

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0258-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRIEST JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Priest Johnson appeals a judgment convicting him of three counts of second-degree sexual assault of a child. He was convicted after a bench trial and sentenced, as amended, to prison terms totaling twenty years. On

appeal he contends that: (1) WIS. STAT. § 948.02(2) (1997-98)¹ violates due process because it allows conviction without proof that the assailant knew the victim was a child; (2) the trial court erred by excluding evidence that the thirteen-year-old victim misrepresented her age to Johnson; (3) he received ineffective assistance from trial counsel; and (4) the trial court misused its sentencing discretion. We affirm on all issues.

¶2 Due process generally requires that the State prove guilty knowledge, or scienter, as to each element of a crime. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-72 (1994). However, an exception to the requirement exists where the charged offense involves sexual conduct with a child and, as here, the assailant has face-to-face contact with the victim. *See State v. Weidner*, 2000 WI 52, ¶¶37-39, 235 Wis. 2d 306, 611 N.W.2d 684. Therefore, the trial court did not violate Johnson's due process rights by convicting him without proof of scienter.

¶3 The trial court did not erroneously deny Johnson a defense by excluding evidence that the victim lied to him. Johnson sought to prove that the victim misled him into thinking she was much older. However, a mistake of age is not a defense to a crime of sexual assault of a child. WIS. STAT. § 939.43(2). The evidence Johnson offered was therefore irrelevant.

¶4 Johnson has waived the third and fourth issues. The issue of ineffective assistance of counsel must first be raised in postconviction proceedings in the trial court. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-

¹ References to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

78, 556 N.W.2d 136 (Ct. App. 1996). The same is true of Johnson's challenge to the trial court's sentencing discretion. *See State v. Norwood*, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991).

By the Court.—Judgment affirmed.

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

