COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 95-0827-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEBRA KERKMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed.*

ANDERSON, P.J. Debra Kerkman appeals from a judgment of conviction for intimidation of a victim contrary to § 940.44(1), STATS.[1] We conclude that the evidence presented to the trial court was

[1] Section 940.44(1), STATS., provides in pertinent part:

Intimidation of victims; misdemeanor.
[Whoever knowingly and maliciously prevents or dissuades … another person who has been the victim of any crime or who is acting on behalf of the victim from … [m]aking any report of the victimization to any peace officer or state, local or federal law enforcement or

insufficient to constitute intimidation of a victim and therefore reverse Kerkman's conviction.

In June 1994, Kerkman was charged with two counts of physical abuse of a child contrary to § 948.03(2)(b) and (5), STATS., and one count of intimidation of a victim contrary to § 940.44(1), STATS. The charges stemmed from multiple incidents between Kerkman and her then fourteen-year-old daughter, Tracy W.[2] Kerkman waived her right to a trial by jury, and her case proceeded to a trial by the court.

At the end of the State's case-in-chief, Kerkman moved to dismiss all three charges. The trial court examined WIS J I—CRIMINAL 950, a composite of § 939.45(5), STATS., which provides for privileged discipline by a person responsible for the welfare of a child, and concluded that since Tracy initiated both altercations, Kerkman's physical retaliations were privileged for self-

(..continued)

prosecuting agency….

[2] The first incident occurred in December 1993 when Kerkman and Tracy were arguing while Tracy's friends were at the house. Based on testimony given by Tracy at trial, the argument started in the house but escalated when Tracy proceeded outside and refused to return at Kerkman's request. Kerkman grabbed Tracy's shoulder and turned her towards the house, but Tracy pushed Kerkman against the porch railing. A physical altercation between the two ensued, and in the midst of hitting one another, Tracy pushed her hand against her mother's neck to choke her. To escape, Kerkman pulled Tracy's head down by her hair, kneed her in the head and twisted her neck.

The second incident occurred in February 1994 during another verbal argument when Kerkman returned home around 10:30 p.m. and found a group of Tracy's friends leaving the house. Since some of Tracy's friends remained, Kerkman asked Tracy who had left and proceeded to grab Tracy's arm to speak to her privately in Kerkman's bathroom. Tracy claims that her mother had told her she could have people over, but Kerkman asked why the friends were there. A hollering match between the two erupted and Kerkman grabbed for Tracy's arm when she attempted to leave the bathroom. When Tracy pushed Kerkman backward, Kerkman retaliated by slapping Tracy.

defense purposes. The court reasoned that the events consisted of a typical altercation in which both Kerkman and Tracy had used nearly identical force. Therefore, the court granted Kerkman's motion and dismissed both physical abuse counts, but proceeded on the intimidation of a victim charge.

The intimidation of a victim charge stems from comments made by Kerkman to Tracy after Kerkman learned Tracy reported the two incidents to the police. Based on Tracy's recollection of the events, she claims her mother told her, "there's no more friends coming over" and that "if this gets out, this can ruin my life." However, the testimony of Tracy, Kerkman and Officer Mark Hunter conflict as to what actually was said and in what context such comments were made.[3]

Despite the dismissal of both physical abuse charges based on privilege, the court found Kerkman guilty of intimidation of a victim, sentenced

[3] Hunter testified as to what Tracy reported had happened after her mother found out about the charges made by Tracy. Tracy told the officer that the comment made about ruining her life was made by Kerkman with respect to Tracy's life, meaning that many restrictions would be placed on Tracy for turning Kerkman in to the police.

Tracy testified that Kerkman was merely upset and that when Kerkman said if this goes anywhere her life is finished, Kerkman was referring to herself, and not Tracy. Tracy stated that her mother did not make that statement to intimidate her. Tracy also claimed that her mother never explained why the other statement about Tracy not having friends over was made.

Kerkman testified that she was very upset at the time and asked Tracy if she was trying to ruin Kerkman's life. The statements made about the friends were made because, according to Kerkman, Tracy's friends were part of the problem. Kerkman claims that she had repeatedly told Tracy she could not have friends over when neither of her parents were there, but when it continued to occur, Kerkman believed it needed to stop. However, Kerkman never followed through with such a threat, and Tracy's friends continued to come to the house.

her to two- years probation and instructed her to continue counseling. Although the court found Kerkman's actions privileged, the court was satisfied with the State's argument that Kerkman threatened Tracy to prevent the matter from continuing. The court concluded that threats made to Tracy about ruining her life and not having friends come over essentially meant that Tracy would not be "able to enjoy the normal aspects that a child normally enjoys in association with their peers."

