COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP994-CR **Cir. Ct. No. 2013CM228**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRISTA J. ZIEHR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH W. VOILAND, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] Trista Ziehr was the owner and operator of a daycare center. Wisconsin requires individuals in her position to immediately

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

report to proper authorities if they have a reasonable cause to suspect that a child has been abused. In October 2014, a jury found Ziehr guilty of failing to so report, and she was sentenced to thirty days in jail.

¶2 Ziehr now appeals her conviction, raising five grounds for our review. She alleges the following:

(1) The circuit court failed to properly instruct the jury that she had a reasonable amount of time to investigate prior to reporting, that she could fulfill her obligations as a reporter by causing a third person to make a report, and that her duty to report was discharged when she reasonably believed that the appropriate authorities had already been notified;

(2) The complaint failed to give her adequate notice of the charges against her because it was duplicitous;

(3) The circuit court erred by admitting evidence of a separate incident where she purportedly failed to report child abuse;

(4) The evidence was constitutionally insufficient such that no reasonable jury could have found her guilty; and

(5) This court should exercise its discretionary powers to reverse her conviction.

¶3 We disagree and affirm the circuit court on all counts. We conclude that (1) the jury instructions given were not in error; rather they fully and fairly informed the jury of the applicable law; (2) the circuit court did not abuse its discretion by admitting other-acts evidence of a second alleged failure to report;

(3) the prohibition against duplicity was not violated because Ziehr was tried solely on the first failure to report incident, of which she had adequate notice; (4) sufficient evidence supports Ziehr's conviction; and (5) a new trial pursuant to our discretionary powers is not warranted. Accordingly, the judgment of the circuit court is affirmed.

I. Background

¶4 In 2013, Trista Ziehr owned and operated a daycare center called Family Tree Learning Center. During this time, Ziehr's minor son was in school half-time and would come stay with his mother at the daycare after school. On March 20, 2013, a four-year-old child (AM) who attended the center informed an employee that Ziehr's son "said you were going to give me a quarter if I slept good." AM then told the employee, "suck a penis, touch a penis." The employee testified that she "grabbed the phone and called Trista," and relayed to Ziehr what AM had told her. Ziehr then returned to the center and talked to AM about the incident. Ziehr concluded the statement was simply "potty talk," and that nothing could have occurred because the child was never with Ziehr's son without supervision.

¶5 That night, AM's father called Ziehr about the incident; he was "heated." AM told his parents that Ziehr's son bribed him to touch Ziehr's son's penis. Ziehr directed AM's father to speak with the employee AM originally talked to because she was at the daycare center when it happened. The employee did call AM's father and indicated that something sexual could not have happened because she was in the room and would have seen it. The following morning, AM's mother contacted Ziehr and said her children would not be going to daycare that day and that she had reported the incident to the police. Ziehr took no further

action and argues on appeal that she did not contact anyone because AM's mother had already called the police.

¶6 Four days after the incident, on March 24, 2013, a detective contacted Ziehr and asked her to bring her son in for questioning. Ziehr did so the following day. Ziehr testified that the detective did not contact her again, and she did not hear from law enforcement until she was arrested in April.

¶7 On April 9, 2013, about three weeks after the AM incident, Ziehr was contacted by the parent of another child—JV—alleging that Ziehr's son told the child he wanted to touch tongue-to-tongue. Ziehr conferred with Kim Berens, the license holder for Family Tree, concerning what to do about the incident. After conferring with Berens, Ziehr testified that they agreed that Berens would report this incident to the police the following morning. Ziehr claims that she did not personally contact the police regarding this incident because they agreed that Berens would report it.

¶8 On April 22, 2013, Ziehr was arrested, and on April 29, she was charged with one count of failure to report child abuse in violation of WIS. STAT. § 48.981(2) and (6). The first complaint stated that Ziehr had failed to report suspected abuse "between March 1, 2013 and April 3, 2013," and only referenced the suspected JV abuse in the probable cause section. On April 8, 2014, the complaint was amended to add allegations that Ziehr failed to report the suspected AM abuse, but still referenced the allegations regarding the suspected JV abuse. One week before trial, on October 23, 2014, the State again amended its complaint and narrowed the alleged time period of Ziehr's failure to report suspected abuse to "between March 20, 2013 and March 25, 2013."

