COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1281-CR

Cir. Ct. No. 2011CF2070

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HILLEREE J. UPRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Hilleree Upright was tried and convicted of child abuse. She seeks a new trial. Upright contends that her trial counsel rendered ineffective assistance, that the circuit court erred with respect to the admission of

evidence, and that she is entitled to a new trial in the interest of justice. We reject all arguments, and affirm.[1]

Background

¶2 A criminal complaint alleged that Upright committed child abuse on November 3, 2011. Upright's trial commenced on September 10, 2012. A postconviction evidentiary hearing was held on May 1, 2014. The circuit court rendered its postconviction decision denying relief on May 16, 2014. To give context to our discussion of alleged ineffective assistance and trial court error, we provide a limited summary of trial evidence.

¶3 The State's primary witness was a Madison Metro bus driver. The driver testified that, at about 4 p.m. on November 3, 2011, near the northeast corner of the Capitol Square, she stopped the bus she was driving at a red light. The driver testified that, with the bus windows closed, she heard screaming outside her bus. When the driver looked in the direction of the screaming, toward a bus shelter, she saw a woman, later identified as Upright. The driver said she saw Upright sitting on the bus stop bench screaming at a child in a stroller. The stroller was flat and the child was lying down. The driver testified: "I saw her start slapping the child." The driver said she saw Upright slap the child five or six times. She clarified that she could not see all of the child, but saw the child's "hands and feet flailing above the stroller." She heard Upright yell: "Shut up. Shut up. Lay down. Go to sleep. Shut up. Shut up." When the light turned green, the bus driver proceeded through the intersection, pulled over, and called

[1] At the time of the postconviction hearing, Hilleree Upright was "known as" Hilleree Labelle.

her dispatcher to report what she had seen. As she spoke with her dispatcher, she saw Upright get up off the bench and enter the YWCA.

¶4 When police responded, they located Upright in the YWCA with her three-year-old daughter, P.N., who was then sleeping in the stroller. The officer observed that the left side of P.N.'s face was noticeably more red than the right side. The officer spoke with Kimberlee Thomas, Upright's sister. After the officer confronted the sister with the report of slapping, the sister admitted that she had seen Upright slap P.N., although the sister thought Upright had slapped at P.N.'s legs. Upright's sister told the officer that Upright had hit P.N. "pretty hard for a child." The officer recounted that the sister told the officer that Upright "was yelling and it was something to the effect of shut the fuck up and go to sleep."

¶5 Upright testified. Upright said that, when the bus driver saw her, P.N. was "pitching a fit because she wanted to get out of her stroller and run around and climb on the bike rack like her cousin." Upright told the jurors that she wanted P.N. to stay in her stroller because P.N. had skipped her nap, but P.N. continued to try to climb out of the stroller, kicking and yelling at Upright. Upright denied that she slapped P.N. Upright asserted that she just pushed P.N.'s legs back down so that P.N. could not kick Upright.

¶6 Upright's sister testified. The sister said that she was with Upright at the bus stop. She said they had gotten off a bus at the stop because the sister was living at the YWCA. The sister said they paused at a bench attached to the bus shelter so the sister could have a cigarette. She testified that P.N. kept trying to get out of her stroller and that Upright "kept, not yelling at [P.N.], but in a firm voice telling her to sit down, be quiet, go to sleep, and like [Upright] would grab [P.N.'s] legs and hold her legs down."

¶7 The jury found Upright guilty. Other facts, as necessary, will be discussed below.

Discussion

A. Ineffective Assistance: Failure To Request Instruction On The Definition Of Great Bodily Harm

¶8 The standards applicable to ineffective assistance of counsel claims are well settled and need not be repeated here. It is sufficient to say that a defendant claiming ineffective assistance must show both that counsel's performance was deficient and that counsel's deficient performance caused prejudice. ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854.

¶9 Upright argues that her trial counsel rendered ineffective assistance by failing to request a jury instruction on the definition of "great bodily harm." Although Upright's theory as to why this missing definitional instruction matters is not entirely clear, we understand her argument to be this:

- Upright was charged with causing "bodily harm" to P.N.
- Although Upright's primary line of defense was that she did not cause "bodily harm" to P.N., a secondary defense was that, if she did cause bodily harm to P.N., the State failed to prove that she was not acting within the "reasonable discipline" privilege.
- As to the "reasonable discipline" privilege, the jury was told that the State must prove that Upright's use of force was not "force which a reasonable person would believe is necessary" under the circumstances.
- In that regard, the jury was further instructed that it is "never reasonable discipline to use force which is intended to cause bodily

harm or death or which creates an unreasonable risk of great bodily harm or death."

