COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP459-CR **Cir. Ct. No. 2015CF143**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES S. STORM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. James Storm appeals a judgment convicting him of third-degree sexual assault and an order denying his postconviction motion for a

new trial. Storm argues the circuit court erred by denying his request for a lesser included offense jury instruction on fourth-degree sexual assault. He also argues the court provided an "insufficient and confusing" response to a question from the jury about whether third-degree sexual assault requires "intentional" conduct.

¶2 We conclude fourth-degree sexual assault is not a lesser included offense of third-degree sexual assault, at least as that offense was charged in this case. We further conclude the circuit court's response to the jury's question regarding intent does not provide a basis to grant Storm a new trial. We therefore affirm.

BACKGROUND

¶3 An Information charged Storm with one count of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2015-16),[1] and one count of fourth-degree sexual assault, contrary to § 940.225(3m). The third-degree sexual assault charge was premised on allegations that Storm, a massage therapist, had nonconsensual sexual intercourse with Jane,[2] a sixteen-year-old girl, by inserting his fingers into her vulva during a massage. The fourth-degree sexual assault charge alleged that Storm had nonconsensual sexual contact with Jane by touching her breasts during the same massage.

¶4 At trial, Jane testified Storm regularly gave massages to her mother beginning in 2004, when Jane was in seventh or eighth grade. Storm would also

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] For ease of reading, we refer to the victim using a pseudonym, rather than her initials.

sometimes give Jane back or full body massages "for relaxation." In 2012, during the spring semester of Jane's sophomore year of high school, she sustained an injury to the adductor muscles in her left leg. She received approximately five upper leg massages from Storm as part of her treatment for that injury.

¶5 Jane's last massage with Storm occurred on April 19, 2012, the day after her sixteenth birthday.[3] Storm had offered her a full-body massage, in addition to her typical leg massage, "because he was going to be on vacation after that." The massage began normally. However, that changed when Storm began massaging Jane's upper left leg. Jane testified that, during her prior leg massages, Storm had massaged up to the point on her leg "like if [she] was wearing short shorts[,] but nothing past that." On this last occasion, though, Storm "went higher up and into areas that were private." Specifically, Jane testified Storm touched parts of her vulva, including her clitoris and urethral opening and the pubic mound just above her vaginal opening. His fingers penetrated her "vulva area," although he did not insert them inside her vagina. This continued for five to ten minutes.

¶6 Jane testified she did not give Storm permission to touch her vulva. She further testified that, later on during the same massage, Storm touched her breasts, including her nipples, without her consent. Jane testified she was "scared … and in shock" and felt "paralyzed" while Storm was touching her vulva and breasts. After the massage ended, Storm told Jane "that we could keep this between me and him."

[3] Jane testified her mother had been present for two or three of the previous leg massages but was not present for the April 19, 2012 massage.

¶7 Jane contacted the police in May 2012 regarding Storm's conduct. On May 15, 2012, she confronted Storm in a one-party consent telephone call that was monitored by Appleton police lieutenant Polly Olson. During the call, Storm told Jane that what happened during the April 19 massage was an "accident." He further stated that she "should have said something that it wasn't okay" and that he "would have stopped if [Jane] said that it was wrong or that … it wasn't okay."

¶8 Lieutenant Olson testified she interviewed Storm on May 16, 2012. During the interview, Storm told Olson he "may have slipped" while massaging Jane's upper thigh, and at one point he felt moisture on his hand, which he thought "could have been perspiration from between [Jane's] thighs." He conceded it was "possible" he had inadvertently touched Jane's labia or other genitalia.

¶9 Testifying in his own defense at trial, Storm conceded he "did slip a little bit" during the April 19, 2012 massage. However, he described it as a "very minute slip" into Jane's "muscle and attachments," not her genitalia. He stated he was concerned the slip had caused Jane pain, so he asked if she was okay, and she responded, "Yes." He testified his hand was in "that area" for "[a] fraction of a second." He felt "moisture," which he assumed was sweat, and "pulled back right away." He denied intentionally touching Jane's genitalia or breasts.

