COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1687 **Cir. Ct. No. 01JV001866**

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

IN THE INTEREST OF DE'ANDRUS N., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DE'ANDRUS N.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Reversed.*

¶1 FINE, J. De'Andrus N. appeals from an adjudication of delinquency, finding him guilty of two counts of attempted first-degree sexual assault of a child, *see* WIS. STAT. §§ 948.02(1) and 939.32, and from the circuit court's resulting dispositional order. We reverse.

¶2 The material facts underlying this appeal are not disputed. The circuit court found that De'Andrus told Nakyra W. to suck the penis of Antwan G. while they were all at a daycare facility. Nakyra refused to comply with De'Andrus's request, and the children were interrupted. De'Andrus was approximately eleven years old at the time; Antwan was approximately eight years old, and Nakyra was five years old. The only issue presented by this appeal is whether on these facts De'Andrus is guilty of attempting to violate WIS. STAT. § 948.02(1). We hold that he is not.

¶3 WISCONSIN STAT. § 948.02(1) provides: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." "Sexual contact" is defined as:

> 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.

WIS. STAT. § 948.01(5)(a). "Sexual intercourse" includes "fellatio" irrespective of whether there is "emission of semen." WIS. STAT. § 948.01(6). Both the State and the circuit court focused on the "touching" aspect of the statute, and the circuit court held that De'Andrus's attempted "touching" of each of the children was through the "instrumentality" of the other child; the State did not argue and the circuit court did not consider whether the "sexual intercourse" definition applied.

¶4 This case requires that we apply WIS. STAT. §§ 948.02(1) and 948.01(5)(a). Our review is *de novo*. ***State v. Setagord***, 211 Wis. 2d 397, 405–406, 565 N.W.2d 506, 509 (1997). If the language of a statute is clear on its face, we need not look beyond that language to determine the statute's meaning. *See*

Bruno v. Milwaukee County, 2003 WI 28, ¶20, 260 Wis. 2d 633, 645, 660 N.W.2d 656, 662. Section 948.01(5)(a) is clear: it requires either that the victim have touched the defendant, or that the defendant have touched the victim. Although § 948.01(5)(a) encompasses "touching ... by the use of any body part or object," the contact must result in some tactile sensation to the defendant, either directly or through an object before there can be a "touching"; mere direction to a third person to touch the victim, or to victims to touch each other, is insufficient. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2415–2416 (1993). Under the facts found by the circuit court, De'Andrus neither touched nor was touched by either of the victims. Accordingly, we reverse.[1]

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[1] The State argues that De'Andrus N. could be guilty of first-degree sexual assault as party to a crime under WIS. STAT. § 939.05, and, indeed, one of the counts lodged against De'Andrus charged him with first-degree sexual assault as party to a crime (in connection with the count alleging that Nakyra W. was the victim). As we have seen, however, WIS. STAT. § 948.01(5)(a) requires that the "touching" be "either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." The circuit court never found that either Antwan or Nakyra was acting with the requisite intent to humiliate or become sexually aroused or gratified. For children so young, such a finding needs to be explicit. *See* ***State v. Stephen T.***, 2002 WI App 3, ¶¶13, 20–22, 250 Wis. 2d 26, 37, 40–42, 643 N.W.2d 151, 155, 156–157 (Ct. App. 2001). Thus, there is no evidence that would support a conclusion that Antwan and Nakyra were potential reciprocal violators of WIS. STAT. § 948.02(1) so as to make De'Andrus the attempting aider or abettor under § 939.05.