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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP002629-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADDISON F. STEINER,

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction and
Order Denying Postconviction Relief Entered in La Crosse
County, the Honorable Elliott Levine Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Where the state presented no evidence to show that Steiner intended to permanently leave his child, did the state prove Steiner was guilty of abandonment of a child?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Steiner requests publication in order to clarify the law that abandonment of a child requires an intent to permanently leave the child, and not an intent to temporarily leave the child. Steiner does not request oral argument.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment of conviction and order denying postconviction relief entered in La Crosse County, the Honorable Elliott Levine presiding.

On April 13, 2011, at around 1:00 p.m., Holmen Police Officer Crystal Sedevie was dispatched to Steiner's home in light of an anonymous complaint that a three-year-old child had been left alone. (90:66-67). Sedevie went to the home and knocked on the door. (90:67). When no one answered, she went to the home next door and spoke to the neighbor. (90:68). The neighbor reported that she had made the anonymous call, and that she suspected a three-year-old child was home alone. (90:68).

Sedevie went back to Steiner's home and tried the door, finding it unlocked. (90:68). In walking through the home, Sedevie saw a door which had a bungee cord attached to the door knob that was then fastened to something else, securing the door. (90:69). Sedevie opened the door and found three-year-old D.S. standing there. (90:69). Sedevie requested assistance from Social Services, changed D.S.'s diaper and found him some clean clothes, and fed him. (90:71-73). Sedevie testified at the trial that the Steiner's home was dirty and in disarray, with clutter and broken toys everywhere. (90: 75-78).

While Sedevie was waiting for Social Services to arrive, a cell phone in the house began to ring, and the caller ID said "Addison." (90:79). Sedevie answered the phone, identifying herself as a Holmen police officer. The caller "said, yeah, right, kind of laughing," and Sedevie asked if he was Addison Steiner. (90:80). He said that he was, and Sedevie told him he needed to return to his home immediately. (90:80).

About ten minutes later, Steiner was at the home. (90:80). He told Sedevie he had had a doctor's appointment, that he was only going to be gone for an hour, and that he had left D.S. sleeping in his room. (90:80). He said he used the bungee cord to secure the room so that D.S. would not walk around the house. (90:80).

The state subsequently charged Steiner with abandonment of a child, child neglect, and abuse of his other two children. (5).

The case proceeded to a jury trial. (90). The jury convicted Steiner of abandonment of a child and child neglect, but were deadlocked on the child abuse charges. (90: 115-116). The court entered judgments of conviction for

the abandonment and neglect charges, and declared a mistrial on the abuse counts. (90: 121). The state decided not to bring those two charges to trial again. (95:3). The court sentenced Steiner to 2.5 years of initial confinement and three years of extended supervision for the abandonment conviction, and consecutive probation for the neglect conviction. (95:47-49).

Steiner testified that he was an overwhelmed single parent. He testified that he and his former wife moved to La Crosse in 2007 after living out in the country. (90:145). Before moving to La Crosse, he and his wife were students, and they lived in a “little farm house” on an acre of land where their three children could “run around and play.” (90:146). After they graduated, Steiner’s wife took a position in La Crosse, and they moved there. Steiner testified he could not find work in La Crosse, and he eventually took a job 90 miles away. (90:148-149). In 2009, Steiner and his wife separated; she moved out of their house and Steiner remained with the three children. (90:150-151).

Steiner lost his job in July of 2010, and he and his wife divorced in August of 2010. (90:153). He became very depressed, testifying that the depression made it very hard for him to do anything, and that it was “debilitating” for him. (90:158). He testified that he found it hard to get out of bed in the morning, living in an unfamiliar town with “no real support system,” divorced and “trying to pick up the pieces.” (90:158). He testified he was seeing a therapist, that he “wanted to be a better person, and to be, you know, to be the best parent I could be to my kids.” (90:159). He testified about his own upbringing, with a strict father who disciplined him by beating him with a belt. (90:155-156).

