COURT OF APPEALS DECISION DATED AND RELEASED

November 30, 1995

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(1), STATS.

NOTICE

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

No. 94-2984-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES A. MONTGOMERY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Charles Montgomery appeals from a judgment convicting him of second-degree sexual assault of a child, § 948.02(2), STATS. The issue is whether the jury heard sufficient evidence to convict him. We conclude that the State did introduce sufficient evidence and therefore affirm.

The State charged Montgomery with three sexual assaults on a fifteen-year-old boy, T.J.R. This appeal concerns Montgomery's conviction on one of them, an assault that occurred on July 21, 1990. Because T.J.R. died before the trial, and because there were no other witnesses, the sole evidence on that charge was the boy's preliminary hearing testimony, which was read to the jury. That testimony, in relevant part, was as follows:

QDo you remember another date, more specifically July 21 of 1990 when you went ... [in] your bedroom to get a pair of shoes?

AYes.

QWhat happened on that day when you went in your bedroom?

AI went in the bedroom to get a pair of shoes, and Chuck had come in and also put me down on the bed and laid on top of me; and I said: Get off. And I had pushed him off. But he wasn't humping up and down on me.

QDid he do anything prior to getting off you, or you pushing him off on that day?

AHe gave me a kiss after that.

QAnd where--I know this is a little hard, but were did he give you that kiss?

AOn the lips.

Section 948.02(2), STATS., prohibits sexual contact with a person less than sixteen years old. For purposes of this statute, "sexual contact" means, in relevant part, "any intentional touching by the complainant or defendant, either directly or through clothing ... of the complainant's or defendant's intimate parts if that intentional touching is ... for the purpose of ... sexually arousing or gratifying the defendant." Section 948.01(5), STATS. The term "intimate parts" includes the groin and buttocks. Section 939.22(19), STATS.

Montgomery concedes that the jury could reasonably infer that he touched T.J.R. for the purpose of sexual arousal. However, he contends that the testimony quoted above does not allow the inference that the touching included sexual contact as defined in § 948.01(5), STATS. As he points out, "T.J.R. testified only that the defendant laid on him. He described no contact with any of his or the defendant's intimate parts. He did not describe the manner in which the defendant laid on him...." In opposition, the State contends that even without direct evidence of sexual contact the jury could reasonably infer that Montgomery's groin made contact with T.J.R.'s body or vice versa. If the jury's inference is reasonable, we must accept it. ***State v. Poellinger***, 153 Wis.2d 493, 504, 451 N.W.2d 752, 756 (1990).

We conclude that the jury could reasonably infer sexual contact from T.J.R.'s brief description of the event. The jury could have first considered the unlikelihood of one person lying on top of another without some contact with one or the other's groin or buttocks, even if not deliberate. That possibility becomes even more remote when adding the fact that Montgomery intended the contact for sexual arousal or gratification. The jury could employ its common sense to infer that one lying on top of another for the purpose of sexual arousal would cause the contact to include intimate parts.

By the Court.—Judgment affirmed.

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