¶9 On October 30, 2014, the day of trial, Ziehr reiterated arguments made in various motions to the court, yet unresolved, that allowing the State to introduce evidence of both the AM and JV incidents violated the prohibition against duplicity. Following the State's declaration that only the failure to report the AM abuse was at issue, the circuit court determined that the jury would be instructed (and it was) that Ziehr was being charged for failing to report the AM incident only. The court, however, admitted evidence of the JV incident as other-acts evidence, an issue taken up further below. Ziehr also requested that the circuit court supplement the standard criminal jury instructions[2] in light of this court's decision in ***Phillips v. Behnke***.[3] The court declined to give Ziehr's supplemental instructions and instead gave the standard instruction.

¶10 After the jury trial, Ziehr was convicted of failing to report suspected child abuse, and was sentenced to thirty days in jail. She filed a motion for stay and release pending appeal, which the circuit court denied. She then filed an emergency stay with this court, which we granted. This appeal followed.

I. Jury Instructions

¶11 Ziehr first contends that the circuit court did not properly instruct the jury regarding failure to report under WIS. STAT. § 48.981(2) and (6). Circuit courts have broad authority to determine the appropriate instruction given a jury. ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. "Only if the jury instructions, as a whole, misled the jury or communicated an incorrect

[2] WIS JI—CRIMINAL 2119.

[3] ***Phillips v. Behnke***, 192 Wis. 2d 552, 531 N.W.2d 619 (Ct. App. 1995).

statement of law will we reverse and order a new trial." ***Id.*** Whether the circuit court appropriately exercised its discretion is reviewed independently by this court. ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶9, 280 Wis. 2d 193, 694 N.W.2d 467.

¶12 Ziehr raises three principal objections to the instructions the circuit court gave the jury. First, she contends that the circuit court should have instructed the jury that she had a reasonable amount of time to investigate the allegations of abuse prior to reporting. Second, Ziehr believes it was error for the circuit court to fail to give a special instruction to the effect that a mandatory reporter complies with the statute if she causes another person to report, but does not personally report. And finally, Ziehr sought, and was denied, an instruction informing the jury that a mandatory reporter need not report if she reasonably believes the appropriate authorities have been notified by a third person. We conclude that the circuit court appropriately exercised its discretion in instructing the jury.

¶13 The issues raised by Ziehr go to the heart of what WIS. STAT. § 48.981 requires. The statute provides that certain professionals, including child care providers,[4] must report suspected child abuse if the person "has reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused." Sec. 48.981(2)(a). If the reporter has a "reasonable cause to suspect" abuse, she must "immediately inform, by telephone or personally" certain appropriate authorities. Sec. 48.981(3)(a)1. Intentional "failure to report" is a

[4] Ziehr admits that she is a mandatory reporter under the statute by virtue of her role with her daycare center.

crime. Sec. 48.981(6). Also relevant to this case, the statute provides that "[a]ny person or institution participating in good faith in the making of a report … shall have immunity from any liability, civil or criminal." Sec. 48.981(4).

¶14 Ziehr's arguments rest principally on this court's decision in ***Phillips v. Behnke***, 192 Wis. 2d 552, 531 N.W.2d 619 (Ct. App. 1995). ***Behnke*** was a civil case involving reporter immunity. In that case, a twelve-year-old girl alleged that her teacher had sexual contact with her. ***Id.*** at 557. The family then informed the school district administrator, who interviewed several students, and subsequently reported to the county social services department. ***Id.*** Following this revelation, along with other students who surfaced with similar allegations, the department of public instruction conducted an investigation, and ultimately revoked his teacher's license. ***Id.*** at 557-58. The teacher responded by suing the complaining family and administrator (along with their insurance companies) for making purportedly false allegations. ***Id.*** at 558. Regarding immunity, the teacher argued that the family was not immune under the statute because they did not report to the proper authorities. ***Id.*** at 560. The teacher further argued that neither the family nor the administrator had immunity because they did not "immediately" report the abuse.[5] ***Id.*** at 561.

