

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 1998

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. 97-3516-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN H. GILLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

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

PER CURIAM. Kevin H. Gillson has appealed from a judgment convicting him of sexual assault of a child in violation of § 948.025, STATS. He contends that statements made by him in response to questioning by a police

officer should have been suppressed because he was not given *Miranda*¹ warnings prior to the questioning. He contends that the trial court's denial of his motion to suppress those statements was not harmless error and that his conviction must be reversed.

Margaret Bannon, a city of Port Washington police officer, testified at trial that in response to questioning by her, Gillson admitted that he and Stephanie D., the victim of this offense, had sexual intercourse several times. The questioning occurred at the high school attended by Gillson. For purposes of this decision, we will assume without deciding that *Miranda* warnings should have been given to Gillson at the time his statements were made. However, because we conclude that any error in admission of the statements was harmless, we affirm the judgment of conviction.

When a motion to suppress a statement is erroneously denied, we will reverse the conviction only where there is a reasonable possibility that the error contributed to the conviction. *See State v. Buck*, 210 Wis.2d 115, 125, 565 N.W.2d 168, 172 (Ct. App. 1997). In applying this test, we weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. *See id.*

The information in this case charged Gillson with engaging in three or more acts of sexual intercourse between August 1, 1996 and September 26, 1996, with a person who had attained the age of thirteen years but not sixteen years. At the close of the State's presentation of its case at trial, the trial court granted the State's motion to amend the information to allege the time period as

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

between July 9, 1996 and September 26, 1996. The jury was instructed that to find Gillson guilty of violating § 948.025, STATS., the State was required to prove beyond a reasonable doubt that: (1) Gillson had committed three or more sexual assaults of Stephanie, which in this case involved engaging in sexual intercourse with her; (2) that Stephanie had not attained the age of sixteen years at the time of each act of sexual intercourse; and (3) that at least three of the alleged sexual assaults took place within the time period from July 9, 1996 to September 26, 1996. The jury was also instructed that consent to sexual intercourse was not a defense.

Stephanie testified that she was fifteen years old at the time of trial and that she began dating Gillson on July 9, 1996. She testified that she and Gillson had sexual intercourse not less than three times and not more than five times after they started dating. Her testimony was consistent with that of Officer Bannon, who testified that she spoke to Stephanie on September 26, 1996, and that Stephanie told her that she and Gillson began dating in July, started having sexual intercourse in August 1996, and had sexual intercourse four or five times.

Even ignoring Gillson's statements and testimony, the evidence at trial was undisputed that he and Stephanie had sexual intercourse at least three times between July 9, 1996 and September 26, 1996, and that Stephanie was not yet sixteen years old. Contrary to the argument in Gillson's brief, Stephanie's testimony was unequivocal in relating that they had sexual intercourse at least three times. It also unequivocally set forth the material time period during which the acts occurred.

Because the evidence was undisputed as to the time frame and minimum number of times Gillson and Stephanie engaged in sexual intercourse,

there is no reasonable possibility that the admission of Gillson's statements corroborating Stephanie's testimony contributed to the conviction. In reaching this conclusion, we also note that Gillson did not defend on the ground that intercourse never occurred, nor did he challenge Stephanie's testimony as to the dates or number of times they had intercourse. Instead, Gillson's defense was intended to establish, consistent with the testimony of Stephanie, that the sexual intercourse was the result of a serious loving relationship and that Gillson and Stephanie had plans to marry and support the child that resulted from their relationship. The hope was clearly that the jury would be sympathetic to their plight and conclude that a criminal conviction was unwarranted, acquitting Gillson. Because Gillson's statements to Bannon were immaterial to that defense, we conclude that there was no reasonable possibility that they contributed to his conviction.²

By the Court.—Judgment affirmed.

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

² Gillson contends that if the trial court had excluded his statements he might have decided not to testify at trial and might have taken a different tactical approach in his cross-examination of the State's witnesses. However, because absolutely nothing in the record discredited Stephanie's testimony and statements to Bannon, there is no reasonable possibility that the result would have been different even absent Gillson's testimony and statements. The record also gives rise to no reasonable possibility that different questioning would have altered Stephanie's clear and unequivocal testimony, and thus altered the result.