Steiner admitted at the trial he had left his three-year-old son alone: “Um, yeah, I’m not proud of it. You know, I

didn't feel like I really had any options, you know...but yeah, it's happened." (90:172). He admitted that it was not safe to leave him alone. (90:215-216).

On the day that the police came to his home and found D.S., Steiner testified he left D.S. alone while he went to see his therapist. (90:176). He testified D.S. was sleeping when he left, and that he expected a friend to come over to the house while he was gone. (90:177).

At the close of the evidence, the court gave the jury the pattern jury instruction for abandonment of a child. (91:47-49). The pattern jury instruction, WIS JI-CRIMINAL 2148 for abandonment of a child is as follows (footnotes omitted):

Statutory Definition of the Crime

Abandonment of a child, as defined in §948.20 of the Criminal Code of Wisconsin, is committed by any person who, with intent to abandon the child, leaves any child in a place where the child may suffer because of neglect.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of Child) was under the age of 18 years.

.....

2. The defendant left (name of child) in a place where the child may have suffered because of neglect.

“Neglect” means to seriously endanger the health or safety of a child by failing to provide necessary care, food, clothing, medical or dental care, or shelter.

This does not require that (name of child) actually suffered because of neglect, but it requires only that (name of child) was left in a place where the child may have suffered because of neglect.

3. The defendant left (name of child) with intent to abandon (name of child).

Meaning of “With Intent to Abandon”

The term “with intent to abandon” requires that the defendant had the purpose to abandon or was aware that (his) (her) conduct was practically certain to cause that result.

Deciding About Intent

You cannot look into a person’s mind to find intent. Intent must be found, if at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

In his closing argument to the jury, the prosecutor argued that abandonment of a child does not mean an intent to permanently leave the child. He argued:

Obviously, he left with the intent to abandon. There's nothing in the jury instruction that abandon means permanently. You won't find it anywhere.

That's because you can abandon somebody even though it's not permanent. You're out with your friends at a concern or a party. At some point you split with your friends. You abandon your friends. For that night, I don't care where they go, I'm going this way. They're not my concern. I'm not worried about them. What they do is what they do. What I do is what I do. You're abandoning them for the night.

It doesn't mean that they're not still your friends. It doesn't mean the next night you might meet up again. You're giving up on them for that time period.

(91:68).

In his rebuttal argument, the prosecutor argued that Steiner "had the intent to abandon [D.S.] every time he walked out of that house and put that strap on the door." (91:99).

The jury convicted Steiner of neglect of D.S. and abandonment of D.S., but were deadlocked on the other counts of abuse of his other children. The court subsequently sentenced Steiner to prison.

Steiner moved for postconviction relief, asking the court to vacate the conviction for abandonment of a child. (72; App. 101-106). Steiner argued the abandonment

conviction could not stand because his conduct did not constitute abandonment within the common, ordinary and accepted meaning of the word. (72:2; App. 102). The court ordered the parties to submit additional written arguments, and held a hearing on the motion. (75; 76; 96). The court denied Steiner's motion. (96:12-16; App. 118-122).

Steiner filed a timely notice of appeal. (97).

ARGUMENT

Where the State Presented No Evidence to Show that Steiner Intended to Permanently Leave His Child, the Evidence is Insufficient to Support a Conviction for Abandonment of a Child.

Steiner was convicted of abandonment of a child, contrary to Wis. Stat. § 948.20, which reads as follows:

Whoever, with intent to abandon the child, leaves any child in a place where the child may suffer because of neglect is guilty of a Class G felony.

The key portion of the statute involved in this case is: "with intent to abandon the child." Steiner contends the crime requires the state to prove that the offender has the intent to permanently leave the child, and not to temporarily leave the child. As such, the issue before the court is the statutory interpretation of Wis. Stat. § 948.20. "The interpretation of a statute presents a question of law" which this court reviews de novo. *Meriter Hospital Inc., v. Dane County*, 2004 WI 145, ¶ 12, 277 Wis. 2d 1, 689 N.W.2d 627.