¶15 We held that both the family and the administrator were entitled to immunity under WIS. STAT. § 48.981(4). ***Behnke***, 192 Wis. 2d at 560-63. Regarding the family, even though they did not report to the proper agency, we nonetheless held that, "[u]nder these circumstances," the immunity protections

[5] The teacher also alleged the reports were not made in good faith, an issue not relevant to Ziehr's arguments.

applied because they contacted the school administrator—a mandatory reporter—with the expectation that a proper report would be made if appropriate. ***Id.*** at 560-61. We also rejected the idea that failure by the family and administrator to immediately report deprived a reporter of immunity. ***Id.*** at 561-62. We noted that the statute's immediacy requirement was tied to reporting, not immunity under § 48.981(4). ***Behnke***, 192 Wis. 2d at 562. We also concluded that "expending a reasonable amount of time to verify a child's allegation of sexual misconduct is consistent with [the § 48.981(3)] requirement that such information be reported immediately." ***Behnke***, 192 Wis. 2d 562. We observed that § 48.981(2) requires mandatory reporters to report only when they have "reasonable cause to suspect" that a child has been abused. ***Behnke***, 192 Wis. 2d 562. And in that case, we noted that the investigation was important to reaching that conclusion and that both the family and the administrator immediately reported "after concluding that there was reasonable cause to suspect" abuse occurred. ***Id.***

A. Reasonable Investigation Instruction

¶16 Ziehr's first argument is that the circuit court erred by not instructing the jury that she had a reasonable amount of time to investigate the allegations of abuse prior to reporting. Ziehr contends that ***Behnke*** stands for the proposition that "'immediate' reporting of suspected child abuse by a child care worker, as required by WIS. STAT. § 48.981(3), includes 'a reasonable amount of time to investigate abuse' prior to reporting." Accordingly, Ziehr requested the following supplemental instruction: "The defendant is entitled to expend a reasonable amount of time to verify a child's allegation of abuse prior to reporting such alleged abuse." The circuit court refused to give Ziehr's supplemental instruction and instead gave the standard criminal jury instruction.

¶17 Contrary to Ziehr's assertion, our decision in ***Behnke*** does not mean that a reporter must be allowed a reasonable amount of time to verify the allegations in every case. Rather, the duty to immediately report arises at the moment a mandatory reporter has "reasonable cause to suspect" that a child has been abused. At most, ***Behnke*** stands for the proposition that an investigation *prior* to reasonably suspecting abuse is consistent with the statute's mandates. ***Behnke*** does not rewrite the statute to allow a reporter to investigate after he or she already has reasonable cause to suspect abuse.

¶18 Ziehr's proposed instruction was, as drafted, an incorrect statement of law. Thus, the circuit court did not err in failing to give the instruction, nor did it fail in giving the standard instruction. Although investigation may be appropriate in some circumstances, mandatory reporters do so at their own risk.[6] Whether and when a reporter has a reasonable cause to suspect abuse is a question for the jury, as the circuit court correctly pointed out. Ziehr was free to argue that she needed to investigate prior to reporting because she lacked a reasonable cause

[6] Ziehr laments that mandatory reporters are between a rock and a hard place. If a mandatory reporter conducts an investigation, failure to immediately report could result in criminal charges. On the other hand, she complains that reporting immediately without investigation risks civil liability.

Without doubt, false reports given in good faith can cause incredible damage. The legislature, however, has weighed those considerations and come out on the side of immediate reporting without verification if one has reasonable cause to suspect abuse. As for the danger of civil liability, Ziehr is incorrect. WISCONSIN STAT. § 48.981(4) provides that a person who participates "in good faith in the making of a report … shall have immunity from any liability, civil or criminal, that results by reason of the action." Thus, the statutory scheme takes the guesswork out of reporting by granting immunity to those making the reports in good faith. The only peril that reporters potentially face results from failing to immediately report suspected abuse. ***Behnke*** did not change this.

to suspect abuse.[7] She was also free to argue, and did, that she did not have reasonable cause to suspect abuse had occurred. Juries are entrusted with making that call, and they did so here. We do not conclude that a circuit court may never instruct the jury regarding the propriety of investigation prior to reasonably suspecting abuse; it may very well be appropriate in some cases. Circuit courts are charged with fully and fairly instructing juries on the law, and they may tailor the instructions to the facts and arguments in given case.[8] Even so, we see no error in the instructions given here.

B. Reporting Through Another Instruction

¶19 Ziehr next argues that, based on ***Behnke***, the circuit court should have given a supplemental instruction on reporting through another. Ziehr requested an instruction stating that the "defendant complies with [the] requirement of reporting if she caused the appropriate authorities to be notified of the alleged abuse, by another person."

