**COURT OF APPEALS DECISION DATED AND FILED**

**May 27, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**

**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.**

**Appeal No. 2009AP991-CR**

**Cir. Ct. No. 2007CF349**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JIMMY D. GARZA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jimmy Garza appeals a judgment of conviction. The issue is sufficiency of the evidence. We affirm.

¶2 Garza was charged with one count of repeated sexual assault of a child between March and August 2007. The jury found him guilty. Garza argues that the evidence was not sufficient to support the verdict. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶3 In the parties' arguments on appeal, they measure the sufficiency of the evidence by discussing whether it satisfied the statutory language or the pattern jury instructions. Neither of these is relevant. Sufficiency of the evidence must be measured against the instructions that were actually used by the jury. To do otherwise would not be a review of this jury's verdict.

¶4 Here, the jury was instructed that the offense has three elements: that Garza committed at least three sexual assaults of the complainant by sexual contact; that the complainant was under thirteen years of age at the time of all the assaults; and that at least three such assaults occurred in the specified time period. The jury was told that sexual contact means intentional touching of the complainant's vagina or breast "directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be intentional touching." The jury was instructed that the touching must have been with intent to become sexually aroused or gratified.

¶5 Garza's arguments on appeal do not challenge the complainant's age. Instead, they challenge whether sexual contact was proved and how many instances. He argues that the State's evidence was so vague, confusing, and

inconsistent that no reasonable juror could have found there was even one sexual assault, much less three.

¶6 We conclude that the evidence was sufficient. We will not attempt to recite the evidence in detail here. We believe that the complainant's statements during an interview with a social worker, combined with the complainant's testimony at trial about those same incidents, allows a reasonable inference that at least two, and possibly as many as five, incidents of Garza "humping" the complainant occurred with clothes on. In addition, Garza admitted to police two incidents in which he rubbed the complainant's leg and rubbed his thumb "across her groin area." This totals at least four instances of contact. To the extent Garza argues that the State did not prove the contact was for sexual gratification, we conclude that gratification was a reasonable inference from the circumstances.

*By the Court.*—Judgment affirmed.

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