COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2062-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. G.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Order affirmed; judgment affirmed in part, reversed in part and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

SNYDER, P.J. Michael J. G. appeals from a judgment convicting him of two counts of first-degree sexual assault of a child (Counts 3 and 4)[1]

[1] Michael was charged with four counts of first-degree sexual assault of a child contrary to § 948.02(1), STATS., 1993-94. The jury returned a guilty verdict on Counts 3 and 4 of the information. He was acquitted of the other two counts.

contrary to § 948.02(1), STATS., 1993-94, and from an order denying his postconviction motion for a new trial. Michael contends that the trial court erred in instructing the jury on Count 4 (intentional penis to stomach contact) and that there was insufficient evidence to support a conviction on that charge. We agree that the trial court wrongly instructed the jury on Count 4 and therefore reverse the conviction. However, because there was sufficient evidence to support a guilty verdict on Count 4, we remand the matter for a new trial in the interests of justice. We reject Michael's contention that he is also entitled to a new trial on Count 3 (penis to hand contact) because of victim recantation.

Michael and his stepdaughter, Bobbie G., age twelve at the time of the offenses, lived with Bobbie's mother. Between November 1994 and January 1995, Michael allegedly had sexual contact with Bobbie in their home. Consequently, Michael was charged with four counts of sexual assault of a child. At trial Bobbie testified that Michael once ordered her to sit in front of him naked; on another occasion Bobbie awoke from a nap while Michael was trying to pull down her pants; in November 1994, Michael reached down her shirt and fondled her right breast while they were watching television (Count 1); in November or December 1994 while Bobbie was showering, Michael reached into the shower and rubbed her vagina (Count 2); in January 1995, Bobbie awoke in her bedroom as Michael was using her hand to rub his penis (Count 3); and between November and December 1994, Bobbie would "wake up and find [herself] naked and have white sticky stuff all over [her] stomach" (Count 4).

The court instructed the jury that "sexual contact," for purposes of Counts 3 and 4, means "any touching of [Bobbie] with the penis of the defendant, if the defendant intentionally caused that touching to occur." During jury deliberations, the jurors sent a note to the judge asking the following two questions

in an attempt to clarify Count 4: "Does he have to [have] touched his penis to [her] stomach to be guilty? If there was semen on her stomach as a result of ejaculation without physical contact would he be guilty?" On the bottom of the jurors' note, the court responded, "Yes. If the semen was directly ejaculated onto [Bobbie's] stomach from the defendant's penis and you are satisfied that the other elements of the offense also exist." The jury found Michael guilty of Counts 3 and 4, and he moved for a new trial. This motion was denied and Michael now appeals.

Michael contends that the trial court erroneously instructed the jury on Count 4 that sexual contact, as defined at the time of the offense by § 948.01(5), STATS., 1993-94, included ejaculation of semen onto the victim without physical contact between the defendant and the victim. Michael argues that because the legislature subsequently amended § 948.01(5) to expressly include "[i]ntentional penile ejaculation," *see* § 948.01(5)(b), STATS., 1995-96, the statute applicable at the time of the offense did not encompass ejaculation alone. In response, the State asserts that when "viewed as a whole," the trial court instructions do not misstate the law. We agree with Michael.

In an attempt to clarify Count 4, the jury posed two questions to the trial court: the first asked whether physical touching was required, and the second asked whether contact with semen without physical touching was sufficient. We interpret these questions as being the converse of each other—i.e., they cannot both be answered in the affirmative. The court, however, responded in the affirmative, stating, "Yes. If the semen was directly ejaculated onto [Bobbie's] stomach from the defendant's penis and you are satisfied that the other elements of the offense also exist." Because the court responded that the semen must have been ejaculated directly onto Bobbie's stomach, we conclude that the court's

response was an answer to the second question which, unlike the first question, specifically mentions ejaculation.

