44). H.M. testified that Kurt got a smile on his face and said "do you remember when you used to touch me?" *Id.* She said no and left the room quickly. She was about 10 at the time. (R.48:45). The second time was after she had just received her driver's license and she and her cousin Brooke, called Kurt. (R. 48:46). She confronted him on the phone, but he did not acknowledge that anything happened. (R.48:47).

Investigator Brad Spiegelhoff testified that he interviewed both H.M. and Kurt Willick. (R.48:68). He

testified that Mr. Willick admitted that he had sexual contact with H.M. (R.48:68). Mr. Willick did not admit to sexual arousal or gratification. (R.48:69).

Mr. Willick testified at the court trial. Between December of 1989 and the Fall of 1991 he lived at his mother's home in Waterford, Wisconsin. (R.48:76). His brother and his family moved in for a time at the same house. (R.48:77). Mr. Willick testified that he came home from work one afternoon and went into his room to change. *Id.* He saw his niece and nephew in the room, but decided to change anyway. *Id.* He decided to expose his penis to the kids and then both started to run out of the room. (R.48:80). As H.M. ran past him, she reached out and touched his penis for "a split second". (R.48:80). He testified that he did not invite her to touch his penis nor did he become sexually aroused or gratified from the touching. *Id.*

The second time, he had again come home from work and went into his bedroom to change. (R.48:81). He went into the bathroom and was urinating when he saw H.M. and she was watching him go to the bathroom. *Id.* He testified that she reached out and held his penis when he urinated. He testified that he did not become sexually aroused or

gratified. (R.48:82).

The third incident occurred in a different bedroom and it was on a weekend. (R.48:83). He was sitting in that room reading when H.M. came in, put her hand down his pants and touched his penis. *Id.* Mr. Willick sat up and yelled at her. *Id.* He did not become sexually aroused or gratified. (R.48:84). He testified that he did not show H.M. how to touch his penis. (R.48:90).

He decided to go to the police because he had received a card from H.M. and it was evidence from the card that she was angry with him. (R.48:87). He approached his brother and told him what happened and then decided to go to the police and report it. (R.48:88).

ARGUMENT

I. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS OF FIRST-DEGREE SEXUAL ASSAULT OF A CHILD AND THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH WELL-ESTABLISHED CASE LAW.

Mr. Willick was charged with three counts of first-degree sexual assault of a child. Pursuant to Wis. Stat. § 948.02(1), a person is guilty of first-degree sexual assault of a child if they have sexual contact with a child

under the age of 13. The definition of sexual contact requires that Mr. Willick acted with the intent to be sexually aroused or gratified.

Mr. Willick did not dispute the fact that his niece, H.M. touched his penis on three separate occasions. However, he did contest the fact that it was intentional and that it was done for the purpose of sexual gratification or arousal. According to the testimony of H.M, she did not remember Mr. Willick ejaculating. Mr. Willick testified he was not aroused nor sexually gratified by the contact.

"[W]hether the evidence, viewed in the light most favorable to the state, is so insufficient in probative value and force that as a matter of law no reasonable jury could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 500, 451 N.W.2d 752 (1990). "If there is any possibility that the jury could have drawn the appropriate inferences from the evidence to support its verdict, we may not overturn that verdict even if we believe that the jury should not have found guilt based on the evidence. *Id.* at 507.

The circuit court in its decision, stated: "The law requires for these charges that the State prove two

elements of this crime beyond a reasonable doubt: First, that the defendant had sexual contact with [H.M.]; and second that [H] was under the age of 13 years at the time of the alleged sexual assault. There is no dispute with respect to the second element, the age of [H.M.], nor is there a dispute that there was a physical touching with respect to the first element, sexual contact. However, the law requires that sexual contact also requires that the defendant acted with intent to become sexually aroused or gratified. And therein lies really the linchpin of this trial." (R.48:113-114, App. 107-108).

This is a case where the sexual contact was the touching by the child to the defendant. One of the questions is whether or not Mr. Willick "allowed" H.M. to touch his penis. The most extensive discussion of touching "by the defendant or upon the defendant's instruction" occurs in the Wisconsin Court of Appeals' decision in *State v. Olson*, 238 Wis.2d 74, 616 N.W.2d 144 (App. 2000). In *Olson*, the court found that "in sexual-contact-with-a-child cases where the contact was initiated by the child, the State must prove that the defendant at least "allowed" - that is, consciously and affirmatively consented to - the contact before an inference could be drawn that he (or she)

intended sexual gratification or arousal." *Olson*, 238

Wis.2d at 82. The court continued:

The mere fact of a child's 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. 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." *Olson, supra*, 238 Wis. 2d at 81 *citing State v. Traylor*, 170 Wis. 2d 393, 404 n.2, 489 N.W.2d 626 (Ct. App. 1992).