¶20 Even if Ziehr is correct that, under ***Behnke***, she could have satisfied her statutory reporting obligations by causing another to report, she clearly did not

[7] It is unclear how Ziehr's proposed instruction on a reasonable investigation would have helped her case. Her theory of the case was not that she was in the process of investigating, but rather that she had already investigated the matter (by conferring with her employee and speaking with AM) and concluded that nothing had happened. Thus, an instruction stating that she was entitled to a reasonable investigation would not have fit with her defense because she had already conducted an investigation and still failed to report.

[8] Although the circuit court has broad discretion in giving jury instructions, it must exercise its discretion to fully and fairly instruct the jury regarding the applicable law. ***State v. Neumann***, 2013 WI 58, ¶89, 348 Wis. 2d 455, 832 N.W.2d 560. "In viewing the facts and circumstances before it, a trial court may supplement jury instructions as needed." ***State v. Clausen***, 105 Wis. 2d 231, 241, 313 N.W.2d 819 (1982).

do so here.[9] This trial concerned the AM incident only.[10] Regarding that incident, Ziehr's only argument is that her duty to report was fulfilled by her reasonable belief that AM's mother had reported the incident on March 20 and her cooperation with the subsequent police investigation a few days later. Neither of these actions could be construed as "caus[ing] the appropriate authorities to be notified of the alleged abuse, by another person," as her proposed instruction suggests. Therefore, even if causing another to be notified is compliance with the mandatory reporter statute, nothing in the record or put forward by Ziehr comes close to suggesting she did so. The circuit court's jury instructions were not in error.

[9] Ziehr points to the following passage, among others, in ***Behnke***:

> To construe the statute as limiting immunity solely to the individual who actually reported the alleged abuse or neglect to the authorities would eviscerate the protections of the statute and lead to absurd results. For example, if five school teachers obtained information that would require reporting under the statute and agreed that one of them would report the information, the teacher who actually reported the information would receive immunity. The other teachers, however, would be deprived of immunity under the statute, despite the fact that they determined a report should be made and designated a reporter. Certainly the legislature did not intend to create such an absurd result.

Behnke, 192 Wis. 2d at 561. ***Behnke*** may or may not stand for the proposition that the causing of another to report in one's stead is sufficient in the mandatory reporting context. Because Ziehr did not cause another to report, addressing this here is unnecessary.

[10] Ziehr points in part to the JV incident, in which she claims her duty to report was discharged when she, "in collaboration with Kim Berens, reported [the] suspected [JV] abuse to authorities on April 10, 2013." This is irrelevant to the crime she was convicted of—failing to report suspected abuse of AM, a different child.

C. Third Party Reporting Instruction

¶21 Finally, Ziehr requested a supplemental instruction informing the jury that "[t]he defendant need not make such a report if the defendant reasonably believed that the appropriate authorities have already been notified by a third person …." Ziehr argues that she "became immune [regarding the AM incident] once she communicated the results of her investigation to—and was notified by—AM's mother that the incident was reported to police."

¶22 This supplemental instruction is not only contrary to the plain language of the law, it is inimical to its prescriptions. The statute states that "[a] person required to report under [WIS. STAT. § 48.981(2)] shall immediately inform, by telephone or personally" the appropriate authorities "of the facts and circumstances contributing to a suspicion of child abuse." Sec. 48.981(3). Thus, even if one can fulfill this mandate by causing another to inform appropriate authorities as discussed above, the statute still requires the reporter to act and actually report to the appropriate authorities. Ziehr here essentially argues that the law does not mandate reporting if the mother of the potentially abused child calls law enforcement. Nowhere does the statutory language indicate that a person required to report is relieved of that duty when she reasonably believes that someone else has independently reported the incident. Rather, the statute places the burden on the mandatory reporter to inform the appropriate authorities "of the facts and circumstances contributing to a suspicion of child abuse," regardless of whether the incident is independently reported by others. This requirement may result in multiple persons reporting the same incident. However, this makes sense in light of the fact that, although an incident may have already been reported, a mandatory reporter may still possess some unique information or perspective regarding the case. The statutory scheme is structured to require mandatory

reporters to communicate all the information *they* possess to the authorities and allow the authorities to conduct a full investigation. Thus, Ziehr's proposed instruction was an incorrect statement of the law that the court properly refused.