Next, we must determine whether the court's instruction accurately reflected the law at the time of Michael's offense. The interpretation of a statute is a question of law that we review independently without deference to the trial court's opinion. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis.2d 680, 703, 530 N.W.2d 34, 43 (Ct. App. 1995). We first look to the plain meaning of the statute and if it is unambiguous our inquiry ends. *See* ***id.*** However, if it is ambiguous, we then look to its context and purpose to determine the intent of the legislature. *See* ***id.*** at 703-04, 530 N.W.2d at 43.

Section 948.01(5), STATS., 1993-94, defines sexual contact as the following:

> [A]ny intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

We read § 948.01(5) as requiring three elements: (1) the complainant or defendant must have engaged directly or indirectly in "intentional touching"; (2) the touching must be "of the complainant's or defendant's intimate parts"; [2] and (3) the touching must either be for the purpose of "sexually degrading or sexually humiliating the complainant" or "sexually arousing or gratifying the defendant."

[2] The term "intimate parts" includes "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." Section 939.22(19), STATS., 1993-94.

The court's original jury instruction correctly stated that sexual contact consisted of "any touching of [Bobbie] with the penis of the defendant." The court's written comments to the jury, however, broadened § 948.01(5), STATS., 1993-94, to include ejaculation onto a person's body. That the trial court expanded the scope of § 948.01(5) is evidenced by a court statement to the parties prior to its response to the jury's questions: "[I]t's my determination that … semen emitted, projected from a penis which strikes the body of another human being is in fact touching and sexual contact within the meaning of Subsection (5)" of § 948.01. Although the court's written comments warned the jury that "the other elements of the crime [must] also exist," we interpret this merely as a reminder that the touching must also occur for the purpose of sexual gratification of the defendant or sexual degradation of the victim. Thus, we construe the court's instruction as permitting a finding of sexual contact where the jury determines that the defendant ejaculated onto the victim.

We cannot agree that § 948.01(5), STATS., 1993-94, includes the ejaculation of semen. The operative word in § 948.01(5) is "touching" which is generally defined as bringing "a bodily part briefly into contact with so as to feel." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2415 (unabr. 1993). Because bodily fluid, such as semen, is not ordinarily considered "a bodily part" once it is emitted, we are not persuaded that "touching" encompasses semen ejaculation onto another person.

Our interpretation of § 948.01(5), STATS., 1993-94, is supported by the legislative history which reveals that the legislature simply failed to include semen ejaculation under the definition of sexual contact. It is within the control of the legislature, not the courts, to define criminal conduct within constitutional limits. *See* ***State v. Wolske***, 143 Wis.2d 175, 187, 420 N.W.2d 60, 64 (Ct. App.

1988). The legislature is presumed to act with knowledge of existing law. *See* ***State v. Neumann***, 179 Wis.2d 687, 707, 508 N.W.2d 54, 62 (Ct. App. 1993). To the extent that a criminal statute is ambiguous, we follow the "rule of lenity," which provides that a penal statute will ordinarily be strictly construed to safeguard a defendant's rights. *See* ***State v. Frey***, 178 Wis.2d 729, 745, 505 N.W.2d 786, 792-93 (Ct. App. 1993). After Michael had been charged under § 948.02(1), STATS., 1993-94, the legislature amended §§ 939.22(34)[3] and 948.01(5), STATS., 1993-94, to include "[i]ntentional penile ejaculation" as sexual contact.[4] *See* §§ 948.01(5)(b), 939.22(34), STATS., 1995-96. Because these amendments came after Michael's offense, we are convinced that the legislature did not contemplate the inclusion of semen ejaculation as sexual contact until it amended § 948.01(5), STATS., 1993-94.

Even though we determine that § 948.01(5), STATS., 1993-94, does not include the ejaculation of semen, we are persuaded that there was sufficient evidence to support the jury's verdict on Count 4 that Michael had sexual contact with Bobbie. The standard of review for sufficiency of the evidence is whether

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[3] Section 939.22, STATS., is a definitional section for chs. 939 through 948, STATS. Subsection (34) of that statute defines "sexual contact."

