STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP2629-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADDISON F. STEINER,

Defendant-Appellant.

ON NOTICE OF AN APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN LA CROSSE COUNTY, THE HONORABLE ELLIOTT LEVINE PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Cases

Page

Statutes

Page

Other Authorities

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ISSUE PRESENTED

Did the state present sufficient evidence to convict Steiner of abandonment of a child, contrary to Wis. Stat. § 948.20, even though the state did not offer evidence that Steiner intended to "permanently" abandon the child.

Trial Court Answered: Yes.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The State does not seek oral argument because it believes that the parties' briefs fully present the issues on appeal and fully develop the theories and legal arguments on each side. Publication may be appropriate if this Court reaches the question of whether abandonment of a child requires the state to prove that the defendant intended to "permanently" abandon the child by leaving the child in a place where the child may have suffered from neglect.

STATEMENT OF THE CASE AND FACTS

The state will supplement the statement of case and facts as appropriate in its argument.

STATUTES INTERPRETED

Wisconsin Statute § 948.20 provides:

> **948.20 Abandonment of a child.** 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.

Wisconsin Statute § 948.21 provides in relevant part:

> **948.21 Neglecting a child.** (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. . .

ARGUMENT

THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT STEINER OF ABANDONMENT OF A CHILD, CONTRARY TO WIS. STAT. § 948.20, EVEN THOUGH THE STATE DID NOT OFFER EVIDENCE THAT STEINER INTENDED TO "PERMANENTLY" ABANDON THE CHILD.

A. Introduction

A jury found Steiner guilty of abandonment of a child, contrary to Wis. Stat. § 948.20. In his post-conviction motion and on appeal, Steiner contends that the state failed to present sufficient evidence to convict him. Steiner asserts that the child abandonment statute requires the state to establish that he intended to "permanently" abandon his three year old son, DJS, when he left DJS in a place where DJS may have suffered from neglect. Defendant's brief at 6-7.

The state disagrees. The state's position is that abandonment of a child does not require proof that a defendant intends to "permanently" abandon a child. As such, the evidence that the state offered at trial provided a sufficient basis upon which the jury could find Steiner guilty of abandoning DJS in violation of Wis. Stat. § 948.20.

B. Applicable standard of review and pertinent principles of statutory construction.

The issue before this Court presents a novel question of statutory construction that relates to the sufficiency of the evidence. Specifically, this Court must decide whether Wis. Stat. § 948.20 prohibiting child abandonment requires the state to demonstrate that the defendant intended to "permanently" abandon a child by leaving the child in a place where the child may have suffered from neglect.

The interpretation and application of Wis. Stat. § 948.20 present a question of law that an appellate court reviews de novo, while benefiting from the analysis of the circuit court. *See State v. Ziegler*, 2012 WI 73, ¶ 37, 342 Wis. 2d 256, 816 N.W.2d 238. In *State v. Johnson*, 2007 WI 107, 304 Wis. 2d 318, 735 N.W.2d 505, the Wisconsin Supreme Court further summarized relevant principles of statutory construction:

> "[S]tatutory interpretation `begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" We interpret statutory language "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." Where this process yields a plain meaning, the statute is not ambiguous and is applied according to this ascertainment of its meaning. If the language is ambiguous, however, we look beyond the language and examine the scope, history, context, and purpose of the statute.

Id. at ¶ 28 (citations omitted). In determining a word's ordinary meaning, a court may consult dictionaries to aid in the construction of undefined words. *Spiegelberg v. State*, 2006 WI 75, ¶ 19, 291 Wis. 2d 601, 717 N.W.2d 641.

C. By failing to timely object to the state's definition of abandon in closing argument, Steiner has forfeitured his right to raise this issue on appeal.

At trial, Steiner did not request the court to instruct the jury that the "intent to abandon" must be permanent. Likewise, Steiner did not object when the prosecutor argued that "[t]here's nothing in the jury instruction that abandon means permanently . . . That's because you can abandon somebody even though it is not permanent"

(91:68). Steiner first raised this claim in his subsequent post-conviction motion (72).

Steiner's failure to object to the prosecutor's closing argument that abandonment need not be permanent constitutes a forfeiture of his right to raise this issue on appeal. The Wisconsin Supreme Court has more recently distinguished between the concept of waiver and forfeiture in *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612: "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" (*quoting United States v. Olano*, 507 U.S. 725, 733 (1993)).

As the *Ndina* court explained:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

Ndina at ¶ 30 (footnote omitted). Further, Steiner's failure to object does not go to a fundamental constitutional right which can only be waived through the defendant's personal and express waiver. *Ndina* at ¶ 31. Under the circumstances, Steiner's failure to object deprived the trial court of an opportunity to timely address his alleged claim of error. As such, he has forfeited his right to raise this claim on appeal.