III. Duplicity

¶23 Ziehr next contends that the complaint was duplicitous because it referenced both the JV incident and the AM incident. Duplicity is a legal doctrine that implicates various constitutional due process rights of defendants. ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983). Whether a complaint is duplicitous is a question of law we review independently. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988). "Duplicity is the joining in a single count of two or more separate offenses." ***Lomagro***, 113 Wis. 2d at 586. Wisconsin has defined the purposes as follows: "(1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity." ***Id.*** at 586-87. Acts that constitute separately chargeable offenses may be coupled into one count if they are committed by the same person at substantially the same time and relate to one continued transaction. ***Id.*** at 587. If the defendant's actions may be properly viewed as one continuing offense, then it is up to the discretion of the State whether to charge one continuous offense, or a single offense or a series of offenses. ***Id.*** However, the State's discretion is limited by the purposes of the prohibition against duplicity. ***Id.*** at 588.

¶24 Thus, the first step in determining whether a charge is duplicitous is to examine whether the complaint states more than one offense. ***Id.*** at 587. If

more than one offense is at issue, then the second step is whether the offenses may be viewed as a single continuous transaction and may be charged as a single count without violating the rule against duplicity. ***Id.*** at 589. Even if a complaint is duplicitous, the proper remedy is for the State to "either elect the act upon which it will rely or separate the acts into separate counts." ***Id.***

¶25 Ziehr argues that the circuit court erred by allowing the State to submit proof of both the suspected JV abuse and the suspected AM abuse. She claims that she did not have adequate notice of which charge the State intended to prove and that this violated the prohibition against duplicity. Though Ziehr raises credible arguments regarding the complaint itself, we conclude that the State did elect to charge only one of the acts alleged and that none of the dangers of the prohibition against duplicity were attendant here.

¶26 On April 29, 2013, the State filed its complaint against Ziehr alleging that "on or between March 1, 2013 and April 3, 2013," Ziehr had "reasonable cause to suspect that a child seen [by Ziehr] in the course of professional duties had been abused … and failed to report that suspicion." The complaint then recited some of the facts regarding the suspected JV abuse. The State filed an amended complaint on April 8, 2014, still alleging the same one-month time frame, but this time adding the alleged suspected AM abuse in addition to the already alleged JV incident. The amended complaint stated that the AM incident occurred "on or about the lat[t]er half of March 2013." Ziehr repeatedly requested that the State clarify which incident it would pursue at trial. Finally, possibly in response to Ziehr's motions, on October 23, 2014, the State filed yet another amended criminal complaint. This latest amended complaint changed the applicable time frame from a little over one month to "on and between March 20, 2013 and March 25, 2013." Despite requests for clarification,

the complaint still alleged facts regarding both the AM and JV incidents. It did, however, specifically state that "on or between March 20 and March 25, 2013, Trista Ziehr did not report this suspected abuse [of AM] consistent with her duties as a mandated reporter." The complaint did not specifically allege that Ziehr failed to report the suspected JV abuse, but the incident was referenced in the complaint.

¶27 Prior to trial (and now before this court), the State argued that both incidents were a part of one continuing offense. On the day of trial, however, the State elected to try Ziehr's failure to report the AM incident alone. Accordingly, the circuit court instructed the jury regarding only the failure to report the suspected AM abuse. The instruction on the elements of the offense made it clear that the jury must find that Ziehr had reasonable cause to suspect that AM, not JV, had been abused, and that Ziehr saw AM in the course of her professional duties. Therefore, there was no doubt during the trial or when the jury was instructed that Ziehr was only charged with failing to report the suspected AM abuse.

¶28 The State did still seek to introduce the JV incident as other-acts evidence in order to prove intent and absence of mistake (a separate issue taken up below). The circuit court admitted certain testimony to this end. The court specifically instructed the jury that they could consider the JV incident *only* for the purposes of intent and lack of mistake.

¶29 The State argues that both incidents are part of a single continuous crime. Ziehr rightly points out that this raises significant dangers in violation of her rights. However, because the State elected to try only the alleged AM abuse, and Ziehr had ample notice that this incident was at issue, we conclude that none of the purposes of the prohibition against duplicity are implicated here.

