COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2016

Diane M. Fremgen
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. 2015AP1610-CR **Cir. Ct. No. 2013CF270**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GINGER M. BREITZMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Ginger M. Breitzman appeals from a judgment of conviction, following a jury trial, of one count of child neglect and one count of disorderly conduct. Breitzman also appeals from the order denying her postconviction motion. We affirm.

BACKGROUND

¶2 On May 20, 2013, an Amended Information charged Breitzman with two counts of physical abuse of a child, two counts of child neglect and one count of disorderly conduct. As relevant to this appeal, one count of child neglect stemmed from an incident in which Breitzman, as the "person who was responsible for the welfare of [her son] J.K.," "lock[ed] J.K. out of the house during the winter of 2011-2012." (Some capitalization omitted.) At the time, J.K. was fourteen years old. The disorderly conduct charge stemmed from an incident between Breitzman and J.K. which took place on December 4, 2012, in which Breitzman "while in a private place, did engage in profane conduct, under circumstances in which such conduct tended to cause a disturbance." The matter proceeded to a jury trial.

¶3 During opening statements, Breitzman's counsel told the jury that the charges against Breitzman were essentially an attempt by J.K. to "build a case against [his] mother," and that the case centered on "the question of reasonable parental discipline." Multiple witnesses testified.

¶4 The State's main witness was J.K. As relevant to this appeal, J.K. testified that one afternoon during the winter of 2012, J.K. came home from school at approximately 3:30 p.m. and was unable to enter his house because the door was locked and Breitzman did not respond to his attempts to enter. J.K. stated that he "knocked on the door, multiple times, rang the doorbell almost every ten minutes and it was too cold outside for what [he] was wearing, so … [he] crawled under a grill cover until [Breitzman] came to the door." J.K. stated that he shielded himself with a grill cover for approximately two to three hours, checking every fifteen minutes to see if Breitzman would open the door. J.K. stated that he

knew Bretizman was home because the "only car we had was … in the driveway." J.K. stated that he attempted to enter through multiple doors, but Breitzman never came to the door. J.K. admitted that he was not appropriately dressed for the weather, as the weather was pleasant when he went to school in the morning, but the temperature decreased when he came home. J.K. also stated that his cell phone battery drained after two hours of attempting to call Breitzman. J.K. attempted to go to a neighbor's home, but the neighbor was not home. Ultimately, after five hours, at approximately 8:30 p.m., Breitzman came to the door and let J.K. in the house. Breitzman told J.K. that she was sleeping.

¶5 J.K. also testified about an incident which took place on December 4, 2012, in which J.K. burned popcorn, prompting Breitzman to use foul language against J.K. J.K. stated that his mother told him to "grab your stuff out of your room," and that she was going to call the police. J.K. stated that he was on the phone with a friend during the incident and hid the phone in his pocket so his mother would not see; however, J.K. did not hang up. J.K.'s friend heard the exchange between J.K. and his mother. J.K. stated that he talked to his friend immediately after the incident and "started crying." J.K. stated that he told his friend he "didn't want to be in the house anymore" and that he needed "to tell [the police] at school everything that's going on and things were getting too crazy for me."

¶6 On cross-examination defense counsel asked J.K. about his nose bleeds. J.K. responded that his nose bleeds frequently, but also described an incident in which his mother hit him "in the car and [his] nose was bleeding." Counsel did not object, but rather asked J.K. follow-up questions regarding the incident. The State clarified that the incident J.K. described was separate from the two charged incidents of child abuse.

¶7 Breitzman also testified, telling the jury that the day J.K. was locked out of the house, she was not aware that J.K. had come home. She stated that she was sleeping and J.K. had a tendency to break his cell phone so she did not hear from him. She stated that she did not give J.K. a set of house keys because J.K. used to lose the keys frequently as a child and she "couldn't trust him." Breitzman did not deny getting "belligerent" with J.K. on December 4, 2012, the day of the popcorn incident, nor did she deny hitting her son in the car, causing a bloody nose; however, she stated that J.K. was interrupting and "getting loud" with her and that was the only time she ever "back handed" him.

¶8 The jury found Breitzman guilty of two counts of child abuse, one count of child neglect (stemming from the Winter 2012 incident), and one count of disorderly conduct (stemming from the popcorn incident).

¶9 Breitzman filed a postconviction motion, arguing, as relevant to this appeal, that there was insufficient evidence presented at trial to support the child neglect and disorderly conduct convictions. She also argued that her counsel was ineffective for: (1) "opening the door" to other acts evidence that Breitzman slapped J.K. in the car causing a nosebleed; (2) failing to object to hearsay testimony "concerning what [J.K.] purportedly told other people"; and (3) for "asserting in his opening statement a defense which was inconsistent with Ms. Breitzman's testimony."