Steiner's failure to object does not constitute plain error that would warrant a reversal. Under the plain error doctrine, appellate courts may review errors that were

waived[1] through a failure to object. *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77. The error must be so fundamental that a new trial must be granted even though no objection was made. The error must be "'obvious and substantial.'" *Id.* (quoted source omitted). However, "[c]ourts should use the plain error doctrine sparingly." *Id.*

The defendant bears the burden of establishing that the error was "fundamental, obvious, and substantial." *Jorgensen*, 310 Wis. 2d 138, ¶ 23. If the defendant meets his burden then the burden shifts to the state to prove that the error was harmless. *Id.*

Here, Steiner has failed to demonstrate that the claimed error here meets the standard for reversal on grounds of plain error. As such, this Court should find that Steiner has forfeited his right to raise his claim on appeal. However, even if this Court reaches the merits of Steiner's claim, no error occurred.

D. Child abandonment, as proscribed in Wis. Stat. § 948.20, does not require proof that a defendant intended to "permanently" abandon a child.

Steiner invites this Court to interpret the phrase "with intent to abandon" to mean "an intent to ***permanently*** leave the child." Defendant's brief at 8 (emphasis added). The state requests this Court to decline Steiner's invitation to limit application of Wis. Stat. § 948.20 to those situations where the state demonstrates that the defendant intended to permanently abandon a child.

[1] While the *Jorgensen* court uses the phrase "waived," the proper term should be "forfeited" in light of the court's subsequent decision in *Ndina*.

Wisconsin Stat. § 948.20 prohibits a person who has the "intent to abandon the child" from "leav[ing] [the] child in a place where the child may suffer because of neglect." The Legislature did not seek to limit the scope of the phrase "intent to abandon" to situations where the intent is permanent. Indeed, to limit Wis. Stat. § 948.20's application to cases of permanent abandonment undermines the statute's primary purpose: protecting children from being left alone in a place where they may suffer from neglect.

Steiner asks this court to rely upon the common and approved usage of abandon through reference to a dictionary. To that end, he hones in on the first definition of abandon in *Webster's Third New International Unabridged Dictionary* (1986). Defendant's brief at 9. That definition provides "1: to cease to assert or exercise an interest, right, or title to esp. with intent of never again resuming or reasserting it." *Webster's* at 2. Steiner places undue weight on the first definition of abandon. "*Webster's*, however, does not list its definitions in order of preference; rather, it lists its definitions in order of historical usage. *Webster's* at 17a, note 12.5." *State v. Schwarz*, 228 Or. App. 273, 208 P.3d 971, 973 (2009).

In *Schwarz*, the Oregon Court of Appeals addressed whether the phrase "with the intent to abandon" in the context of a criminal maltreatment statute required proof that a caregiver's abandonment was permanent. *Id.* at 971. The *Schwarz* court rejected reliance on *Webster's* first definition of abandon, finding that it appears to relate to the abandonment of property rather than an individual. *Id*. at 973. Instead, it relied upon a definition which more clearly applied to people. That definition provided "3: to forsake or desert esp. in spite of an allegiance, duty, or responsibility * * *: withdraw one's protection support or help from[.]" *Webster's* at 2 as quoted in *Schwarz*, 208 P.3d at 973. The *Schwarz* court concluded that this

definition does not suggest that the "abandonment be permanent." *Id.* at 974.[2]

This Court should find the reasoning in *Schwarz* persuasive and conclude the intent to abandon does not require intent to "permanently" abandon the child. Wisconsin Stat. § 948.20 prohibits a person from leaving a child in a place where the child could suffer because of neglect without regard to the period of time the person intends to leave the child. The focus of the phrase "intent to abandon" should be construed in the context of what is prohibited: "leav[ing] any child in a place where the child may suffer because of neglect." *Id.* The potential for harm to the child ("suffering from neglect") occurs whether the person responsible for a child[3] intentionally leaves the child for an hour or forever.

Steiner relies upon *State v. Wilson*, 287 N.W.2d 587 (Iowa 1980), which interpreted Iowa's abandonment statute. The Iowa Supreme Court defined "abandonment" to mean "an intention to leave the child permanently, as distinguished from temporary neglect." *Id*. at 589. The Iowa statute differs from Wis. Stat. § 948.20. The Iowa statute applied only to persons who had a specific duty such as a parent and focused on conduct that either

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[2] In *Schwarz*, the defendant asked the Oregon Court of Appeals to rely upon an earlier decision that suggested that its child abandonment statute required proof of an intent to permanently forego parental duties. The court characterized the language from the prior decision as dictum, finding that the prior decision did not explain the source of the "permanent" requirement. *Schwarz*, 208 P.3d at 974.

