

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 26, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2006AP173**

**Cir. Ct. No. 2005JV60**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE INTEREST OF JOSHUA B., A PERSON UNDER THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**JOSHUA B.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Kenosha County:  
MARY K. WAGNER, Judge. *Affirmed.*

¶1 SNYDER, P.J.<sup>1</sup> Joshua B. appeals from a dispositional order finding him delinquent.<sup>2</sup> He contends that the circuit court erred in concluding that he was guilty of first-degree sexual assault of a child because insufficient evidence supports such a finding. Specifically, Joshua argues that the State did not prove beyond a reasonable doubt that he had sexual contact, as defined by statute, with the victim. We disagree and affirm the order of the circuit court.

### BACKGROUND

¶2 In the early morning hours of September 11, 2004, eleven-year-old Sara B. and her friend Kelsey H., who was sleeping over at Sara's house, were asleep on the floor of Sara's bedroom. Sara, Kelsey, and Joshua all gave somewhat different accounts of the events that night. According to Sara, at approximately 4:45 a.m. she woke up to find a male on top of her, kissing her on the neck, face and mouth, and licking her neck. Sara stated that the male touched her breast with his hand and said, "Open your legs." She also said he was fully clothed and was "also going up and down on top of me." She yelled for her dad and the male intruder ran out of the room.

¶3 Kelsey, who was asleep for most of the incident, related that she saw someone with blue eyes in the room where she and Sara were sleeping. Kelsey roused when she heard Sara call for her dad. She observed a male lying next to Sara and described him as wearing all black, including a black mask.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

<sup>2</sup> In his brief, Joshua asks us to reverse an order denying his motion to withdraw a guilty plea. However, this appeal follows a trial and delinquency disposition. Accordingly, we understand Joshua's appeal to seek a reversal of the dispositional order.

¶4 Joshua gave a statement to the police also. He admitted that he had been in Sara's room that night, but provided a different description of the events. Joshua stated that he had come into the house through a bathroom window, and began to look around. He found two sleeping girls, one of whom he estimated was twelve years old and the other eight or nine. When one of them woke up and started screaming, Joshua ran out through a sliding door in the kitchen. Joshua also stated that while he was in the bedroom, he spit on one of the girls. He was "not sure why" he did that, but he did.

¶5 On February 8, 2005, the State filed a delinquency petition alleging that Joshua had sexually assaulted a child under the age of thirteen. At the court trial, Sara provided more detail about what happened the night Joshua broke into her house. She testified that Joshua got on top of her and put his hand over her mouth. He touched her breast with his hand, kissed her, and licked her. Sara demonstrated for the court how Joshua touched her breast; she indicated that it was a hard touch over her clothing, and not for very long. She said that after Joshua touched her breast he pulled back his hand. After touching and kissing Sara, Joshua was near her feet and told her to spread her legs. When he left her room, Sara thought she heard Joshua say, "I'm going to kill you next time," or something similar.

¶6 Joshua also testified at trial. He stated that he was in the house looking for things to take, particularly money or jewelry. Joshua admitted that he entered Sara's bedroom, kneeled beside her, and kissed her on the neck. He testified that when he kissed her she woke up and he put his hand over her mouth. Joshua demonstrated for the court what he did while in Sara's bedroom. Then, he testified, as she began moving around, he ran out of the house. Joshua denied touching Sara's breast.

¶7 The circuit court held that Joshua did sexually assault Sara. Joshua was adjudicated delinquent and ordered into the serious juvenile offender program for five years.

## DISCUSSION

¶8 Joshua's sole issue on appeal is whether the evidence presented at trial was sufficient to support the circuit court's order. Both Joshua and the State direct us to the appropriate standard of review on appeal:

The burden of proof is upon the state to prove every essential element of the crime charged beyond a reasonable doubt. The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding.

*State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (citation omitted).

¶9 Here, the State's burden was to prove that: 1) Joshua had sexual contact with Sara, and 2) Sara had not yet reached the age of thirteen. *See* WIS. STAT. § 948.02(1); WIS JI—CRIMINAL 2102. Sexual contact is defined in part as “the intentional touching of the clothed or unclothed intimate parts of another person ... if that intentional touching ... is for the purpose of sexual humiliation, sexual degradation, sexual arousal or gratification.” WIS. STAT. § 939.22(34). Joshua contends that the State failed to demonstrate beyond a reasonable doubt that his purpose was sexual humiliation, degradation, arousal or gratification.

¶10 Joshua now argues that, even if he did touch Sara's breast, the "accidental reaching across a breast up toward the neck in a dark room is not sexual contact." This argument is first raised on appeal. At trial, Joshua did not testify, nor did he argue, that any touching may have been accidental or otherwise lacking in the requisite intent. Rather, Joshua denied touching Sara's breast and testified that he did not know what his intent was in regard to many of his actions that evening.

¶11 When the prosecutor asked Joshua why he left his house that morning, he answered, "I don't know." When asked what he was looking for when he first peered into Sara's house, Joshua answered, "I don't know." Joshua testified he was only interested in finding money or jewelry, but when asked what he planned to do with it he answered, "I don't know." When asked why he stayed in Sara's room even though there was nothing to steal in there, Joshua answered, "I don't know." When asked what was going through his mind, Joshua said, "I don't know." When asked why he kissed her on the neck, he said, "I don't know."

¶12 The State presented evidence that Joshua touched Sara's breast with a hard touch over her clothing and that he was not reaching for something above her breast or shoulder area. Rather, Joshua withdrew his hand after touching Sara's breast. Also, Sara testified that it was a matter of seconds between the time Joshua kissed her neck and then touched her breast.

¶13 After closing arguments, the circuit court recited the following findings of fact:

Joshua ... snoops around [Sara's] house, looks into windows, breaks into a screen window in the bathroom by climbing up on a chair ... plans his escape by opening up a sliding door in the kitchen and making sure that he can get out.

He says he looked through the purse and looked for things to steal but doesn't steal anything. Enters into the bedroom of this young girl who was 11 years old.... [L]ays down, reaches over her, touches her breast, covers her mouth when she awakens, tries to prevent her from screaming, sits on her feet and tells her to spread her legs and threatens to kill her ....

[Joshua] is untruthful in saying that he didn't touch her breast. He did lick her or kiss or lick her neck and ear, which in context of this entire episode of touching her breast, licking her neck or ear or kissing her neck or ear and telling her to spread her legs and sitting on her feet is certainly beyond a reasonable doubt evidence of a sexual assault of this girl....

¶14 “Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.” *Poellinger*, 153 Wis. 2d at 504 (citation omitted). Joshua argues, “A reasonable hypothesis is that the touch was an accidental, short brushing against the breast in the dark.” On appeal, however, it is not our role to choose from competing hypotheses. Rather, we look to the record to see if the evidence supports the trial court’s finding of fact and drawing of inferences. Here, the evidence supports the court’s determination that sexual assault occurred. In the context of the kissing, licking, and demanding that the victim spread her legs, it can reasonably be inferred that Joshua’s firm touch on Sara’s breast was for the purpose of sexual arousal or gratification.

## CONCLUSION

¶15 We will not reverse a delinquency order unless “the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *See*

*Poellinger*, 153 Wis. 2d at 501. Here, the evidence supports the trial court's determination that Joshua sexually assaulted Sara.

*By the Court.*—Order affirmed.

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