[4] Section 948.01(5), STATS., 1993-94, has been recreated to include two paragraphs, the second of which reads:

> Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

Section 948.01(5)(b).

the evidence, when 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* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We will not substitute our evaluation of the evidence for that of the jury. *See* ***State v. Barksdale***, 160 Wis.2d 284, 290, 466 N.W.2d 198, 201 (Ct. App. 1991).

Although there was no direct evidence of sexual contact in Count 4, there was sufficient circumstantial evidence on which a jury could base its findings. First, Bobbie testified that she would awake in her bed to find herself unclothed with "white sticky fluid" on her stomach. Although she did not state that the fluid was "semen," a jury could have reasonably inferred that Bobbie was not old enough to identify the "white sticky fluid" as semen. Second, the evidence demonstrated that Michael's semen was on Bobbie's bedding. Despite the testimony of Bobbie's mother that the semen stains were a result of her sexual activity with Michael, a jury could have reasonably found that these stains were produced by Michael's sexual contact with Bobbie. Third, the evidence generally established that Michael was sexually fixated on Bobbie. His obsession with Bobbie is supported by her testimony that Michael ordered her to sit naked in front of him, that she awoke from a nap as he was trying to remove her clothes and that he used her hand to rub his penis. Consequently, we are persuaded that the jury had sufficient evidence to decide that Michael had sexual contact with Bobbie as to Count 4.

The problem is not with the sufficiency of the evidence to convict on Count 4, but in determining what theory the jury relied upon in making its findings. There are two alternative theories the jury could have applied: first, the

jury could have relied upon the legally incorrect position that ejaculation of semen constitutes sexual contact; second, the jury could have found sexual contact based upon circumstantial evidence, including the semen evidence, which indicated that Michael touched Bobbie with his penis. Because we are unable to determine which approach the jury used, but suspect it relied upon the legally incorrect theory, we have no confidence in the outcome of the Count 4 conviction. Accordingly, we remand for a new trial on that count.

Finally, Michael contends that the trial court misused its discretion when it denied his postconviction motion for a new trial based on the victim's recantation. Michael's motion stemmed from the testimony of his wife, Dawn, and her son, Daniel, who stated that in a telephone conversation Bobbie admitted to fabricating her accusations against Michael because "she wanted [Michael] out of the house and she wanted it just to be us three again." Although Bobbie did not testify at the postconviction motion hearing, a police officer testified that Bobbie denied recanting her testimony. The trial court denied Michael's motion after weighing the credibility of Dawn's and Daniel's statements with Bobbie's original testimony. Michael now argues that the trial court overstepped its bounds by improperly invading the province of the jury. We are not persuaded.

As a general rule, recantations are "inherently unreliable." *See* ***State v. McCallum***, 208 Wis.2d 463, 476, 561 N.W.2d 707, 712 (1997). Recantation evidence "must be corroborated by other newly discovered evidence." ***Id.*** Corroboration may be found if: "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78, 561 N.W.2d at 712. Circumstantial guarantees of trustworthiness include whether the recantation was made under oath and whether

it was consistent with a motive for the alleged original false statement. *See* ***id.*** at 476-78, 561 N.W.2d at 712.

Our first step is to identify the recantation. Here, however, Bobbie did not recant at the postconviction hearing. Although the trial court heard testimony from Dawn and Daniel attempting to support an alleged recantation by Bobbie, this testimony does not qualify as the recantation itself. Rather, Dawn's and Daniel's testimony is merely corroborating evidence. The problem is that there is no recantation to corroborate. *Cf.* ***id.*** at 469, 561 N.W.2d at 709. We are convinced that Bobbie did not recant and, therefore, need not address whether the trial court properly weighed the credibility of the corroborating witnesses.

In sum, we reverse Count 4 and remand with directions that the trial court instruct the jury on the question of sexual contact consistent with this opinion. We affirm Count 3 and the trial court's order denying Michael's motion for a new trial.

By the Court.—Order affirmed; judgment affirmed in part, reversed in part and cause remanded with directions.

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