[3] Wisconsin Stat. § 948.20 applies regardless of the child's age. However, in assessing whether a child would suffer neglect, a jury may certainly consider age. A ten year old is not likely to suffer neglect if left alone at home for several hours as a ten year old can take care of basic needs and may know how to call 911 in an emergency. A three year old still lacks the ability to take care of the most basic needs. With respect to infants and toddlers, even a short term absence creates a significant potential that the child may suffer neglect when an adult leaves them unattended in a place.

knowingly or recklessly exposed the victim to a hazard or danger. *Wilson*, 287 N.W.2d at 588. Wis. Stat. § 948.20 applies to any person.

More importantly, in interpreting its criminal abandonment statute, the Iowa Supreme Court relied heavily upon the express definition of "abandonment of a child" that appeared in a statute designating abandonment as a grounds for finding a child in need of assistance. Iowa Stat. § 232.2(5)(a), the Code 1979, defined "abandonment of a child" to mean "the permanent relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship." *Wilson*, 287 N.W.2d at 588. Unlike Iowa, Wisconsin's child protective placement statute does not limit abandonment to circumstances involving "permanent relinquishment or surrender." *See* Wis. Stat. § 48.13(2). In this context, the Wisconsin Jury Instructions Committee defines abandonment with regard to the potential risk of harm to the child that the abandonment poses rather than whether the abandonment is temporary or permanent. See Wis. JI-Children 210 (2013).[4] Under the circumstances, the *Wilson* court's requirement that abandonment be permanent is not persuasive when it comes to interpreting "intent to abandon" as used in Wis. Stat. § 948.20.

[4] Wis. JI-Children 210 provides, in relevant part:

> "Abandonment" means that the parent(s) separated (himself)(herself)(themselves) from (his)(her)(their) child under circumstances which show a lack of reasonable parental concern for the well-being, support, or care of (his)(her)(their) child during the period of time alleged in the petition.
>
> You are to examine all the circumstances surrounding this separation including its duration or whether it created any foreseeable danger for the child.

Steiner suggests that the only way to logically harmonize the neglect and abandonment statutes is to limit application of the child abandonment statute to those situations where there is "intent to leave the child permanently in a place where the child may suffer neglect . . ." Defendant's brief at 13. When the intent to leave the child is only temporary, then Steiner asserts only child neglect has occurred and the child abandonment statute would not apply. *Id.*

The state disagrees. The child abandonment and neglect statutes may be harmonized without requiring that child abandonment require proof that a person intended to "permanently" abandon the child. Child abandonment, as defined in Wis. Stat. § 948.20, and child neglect, as defined in Wis. Stat. § 948.21, may overlap with one another and reach related conduct. However, each requires proof of different elements that the other does not. Child abandonment requires proof that a person actually intended to abandon the child by leaving the child in a place where the child may suffer from neglect. Child neglect does not. A person could neglect a child while the child remains in the person's presence. Child neglect also requires proof that the person who neglected the child is "responsible for the child's welfare." *See* Wis. Stat. § 948.01(3). In contrast, child abandonment applies whether or not the person is responsible for the child's welfare. Wis. Stat. § 948.20.[5]

[5] The state appropriately charged Steiner with both abandonment of a child and child neglect. See Wis. Stat. § 939.65. Because each offense requires proof of a fact for conviction which the other does not, the trial court appropriately entered judgments of convictions as to both. See Wis. Stat. § 939.71. Further, because abandonment of a child and child neglect do not constitute the same offense under the *Blockburger* test, double jeopardy does not bar convictions for both. *See State v. Lasky*, 2002 WI App 126, ¶ 9, 254 Wis. 2d 789, 646 N.W.2d 53.

Steiner also suggests that his proposed definition of abandon is supported by the definition of abandon that appears in Wis. JI-Criminal 1465A (2003), which creates an affirmative defense to the felony offense of operating an automobile without the owner's consent. The instruction defines abandon in part to mean "permanently given up possession of the vehicle." However, the committee's insertion of the word "permanently" is not based upon the plain language of Wis. Stat. § 943.23(3m) upon which it is based. That subsection only requires that "the defendant abandoned the vehicle without damage within 24 hours after the vehicle was taken. . ." *Id*. How the Wisconsin Jury Instruction Committee defines a statutory term used in a different statute related to an abandoned vehicle is hardly instructive as to how this Court should define abandon in the context of Wis. Stat. § 948.20.