- Without a legal definition of "great bodily harm," the jury would not have understood that "bodily harm" and "great bodily harm" are different.
- The jury may have mistakenly believed that, if Upright intended any harm, the "reasonable discipline" privilege did not apply.

¶10 We are uncertain, because she never expressly says so in her briefing, but Upright seems to be concerned that the jury would mistakenly think that it is never "reasonable discipline" to inflict bodily harm because the instruction states that it is never reasonable to use "force ... which creates an unreasonable risk of great bodily harm." If this is what Upright means to argue, it is an entirely theoretical problem divorced from the facts in this case.

¶11 As the State explains, and our background section shows, the jury was presented with two very different and competing versions of the events. The State's evidence, if believed, showed that Upright screamed at P.N. and slapped P.N. multiple times "hard." The defense testimony, primarily Upright's own testimony, was that Upright responded to P.N.'s "fit" by pushing P.N.'s legs back down so that P.N. could not kick Upright.

¶12 Upright did not argue that, if the State's version was accurate, her conduct fit the reasonable discipline privilege.[2] And, the State did not argue that,

[2] Upright's counsel argued that "[p]ushing your child down in the stroller, keeping your child in the stroller even though it doesn't want to be [there]," even if "you're pushing it forcefully," is reasonable discipline. In contrast, counsel conceded that, if the jury believed, beyond a reasonable doubt, that Upright intentionally hit P.N. in the face, then a guilty verdict was warranted.

if Upright's version was accurate, the State nonetheless met its burden of proving the crime, much less its burden of proving that Upright was not engaged in reasonable discipline. Thus, there is no reason to think that the jury in this case gave more than passing thought to the reasonable discipline privilege.

¶13 Accordingly, we conclude that it was not deficient performance to fail to request that the jury be instructed on the meaning of "great bodily harm." Moreover, it is clear that the absence of such an instruction did not cause prejudice.

B. Ineffective Assistance: Failure To Call P.N. As A Witness

¶14 Upright argues that her trial counsel rendered ineffective assistance by failing to call P.N. as a witness at trial. As best we can tell, Upright surmises that it does not matter what P.N. would have done or said on the witness stand. Upright contends that all possible scenarios would have helped Upright's defense and would have made a difference in the verdict. We disagree.

¶15 Upright points to offers of proof indicating that, shortly after the alleged slapping, P.N. told her step-grandfather, her grandmother, and a social worker that Upright did not hit her. Based on this, Upright surmises that one possibility is that P.N. would have testified at trial that Upright did not hit her. While certainly possible, common sense dictates that this scenario is highly unlikely.

¶16 At the time of the alleged slapping, P.N. had recently turned three years old. The trial was held ten months later, the day before P.N. turned four. There is no reason to think that P.N. would have any meaningful memory of a *non-event* that had taken place so long ago.

¶17 We acknowledge that it is more likely that P.N. would remember being severely slapped, especially if it had been a unique experience for her. But this, too, is speculative. And, for reasons too obvious to dwell on, this possible scenario was not a promising one for Upright, even if it opened the door to evidence that P.N. denied being slapped closer in time to the charged event.

¶18 In our view, one scenario that is not entirely speculative is the one in which P.N. is called as a witness at trial and testifies to a lack of memory. Upright, however, fails to persuade us that this scenario would have aided in her defense.

¶19 According to Upright, if P.N. had testified as to a lack of memory, P.N. would have been unavailable under WIS. STAT. § 908.04(1)(c),[3] and P.N.'s prior statements would have been admissible as statements of recent perception under WIS. STAT. § 908.045(2). We decline to address this argument in any detail because Upright does no more than make the assertion, which, even then, clearly appears for the first time in her reply brief. In particular, we note that Upright does not explain why the mere denial that something happened constitutes a description or explanation of "an event or condition," as required by the recent perception exception. *See* § 908.045(2). Upright does not tell us that P.N. affirmatively described anything about the relevant place or time to anyone.

¶20 In sum, Upright has fallen far short of showing that the failure of her trial counsel to call P.N. as a witness at trial constituted ineffective assistance of counsel. Under an objective standard for judging performance, Upright does not

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[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

persuade us that it was deficient performance to fail to call P.N. as a witness.[4] And, even if we assumed deficient performance, Upright fails to show prejudice.