In this case Mr. Willick has maintained that his niece initiated the contact on each occasion. During the first incident, he testified that she ran past him and "tagged" his penis. During the second incident, he was urinating and she touched his penis and during the third, he testified that she walked up to him and put her hand down his pants and he stopped her right away. Particularly as to counts 2 and 3, the testimony of H.M. was very vague. Even the circuit court, in its decision, acknowledged that H.M. could not remember much detail as she was four when the touching occurred. (R.48:118, App. 112). As to counts 2 and 3 she only testified that he exposed himself and she touched his penis. In contrast to the testimony of H.M., Mr. Willick did remember more details and as to count 2, his description was that she touched his penis while he was

urinating. And she stopped after he was finished. That is not a touching for sexual gratification or arousal. Similarly, in count 3, he testified that she walked up to him and put her hand down his pants. He stopped it immediately. Mr. Willick did not "allow" her to touch his penis and stopped it when it occurred. For these reasons, there should not have been an inference that the touchings in counts 2 and 3 were for the purpose of arousal or sexual gratification. There was not sufficient evidence to sustain a conviction in those two counts.

The circuit court in its decision stated: "I acknowledge that the primary issue here is whether the defendant acted with intent to become sexually aroused or gratified, and I believe that those occasions he did." (R.48:119, App. 113). The circuit court found that H.M. was credible and that Mr. Willick's explanations were not and based its decision on those findings, even after admitting that H.M. could not remember much of the incidents.

The court of appeals found that there was sufficient evidence to support the convictions and that the trial court reasonably inferred "from the evidence that Willick permitted H.M. to touch his penis and that he did so for

the purpose of his sexual arousal or gratification.” (App. 100h) .

The court of appeals pointed out that the circuit court based its decision on the credibility of H.M. (App. 100i). The court also found that the evidence “was more than sufficient for the trial court to reasonably infer, as it did, that Willick intentionally allowed, if not invited, H.M. to make contact with his penis for the purpose of his sexual arousal or gratification.” (App. 100i). However, this determination ignored the testimony of Mr. Willick in this he told the court that as to count 2, H.M. touched his penis while he was urinating. And she stopped after he was finished. That is not a touching for sexual gratification or arousal. Similarly, in count 3, he testified that she walked up to him and put her hand down his pants. He stopped it immediately. Mr. Willick did not “allow” her to touch his penis and stopped it when it occurred. These types of touching were not intentional or for the purpose of sexual gratification or arousal.

A review of the findings of fact, viewing the evidence most favorably to the state and the conviction, the Court of Appeals asks only if the evidence is inherently or patently incredible or so lacking in probative value that

no fact finder could have found guilt beyond a reasonable doubt. See *State v. Oimen*, 184 Wis.2d 423, 436, 516 N.W.2d 399, 405 (1994); *State v. Alles*, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982). In this case, the evidence regarding the defendant-appellant's intent was so patently incredible no fact finder could have found guilt.

Specifically as to count 2, where H.M. did not recall any details of the incident and where Mr. Willick testified that she touched him while he was urinating. The touching stopped as soon as he was done urinating. This was not done for the purpose of sexual gratification or arousal. Similarly, count 3, where H.M. initiated the touching, she could not remember details and he stated that he stopped the touching as soon as it began. The court of appeals found otherwise and that decision conflicts with well-established case law. Review should be granted.

CONCLUSION

For the reasons stated above, review should be granted.

DATED this 14th day of June, 2021.

Respectfully submitted,

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LENGTH AND FORM CERTIFICATION

This brief meets the form and length requirements of Rule 809.19(b) and (c), in that it is:

14 pages long.

Typewritten (10 spaces per inch, non-proportional font, double spaced, 1½ inch margin on the left and 1 inch margin on other three sides.

Dated this 14th day of June, 2021.

/s/Angela C. Kachelski
Angela C. Kachelski

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of June, 2021.

/s/Angela Kachelski
Angela Kachelski

STATEMENT OF SERVICE AND MAILING

Counsel hereby certifies that she has sent an original and nine copies of the Defendant-Appellant-Petitioner's Petition for Review to this court via the United States Post Office. Counsel also certifies that she has served one copy of this Petition on the Attorney General via the United States Post Office this 14th day of June, 2021.

/s/ Angela C. Kachelski
Angela C. Kachelski

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Decision of the Court of Appeals affirming
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