In *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 the supreme court articulated the rules of statutory interpretation relevant to this

appeal. First, “statutory interpretation ‘begins with the language of the statute.’” *Id.* at ¶45, quoting *Seider v. O’Connell*, 2000 WI 76, 236 Wis. 2d 211, 232, 612 N.W.2d 659. If the statute’s meaning is plain, ordinarily the court stops its inquiry. *Id.*

Second, “[s]tatutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id.*, citing *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656.

Third, the statute’s context matters:

[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id. at ¶46.

In general, legislative history is not consulted except to resolve an ambiguity in the statutory language.¹ *Id.* at ¶51.

Applying these rules of statutory interpretation, the court should conclude that “with intent to abandon” means an intent to permanently leave the child, not an intent to leave the child and then return later.

Neither Wis. Stat. § 948.20 nor Wis. Stat. § 939.22 define “abandon” or “intent to abandon.” And, as “abandon” is not a technical word, it should be given its common,

¹ Counsel was unable to find any relevant legislative history regarding the phrase “with intent to abandon” in Wis. Stat. § 948.20.

ordinary meaning. The “common and approved usage of a word in a statute may be ascertained by reference to a recognized dictionary.” *State v. Woods*, 117 Wis. 2d 701, 735-36, 345 N.W.2d 457 (1984).

The first definition of abandon given in Webster’s Third New International Unabridged Dictionary is: “to cease to assert or exercise an interest, right, or title to esp. with the intent of never again resuming or reasserting it.” Under abandonment, the dictionary gives the example of “desertion of a child by its parents.” The dictionary lists “relinquishment and renunciation” as synonyms of “abandonment.”

The Merriam Webster on-line dictionary defines “abandon” this way²:

1. a: to give up to the control or influence of another person or agent
b: to give up with the intent of never again claiming a right or interest in <abandon property>
2. to withdraw from often in the face of danger or encroachment <abandon ship>
3. to withdraw protection, support, or help from <he abandoned his family>
4. to give (oneself) over unrestrainedly
5. a. to cease from maintaining, practicing, or using <abandoned their native language>
b. to cease intending or attempting to perform <abandoned the escape>

² www.merriam-webster.com/dictionary/abandon.

Wikipedia offers this definition of “child abandonment:” “the practice of relinquishing interests and claims over one’s offspring with the intent of never again resuming or reasserting them.”

The trial court, in denying Steiner’s postconviction motion, used the words “forsake” and “ceded” as synonyms of abandonment. Webster’s Third New International Unabridged Dictionary defines “forsake” first as “to renounce or surrender” and “to quit or leave entirely.” It defines “cede” as “to give up, give over, grant, or concede typically by treaty or negotiated pact.”

All of these definitions have the connotation of permanence rather than a temporary leaving of a person, thing or idea. As such, when Steiner left his child alone locked in his bedroom, with the intent to return, he did not “abandon” his child. Had he left the child with the intent to never return, or had he left the child on the doorstep of the church with the intent to never retrieve the child, those actions would constitute abandonment.³

This was the result reached by the Iowa Supreme Court in *State v. Wilson*, 287 N.W.2d 587 (Iowa 1980). In *Wilson*, the mother left her 18-month-old child unattended in an apartment for approximately 90 minutes. *Id.* at 588. The court applied two principles of statutory construction to

³ Abandoned children are a theme in literature, myth and sacred texts, and in those texts, the abandonment is an intent to permanently desert the child. For example, Moses was abandoned when his mother put him in a boat in the river; Romulus and Remus were abandoned and suckled by wolves; Hansel and Gretel and Snow White were abandoned into the wilderness.

