

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2009-224

MAY 21 2010

MAY TERM, 2010

In re D.H.

}	APPEALED FROM:
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}	
}	Bennington Family Court
}	
}	
}	DOCKET NOS. 8-1-09 Bnjv &
}	96-7-08 Wmjv

Trial Judge: Katherine A. Hayes

In the above-entitled causes, the Clerk will enter:

In this delinquency case, juvenile D.H. appeals the family court's finding that he committed sexual assault in violation of 13 V.S.A. § 3252(a)(1)(A).¹ D.H. argues that the court improperly presupposed his guilt and that the court's findings are not supported by the record. We affirm.

The family court found the following facts beyond a reasonable doubt. In July 2005, when D.H. was thirteen and his cousin J.H. was nine, the two were visiting their grandparents. The two were playing outside in an above-ground swimming pool near the house. The children's grandmother and great-grandmother were both inside the house. The great-grandmother sat by a window and watched from inside the house. The children spent most of the morning in the pool, came in for lunch, and then went back into the pool. While the two were playing, D.H. came up behind J.H. and grabbed hold of her neck. They struggled. D.H. pulled off J.H.'s shorts, pulled his own shorts down, and penetrated J.H.'s vagina briefly with his penis. J.H. did not consent to this sexual act. J.H. called for her grandmother, but did not get her attention. J.H. did not immediately complain about D.H.'s conduct to her grandmother or her parents. J.H. did not disclose the conduct until three years later when her mother found out by reading a statement J.H. had made on-line to another girl.

The disclosure occurred in March 2008. J.H. was having a dispute with another student at her school and reported to her mother that the student had made threatening statements on J.H.'s personal internet page. J.H.'s mother wanted to see the page. At first, J.H. claimed she did not know the password, but, eventually, J.H.'s mother gained access to the page. When mother read the communication from the other student, she also saw J.H.'s reply that she had been raped when she was nine-years old. J.H.'s mother confronted J.H., who began to cry and revealed that D.H. had sexually assaulted her in the swimming pool.

¹ D.H. was charged under the version of the statute that was in effect at the time of the assault. The statute was amended in 2006. 2005, Adj. Sess., No. 192, § 10.

J.H.'s parents called the police to report the assault. When questioned, D.H. denied the incident. During an interview with the investigating officer, D.H. initially did not recall being at his grandparents' house with J.H. Once the officer told him that his grandmother remembered the two being there at the same time, D.H. recalled being there with J.H., but still denied assaulting his cousin. At one point, in response a question, D.H. commented that he wished the incident had never happened. When the officer told D.H. that J.H. was having a difficult time coping with the incident, D.H. asked the officer if he should apologize to J.H.

At the contested hearing, the State presented the testimony of J.H.'s mother, J.H., and the investigating officer. D.H. and his grandmother and great-grandmother testified on behalf of D.H. Both women testified that D.H. and J.H. were playing together in the pool, and that they could see the children from the house. The great-grandmother testified that she was watching the entire time and no assault occurred. At trial, D.H. clarified that his statements during the interview were not admissions of guilt, but an expression of his wish that nothing had happened to J.H. and that he wanted to tell her he was sorry it happened to her.

The court issued a written decision. The court did not find the great-grandmother's testimony that she never left the window credible, explaining that it was highly likely the great-grandmother would have gone to the bathroom or averted her attention elsewhere for brief moments. In any event, the court decided that neither woman's testimony was very helpful because the women could not see what occurred below the surface of the pool, and they both had a motive to protect D.H. Thus, in the court's eyes, the matter came down to a credibility determination between J.H. and D.H. The court found J.H. to be a credible witness based on her demeanor at trial. The court noted that J.H. did not have motive to lie, though there was evidence of her reluctance to go forward after her parents read the emails. As for D.H., the court noted he had a significantly greater motive to lie, and that his testimony had inconsistencies. He first denied ever being at his grandmother's with J.H. The court also found it persuasive that during his interview with police, defendant made statements expressing guilt and desiring to apologize.

On appeal, D.H. first argues that the court presupposed his guilt by assuming that he would lie during his testimony. According to D.H., the court effectively denied him his presumption of innocence, see 13 V.S.A. § 6502 (defendant has presumption of innocence in a criminal proceeding), by finding that he had greater motive to lie than J.H.