¶10 The postconviction court held a ***Machner***[1] hearing, at which both counsel and Breitzman testified. The postconviction court ultimately denied the motion. This appeal follows.

DISCUSSION

¶11 On appeal, Breitzman contends that there was insufficient evidence to support the child neglect and disorderly conduct convictions. She also argues that counsel was ineffective for multiple reasons. We conclude that the evidence is sufficient to support the convictions and that counsel was not ineffective.

Sufficiency of the Evidence

¶12 The standard for reviewing the sufficiency of the evidence "is whether the evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt." ***State v. Sharp***, 180 Wis. 2d 640, 658-59, 511 N.W.2d 316 (Ct. App. 1993). If there is any possibility the trier of fact "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn the verdict even if we believe "that the trier of fact should not have found guilt based on the evidence before it." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury determines the credibility of witnesses and the weight of the evidence, and we will not substitute our judgment for the trier of fact's "unless the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." *See*

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Sharp, 180 Wis. 2d at 659; *see also* ***Poellinger***, 153 Wis. 2d at 507 ("[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt."). This standard applies regardless of whether the evidence is direct or circumstantial. *See* ***Poellinger***, 153 Wis. 2d at 501.

Child Neglect

¶13 To prove that Breitzman was guilty of child neglect, the State was required to show that: (1) Breitzman was responsible for J.K.'s welfare; (2) Breitzman intentionally contributed to the neglect; and (3) J.K. was under the age of eighteen. *See* WIS JI—CRIMINAL 2150; WIS. STAT. § 948.21 (2013-14).[2]

¶14 It is undisputed that J.K. was under the age of eighteen in the winter of 2012 and that Breitzman was responsible for his welfare. The second element outlined above requires that the defendant intentionally contribute to the neglect of the child. The term "intentionally" requires only that the defendant be "aware that his [or her] conduct was practically certain to cause that result." *See* WIS JI—CRIMINAL 2150. A child is neglected if the person responsible for the child's welfare fails "to provide necessary care, food, clothing, medical or dental care, or shelter so as to seriously endanger the physical health of the child." ***Id.*** However, the jury instructions also provide:

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> It is not required that the child actually become neglected. An act or failure to act contributes to the neglect of a child if the natural and probable consequences of that act or failure to act would be to cause the child to become neglected.

Id.

¶15 J.K. testified that he waited outside of his home for approximately five hours before his mother let him in the house. He stated that the temperature got progressively colder, prompting him to take shelter under a grill cover. J.K. was certain his mother was home because her car was in the driveway; however, she did not answer his phone calls or come to any of the house's doors despite J.K.'s repeating knocking and doorbell ringing. The jury found J.K. credible and clearly concluded that Breitzman endangered J.K.'s health and safety by leaving him outside for five hours in the winter. J.K.'s testimony supports the jury's conclusion.

Disorderly Conduct

¶16 WISCONSIN STAT. § 947.01(1) provides: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." To prosecute a defendant for disorderly conduct, the State must prove two elements. *See* ***State v. Douglas D.***, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725. First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct. *See* ***id.*** Second, it must prove that the defendant's conduct occurred under circumstances where it tended to cause or provoke a disturbance. *See* ***id.*** "An objective analysis of the conduct and circumstances of each particular

case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others." ***State v. Schwebke***, 2002 WI 55, ¶24, 253 Wis. 2d 1, 644 N.W.2d 666.

¶17 The trial court instructed the jury following WIS JI—CRIMINAL 1900:

> Before you may find the defendant guilty of [disorderly conduct], the State must prove … that the following two elements were present.
>
> 1. The defendant engaged in profane conduct.
>
> 2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.
>
> "Disorderly conduct" may include physical acts or language or both.
>
> ….
>
> The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community. This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.
>
> It is not necessary that an actual disturbance must have resulted from the defendant's conduct.

¶18 The jury returned a verdict of guilty on the disorderly conduct charge. We presume jurors follow the instructions they were given. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Breitzman contends that the evidence presented at trial was insufficient to support a conviction for disorderly conduct. The basis of the disorderly conduct charge was

Breitzman's conduct towards J.K. during the popcorn incident, in which she yelled at J.K., calling him a "retard," a "fuck face," and a "piece of shit." Breitzman does not deny calling J.K. those names, but rather contends that her conduct did not tend to cause or provoke a disturbance. Here, J.K. had his phone hidden in his pocket, allowing his friend to hear Breitzman's foul language. J.K. later cried to his friend and essentially stated that he had reached a breaking point, prompting J.K. to contact the police the following day. The jury could reasonably conclude that Breitzman's language and tone towards J.K. "unreasonably offends the sense of decency or propriety of the community," thus satisfying the elements of WIS. STAT. § 947.01(1). Because the statute encompasses conduct that tends to cause a disturbance that is "'private in nature,'" we must conclude that the evidence supports the jury's finding that Breitzman's conduct was profane and that it disturbed J.K. *See* ***Schwebke***, 253 Wis. 2d 1, ¶31.[3]

Ineffective Assistance of Counsel

¶19 Breitzman contends that she was denied the effective assistance of counsel for three reasons: (1) trial counsel did not move to dismiss the disorderly conduct charge on grounds that the charge violated her right to free speech;

[3] In ***State v. Schwebke***, 2002 WI 55, ¶¶31-32, 253 Wis. 2d 1, 644 N.W.2d 666, the Wisconsin Supreme Court noted:

> [I]n domestic disputes, even though the disturbance may only occur on a private level, such conduct affects the overall safety and order in the community…. [T]he conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person.

