COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3156-CR **Cir. Ct. No. 2005CF603**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTY M. WOPPERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Christy M. Woppert has appealed from a judgment convicting her of second-degree reckless homicide in violation of WIS. STAT. § 940.06(1)(2007-08).[1] We affirm the judgment.

¶2 Woppert was convicted by a jury of causing the death of Mason J.M., a nine-week-old infant for whom she babysat. Expert testimony indicated that Mason died as a result of brain damage caused by abusive head trauma consisting of violent shaking or impact or some combination of the two. Expert testimony further indicated that the injuries occurred in the early afternoon of April 12, 2005, when Woppert was alone with Mason. Woppert testified at trial and denied shaking Mason, throwing him against anything, or causing his death by any kind of reckless action.

¶3 The issue on appeal is whether the trial court erroneously exercised its discretion by denying Woppert's pretrial motion to admit evidence regarding Woppert's care of other children for whom she babysat. In her motion, Woppert moved the trial court to admit the proffered evidence as character evidence under WIS. STAT. § 904.04(1), or as evidence of habit under WIS. STAT. § 904.06. Specifically, Woppert sought permission to present testimony from Jessica Rodriguez and Margo and Mark Bennett indicating that Woppert provided care for their children that was patient, loving, skilled and appropriate.

¶4 Woppert's pretrial motion indicated that Rodriguez would testify that Woppert babysat her infant daughter for seven to nine hours a day five days a week for a five-month period, and that the child had problems with constipation,

[1] All references to the Wisconsin statutes are to the 2007-08 version.

cried frequently, and required medication. Woppert indicated that Rodriguez would testify that Woppert administered medication to the child, kept medication logs, and provided care that was "appropriate, loving and patient."

¶5 Woppert's pretrial motion also sought to admit evidence that the Bennetts had known her for approximately ten years and that, for the previous five years, Woppert had provided child care for three children in the Bennett household, including two foster children with special needs. According to the motion, the evidence would have indicated that the Bennetts' eight-year-old foster son had ADHD and reactive attachment disorder. The motion also indicated that the Bennetts' foster daughter had been with them from the time she was four days old until she was twenty-one months, and that the girl had holes in her heart and reflux. The motion indicated that Woppert was "patient, skilled and appropriate" with the children.

¶6 The trial court ruled that, to the extent Woppert was seeking permission to present witnesses to testify that she provided appropriate care to their children, the evidence was inadmissible. On appeal, Woppert contends that the trial court erred by failing to determine that her proffered evidence was evidence of habit that was admissible under WIS. STAT. § 904.06(1).[2] She contends that the evidence would have shown her regular and routine babysitting practices, and was admissible to show that, acting in conformity with her babysitting habits, she did not act violently toward Mason. Alternatively, Woppert

[2] On appeal, Woppert no longer pursues her pretrial contention that the evidence was admissible as character evidence under WIS. STAT. § 904.04(1).

contends that if the evidence was inadmissible under § 904.06(1), excluding it violated her constitutional right to present a defense. Neither argument has merit.

¶7 We review a trial court's decision admitting or excluding evidence under an erroneous exercise of discretion standard. ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶14, 294 Wis. 2d 700, 720 N.W.2d 704. The trial court has broad discretion, and our review is highly deferential. ***Martindale v. Ripp***, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698. We will not find an erroneous exercise of discretion if the trial court applied the proper law to the established facts and there is any reasonable basis for the trial court's ruling. ***Balz***, 294 Wis. 2d 700, ¶14. However, whether a trial court has infringed upon a defendant's right to present a defense is a question of constitutional fact that requires independent appellate review. ***State v. Tucker***, 2003 WI 12, ¶28, 259 Wis. 2d 484, 657 N.W.2d 374.

¶8 With some exceptions that are inapplicable here, evidence of the habit of a person is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit. WIS. STAT. § 904.06(1). Habit may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine. ***Balz***, 294 Wis. 2d 700, ¶15; WIS. STAT. § 904.06(2). "Habit is a regular repeated response to a repeated, specific situation." ***Balz***, 294 Wis. 2d 700, ¶15. "The frequency and consistency that behavior must be present to become habit is not subject to a specific formula, and its admissibility depends on the trial court's evaluation of the particular facts of the case." ***Id.***

¶9 Although a party may be identified as having a habit for care or a habit of lying, evidence of such "habits" is more appropriately identified as

evidence of character traits. ***Id.***, ¶16. Evidence of habit is distinguishable from character evidence, which is a generalized description of a party's nature, or of the party's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. ***Id.***

¶10 Habit is more specific and denotes one's regular response to a repeated situation. ***Steinberg v. Arcilla***, 194 Wis. 2d 759, 767, 535 N.W.2d 444 (Ct. App. 1995). The trial court must determine whether a reasonable jury could find that the predicate evidence necessary to prove habit has been established. ***Id.*** at 768-69. The predicate evidence must be sufficient to permit a reasonable jury to find that there exists a regular response to a repeated situation. ***Id.*** at 769.

