COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2489-CR **Cir. Ct. No. 2005CF140**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. DENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Dennis Denson appeals a judgment convicting him of one count of repeated sexual assault of the same child. He also appeals an order denying his motion for postconviction relief. Denson argues that he is entitled to a

new trial because the jury was never instructed on an essential element of the charged offense. We affirm.

¶2 Denson argues that the circuit court failed to instruct the jury on an essential element of the crime because the court did not define "sexual contact" or "sexual intercourse" in the jury instructions. At the close of evidence, the circuit court asked the attorneys whether it should define for the jury the meaning of "sexual contact" and "sexual intercourse." Neither the prosecutor nor the defense attorney indicated a preference, so the court decided not to provide definitions. The court reasoned that the definitions were unnecessary because the defendant contended that he had no intimate contact with the victim whatsoever; thus, whether the defendant's acts constituted "sexual contact" or "sexual intercourse" was not at issue.

¶3 On appeal, the State concedes that the definitions of "sexual contact" or "sexual intercourse" constitute an essential element of the charged crime and should always be given to the jury, even when, as here, the defendant denies that the charged conduct occurred. The State contends, however, that this instructional error did not deny Denson his constitutional right to a jury trial on each element of the charged crime and does not entitle Denson to a new trial because the error was harmless.

¶4 We will assume that the omission was error, but affirm nonetheless because we agree with the State that the error was harmless. *See* ***State v. Gordon***, 2003 WI 69, ¶40, 262 Wis. 2d 380, 663 N.W.2d 765 (harmless error analysis is appropriate where the circuit court failed to give an instruction on an element of the charged crime). The circuit court's failure to properly instruct the jury on the definitions of sexual contact or sexual intercourse is harmless if we are "able to

conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶37 (citations omitted).

¶5 Denson's defense was that none of the sexual acts occurred. The victim contended that the acts did occur, and her testimony supports a finding of both sexual contact and sexual intercourse. The record reflects no reason why the jury, if it believed the victim, would not credit all of her testimony in this regard. Because the jury's decision turned on its determination of the relative credibility of the victim and the defendant, not on the type of sexual contact that occurred, the failure to instruct the jury on the definitions of sexual contact or sexual intercourse is harmless.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).