¶30 First, Ziehr had sufficient notice of the conduct being charged. As far back as the April 7, 2014 complaint, Ziehr knew that her failure to report the suspected AM abuse formed at least part of the basis for the charge against her. Ziehr's assertion that she could not defend herself appropriately due to the State's late election to pursue only one of the two incidents complained of lacks credibility.[11] Second, because the circuit court clarified that Ziehr was on trial for only the AM incident, there is no concern that she will be subject to double jeopardy. Third, although the somewhat vague series of complaints alleged facts concerning both incidents, we see no danger of prejudice or confusion regarding evidentiary issues during trial because it was abundantly clear that Ziehr was on trial for only the AM incident, and all evidentiary issues were decided within this paradigm. Finally, we see no risk that Ziehr's sentence was affected inappropriately or that she was convicted on a less than unanimous verdict. The jury was clearly instructed to consider whether Ziehr failed to report the suspected AM abuse, not the suspected JV abuse, and all evidence of the suspected JV abuse was guided by a limiting instruction. There is little possibility that the jury was confused or that evidence of the suspected JV abuse unfairly prejudiced Ziehr. The instructions, and trial generally, clearly focused the jury's inquiry to the AM incident alone. For the above reasons, we reject Ziehr's argument that her conviction violated the prohibition against duplicity.

[11] While the State's change of strategy no doubt affected Ziehr's defense strategy, such same-day maneuvering is the stuff of life for a trial lawyer and not, in and of itself, a showing of prejudice.

IV. Other-Acts Evidence

¶31 Because the trial was solely about the AM incident, Ziehr argues that the circuit court abused its discretion by admitting evidence of the JV incident. We review a circuit court's decision to admit other-acts evidence for appropriate exercise of discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). An appellate court will sustain an evidentiary ruling as long as the circuit court examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Id.*** If the circuit court fails to set forth its reasoning explicitly, we independently review the record to determine whether it provides a basis for the circuit court's decision. ***Id.*** at 781. Even if the circuit court erroneously exercised its discretion in admitting or excluding evidence, we conduct a harmless error analysis to "determine whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Adamczak***, 2013 WI App 150, ¶9, 352 Wis. 2d 34, 841 N.W.2d 311, *review denied*, 2014 WI 22, 353 Wis. 2d 450, 846 N.W.2d 15 (citation omitted).

¶32 WISCONSIN STAT. § 904.04(2)(a) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, subsec. (2) does not exclude evidence of other acts if "offered for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or *absence of mistake or accident*." ***Id.*** (emphasis added).

¶33 In ***Sullivan***, the supreme court laid out a three-part test for admissibility of other-acts evidence under WIS. STAT. § 904.04. ***Sullivan***, 216 Wis. 2d at 771-72. First, the evidence must be offered for a proper purpose such

as establishing intent or lack of mistake. ***Id.*** at 772. Second, the evidence must be relevant. ***Id.*** Relevance involves two considerations: (1) whether the evidence relates to a fact or proposition of consequence to the action, which is determined by the substantive law and the elements of the offense and (2) whether the evidence has probative value. ***Id.*** The party seeking to admit the other-acts evidence bears the burden of demonstrating that these first two parts of the ***Sullivan*** test have been satisfied. ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Finally, if the party seeking admission satisfies the burden, the party opposing admission must show that the danger of unfair prejudice substantially outweighs the probative value of the evidence. ***Id.***

¶34 Ziehr argues that evidence regarding the JV incident was erroneously admitted. Though admitted for the purposes of intent and absence of mistake,[12] Ziehr contends that the evidence was irrelevant for that purpose. She claims that "the [JV] incident does not indicate that Ziehr was more or less likely to intentionally fail to report suspected [AM] abuse." Ziehr further argues that even if the court was right that the evidence was admitted for a proper purpose and was relevant, it still should have been excluded because the danger of unfair prejudice substantially outweighed any probative value. She concludes that rather than being probative of intent, the evidence "creates the impression that Ziehr as a mother is attempting to conceal her son's misconduct." She also argues that she was prejudiced because the State improperly used evidence of the JV incident during its closing argument.

[12] The circuit court initially admitted the evidence for the purpose of knowledge, but later accepted the State's argument that the purposes were intent and absence of mistake.

¶35 We conclude that the circuit court properly exercised its discretion to admit evidence of the JV incident. First, the evidence was offered for a proper purpose. In the pretrial hearing as well as at trial, the State made it clear that it sought to introduce the evidence of the JV incident to prove Ziehr's intent and absence of mistake. Prior to instructing the jury, the circuit court also confirmed that the evidence was being admitted on the issue of intent and absence of mistake. The jury was then instructed that they were to consider the JV incident "only on the issues of intent and absence of mistake or accident." These are permissible purposes under WIS. STAT. § 904.04.

