

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1773-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BARRY D. FABER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iowa County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. The State appeals a trial court order dismissing two felony charges against Barry Faber. Both charges alleged a violation of § 948.055, STATS., which prohibits intentionally causing a child under the age of eighteen to view or listen to “sexually explicit conduct.” The issue is whether the trial court

properly concluded that comments Faber made to two sixteen-year-old girls did not violate this section. We affirm.

At Faber's preliminary examination, his two alleged victims testified that he crudely propositioned them to commit sexual acts, and described the size of his penis to one of them. There was no testimony, however, that he accompanied his remarks with any physical acts or gestures. At the close of testimony, the trial court concluded that the "sexually explicit conduct" prohibited by § 948.055, STATS., did not include oral descriptions of sexual acts or sexual organs, however lewd or obscene.

The term "sexually explicit conduct," as used in § 948.055, STATS., means actual or simulated sexual intercourse, bestiality, masturbation, sexual sadism or sexual masochistic abuse, or lewd exhibition of intimate parts. *See* § 948.01(7), STATS. The State contends that such conduct, when listened to, includes descriptive oral requests or demands for sex, and description of sexual organs. It points to the fact that mere speech may constitute disorderly conduct in violation of § 947.01, STATS. The State also contends that the recent amendment of § 948.055, to include the words "or listen to," substantially broadened the original purpose of this section to protect children from viewing pornographic and sexually explicit material.

A statute's interpretation and its application to undisputed facts is a matter of law that we review independently. *See Chang v. State Farm Mut. Auto Ins. Co.*, 182 Wis.2d 549, 560, 514 N.W.2d 399, 403 (1994). We construe statutes to give effect to the legislature's intent, and our first resort is to the language of the statute. *See State v. Rognrud*, 156 Wis.2d 783, 787-88, 457 N.W.2d 573, 575 (Ct. App. 1990). Where the statute's meaning is plain and unambiguous from its

language, our inquiry ceases and we give effect to that plain meaning. *See State v. Szarkowitz*, 157 Wis.2d 740, 748, 460 N.W.2d 819, 822 (Ct. App. 1990). We read statutes in context, and consider related sections when interpreting them. *See Brandt v. LIRC*, 160 Wis.2d 353, 362, 466 N.W.2d 673, 676 (Ct. App. 1991).

The plain language used to define a violation of § 948.055, STATS., excludes Faber’s speech to his alleged victims. The legislature defined “sexually explicit conduct,” for the purpose of § 948.055, as any one of several actual or simulated acts. Therefore, a violation of § 948.055 occurs only if one of the described acts or simulated acts is heard or seen by a child. No other interpretation is reasonably available. While Faber’s words referred to some of those acts in crude terms, his oral description cannot reasonably be considered an actual or simulated performance of them. The trial court therefore properly dismissed the charges.

By the Court.—Order affirmed.

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