¶11 The trial court acted within the scope of its discretion in determining that the evidence proffered by Woppert was not admissible as evidence of habit.[3] The evidence proffered by Woppert indicating that Woppert provided appropriate care to the Rodriguez and Bennett children did not constitute evidence of a regular response to a repeated situation, rising to the level of habit. *Cf.* ***Balz***, 294 Wis. 2d 700, ¶17. The proffered testimony from Rodriguez and the Bennetts indicating that Woppert was loving and appropriate in caring for their children was, in reality, character evidence. *See* ***Steinberg***, 194 Wis. 2d at 766-67 (what people speak of as a "habit" of care is in reality evidence of character or a character trait).

[3] In her appellant's brief, Woppert states that the trial court failed to determine whether the proffered evidence was that of habit, rather than character. Based upon our review of the trial court's pretrial ruling, we do not agree. While acknowledging that evidence of habit and routine practice is admissible evidence, the trial court indicated that the type of evidence being proffered by Woppert did not constitute habit or routine practice.

¶12 In a criminal case, an accused may offer evidence of a pertinent trait of her character. WIS. STAT. § 904.04(1)(a). However, proof must be made by testimony as to reputation or by testimony in the form of an opinion.[4] WIS. STAT. § 904.05(1). Evidence of other acts generally is inadmissible to prove the character of the person in order to show that the person acted in conformity therewith. *See* WIS. STAT. § 904.04(2).

¶13 As noted by the State in its respondent's brief, Woppert did not move the trial court to admit opinion or reputation testimony regarding her character for patience or carefulness. Instead, she sought to admit evidence of specific instances of providing appropriate care for other children for whom she babysat as evidence that she did not act violently or recklessly toward Mason. Such evidence was inadmissible under WIS. STAT. § 904.04(2)(a). The fact that Woppert did not physically abuse the Rodriguez or Bennett children did not show that she did not violently shake Mason on April 12, 2005, or otherwise cause abusive head trauma to him on that date. *Cf.* ***State v. Tabor***, 191 Wis. 2d 482, 497, 529 N.W.2d 915 (Ct. App. 1995) (evidence of non-criminal conduct is generally irrelevant to negate the inference of criminal conduct).

¶14 We also reject Woppert's contention that the trial court's ruling violated her constitutional right to present a defense. As noted above, we independently review whether the exclusion of evidence offered by a defendant

[4] Proof of a defendant's character may also be made by evidence of specific instances of the person's conduct when the defendant's character is an essential element of the charge, claim, or defense. WIS. STAT. § 904.05(2). However, character was not an essential element of the charge or defense in this case. The issue was whether Woppert engaged in criminally reckless conduct at the time of Mason's death. *See* WIS. STAT. § 940.06(1).

violated the defendant's constitutional right to present a defense. ***Tucker***, 259 Wis. 2d 484, ¶28.

¶15 There is no abridgement of a defendant's right to present a defense as long as the rules of evidence used to exclude the evidence offered are not arbitrary or disproportionate to the purposes for which they were designed. ***State v. Muckerheide***, 2007 WI 5, ¶41, 298 Wis. 2d 553, 725 N.W.2d 930. Admission of the evidence offered by Woppert was impermissible under the rules of evidence governing habit and character evidence, and its exclusion was not arbitrary or disproportionate. *See* ***id.*** Moreover, as noted by the State, Woppert was allowed to present much of the testimony discussed in her pretrial motion.

¶16 At trial Rodriguez testified that Woppert began babysitting her daughter when her daughter was three months old, during a time that Rodriguez was working from home. Rodriguez testified that Woppert babysat for eight to nine hours a day from July through January. Rodriguez testified that her daughter was extremely fussy, and would cry for hours on end. Rodriguez testified that she taught Woppert how to sooth and calm her daughter, and described techniques used by Woppert when her daughter was fussy, including picking her up and giving her a bottle or changing her diaper, rocking or swaying with her, singing to her, giving her different things to look at, or taking her for a walk. Rodriguez testified that when she heard the baby crying, she would just continue to work because she knew the baby was in good care.

¶17 Margo Bennett also testified at trial. She testified that she had known Woppert for about nine years, and that Woppert had cared for her household's three children, two of whom were foster children at the time. Bennett described how she was required to take parenting training in order to be a foster

parent, and testified that she required Woppert to become familiar with these parenting techniques when she babysat the Bennett children. Bennett indicated that as a result of her involvement with foster care training, Woppert also participated in social worker visits to the home. Bennett described her foster daughter's serious medical issues, and how Woppert was taught to care for her acid reflux. She testified that her son had ADHD, many allergies, and asthma, and that Woppert gave him a breathing treatment.

¶18 The implication of the testimony of Rodriguez and Bennett was that Woppert provided good, skilled care for their children. Based upon their trial testimony, no basis exists to conclude that the trial court's pretrial ruling limiting their ability to testify that Woppert provided appropriate care to their children infringed upon Woppert's right to present a defense. Moreover, as contended by the State, even if the trial court could have been deemed to have erred in its ruling, based upon the testimony presented the error must be deemed harmless. *See* ***State v. Shomberg***, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370 (if it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error, then the error did not contribute to the verdict and the error is harmless).

By the Court.— Judgment affirmed.

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