¶10 As to the third-degree sexual assault charge involving Storm's alleged touching of Jane's genitalia, Storm's attorney asked the circuit court to instruct the jury on fourth-degree sexual assault, as a lesser included offense. The State opposed the instruction, arguing it had charged Storm with third-degree sexual assault based on a theory that he had sexual intercourse with Jane without her consent. The State argued fourth-degree sexual assault is not "included" within third-degree sexual assault, when the latter charge is based on sexual

intercourse, because fourth-degree sexual assault requires proof of an additional element—namely, "intentional touching."[4] The circuit court ultimately agreed that, under the circumstances of Storm's case, fourth-degree sexual assault is not an "included" offense of third-degree sexual assault. It therefore denied Storm's requested instruction.

¶11 In its closing argument, the State argued the evidence showed that Storm had committed third-degree sexual assault by inserting his fingers into Jane's vulva or "genital area" without her consent. The State advised the jury that intent is not an element of third-degree sexual assault by sexual intercourse. Defense counsel argued, in turn, that there was no evidence Storm had penetrated Jane's vaginal opening, and any slight touch of her genitalia that did occur was "brief and unintentional" and took place in the context of a legitimate massage of her adductor muscles.

¶12 During its deliberations, the jury sent a note to the circuit court asking, "Third-degree crime—does it have to be intentional or can it be accidental?" Defense counsel argued the court should instruct the jury that "an accidental touching is not sufficient." The court rejected that argument and instead provided the following response to the jury's question:

> With respect to third-degree sexual assault, the charge in Count 1, you—you ask does it have to be intentional, or can it be an accident?
>
> The first place to start, and you're directed to start there, is to your packet of instructions and the specific instruction No. 1218A which addresses the substance of what has to be proved in Count 1.

[4] Contrary to Storm's assertion on appeal, the State did not concede in the circuit court that fourth-degree sexual assault is a lesser included offense of third-degree sexual assault.

> The elements do not include intent. As to whether it can be accidental, it may be helpful to understand that the act of intercourse as defined must be an affirmative act. It may also be helpful to understand that providing bona fide medical or health care services or the like is not within the definition of sexual intercourse.
>
> That's the best guidance I can give you on this question. So I ask you to give it consideration in light of that.

¶13 The jury ultimately found Storm guilty of third-degree sexual assault—the count alleging nonconsensual intercourse—but not guilty of fourth-degree sexual assault—the count alleging nonconsensual touching of Jane's breasts. Storm moved for judgment notwithstanding the verdict, arguing the jury's question about intent showed that it did not understand the elements of third-degree sexual assault "as they related to the definition of sexual intercourse." Storm also argued that, without a knowledge or intent requirement, WIS. STAT. § 940.225(3)—the statute criminalizing third-degree sexual assault—was unconstitutional as applied to him. The circuit court issued a written decision denying Storm's motion.

¶14 Storm subsequently filed a postconviction motion seeking a new trial, arguing the circuit court erred by refusing to provide a lesser included offense instruction on fourth-degree sexual assault and by improperly answering the jury's question regarding intent. The court denied Storm's motion, again reasoning that fourth-degree sexual assault is not a lesser included offense of third-degree sexual assault, at least as charged in this case, because it requires proof of an additional element—i.e., intent. The court also concluded the response it had provided to the jury's question about intent accurately stated the law. Storm now

appeals the judgment convicting him of third-degree sexual assault and the order denying his motion for a new trial.[5]

DISCUSSION

I. Refusal to give a lesser included offense instruction

¶15 Whether Storm was entitled to a lesser included offense instruction on fourth-degree sexual assault is a question of law that we review independently. *See* ***State v. Salter***, 118 Wis. 2d 67, 83, 346 N.W.2d 318 (Ct. App. 1984).