C. Exclusion Of P.N.'s Out-Of-Court Statement Under Residual Hearsay Exception

¶21 Regardless whether P.N. was called as a witness at trial, an out-of-court assertion by her might have been admissible as a hearsay exception under WIS. STAT. § 908.03. At trial, Upright's counsel offered P.N.'s denial that she was hit—denials allegedly made to her step-grandfather, to her grandmother, and to a social worker—as exceptions to the hearsay rule under the present sense impression exception, § 908.03(1), and the excited utterance exception, § 908.03(2). On appeal, Upright abandons those arguments and asserts that P.N.'s statements should have been admitted under the residual exception, § 908.03(24).

¶22 Upright does not point to any place where the circuit court actually rejected a residual exception argument. Regardless, Upright's task on appeal is to demonstrate that it would have been a misuse of discretion for the circuit court to decline to admit P.N.'s out-of-court statements under the residual hearsay exception. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983) ("[W]here the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to

[4] We acknowledge that trial counsel's actual reason for failing to call P.N. as a witness at trial was based on an erroneous understanding of the competency of young children to testify. But the standard used to judge deficient performance is objective. *See* ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461 ("Deficient performance is judged by an objective test, not a subjective one."). So far as we can tell, even though P.N. was a competent witness, it was a reasonable tactical decision not to call her as a witness both because she was so unlikely to provide helpful information and because much can go wrong when calling a witness not knowing with confidence what that witness might say.

determine whether it provides a basis for the trial court's exercise of discretion."). We ignore the prospect that Upright makes her residual exception argument for the first time on appeal, and simply conclude that she fails to show that the court would have erred in rejecting such an argument.

¶23 The alleged out-of-court statements at issue are not P.N.'s description of what happened. There is no assertion that P.N. talked about being in the stroller or that her mother held her down or that P.N. otherwise recounted anything about what did happen. The statements do not describe a time frame or a place. Rather, the statements at issue are simple denials that Upright hit or hurt P.N.

¶24 What we do know is that P.N. allegedly made the first denial to her step-grandfather when he picked her up from the YWCA and drove her to the residence he shares with P.N.'s grandmother. The denial to the grandmother occurred that evening or the next morning. Approximately a week later, P.N. was interviewed by a social worker who would have testified that P.N. said her mother did not slap her. We are also given limited information about P.N.'s ability to communicate. The step-grandfather was asked if P.N. was verbal, and he responded: "Yes, she would talk with you." P.N.'s grandmother testified: "For a three-year-old she could express her thoughts very well."

¶25 Based on the above scant facts, Upright argues that the following factors favor admission:

- P.N. "was verbal and able to communicate, yet of such a young age that she was 'unlikely to review an [alleged] incident of [] assault and calculate the effect of a statement about it'" (quoting ***State v. Sorenson***, 143 Wis. 2d 226, 246, 421 N.W.2d 77 (1988)).

- P.N. "expressed no fear of Upright."
- "None of the individuals to whom [P.N.] made the statements would have a motive to fabricate or distort the contents of her statements."
- "The statements, especially the first two, were made close in time to when the alleged incident occurred and to people in whom [P.N.] would confide."
- "All three statements corroborate each other and are not inconsistent with the physical evidence."

Upright does not address factors that might cut the other way.

¶26 There are many reasons why the circuit court would not have misused its discretion in rejecting Upright's argument and excluding P.N.'s hearsay statements. We limit our discussion to just a few.

¶27 First, Upright's reliance on ***Sorenson*** ignores the context of the court's discussion. The ***Sorenson*** court is discussing the need for hearsay evidence when a young child might have affirmatively experienced a notable event, in that case a sexual assault. The court discusses factors that might bear on whether such a child might have made a subsequent reliable out-of-court accusation. *See* ***id.*** at 243-46.

¶28 Upright assumes that the situation is comparable when a young child asserts, in response to questions, that *nothing* happened. It is not apparent to us that the comparison is apt. When a very young child asserts that nothing happened, the meaning is unclear. Does the child mean to say nothing very recently, nothing that day, or nothing ever? Does the child have an understanding of time? Do such children differentiate punishment two hours ago from two days ago? More fundamentally, is the ability of a very young child to remember and

communicate an event comparable to the child's ability to remember and communicate that something did not happen? Accordingly, we do not find Upright's reliance on ***Sorenson*** persuasive.