Kerkman appeals her conviction arguing that she cannot be convicted of intimidation of a victim pursuant to § 940.44(1), STATS., since she was acquitted of the underlying charges of physical abuse of a child.

According to WIS J I—CRIMINAL 1294, the State must prove three elements beyond a reasonable doubt for a fact finder to convict Kerkman of intimidation of a victim: (1) that Tracy was a victim of a crime; (2) that Kerkman prevented, dissuaded, or attempted to prevent or dissuade Tracy from reporting the crime to a law enforcement agency, and (3) that Kerkman acted knowingly and maliciously.

Kerkman argues that since she was acquitted of the two physical abuse charges, Tracy cannot be considered a "victim of a crime." To convict of intimidation of a victim, the State must prove the elements of the underlying crime or crimes beyond a reasonable doubt. ***State v. Thomas***, 161 Wis.2d 616, 624, 468 N.W.2d 729, 732 (Ct. App. 1991). We agree with the trial court's determination that since all the elements of child abuse were proven, dismissing the charges against Kerkman because of her privilege of self-defense as a parent

did not nullify Tracy's status as a "victim of a crime."

The court of appeals has broad discretionary reversal power under § 752.35, STATS., when the court is convinced either that the real controversy has not been fully tried or that it is probable that justice has for any reason been miscarried. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990). Although an issue may not be raised or challenged by the parties, the courts have the power to voluntarily consider such issues in the interest of justice. ***Id***. at 22 n.5, 456 N.W.2d at 806. Kerkman did not directly appeal her conviction based on insufficiency of the evidence; however, we feel the evidence was insufficient for an intimidation conviction.

Generally, before an appellate court can overturn a conviction on insufficiency of the evidence grounds, "the evidence, viewed most favorably to the state and the conviction, [must be] 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, 755 (1990).

Since all three elements of intimidation of a victim must be proven, if any one element was not proven beyond a reasonable doubt, Kerkman should not have been convicted. First, we look to whether Kerkman acted knowingly and maliciously. This element requires that Kerkman knew Tracy was a victim of a crime and either "acted with the intent to injure or annoy another" or "acted with an intent to interfere with the orderly administration of justice." *See* WIS J I—CRIMINAL 1294. "State of mind can …

only be inferred from assessment of a person's acts and statements in light of the surrounding circumstances." ***State v. Schlegel***, 141 Wis.2d 512, 517, 415 N.W.2d 164, 166 (Ct. App. 1987) (citation omitted).

After reviewing the conflicting testimony of Kerkman, Tracy and Hunter as to what Kerkman said to Tracy and in what context and circumstances the comments were made, we fail to see how such comments were knowingly and maliciously made. Kerkman and Tracy both testified that at the time Kerkman made the statements she was upset and that the statement about ruining her life was made in reference to Kerkman's life, not Tracy's life.

Also, Kerkman testified that the comments about Tracy's friends were not made to threaten or intimidate Tracy, but were made because Kerkman believed her daughter's friends were part of their problems. Both arguments erupted over Tracy having friends over to the house when her mother was not there, which Tracy had been previously told not to do. Since it had occurred over and over again, we can infer that Kerkman felt the best way to remedy the situation was to say Tracy's friends could not come to the house.

Since we fail to see beyond a reasonable doubt how Kerkman's statements were made knowingly and maliciously with an intent to prevent Tracy from talking to the police, Kerkman's conviction should be reversed.[4]

[4] Since all three elements of intimidation of a victim need to be proven beyond a reasonable doubt in order to convict, and we have determined that the statements made by Kerkman were not knowingly and maliciously made, we do not need to prove that the other two elements were not proven beyond a reasonable doubt.

Convicting a parent of intimidation of a victim would have a chilling effect on parental discipline. In Wisconsin, the parental discipline defense privilege allows a parent to use reasonable discipline and force when deemed necessary, and places a limit where a parent intends to cause or create an unreasonable risk of great bodily harm or death. Section 939.45(5)(b), STATS. To consider an upset parent's reprimands concerning the extent of a child's extra-curricular activities as "knowing and malicious intimidation" creates a ridiculous situation.

The trial court's interpretation of Kerkman's statements as threats that Tracy would be unable to enjoy the normal aspects of associating with her friends if the matter continued was inconsistent with what both Kerkman and Tracy testified to. Kerkman's response and comments to Tracy about her friends not coming over appear to have been motivated by a normal parental reaction to a teenager's failure to abide by house rules. Tracy had been told repeatedly by Kerkman not to have her friends over when no one else was home, but continually disobeyed her mother's request. Since the arguments were based on these occurrences, it is only natural that Kerkman wanted Tracy to stop having her friends over.

We conclude that the evidence presented at trial was insufficient to prove all three elements of intimidation of a victim and therefore the trial court erroneously convicted Kerkman.

By the Court.—Judgment reversed.

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