¶16 A circuit court engages in a two-step process when determining whether to submit a lesser included offense instruction to the jury. *See* ***State v. Muentner***, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987). First, the court must determine whether the offense for which the instruction was requested is, in fact, a lesser included offense of the charged crime. ***Id.*** As relevant here, a lesser crime is "included" in the charged offense when it "does not require proof of any fact in addition to those which must be proved for the crime charged." WIS. STAT. § 939.66(1). Stated differently, "if conviction of the lesser crime requires proof of an element that is not *essential* to conviction of the crime charged, the lesser crime is not a lesser-included offense." ***State v. Martin***, 156 Wis. 2d 399, 403, 456 N.W.2d 892 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991). If the court concludes the crime at issue qualifies as a lesser included offense of the

[5] Notably, Storm did not argue in his postconviction motion, and does not argue on appeal, that the evidence at trial was insufficient to prove he had "sexual intercourse" with Jane. *See* WIS. STAT. §§ 939.22(36) & 940.225(5)(c) (defining the term "sexual intercourse" to include "vulvar penetration"). In addition, Storm does not renew his argument on appeal that § 940.255(3)—the third-degree sexual assault statute—is unconstitutional as applied to him because it lacks an intent requirement.

charged crime, it must then proceed to the second step of the analysis and determine "whether there is a reasonable basis in the evidence for an acquittal on the greater charge and for a conviction on the lesser charge." ***Muentner***, 138 Wis. 2d at 387.

¶17 Here, the circuit court properly determined that, under the circumstances of this case, fourth-degree sexual assault is not a lesser included offense of third-degree sexual assault. Storm was charged with third-degree sexual assault based on allegations that he had nonconsensual sexual intercourse with Jane. In order to obtain a conviction on that charge, the State had to prove two elements: (1) that Storm had sexual intercourse with Jane; and (2) that Jane did not consent to the sexual intercourse.[6] *See* WIS. STAT. § 940.225(3); WIS JI—CRIMINAL 1218A (2002). For purposes of § 940.225, the term "sexual intercourse"

> includes the meaning assigned under s. 939.22(36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal

[6] As the State notes, WIS. STAT. § 940.225(3) sets forth an alternative means of committing third-degree sexual assault. Namely, a person also commits third-degree sexual assault by having nonconsensual "sexual contact in the manner described in sub. (5)(b)2. or 3.," which subdivisions pertain to the intentional emission of semen, urine, or feces. *See* § 940.225(3), (5)(b)2. and 3.

When analyzing whether an offense is a lesser included offense of a charged crime, "[w]here the crime charged has two or more alternative elements, 'the court examines the accusatory pleading' to ascertain which alternative element is asserted." ***State v. Martin***, 156 Wis. 2d 399, 405, 456 N.W.2d 892 (Ct. App. 1990) (quoting ***State v. Carrington***, 134 Wis. 2d 260, 271, 397 N.W.2d 484 (1986)), *aff'd*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991). Here, Storm was indisputably charged with third-degree sexual assault by nonconsensual sexual intercourse involving penetration by his fingers. Accordingly, we need not determine in this case whether fourth-degree sexual assault is a lesser included offense of the alternative form of third-degree sexual assault premised on certain forms of "sexual contact."

> opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

Sec. 940.225(5)(c). WISCONSIN STAT. § 939.22(36), in turn, states that sexual intercourse "requires only vulvar penetration and does not require emission." Notably, third-degree sexual assault, at least as charged in this case, does not contain any element requiring the State to prove the defendant's intent, either to commit intercourse, or to do so for a particular purpose.

¶18 The same cannot be said of fourth-degree sexual assault. A person commits fourth-degree sexual assault when he or she: (1) has sexual contact with another person; (2) without that person's consent. WIS. STAT. § 940.225(3m); *see also* WIS JI—CRIMINAL 1219 (2004). As relevant here, "sexual contact" means:

> 1. Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19(1):
>
> a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

Sec. 940.225(5)(b).

¶19 Thus, in order to obtain a conviction for fourth-degree sexual assault, the State must prove that the defendant intentionally touched the victim's intimate parts[7] for the purpose of sexually degrading or humiliating the victim or sexually arousing or gratifying the defendant. In other words, the State must

[7] "Intimate parts" are defined as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." WIS. STAT. § 939.22(19).

prove both that the touching was intentional and that it was done for one of several enumerated purposes. Conversely, as noted above, third-degree sexual assault by sexual intercourse does not require the State to prove any sort of intent or purpose on the defendant's part. Fourth-degree sexual assault therefore requires proof of an element that is not essential for a conviction on third-degree sexual assault, at least as that offense was charged in this case. As a result, fourth-degree sexual assault is not a lesser included offense of that crime. *See* ***Martin***, 156 Wis. 2d at 403.

