COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1956-CR
2016AP1957-CR

Cir. Ct. Nos. 2013CF453
2013CF1256

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIN K. TAYLOR,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. Darrin K. Taylor was charged with sexually assaulting his girlfriend's minor daughter and a bevy of other offenses—among them, causing mental harm to his victim and a bail jumping charge based on the

mental harm charge. The sole issue in these consolidated appeals is whether the evidence was sufficient for the jury to convict Taylor on the charge for causing mental harm and the associated bail jumping charge. We conclude it was. Relevant facts support the jury's verdict, and no expert testimony was required to show that Taylor caused mental harm to his victim.

BACKGROUND

¶2 Taylor was charged with two counts of first-degree sexual assault of a child based on sexual contact with the then ten-year-old daughter (S.F.) of his girlfriend (L.B.). This contact occurred sometime between March and April 2013. Because Taylor was out on bond for a separate criminal charge, the complaint also charged two counts of bail jumping based on the sexual assault charges. When Taylor was arrested for these charges, he was unable to post bond and remained in jail.

¶3 While incarcerated, Taylor was ordered not to have any contact with S.F. or L.B. Notwithstanding the order, he communicated with L.B. and made contact with S.F. on multiple occasions. The investigation continued, and following further allegations of sexual assault by S.F., the State filed a second complaint charging Taylor with numerous additional offenses, including repeated sexual assault of the same child, contempt of court, intimidation of a victim, and related bail jumping charges. The complaint also charged Taylor with causing mental harm to a child and a bail jumping charge based on the mental harm charge. The newly-added sexual assault charge alleged multiple additional sexual acts and that Taylor had been assaulting S.F. since June 2011. And relevant here, the complaint alleged that Taylor's illicit contact with S.F. while he was incarcerated caused her mental harm.

¶4 The two cases (nineteen counts in all) were joined for a jury trial. The jury found him guilty on all but two of the charges. The court sentenced Taylor, and he appeals. Additional facts will be set forth as necessary below.

DISCUSSION

¶5 Although convicted of seventeen separate charges, on appeal Taylor challenges only the charges for causing mental harm to a child and the related felony bail jumping charge. The crime of causing mental harm to a child is defined in WIS. STAT. § 948.04, which reads: "Whoever is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child is guilty of a Class F felony." This crime requires the State to prove five elements:

> 1. The defendant was exercising temporary or permanent control of [the child.]
>
> 2. [The child] suffered mental harm.
>
> ….
>
> 3. The defendant caused mental harm to [the child]. This requires that the defendant's conduct was a substantial factor in producing the mental harm.
>
> 4. The defendant caused mental harm by conduct which demonstrated substantial disregard for the mental well-being of [the child.]
>
> 5. [The child] had not attained the age of 18 years at the time the alleged harm was caused.

WIS JI—CRIMINAL 2116. Taylor focuses his argument on elements (2) and (3), arguing that the evidence was insufficient to prove that S.F. suffered mental harm and Taylor's conduct was the cause. Though Taylor "does not dispute" that expert

testimony is not required to satisfy the statutory elements, he nonetheless maintains the testimony here was insufficient without expert testimony.

¶6 Whether the evidence presented at trial was sufficient to sustain conviction by a jury is a question of law reviewed de novo. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. "When conducting such a review, we consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoting ***State v. Poellinger,*** 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). In other words, this court will uphold the conviction so long as "any reasonable hypothesis" supports it. ***Smith***, 342 Wis. 2d 710, ¶24**.** Taylor's argument also requires us to interpret the applicable statutory provisions, a question of law we review de novo. ***State v. Wiedmeyer***, 2016 WI App 46, ¶6, 370 Wis. 2d 187, 881 N.W.2d 805.

¶7 As used in WIS. STAT. § 948.04, "Mental harm" is defined as:

> [S]ubstantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child, including, but not limited to, anxiety, depression, withdrawal, or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child's age and stage of development.

WIS. STAT. § 948.01(2). Under this statute, mental harm is defined as "substantial harm to a child's psychological or intellectual functioning." ***Id.*** In the same sentence, the core definition is amplified and explained by adducing several ways such harm "may be evidenced." ***Id.*** These include but are not limited to "anxiety,

depression, withdrawal, or outward aggressive behavior." ***Id.*** The second sentence similarly does not change the core definition, but tells us how mental harm "may be demonstrated"—namely, by "a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development." ***Id.***

¶8 Taylor appears to interpret this statutory language as requiring the State "to prove that the observable change in behavior is not within the normal range for the child's age and stage of development." But the use of "may be evidenced by" and "may be demonstrated by" reflect ways the burden of proof *may* be met, not separate and required showings. *See* WIS. STAT. § 948.01(2). The core definition of mental harm under the statutory language is simply "substantial harm to a child's psychological or intellectual functioning." ***Id.***

¶9 As Taylor appears to concede, nothing in the statutory language suggests expert testimony is required to demonstrate mental harm. Expert testimony is only required "if the issue to be decided by the jury is beyond the general knowledge and experience of the average juror." ***State v. Perkins***, 2004 WI App 213, ¶16, 277 Wis. 2d 243, 689 N.W.2d 684 (citation omitted). Requiring expert testimony is "an extraordinary step, one to be taken only when 'unusually complex or esoteric issues are before the jury[,]' and '[d]etermining whether expert testimony assists the fact finder is a discretionary decision of the trial court.'" ***Id.*** (citations omitted; alternations in original).