conclude that her conduct did not constitute the crime of abandonment. First, criminal statutes are to be “strictly construed, and not extended to include an offense not clearly within the fair scope of the language employed.” *Id.* at 589, quoting *State v. Campbell*, 217 Iowa 848, 853, 251 N.W. 717, 719 (1933). The court was wary of equating “abandonment” with temporary neglect “because of the rule that criminal statutes are not to be enlarged by construction.” *Id.* at 591. Second, the legislature is “presumed to know the usual meaning ascribed by the courts to language and to intend that meaning unless the context shows otherwise.” *Id.*

The court decided that “abandonment” of a child meant “an intention to leave the child permanently, as distinguished from temporary neglect.” *Id.* at 589. The court cited with favor definitions such as “an intention of causing a perpetual separation,” “any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child,” and an “intent to sever the parental relation entirely.” *Id.* The court quoted Black’s Law Dictionary which included synonyms of “desert, surrender, forsake, or cede,” as well as “to relinquish or give up with intent of never again resuming one’s right or interest.” *Id.* at 590.

The same rules of statutory interpretation apply in Wisconsin. Criminal statutes “are to be strictly construed in favor of the accused.” *State v. Schaller*, 70 Wis. 2d 107, 110, 233 N.W.2d 416 (1975). A strict construction of abandonment is an intent to relinquish any interest in the child. Neglect is broader; it encompasses acts and failures to act which can constitute neglect. Abandonment, on the other hand, involves a single type of action: an intent to permanently leave the child. And, as discussed above, unless the words in a statute are technical, they are to be construed

according to their common and ordinary meaning. As the Iowa court held, the common meaning of abandon is a permanent relinquishment.

The statutory context of Wis. Stat. § 948.20 also supports the conclusion that abandonment of a child is an intent to permanently leave the child, and not a temporary leaving of the child. Immediately following Wis. Stat. § 948.20 is the child neglect statute, Wis. Stat. § 948.21, with which Steiner was also charged and convicted. That statute provides:

- (1) Any person who is responsible for a child's welfare who, through his or her actions or failure to take action, intentionally contributes to the neglect of the child is guilty of one of the following:
 - (a) A Class A misdemeanor.
 - (b) A Class H felony if bodily harm is a consequence.
 - (c) A Class F felony if great bodily harm is a consequence.
 - (d) A Class D felony if death is a consequence.

Neglect, like abandon, is not defined in the statute, nor is it defined in Wis. Stat. § 939.22. Neglect is, however, defined in WIS JI-CRIMINAL Pattern Jury Instruction 2150:

A child is neglected when the person responsible for the child's welfare fails for reasons other than poverty to provide necessary care, food, clothing, medical or dental

care, or shelter so as to seriously endanger the physical health of the child.⁴

Steiner's temporary leaving of his three-year-old son alone, locked in his room, meets the definition of neglect. The evidence showed D.S. had severe diaper rash and he was extremely hungry when Sedevie found him locked in his room. (90:72). His room was strewn with broken toys, half of the dresser drawers were out, and the electrical outlets did not have covers. (90:70).

Abandonment, however, must be something different from neglect. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 271 Wis. 2d at 663, ¶46. The logical way to harmonize the neglect and abandonment statutes is by time. That is, the temporary leaving of a child in a place where the child is endangered is neglect, while the intent to leave the child permanently in a place where the child may suffer neglect is abandonment.

This conclusion is also supported by the use of the word "abandon" in the context of a different crime, operating a motor vehicle without the owner's consent, contrary to Wis. Stat. § 943.23. Pursuant to Wis. Stat. § 943.23(3m), it is an affirmative defense if the defendant abandons the vehicle without damage within 24 hours. WIS JI-CRIMINAL Pattern Jury Instruction 1465A defines "abandon" in that context this way: "'Abandon' means that the defendant must have freely, voluntarily, and *permanently given up possession* of the vehicle." (emphasis added).

⁴ This definition is also part of the pattern instruction for abandonment, WI JI-CRIMINAL 2148, as the child must be left in a place where the child may suffer because of neglect.

In sum, the plain meaning of the term abandon, and the context of the abandonment statute, support the conclusion that the crime of abandonment of a child means an intent to permanently leave the child, not temporarily leave the child.