¶20 Storm argues that, "[a]s a practical matter, it is impossible to have sexual intercourse without sexual contact." In other words, he contends one cannot physically commit sexual intercourse without first touching the victim's intimate parts. Whatever the merit of that contention in a practical sense, when determining whether a circuit court should have given a lesser included offense instruction our focus is on the elements of the respective crimes, as set forth in the relevant statutes. *See* ***id.*** Here, the statutes clearly define "sexual contact" as requiring intentional conduct. *See* WIS. STAT. § 940.225(5)(b). There is no similar requirement for "sexual intercourse." *See* WIS. STAT. §§ 939.22(36), 940.225(5)(c).

¶21 The State concedes the absence of an intent element for third-degree sexual assault by sexual intercourse "may seem counterintuitive." However, as the State correctly observes, this court's decision in ***State v. Neumann***, 179 Wis. 2d 687, 508 N.W.2d 54 (Ct. App. 1993), forecloses any argument that the lack of an intent element was the result of legislative oversight. In ***Neumann***, the defendant argued the circuit court had erred by concluding that a prior statute criminalizing second-degree sexual assault by sexual intercourse—WIS. STAT.

§ 940.225(2)(a) (1991-92)—did not contain an element of intent. ***Neumann***, 179 Wis. 2d at 705.[8] We concluded the plain language of § 940.225 (1991-92),

> clearly indicated that sexual contact requires intent, both in the form of an intentional act, and a purpose for that act. By contrast, the legislature defined sexual intercourse without any reference to intent or purpose, and instead, defined the acts that would constitute sexual intercourse. … Thus, the language of the statute indicates that no intent need be proven for the offense of sexual assault by sexual intercourse.

Neumann, 179 Wis. 2d at 707-08.

¶22 We further concluded the legislative history of WIS. STAT. § 940.225 (1991-92), "also indicate[d] that no particular intent is required." ***Neumann***, 179 Wis. 2d at 708. We noted that statute was created to replace the former "rape statute"—WIS. STAT. § 944.01 (1973-74)—which "contained no language indicating a requisite intent." ***Neumann***, 179 Wis. 2d at 708. We observed the Wisconsin Supreme Court had expressly held that the former rape statute did not contain an intent element. ***Id.*** (citing ***Redepenning v. State***, 60 Wis. 2d 471, 480-81, 210 Wis. 2d 673 (1973); ***Brown v. State***, 59 Wis. 2d 200, 214, 207 N.W.2d 602 (1973)). We noted that, when the legislature repealed the rape statute and enacted the statute at issue in ***Neumann***, it "broadened the meaning of 'sexual intercourse' as it was found in the rape statute, but did not add an intent element into the sexual assault by sexual intercourse offense, despite the fact that the supreme court had concluded that intent was not an element of the former rape statute." ***Id.*** We explained, "The fact that the legislature did not subsequently add

[8] The statutes at issue in ***Neumann*** contained definitions of "sexual intercourse" and "sexual contact" that are virtually identical to the definitions applicable to this case. *See* ***State v. Neumann***, 179 Wis. 2d 687, 707 n.8 & n.9, 508 N.W.2d 54 (Ct. App. 1993) (citing WIS. STAT. §§ 939.22(36), 940.225(5)(b) & (c) (1991-92)).

an intent element to the statute leads this court to the conclusion that the legislature intentionally omitted any intent requirement from the newly created offense of sexual assault by sexual intercourse." ***Id.*** at 709 (footnote omitted).

¶23 We also observed in ***Neumann*** that public policy considerations supported a conclusion that the legislature did not intend the offense of sexual assault by sexual intercourse to include an intent element. We reasoned the legislature "most likely concluded that a defendant's intent should not be an element of the crime because to allow for a defendant to claim the defense of intoxication, and other defenses based upon lack of intent, would be contrary to the goals of enforcement and protection of bodily security." ***Id.*** at 710. We also stated the legislature's "rationale for requiring intent when a person is charged with sexual contact rather than sexual intercourse is quite clear," explaining:

> There exist many circumstances under which one person might unintentionally touch certain defined intimate areas of another person. The same can rarely, if ever, be said for the act of penetration. Thus, the fact that the legislature chose to require a particular "purpose" for the touching in the definition of sexual contact is rational.