¶10 This statutory description of mental harm is not so esoteric or outside the realm of ordinary experience that laypersons cannot identify when a child's psychological or intellectual functioning has been substantially harmed; experts are not required. This court has held that unless precedent or the statutory

language requires it, even mental illness may be established based on lay testimony. *See* ***id.***, ¶¶21-22 (concluding that expert testimony is not required to establish mental illness). Thus, we see little reason (and Taylor offers none) why "mental harm" under WIS. STAT. § 948.01(2) may not be shown through—in this case—the testimony of her parents. Indeed, parents may be in the best position to determine whether their child's "psychological or intellectual functioning" has been harmed. Accordingly, we reject any suggestion that expert testimony is required in every case to establish mental harm under § 948.01(2).

¶11 Taylor responds that ***In Interest of H.Q.***, 152 Wis. 2d 701, 708, 449 N.W.2d 75 (Ct. App. 1989), "is instructive" and shows that expert testimony was required in this case. However, that decision dealt with a different statute involving injunctions when the circuit court had reason to believe a person had or may engage in child abuse. ***Id.*** at 703-04. The definition of child abuse included "emotional damage," which in turn was defined as "severe anxiety, depression, withdrawal, or outward aggressive behavior," or any combination of these behaviors. ***Id.*** at 704. The court never stated that expert testimony was required in every case under that statute. ***Id.*** at 708-09. Rather, the court observed that the record in that particular case contained "no evidence" of such behavior, and remarked that the testimony of the children that they were "'upset' or 'concerned' about their father" did not, "in the absence of expert testimony," satisfy the statutory standard in that case. ***Id.*** at 709. While ***H.Q.*** may have some superficial similarities, whether a statutory standard is met—and how it must be met—is unique to the facts of a given case and the statutory language at issue. Thus, we do not find ***H.Q.*** instructive or controlling in our case.

¶12 The record before us contains sufficient evidence to support the conclusions both that S.F. suffered mental harm and that Taylor caused it. The jury heard testimony from S.F.'s mother, who explained that she noticed a change in S.F.'s behavior in the summer of 2013. S.F. no longer wished to stay with her mother and was "always crying." S.F.'s mother also testified that S.F. would "would wake up in the middle of the night very upset, and [she] would hold her." S.F.'s father testified that he too observed a change in S.F.'s behavior during the summer and fall of 2013. He also testified that S.F. developed a fear of the dark. S.F. did not wish to return to her mother when she was with him, and he too found S.F. crying. From this testimony, the jury reasonably could have—and did—conclude that S.F. suffered mental harm.

¶13 Similarly, the jury could reasonably conclude that Taylor's communications with S.F. while he was in prison—a violation of a court order—were a substantial factor in causing this change in S.F.'s behavior. After Taylor was arrested in March 2013, he began contacting S.F. from prison via telephone and various communications through her mother. In May 2013, Taylor requested S.F. visit him in prison, where he told her "to help Daddy" and "to make sure everybody knows Daddy's not bad," and asked her to help him get out of jail. In June 2013, Taylor wrote a letter to L.B. in which he wished S.F. a happy birthday. Around the same time he asked a relative to tell S.F. and her siblings that he loved and missed them. In addition, the jury heard testimony that Taylor encouraged S.F.'s mother to convince S.F. to tell the court that he had not done anything "bad." Shortly thereafter—according to the testimony of S.F.'s father and mother—S.F.'s behavior changed; she began crying regularly, refusing to sleep alone, and insisting on living with her biological father.

¶14 Taylor contacting S.F.—who was no doubt already traumatized by Taylor's repeated sexual assaults—and pressuring her to "help" him coincided with S.F.'s symptoms of mental harm. A victim of repeated sexual assaults being pressured by her abuser to change her story could easily lead to symptoms of mental harm like those S.F. exhibited. Combined with the timing of S.F.'s symptoms, a reasonable jury could conclude that Taylor's conduct in prison was a substantial factor in causing that harm.

¶15 In sum, the evidence was sufficient for the jury to conclude that Taylor caused mental harm to S.F. Because there was sufficient evidence to support the jury's decision to convict Taylor on the mental harm charge, we also affirm the related bail jumping charge.

By the Court.—Judgments affirmed.

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