¶36 Second, the evidence is related to a fact of consequence. Intent is an element of the crime of failure to report that the State was required to prove beyond a reasonable doubt. WIS. STAT. § 48.981(6).[13] As the court noted in ***Sullivan***, "[I]ntent is the state of mind that negates accident or inadvertence. Evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused's charged criminal conduct." ***Sullivan***, 216 Wis. 2d at 784. Thus, absence of mistake also goes to the intent element of the crime. Evidence of the JV incident was admissible to undermine any innocent explanation for failure to report the AM incident, and that is exactly what the State used it for. In closing, the State argued that the JV incident showed that Ziehr did not make a mistake: "[W]e know that [Ziehr] didn't somehow [make] a mistake, because we know that a few weeks later another parent called up, and she didn't do anything different then." Showing that Ziehr did not report another incident

[13] "Whoever *intentionally* violates this section by failure to report as required may be fined not more than $1,000 or imprisoned not more than 6 months or both." ***Id.*** (emphasis added).

tends to undermine an innocent explanation of Ziehr's earlier actions.[14] Because the JV incident was probative of a fact of consequence, it satisfied the second part of the ***Sullivan*** test.

¶37 Finally, Ziehr fails to show that she was unfairly prejudiced by the admission of the later JV incident. The prosecution only used the evidence for its proper purpose—proving intent and lack of mistake. The two incidents were distinct and the jury was clearly instructed that (1) Ziehr was on trial for failing to report the AM incident and (2) that they must only consider the evidence for the purpose of intent and absence of mistake. We must presume that juries follow properly given limiting instructions. ***Marinez***, 331 Wis. 2d 568, ¶41. Moreover, the record reflects that the JV incident was simply not a central part of the trial. Out of a 390-page trial transcript, testimony regarding the JV incident takes up just a few pages of the proceedings. The State made very limited references to the event in its closing argument, and it did so solely in the context of Ziehr's intent and absence of mistake. Looking at this record, we do not see a great danger of prejudice to Ziehr. Therefore, we conclude that the circuit did not err in finding that danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Thus, the circuit court did not err in admitting evidence of the purported JV abuse and Ziehr's response to it.[15]

[14] Ziehr contends that she did report the JV incident. She asserts that she collaborated with Kim Berens, and Berens agreed to report that incident. Even if we accept that this collaborative reporting complied with the statute, testimony regarding this incident would still be relevant to show that Ziehr knew her obligations and acted intentionally in *not* reporting the AM incident.

[15] Though we need not reach this here, even if we were inclined to agree with Ziehr that the evidence was erroneously admitted, we would likely conclude that the error was harmless for the reasons already discussed.

V. Sufficiency of the Evidence

¶38 We likewise reject Ziehr's argument that there was insufficient evidence to prove that she had reasonable cause to suspect that AM had been abused. An appellate court may not reverse on the basis of sufficiency "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶39 Ziehr admits that she was made aware of AM's statements concerning "suck a penis, touch a penis." Ziehr concluded this was "potty talk" and that she had no reasonable cause to suspect that abuse had occurred. That may be a reasonable inference, but the jury disagreed, and reasonably so. The jury certainly could, and did, reasonably conclude that she had reasonable cause to suspect that abuse had occurred and that she did not report it. Because we view the evidence in the light most favorable to sustaining the conviction, we cannot reverse where the evidence supports an inference of guilt, as it does here.

VI. Discretionary Reversal

¶40 We likewise decline to exercise our power of discretionary reversal under WIS. STAT. § 752.35, which authorizes us to reverse the judgment "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Ziehr's arguments in this regard rest principally in a cumulative and reframed packaging of her other arguments. While there was some confusion and lack of clarity in the run-up to trial, as the State noted, "[T]he trial itself was entirely professional and unlikely to have infected the jury with any sense of chaos or irregularity." We see nothing

further in the record to suggest that reversing the judgment is appropriate in this case.

VII. Conclusion

¶41 A jury of her peers held that Ziehr, a mandatory reporter, had reasonable cause to suspect that a child under care was abused by her son, and she failed to report it. We hold that the circuit court properly instructed the jury on the applicable law, that the prohibition against duplicity was not violated, that the admission of evidence, of a separate incident of purported abuse was a proper exercise of discretion, and that the evidence was sufficient for the jury to reach the conclusion that it did. We see no further reason to disturb the results of the trial. For these reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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