Id. at 713-14.

¶24 Like the offense at issue in ***Neumann***, third-degree sexual assault under WIS. STAT. § 940.225(3), at least as charged in this case, does not include an element of intent. In contrast, fourth-degree sexual assault requires the State to prove the defendant's intent to commit the act for a specific purpose in order to obtain a conviction. *See* WIS JI—CRIMINAL 1219 (2004). Because fourth-degree sexual assault requires proof of an element that is not required for a conviction on the form of third-degree sexual assault that was charged in this case, fourth-degree sexual assault is not a lesser included offense of that crime. *See* ***Martin***, 156

Wis. 2d at 403. Accordingly, the circuit court properly refused to give a lesser included offense instruction on fourth-degree sexual assault.[9]

II. Response to the jury's question regarding intent

¶25 Storm next argues the circuit court erred in responding to the jury's question regarding the intent required for third-degree sexual assault. A circuit court has wide discretion in instructing the jury. ***State v. Foster***, 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995). "We will reverse and order a new trial only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury." ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). "Just as the initial jury instructions are within the [circuit] court's discretion, so, too, is the 'necessity for, the extent of, and the form of re-instruction' in response to requests or questions from the jury." ***State v. Simplot***, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993) (quoting ***Hareng v. Blanke***, 90 Wis. 2d 158, 166, 279 N.W.2d 437 (1979)). When the jury poses a question, the court must "respond ... with sufficient specificity to clarify the jury's problem." ***Id.*** at 404-05 (quoting ***State v. Booth***, 147 Wis. 2d 208, 212-13, 432 N.W.2d 681 (Ct. App. 1988)).

[9] In his brief-in-chief, Storm cited an unpublished, per curiam opinion in support of his argument that the circuit court erred by refusing to give a lesser included offense instruction. That citation violated WIS. STAT. RULE 809.23(3). Storm indicated in a footnote that he understood the unpublished decision could not be cited, "even for its persuasive value." However, he then proceeded to argue the unpublished decision was "persuasive" and that he was "entitled to an instruction on the lesser offense just like the defendant in" that case. Storm again relied on the same unpublished decision in his reply brief, despite the State having pointed out in its respondent's brief that such reliance was improper. We admonish Storm's attorney that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

¶26 Here, in response to the jury's question as to whether third-degree sexual assault "[has] to be intentional," the circuit court correctly informed the jury that: (1) intent is not an element of third-degree sexual assault, as charged in this case; and (2) "providing bona fide medical or health care services or the like is not within the definition of sexual intercourse."[10] The court also properly referred the jury to WIS JI—CRIMINAL 1218A (2002)—the instruction on third-degree sexual assault by nonconsensual sexual intercourse—which does not list intent or any particular mental state as an element of that crime.

¶27 Storm nevertheless argues the circuit court's response was improper because "Wisconsin courts have read into statutes that impose strict liability a knowledge or intent element depending upon the nature of the statute." In support of that proposition, Storm cites ***State v. Collova***, 79 Wis. 2d 473, 487-88, 255 N.W.2d 581 (1977), in which our supreme court read a scienter requirement into the offense of operating after suspension or revocation.

¶28 However, Storm fails to acknowledge that, in ***Neumann***, this court expressly determined a predecessor statute to the current WIS. STAT. § 940.225(3) did not require the State to prove intent in order to obtain a conviction for sexual assault by sexual intercourse. ***Neumann***, 179 Wis. 2d at 710. The statute at issue in ***Neumann*** contained definitions of the terms "sexual intercourse" and "sexual contact" that are virtually identical to the definitions set forth in the current version of § 940.225. *See supra* n.8. The ***Neumann*** court held that the language