(Formatting altered.)

(2) counsel failed to object to prejudicial other acts evidence; and (3) counsel argued a theory of defense that contradicted her testimony. We disagree.

¶20 In evaluating an ineffective assistance of counsel claim, we apply the two-part test outlined by ***Strickland v.Washington***, 466 U.S. 668(1984). *See* ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. To satisfy this test, Breitzman must show that: (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced her defense. *See* ***Strickland***, 466 U.S. at 687. If Breitzman fails to satisfy either prong of the two-part test, her ineffective assistance of counsel claim must also fail. *See* ***id.*** Deficient performance requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** With respect to the "prejudice" component, Breitzman must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694.

¶21 "[A]n ineffective assistance of counsel claim presents a mixed question of fact and law." ***State v. Champlain***, 2008 WI App 5, ¶19, 307 Wis. 2d 232, 744 N.W.2d 889. We review a postconviction court's findings of fact for clear error; whether trial counsel's performance is constitutionally infirm is a question of law, which we review *de novo. See* ***id.***

¶22 We agree with the postconviction court that Breitzman did not receive ineffective assistance of counsel. As to counsel's failure to challenge the disorderly conduct charge on free speech grounds, the postconviction court discussed the basic tenets of free speech law and noted that the disorderly conduct statute "can include both protected and unprotected speech." The court stated that if trial counsel had moved to dismiss the charge, the trial court would have denied

the motion.[4] Consequently, trial counsel was not ineffective for failing to move to dismiss the disorderly conduct charge. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails).

¶23 We also agree with the postconviction court that trial counsel's decision to not object to the other acts evidence was a matter of trial strategy. A postconviction court's determination that counsel had a reasonable trial strategy "is virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. At the ***Machner*** hearing, counsel testified that he did not object to evidence that Breitzman hit her son while driving—an uncharged offense—because a central theory of the defense was that J.K. had a tendency to exaggerate. Counsel stated that he planned to counter J.K.'s testimony with testimony from Breitzman in hopes of undermining J.K.'s credibility, telling the court that "the best approach would be to be very transparent about [the incident] and to not sit there and make lots of objections on things that would be overruled and become obvious and rather let the jury see what is the other side here." Indeed, counsel testified that he actually wanted the jury to hear some of the allegations J.K. made against Breitzman to paint J.K. as a child who makes "grandiose" allegations against his mother. Counsel's decision was deliberate and was based on articulated reasons which are neither irrational nor unreasonable. "We will not second guess trial counsel's selection of trial tactics or strategies in the face of alternatives that he or

[4] The postconviction court also presided over the trial.

she has considered." ***State v. Nielsen***, 2001 WI App 192, ¶26, 247 Wis. 2d 466, 634 N.W.2d 325.

¶24 Finally, we agree with the postconviction court that counsel did not present the jury with testimony contrary to his theories of defense. Breitzman contends that trial counsel's opening remarks to the jury included an explanation that the theory of defense was reasonable parental discipline; however, Breitzman testified that she did not hit J.K. on the two occasions for which she was charged, but did hit J.K. on the one occasion for which she was not charged. Breitzman contends that it was irrational for counsel to apply the discipline defense to an uncharged occurrence and that counsel most likely confused the jury, leading the jury to believe that counsel's defense theory was contrary to Breitzman's testimony.

¶25 Counsel testified at length about his defense strategy, telling the court that his main theories of defense centered on: (1) Breitzman's right to discipline her child; (2) J.K.'s unruly behavior and tendency to exaggerate; and (3) Breitzman's "difficult set of circumstances" as a single mother with a "rebellious child" and "limited economic resources." Counsel stated that he discussed his theories with Breitzman and that Breitzman agreed with his approach. Accordingly, throughout the course of the trial, counsel elicited testimony from Breitzman that discussed: (1) J.K.'s behavioral changes and tendency towards rebellion; (2) J.K.'s tendency to exaggerate facts; (3) Breitzman's disciplinary methods; (4) Breitzman's struggles as a single mother; and (5) Breitzman's love for her child. All of the testimony counsel elicited went to one or more of his theories of defense.

¶26 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.