Although the jury instructions did not define “abandon” for the jury, the prosecutor did define it for the jury. In his closing argument, the prosecutor said: “There’s nothing in the jury instruction that abandon means permanently. You won’t find it anywhere.” (91:68). The prosecutor’s argument, defining “abandon” for the jury, was error for two reasons. First, the argument presumed to speak for the trial court. Second, it infringed upon a crucial matter for jury consideration.

It is the court’s responsibility, not the prosecutor’s, to instruct the jury. See *State v. Neuser*, 191 Wis. 2d 131, 138, 528 N.W.2d 49 (Ct. App. 1995). Here, the prosecutor presumed to tell the jury what the law is; that is, he told the jury that abandon includes temporarily leaving a child, effectively instructing the jury on the law. As argued above, Steiner contends the prosecutor misstated the law when he told the jurors that Steiner abandoned D.S. when he left the child temporarily. In addition, this “instruction” effectively told the jurors that if their common-sense told them that an intent to abandon meant an intent to leave the child permanently, they should disregard that common-sense view.

In *Neuser*, the prosecutor presumed to speak for the trial court when he argued to the jury that a lesser-included offense was submitted not because the trial court believed it was appropriate to do so, but rather because the defendant had requested the lesser-included offense instruction. *Id.* at 138. The court of appeals held this was error, observing that the

prosecutor improperly “presumed to speak for the trial court and then spoke incorrectly.” *Id.* The court continued:

The prosecutor is a prominent public authority figure in the eyes of a jury. When that figure misrepresents the ruling of the trial court on a crucial matter for jury consideration and, in that same breath, appears to speak for the court on that matter, there can be little doubt that justice has miscarried.

Prosecutors are officers of the court and occupy a “quasi-judicial” office.

Id. at 138-39. When the prosecutor in this case defined abandon for the jury, and as Steiner contends, defined it incorrectly, the jurors likely concluded the prosecutor, in his quasi-judicial role, was correctly giving them the applicable law.

In addition, the prosecutor presumed to speak for the trial court on a crucial matter for the jury’s consideration. The jury was charged with deciding whether Steiner left D.S. locked in his room “with intent to abandon the child.” By instructing the jury what the law is, even though the jury instruction fails to so instruct, the prosecutor improperly affected the jury’s deliberations on an essential element of the crime.

Steiner’s trial counsel did not object to the state’s closing argument. Steiner did, however, raise the issue to the trial court which denied his motion to vacate his conviction for abandonment of a child, and therefore, the trial court has had an opportunity to rule on his claim. And this court, of course, has the authority to reach the issue even though trial counsel did not object.

Although Steiner's argument centers on the meaning of "abandon," his appeal challenges his conviction based on sufficiency of the evidence. That is, he was not guilty of abandonment of a child because the state never proved he intended to permanently leave his child, D.S. Pursuant to Wis. Stat. § 809.30(2)(h), a defendant can raise sufficiency of the evidence for the first time on appeal.

In addition, Wis. Stat. § 972.35 specifically grants authority to this court to reverse a judgment, in its discretion, regardless of whether any objection appears in the record. This court has the duty to do justice in an individual case, and this court is the court of last resort for most cases. *Vollmer v. Luety*, 156 Wis. 2d 1, 15, 456 N.W.2d 797 (1990).

Here, while Steiner's conviction for neglect is supported by the record, the evidence was insufficient to convict him of abandonment of a child. In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

The state never claimed or proved that Addison Steiner left D.S. at home and intended to never return. As the prosecutor argued to the jury in closing arguments, its theory of the case was that Steiner's temporary leaving of the child constituted abandonment. Therefore, if this court concludes that abandonment of a child means an intent to permanently leave the child, Steiner's conviction for abandonment of D.S. must be vacated.

CONCLUSION

For these reasons, Addison F. Steiner respectfully requests that the court vacate his conviction for abandonment of a child.

Dated this 24th day of February, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,022 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of February, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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