[10] *See* WIS JI—CRIMINAL 1200B (2010) (stating sexual intercourse "does not include an intrusion for a bona fide medical, health care, or hygiene procedure"); *see also* ***Neumann***, 179 Wis. 2d at 712 n.14 (stating it "stretches all bounds of reason to believe that the legislature intended to include bona fide medical, health care, and hygiene procedures within the definition of 'sexual intercourse'").

and history of the relevant statute, as well as public policy considerations, supported a conclusion that sexual assault by sexual intercourse did not require the State to prove intent. ***Neumann***, 179 Wis. 2d at 706-10. The court further explained why the legislature could have rationally decided to require intent for offenses involving sexual contact but not for offenses involving sexual intercourse. ***Id.*** at 713-14. Storm's argument that the circuit court should have read an intent requirement into the crime at issue here is directly contrary to our holding in ***Neumann***.

¶29 Storm also argues that imposing "[s]trict liability for a felony offense of this nature without some requirement that the actor's behavior be purposeful seems contrary to basic fairness." However, the legislature is not "precluded from creating a strict liability offense where substantial penalties are to be imposed." ***State v. Lederer***, 99 Wis. 2d 430, 435, 299 N.W.2d 457 (Ct. App. 1980). In ***Redepenning***, our supreme court expressly concluded intent was not an element of the crime of rape, the maximum punishment for which was thirty years in prison. ***Redepenning***, 60 Wis. 2d at 480-81 & n.14. We similarly concluded in ***Neumann*** that intent was not an element of second-degree sexual assault by sexual intercourse. ***Neumann***, 179 Wis. 2d at 710. The maximum penalty for that offense was "a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both." WIS. STAT. §§ 939.50(3)(c) & 940.225(2)(a) (1991-92). In this case, the maximum penalty for third-degree sexual assault is "a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both." WIS. STAT. §§ 939.50(3)(g), 940.225(3). Storm does not explain why fundamental fairness requires a conclusion that third-degree sexual assault by sexual intercourse contains an intent element, given that similar offenses with equivalent or greater penalties were held not to require intent in ***Redepenning*** and ***Neumann***.

¶30 In addition to informing the jury that intent is not an element of third-degree sexual assault, as charged in this case, and that bona fide medical or health care services do not fall within the definition of sexual intercourse, the circuit court told the jury that the "act of intercourse as defined must be an affirmative act." In its decision denying Storm's postconviction motion, the court explained that "because the jury was instructed that it must find that Storm engaged in an affirmative act, the jury was instructed that it needed to view Storm's actions as purposeful in order to find him guilty." The State similarly contends on appeal that the court's reference to an "affirmative act" defeats Storm's argument that the court's response to the jury's question "failed to include a scienter or *mens rea* component."

¶31 Storm contends the court's instruction to the jury indicating that intent is not an element of third-degree sexual assault, as charged in this case, and then advising them that the act of intercourse must be defined as an affirmative act was insufficient and confusing. He argues that intercourse itself is an affirmative act. Therefore, he contends the instruction that an affirmative act was required to constitute intercourse would have necessarily implied to the jury that they would need to find Storm intended to invade Jane's genital area in order to find Storm guilty of the charged offense.

¶32 We need not decide whether the court's statement regarding an "affirmative act" was proper because, even if that statement was erroneous, the error was harmless. *See* ***State v. Williams***, 2015 WI 75, ¶51, 364 Wis. 2d 126, 867 N.W.2d 736, *cert. denied*, 136 S. Ct. 1451 (2016) (stating erroneous jury instructions are subject to harmless error analysis). The court's statement did not likely mislead the jury, given that the court also correctly stated intent was not required to convict Storm of third-degree sexual assault and properly referred the

jury to the pattern jury instruction for that crime. If anything, the court's statement regarding an "affirmative act" required the jury to find proof of an additional element not actually required in order to obtain a conviction. Under these circumstances, it is clear beyond a reasonable doubt that a rational jury would have found Storm guilty absent the court's reference to an "affirmative act," and if there was any error in that regard, it was therefore harmless. *See* ***State v. Beamon***, 2013 WI 47, ¶27, 347 Wis. 2d 559, 830 N.W.2d 681.

By the Court.—Judgment and order affirmed.

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