We conclude there was no error. There is no indication that the court prejudged D.H. prior to hearing his testimony or applied a blanket presumption that he was guilty and therefore his protestation of innocence was false. See State v. Boise, 146 Vt. 46, 49 (1985) (explaining that an instruction focusing upon a defendant's interest in the outcome of a trial as bearing on the defendant's credibility "may encroach upon the presumption of innocence" because an innocent defendant has the same interest in the outcome of a trial as a guilty defendant). The court's finding was much more narrow—that as between J.H. and D.H., J.H. was more credible. The court arrived at this finding based on several considerations, among them the motive each witness had to lie. The court also considered the consistency of each witness's testimony and the demeanor of the two at trial. The court's analysis was appropriate. Assessments of credibility are "the sole province of the factfinder." State v. Wetherbee, 156 Vt. 425, 431 (1991). In determining the veracity of testimony, it is proper to consider "a witness's bias, interest in the outcome, opportunity to observe, and demeanor." State v. Pelican, 160 Vt. 536, 542 (1993). Even though defendant believes that these factors weigh in his favor, the court found otherwise.

Because the court's credibility determination was based on the evidence, we find no grounds to disturb it.

D.H. next argues that several of the court's findings are not supported by the evidence. A trial court's factual findings are viewed in a light most favorable to the verdict, and will not be disturbed merely because there is contradictory evidence. Mullin v. Phelps, 162 Vt. 250, 260 (1994). D.H. lists several findings he asserts are not supported by the evidence: (1) D.H. had a motive to lie; (2) D.H.'s testimony was inconsistent; (3) the great-grandmother moved away from the window; (4) J.H. had no motive to lie; and (5) J.H. had no significant memory lapses or defects in her testimony.

D.H. essentially describes all of the evidence and argues that it demonstrates that he was truthful and J.H. was not. D.H.'s retelling of the facts "simply demonstrates the existence of conflicting evidence." Id. at 261. This is insufficient to demonstrate that the court's findings lacked evidentiary support. See Landmark Trust (USA), Inc. v. Goodhue, 172 Vt. 515, 520 (2001) ("That the court chose plaintiffs' evidence rather than defendants', and credited plaintiffs' theory of the case as more supportable is not grounds for error."). Though D.H. has a different view of what the evidence tends to prove, we conclude that the court's findings are all supported by the evidence.

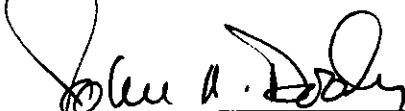
We consider each of D.H.'s challenges in turn. As explained above, the court's finding that D.H. had a greater motive than J.H. to lie was not erroneous. There was also support for the court's finding that D.H.'s story was inconsistent. D.H. first told police that he could not remember being at his grandparents' house with J.H., but when faced with his grandmother's admission that the two were together, he remembered. He denied assaulting J.H., but said he felt responsible and wondered if he should apologize. Though D.H. denies that these statements were admissions of guilt, it was up to the trial court to make that determination. As to the great-grandmother's testimony, the trial court was not persuaded by her statement that she did not move from the window during the entire time the children were in the pool. It is up to the court to determine the credibility of a witness's statements, and the court was free to believe or disbelieve the great-grandmother on this point. See Wetherbee, 156 Vt. at 431 (explaining that credibility assessments are solely for factfinder). Finally, the court did not err in crediting J.H.'s testimony based, in part, on its finding that she had no motive to lie. While D.H. interprets the evidence differently, the evidence supports the court's finding that J.H. gained nothing by lying about the incident. Similarly, the evidence supports the court's finding that J.H. did not have "significant memory lapses or defects." At all times, J.H. consistently described the incident. That others reported she had told them slightly different details, including whether she wore shorts, underwear, or a bathing suit, does not undermine J.H.'s consistent description of the assault.

Finally, we reject D.H.'s argument that the delinquency adjudication was not supported by sufficient evidence. A challenge to the sufficiency of the evidence in a delinquency proceeding is the same as a criminal case. An adjudication will not be overturned if when viewing the evidence in the light most favorable to the State, and excluding modifying evidence, the evidence supports a finding that defendant committed the offense beyond a reasonable doubt. State v. Hinchliffe, 2009 VT 111, ¶ 16, ___ Vt. ___. In this case, J.H.'s testimony was sufficient to establish that D.H. sexually assaulted her. "[W]here the victim testifies as to all elements of the charges against a defendant, we need only recount the victim's testimony concerning the charges to rebut a claim of error." State v. Brink, 2008 VT 33, ¶ 10, 183 Vt. 603 (mem.)

(quotation omitted); see State v. Eaton, 134 Vt. 205, 208 (1976) (holding that victim's testimony of penetration was sufficient to establish that element of the charge). D.H.'s attempt to undermine J.H.'s credibility is insufficient to discredit her testimony, testimony which the court found to be credible. There was adequate evidence to support the delinquency adjudication in this case.

Affirmed.

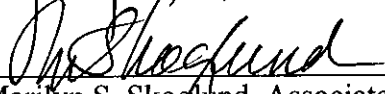
BY THE COURT:



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice