**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 29, 2011**

**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. 2010AP2687-CR** **Cir. Ct. No. 2008CF104**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CARLOS G. COMAS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 LUNDSTEN, P.J. A jury found Comas guilty of repeated sexual assault of the same child. Comas seeks resentencing. He argues that the circuit court erred in sentencing him because the court mistakenly believed that a

mandatory minimum sentencing provision applied. Comas contends that the mandatory minimum was inapplicable for two distinct reasons. One of these reasons is that the jury's verdict, viewed in light of the jury instructions, does not support application of the mandatory minimum. We agree and, therefore, reverse and remand with directions.

## *Background*

¶2 The State charged Comas with one count of repeated sexual assault of the same child, citing WIS. STAT. § 948.025(1)(a).[1] The complaint alleged that, between December 1, 2007, and February 7, 2008, Comas committed "repeated sexual assaults involving the same child," born "05/28/1998." The complaint stated that the offense was a Class B felony, carrying a maximum term of imprisonment of 60 years, and also stated that, pursuant to WIS. STAT. § 939.616(1), the offense was subject to a mandatory minimum term of confinement of 25 years.

¶3 The case went to trial. The jury was instructed that it should find Comas guilty if the jury found three or more sexual assaults consisting of "sexual intercourse" or "sexual contact" with the child in question. The jury was not required to agree on particular instances of "sexual intercourse" or "sexual contact," so long as it agreed that there had been three assaults within the meaning of either term. The jury returned a guilty verdict.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. As we explain in more detail below, the citation in the State's complaint to WIS. STAT. § 948.025(1)(a) referred to a version of § 948.025 created by 2005 Wis. Act 430. However, as amended by a different act enacted the same day, 2005 Wis. Act 437, § 948.025 does not contain a subsection (1)(a).

¶4 The circuit court sentenced Comas to 25 years of initial confinement and six and one-half years of extended supervision. In doing so, the court stated that it believed it was bound to apply the 25-year mandatory minimum confinement provision. Comas filed a postconviction motion, requesting resentencing and making the two arguments he repeats on appeal. The circuit court denied the motion, agreeing with the State that the mandatory minimum did apply. Comas appeals the judgment and the order denying his postconviction motion.

## *Discussion*

¶5 Comas presents two arguments as to why the circuit court erred when concluding that the 25-year mandatory minimum confinement provision applied. We briefly summarize Comas's first argument, but we resolve this appeal based on Comas's second argument.[2]

¶6 Comas's first argument is complex. It involves two acts of the legislature, 2005 Wis. Act 430 and 2005 Wis. Act 437, which were both enacted on the same day in 2006.[3] On appeal, the parties agree that each act amended the same child sexual assault statutes, WIS. STAT. §§ 948.02 and 948.025 (2003-04).

[2] We note that, in a recent unpublished decision involving the same legislative acts, ***State v. Thompson***, No. 2009AP1505-CR, unpublished slip op. (WI App Nov. 24, 2010), we explained that the parties agreed, for purposes of that appeal, that the mandatory minimum confinement provision applied to a charge under a different child sexual assault provision, WIS. STAT. § 948.02(1)(b) (2005-06). *See* ***Thompson***, No. 2009AP1505-CR, ¶2 & n.2. It may be that the defendant in ***Thompson*** could have raised the same or similar arguments that Comas makes in this case. However, consistent with the manner in which the ***Thompson*** parties presented the issue, we did not address whether the parties' agreement regarding the mandatory minimum was justified. *See* ***id.***

[3] Both acts were enacted on May 22, 2006, and both took effect on June 6, 2006.

In Comas's view, these acts amended the statutes in mutually inconsistent ways and the inconsistency should be resolved by concluding that the higher numbered act, Act 437, superseded the lower numbered act, Act 430, with the result being that the mandatory minimum provision the State relies on—appearing only in Act 430—never took effect. The State disagrees, arguing that, although the two acts create some ambiguity, the only reasonable reading of the amendments is that the mandatory minimum did take effect and was applicable to Comas's conviction. Addressing these arguments, the circuit court essentially adopted the view that the State advances on appeal. We do not weigh in on this topic.

¶7 Comas's second argument assumes, for argument's sake, that Act 430 took effect and that a conviction under WIS. STAT. § 948.025(1)(a) carried with it the 25-year mandatory minimum. Comas contends, in effect, that, even if this is true, the mandatory minimum does not apply in this case because it is not supported by the jury's verdict, viewed in light of the jury instructions. The gist of Comas's argument is that, although he was charged under § 948.025(1)(a), a crime requiring proof of multiple acts of *sexual intercourse*, Comas's jury was instructed, and he was actually convicted, in accordance with a different subsection, § 948.025(1)(ar), a crime that requires proof of multiple acts of *sexual intercourse or sexual contact*. It is undisputed by the parties here that the latter crime does not carry with it a mandatory minimum. According to Comas, it follows that the jury's verdict does not support application of the mandatory minimum sentence. We agree, and now explain in greater detail.

¶8 During the applicable time period, and as pertinent here, the difference between WIS. STAT. § 948.025(1)(a) and (1)(ar), as amended by Act

430, was that subsection (1)(a) required proof of three or more acts of "sexual intercourse,"[4] and subsection (1)(ar) required proof of three or more acts of "sexual intercourse" *or* "sexual contact."[5] Under the assumption we employ for argument's sake here, a violation of § 948.025(1)(a) carried with it a 25-year

[4] As amended by Act 430, WIS. STAT. § 948.025(1)(a) reads:

> **(1)** Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of:
>
> (a) A Class B felony if at least 3 of the violations were violations of s. 948.02(1)(b) or (c).

This cross-reference to subsections (1)(b) or (c) corresponds to Act 430's changes to WIS. STAT. § 948.02(1). As affected by Act 430, § 948.02(1)(b) and (c) stated:

> (b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.
>
> (c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.

[5] As amended by Act 430, WIS. STAT. § 948.025(1)(ar) reads:

> **(1)** Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of:
>
> ….
>
> (ar) A Class B felony if at least 3 of the violations were violations of s. 948.02(1)(b), (c), (d), or (e) but fewer than 3 of the violations were violations of s. 948.02(1)(b), (c), or (d).

As affected by Act 430, WIS. STAT. § 948.02(1)(d) and (e) stated:

> (d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.
>
> (e) Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.

mandatory minimum confinement period,[6] but no mandatory minimum applied to violations of § 948.025(1)(ar).

¶9 At trial, although the jury was told that Comas was charged under WIS. STAT. § 948.025(1)(a), the jury was instructed in accordance with § 948.025(1)(ar). In pertinent part, the jury was instructed as follows:

> Section 948.025 of the Wisconsin criminal code is violated by one [who] ... commits three or more sexual assaults of the same child who had not attained the age of 13 years.... [T]he State must prove ... that the following three elements were present.
>
> Number one, the defendant committed at least three sexual assaults of [the child]. In this case the sexual assaults are alleged to involve *sexual intercourse* and *sexual contact*.
>
> Number two ....
>
> Number three, ... you must unanimously agree that at least three sexual assaults occurred between [the specified dates] but you need not agree on which acts constitute the required three.
>
> *Sexual contact* is an intentional touching of the vaginal area of [the child] by the defendant, Mr. Comas. The touching may be of the vaginal area directly or it may be through the clothing. The touching may be done by any part – any body part or by any object but it must be an intentional touching.
>
> ... *Sexual intercourse* means any intrusion, however slight, by any part of a person's body or of any object into the genital or anal opening of another. Emission of semen is not required. The act of sexual intercourse must be either

[6] WISCONSIN STAT. § 939.616(1) provides, in part:

> **(1)** If a person is convicted of a violation of s. ... 948.025(1)(a), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years.

> by the defendant, Mr. Comas, or upon the defendant's instruction.[7]

(Emphasis added.)