¶29 As to Upright's assertion that it is significant that P.N. "expressed no fear of Upright" to others, the circuit court could reasonably question why this is probative. A reasonable judge could conclude that jurors, based on common experience, would believe that very young children who suffer harsh discipline settle back into normalcy after a very short period of time, especially when the party imposing the discipline is a parent. Perhaps more to the point, the circuit court could have reasonably concluded that P.N.'s lack of fear of her mother was not significant.

¶30 Upright's assertion that none of the individuals that P.N. talked to had a motive to fabricate is plainly not true. We agree with the State that Upright's mother and stepfather, as family members, would have had a motive to reduce Upright's criminal exposure. As to the social worker, it is true that she had no motive to fabricate, but it is also true that her testimony was less significant. A reasonable jury would have wondered whether P.N. could reliably recount a non-event, especially a week later. It is one thing for a young child to describe a startling, painful, and memorable event, but quite another, a week later, to reliably and persuasively describe what, to the child at the time, would have been entirely insignificant.

¶31 In sum, Upright fails to persuade us that the facts here present a close call regarding admissibility under the residual exception, much less persuade us that it would have been a misuse of discretion to reject a residual exception argument.

D. Exclusion Of Habit Evidence

¶32 Upright complains that the circuit court erroneously excluded habit evidence. More specifically, Upright offered to present testimony asserting that "whenever [P.N.] would get hurt or anything she would tell [her grandparents] that she was hurt." Upright argues that this is habit evidence under WIS. STAT. § 904.06 because it constitutes, in our words, a "regular repeated response to a repeated, specific situation." *See* ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶15, 294 Wis. 2d 700, 720 N.W.2d 704. According to Upright, this habit evidence was relevant if coupled with testimony showing that P.N. did not report to her grandparents that she was hurt.

¶33 Like the circuit court, we question whether such evidence can properly be characterized as habit evidence. However, assuming, for the sake of argument only, that the type of evidence at issue here is habit evidence, we conclude that the particular evidence that was offered lacks probative value and was properly excluded on that basis.

¶34 The probative value of the evidence depends on an underlying assumption that cannot be true. That assumption is that P.N.'s grandparents always know when P.N. suffers "hurt," even when they do not observe the incident that causes the "hurt" or evidence of it, and, therefore, they always know whether P.N. reports the "hurt." This makes no sense. As to unobserved "hurt," the grandparents can only know about those instances in which P.N. does report. They cannot possibly know that every time P.N. suffers "hurt"—that is, "hurt" they *do not* witness or otherwise reliably learn about—that P.N. always reports that "hurt."

¶35 A hypothetical similar to the allegation here is instructive. If, unknown to the grandparents, Upright slapped P.N. hard for misbehaving a few hours before Upright took P.N. to her grandparents' house, and P.N. did not report being slapped, the grandparents would never know that P.N. had failed to report being slapped. Simply stated, the grandparents cannot know how often P.N. suffers "hurt" outside their viewing and then fails to report it to them.

¶36 There are other problems with the probative value of this supposed "habit" evidence identified by the circuit court, but what we have explained is sufficient to justify its exclusion. No reasonable juror would have given it weight.

E. Alleged Discovery Violation

¶37 Upright argues that the prosecutor violated Upright's statutory discovery rights by failing to disclose crime scene photographs a reasonable amount of time before trial. The circuit court concluded that there was no violation, and that ruling appears to be correct. We decline, however, to resolve that question because, even if the circuit court is wrong and, consequently, erred by permitting the State to introduce the photographs at trial, the error was plainly harmless.

¶38 The photographs at issue show a bus, like the one the bus driver was operating, near the bus stop where the alleged incident took place. We have reviewed the photographs and, as the circuit court correctly explained, there is nothing remarkable about them. If anything, the photographs demonstrate that the bus driver's ability to see in some directions from her driver's seat was limited. We agree with the circuit court's statement that there was no "unfair surprise or any substantial risk of unfair [prejudice] to the defendant."

¶39 Upright acknowledges that, if the circuit court erroneously permitted the introduction of the photographs at trial, the error is subject to a harmless error analysis. But Upright gives us no reason to suppose that the trial would have proceeded differently if only her attorney had viewed the photographs sooner. Instead, Upright complains that she was denied the opportunity to explore ways to combat the photographs, *without* suggesting any reason to think that such efforts would have been productive. We conclude that any error was harmless.

F. Interest Of Justice

¶40 Upright argues that she is entitled to a new trial in the interest of justice. Her supporting argument adds nothing to the arguments we have already rejected. We therefore also reject this argument.

Conclusion

¶41 For the reasons above, we affirm the judgment of conviction and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).