

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-2777-CR
95-3396-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERRY L. CARTER,

Defendant-Appellant.

APPEALS from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Jerry Carter appeals from a judgment convicting him on two counts of second-degree sexual assault of a child. He also appeals from an order denying postconviction relief. He contends that it was a violation of double jeopardy to convict on both counts because they were identical in law and fact. We agree and therefore reverse. On remand, the trial court should enter judgment on one count only and resentence Carter accordingly.

The jury heard evidence that Carter entered a room with a fourteen-year-old, Rosie L.D., and briefly rubbed her buttocks. She told him to stop and tried to leave the room. Carter blocked her way and briefly touched her breast. She then pushed him away and left. Rosie testified that after Carter touched her buttocks but before touching her breast he kissed her on the cheek. A school counselor testified that Rosie initially described the kiss as occurring before the first touch. The whole incident occurred within a couple of minutes.

The State charged Carter in count one with violating § 948.02(2), STATS., by touching the victim's buttocks. Count two charged a violation of § 948.02(2) by touching the victim's breast. The jury returned guilty verdicts on both counts and the court imposed two sentences. That, according to Carter, violated his state and federal constitutional protections against double jeopardy.

The prohibition against double jeopardy prevents arbitrarily dividing a single offense into multiple offenses with multiple punishments. *State v. Kanarowski*, 170 Wis.2d 504, 510, 489 N.W.2d 660, 662 (Ct. App. 1992). A single and indivisible offense is one that is identical in law, as in this case, and not significantly different in fact. See *State v. Eisch*, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980). An offense is not significantly different in fact unless the defendant's acts are separated in time, or of a significantly different nature, or require a separate volitional act. *State v. Hirsch*, 140 Wis.2d 468, 473, 410 N.W.2d 638, 640 (Ct. App. 1987).

Carter's two contacts with Rosie constituted one offense. Both were brief touchings of the victim's clothed intimate parts, virtually identical in character. Both occurred within a few seconds of one another. Although Rosie objected after the first touch, and Carter may have kissed her before the second touch, one cannot reasonably infer that separate volitional acts prompted each touching. "A defendant ought not be charged, tried, or convicted for offenses that are substantially alike when they are a part of the same general transaction or episode." *Eisch*, 96 Wis.2d at 34, 291 N.W.2d at 805. The double jeopardy protection requires conviction on only one count in this case. The judgment shall be amended and Carter resentenced accordingly.

By the Court. — Judgment and order reversed and cause remanded.

Nos. 95-2777-CR
95-3396-CR

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.