¶10 Consistent with this instruction, the testimony and argument at trial focused on "sexual contact." Significant portions of the victim's testimony at trial concerned Comas "rubbing" the child's vagina with his fingers and with his penis, acts clearly constituting sexual contact, but not clearly constituting sexual intercourse. Although there was a videotaped interview played at trial in which the child indicated that there had been penetration, and the prosecutor briefly argued in his closing arguments that there was some evidence of penetration, the majority of the prosecutor's argument was focused on the "sexual contact" testimony about Comas's "rubbing" of the child's vagina.

¶11 The verdict form did not give the jury an opportunity to state whether it found that Comas had committed acts of sexual intercourse, sexual contact, or some combination of both. Rather, the jury rendered a guilty verdict by inserting the word "guilty" into the following form:

> We, the jury, find the defendant, Carlos G. Comas, [insert guilty/not guilty] of committing three or more sexual assaults of SBB, DOB 05/28/1998, in Wood County, between December 1, 2007 and February 7, 2008, in violation of 948.025(1)(a), Wis. Stats., as charged in the information.

[7] It is unclear why the jury instruction did not track WIS. STAT. § 948.025(1)(a)'s requirement of proving three acts of sexual intercourse or, in the alternative, why the instruction did not refer to § 948.025(1)(ar), a provision which seemingly fits the prosecution theory. It may be that the instruction used to define the crime was based on an outdated form instruction applicable at a time when § 948.025(1)(a) carried no mandatory minimum and permitted a conviction based on sexual intercourse or sexual contact. Regardless of the reason, the fact remains that the jury was instructed that it could convict Comas if he committed three or more sexual assaults consisting of "sexual intercourse" or "sexual contact."

¶12 It is readily apparent that, even granting the State the assumptions discussed above, before the 25-year mandatory minimum confinement provision could apply to Comas, his jury would have needed to find that Comas committed three or more acts of *sexual intercourse* with the child, as required by WIS. STAT. § 948.025(1)(a). It is equally clear that the instructions underlying the jury's verdict did not require that the jury find that Comas engaged in one act of sexual intercourse, much less three or more acts of sexual intercourse. Thus, the jury's verdict did not support a violation of § 948.025(1)(a) as amended by Act 430 and, consequently, did not support imposing on Comas the 25-year mandatory minimum.[8]

¶13 Inexplicably, the State does not address this topic. We could take this silence as a concession. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App. 1999) ("An argument to which no response is made may be deemed conceded for purposes of appeal."). However, it does not appear that the State means to concede the point because the issue is obviously dispositive and a concession on this topic would render pointless the substantial argument the State presents in response to Comas's first argument. In any event, it is sufficient to say that the State provides no reason to think that the jury based its verdict on a finding of three or more acts of sexual

[8] We have focused our attention on the difference between intercourse under WIS. STAT. § 948.025(1)(a) and intercourse or sexual contact under § 948.025(1)(ar), as amended by Act 430. We note here that the reason this analysis plainly disposes of the issue in this case is because the jury was not instructed that it was required to find great bodily harm or the use or threat of force or violence. Comas contends, and the State does not dispute, that, under any view of the statutes during the relevant time period, no mandatory minimums applied to mere sexual contact absent great bodily harm or the use or threat of force or violence.

intercourse and, therefore, no reason to think that the jury's verdict requires imposition of the 25-year mandatory minimum.

¶14 In closing, we observe that Comas asks that his judgment "reflect the statute conforming to the jury's verdict: WIS. STAT. § 948.025(1)(ar)." In the absence of a contrary argument from the State, we grant Comas's request.

***Conclusion***

¶15 For the reasons discussed, we reverse the circuit court's judgment and order and remand for further proceedings. We direct the circuit court to resentence Comas without reliance on the 25-year mandatory minimum confinement provision and to enter a judgment showing a conviction under WIS. STAT. § 948.025(1)(ar).

*By the Court*.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.