

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2010

A. John Voelker
Acting 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. 2009AP2425-CR

Cir. Ct. No. 2009CM298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

ANDREW J. BOLIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County:
JENNIFER L. WESTON, Judge. *Reversed.*

¶1 LUNDSTEN, J.¹ The State charged Andrew Bolin with one count of lewd and lascivious behavior under WIS. STAT. § 944.20(1)(a). After a jury

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

returned a guilty verdict, the circuit court dismissed the count notwithstanding the verdict. The court concluded that § 944.20(1)(a) only applied to consensual public acts of indecency, whereas Bolin's acts were with non-consenting others. The State appeals, arguing that this interpretation is incorrect. I agree with the State and reverse.

Background

¶2 On an evening in April 2009, Andrew Bolin and several others, including three women, were gathered on the porch of a private residence. According to testimony at trial, the following events occurred while this group was gathered. At some point, Bolin began putting his hand up a woman's pajamas, "trying to put his hand in [her] vagina," and he succeeded in touching "the outside." Bolin also exposed his penis and pushed the woman's head down "[v]ery close" to it. Bolin then approached a second woman on the porch and "whack[ed] [her] in the head with his penis and grind[ed] all over [her]." Bolin proceeded to drag a third woman from the porch and to straddle her with "his body over her face" and with his penis still exposed. The testimony indicated that none of this activity was consensual.

¶3 Among other charges, Bolin was charged with lewd and lascivious behavior under WIS. STAT. § 944.20(1)(a), a Class A misdemeanor. After a trial, the jury returned a guilty verdict on the count. The circuit court, however, on its own motion, dismissed the count notwithstanding the guilty verdict, concluding that § 944.20(1)(a) did not apply to Bolin's acts. The State appeals.

Discussion

¶4 The issue in this appeal is whether the offense of lewd and lascivious behavior as found in WIS. STAT. § 944.20(1)(a) applies to Bolin’s acts. The circuit court concluded that this provision, which prohibits indecent public acts “with another,” only applies when the public acts are consensual. I disagree.

¶5 This case presents a question of statutory interpretation, which is reviewed *de novo*. *State v. Murdock*, 2000 WI App 170, ¶18, 238 Wis. 2d 301, 617 N.W.2d 175. “Statutory language is given its common, ordinary, and accepted meaning” and “is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. “If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Id.*, ¶45 (citation omitted).

¶6 WISCONSIN STAT. § 944.20(1) states:

(1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Commits an indecent act of sexual gratification *with another* with knowledge that they are in the presence of others; or

(b) Publicly and indecently exposes genitals or pubic area.

(Emphasis added.)

¶7 Bolin was charged under subsection (a). The circuit court’s dismissal of that charge was premised on its reading of “with another” as implicitly requiring “a companion” or, put another way, two consenting actors.

While it is plainly true that subsection (a) is intended to cover a situation in which consenting actors engage in indecent acts, it does not follow that the subsection is limited to that scenario. Stated differently, there is no reason to interpret “with another” as requiring proof that the other actor is a consenting actor.

¶8 In reaching its conclusion, the circuit court found it significant that WIS. STAT. § 944.20(1)(a) appears in the code chapter titled “Crimes Against Sexual Morality.” The circuit court’s apparent reasoning was that statutes such as § 944.20 are concerned with morally unacceptable behavior, but not with behavior that crosses into the realm of, for example, sexual assault. I disagree with this reasoning. The fact that other statutes may apply to Bolin’s behavior does not answer the question of whether § 944.20(1)(a) is also applicable. *See State v. Mendez*, 157 Wis. 2d 289, 296, 459 N.W.2d 578 (Ct. App. 1990) (“The law recognizes that a given factual scenario might embrace more than one crime.”).

¶9 The language at issue is unambiguous as applied to the facts in this case. The subsection prohibits “an indecent act of sexual gratification with another with knowledge that they are in the presence of others.” WIS. STAT. § 944.20(1)(a). This plainly requires that a charged person engage in an “indecent act of sexual gratification” with a second person. In addition, the charged person must have performed this act “with knowledge that they are in the presence of others.” There is no indication that the State needs to prove that the second person consented or is otherwise a “companion” of the charged person. *See Harrell v. State*, 88 Wis. 2d 546, 562 n.32, 277 N.W.2d 462 (Ct. App. 1979) (discussing a “sexual perversion” statute, and noting that “[b]ecause consent is not an element of [the section], both consensual and nonconsensual acts were included within this section”).

¶10 In sum, the circuit court has read into the statute a requirement that is not there, something it may not do. *See State v. Zarnke*, 224 Wis. 2d 116, 139, 589 N.W.2d 370 (1999) (noting that it is “well-established that ‘[w]here the language used in a statute is plain, the court cannot read words into it’” (citation omitted)).

¶11 Moreover, I note that this result is consistent with the notion that WIS. STAT. § 944.20(1)’s concern is with harm to the public from witnessing certain indecent acts. There is no reason to suppose witnessing a nonconsensual indecent act is any less harmful than witnessing a consensual indecent act. Thus, the plain meaning of the statute also makes sense.

¶12 I recognize, as did the circuit court, that the prosecutor could have charged Bolin under WIS. STAT. § 944.20(1)(b) instead. This, seemingly, would have been the more straightforward approach to charging since Bolin publicly and indecently exposed his genitals. Still, Bolin did more than expose himself, and, as I have explained, § 944.20(1)(a) is applicable as well. The prosecutor was free to charge Bolin accordingly. *See* WIS. STAT. § 939.65 (“[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.”).

Conclusion

¶13 For the reasons discussed, I reverse the circuit court’s order.

By the Court.—Order reversed.

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