In other contexts, the Legislature has demonstrated the ability to differentiate between permanent and temporary elements in criminal statutes. For example, Wis. Stat. § 943.20(1)(a), the crime of theft (taking and carrying away) requires proof that the actor intended to "permanently" deprive the person of movable property. *See also* Wis. Stat § 948.04 (causing mental harm to a child, "temporary or permanent control"); Wis. Stat. § 940.225(2)(c) (second degree assault against a person "temporarily or permanently incapable of appraising the person's conduct"); and Wis. Stat. § 940.31(2)(b) (kidnapping "if the victim is released without permanent physical injury"). Certainly, if the Legislature had sought to limit Wis. Stat. § 948.20's reach to only those circumstances in which the state demonstrates that a person intended to "permanently" abandon the child, it knew how to do so.

Relying upon *State v. Neuser*, 191 Wis. 2d 131, 528 N.W.2d 49 (Ct. App. 1995), Steiner asserts that the prosecutor improperly instructed the jury by telling the jurors that abandon does not mean an intent to leave a child permanently. Defendant's brief at 14-15.

"Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury." *Neuser,* 191 Wis. 2d at 136. The prosecutor here did not commit error. For the above reasons, he did not misstate the law. Further, he also did not presume to speak for the trial court (91:68). As such, the prosecutor's closing argument was entirely appropriate.

E. The state presented sufficient evidence from which the jury could conclude that Steiner abandoned his three year old son, DJS, in a place where DJS could have potentially suffered because of neglect.

Applying the highly deferential standards for appellate review of the sufficiency of the evidence, this Court should find that the state presented sufficient evidence to convict Steiner of abandonment of a child. *See State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). The state satisfied each of the three elements for the crime of abandonment of a child. See Wis. JI—Criminal 2148 (2003).

First, DJS was a three year old child. Steiner acknowledged as much (90:215-16).

Second, the defendant left the child in a place where the child may have suffered from neglect. Officer Sedevie's testimony adequately demonstrates that DJS was left in a place where DJS may have suffered neglect. On April 13, 2011, Holmen Police Officer Crystal Sedevie responded to a dispatch to the defendant's residence (90:67). Upon arriving at the residence, she observed the blinds were down and was unable to make contact with anyone inside the residence (90:67-68). Sedevie then made contact with Johnson-Zabel in the neighboring duplex. Johnson-Zabel informed her that she suspected

that a three year old was home alone. Sedevie then entered the residence through an unlocked front door (90:68). When she went upstairs, she observed a black rubber tie down attached to a doorknob which was fastened to something. Sedevie used both hands to pull the tie off and opened the door. She observed three year old DJS inside (90:69). Sedevie described DJS as holding his tan blanket. His sweat pants were extremely soiled, with an overpowering odor of feces and urine. She observed trash, broken pieces and broken toys, and torn up paper all over (90:69-70). She did not observe clothes, food, water or a sippy cup in the room (90:70). Sedevie attempted to speak with DJS (90:71). After clearing the residence, Sedevie then located clean clothes in the basement and changed the diaper (90:71). Sedevie noted that the diaper was extremely soiled. The urine had started to run out of the diaper. Based on her experience, "it was not a fresh dirty diaper" (90:72). Sedevie described him as "pretty much starving" and described how he "dove into" a bowl of gold fish crackers (90:72-73). Steiner further admitted it was not safe to leave a three year old alone (90:215-16). Certainly, the record demonstrates that Steiner left DJS in a place where DJS in fact suffered through neglect.

Third, Steiner abandoned DJS, when he left DJS unattended for almost an hour and a half. According to the dispatch log, Sedevie indicated that the dispatch occurred at 1:04 p.m. and that Steiner arrived at the residence at approximately 2:30 p.m. (90:72, 81). Steiner admitted leaving DJS in the residence when he left to attend to an appointment (90:176). Based upon his daughter GS's testimony that he would tie DJS door closed when Steiner left the residence (91:17), and Steiner's act of securing the door when he went to his appointment, Steiner demonstrated an intent to abandon DJS.

While Steiner may certainly have intended to return home, he intentionally abandoned DJS by leaving DJS in a place where DJS suffered from neglect. In the period of

time that Steiner was absent, DJS was locked inside a bedroom with a full and soiled diaper and without nourishment. Viewing the evidence in a light most favorable to the state, the jury had sufficient evidence from which it could reasonably find Steiner guilty of abandonment of a child.

F. This Court should not exercise its discretionary authority and reverse Steiner's conviction under Wis. Stat. § 752.35.

In a single paragraph, Steiner requests this court to exercise its discretionary authority and reverse his conviction pursuant to Wis. Stat. § 752.35. Defendant's brief at 16. Steiner has inadequately developed this argument to merit this Court's consideration of the claim. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Steiner has failed to articulate why this Court should exercise its discretionary reversal power. This is a power that appellate courts exercise "'infrequently and judiciously'" in exceptional cases. *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted). Because the intent to abandon may be temporary rather than permanent, the case as argued to the jury did not prevent the real controversy from being tried.

CONCLUSION

For the above reasons, the state respectfully requests this Court to affirm the judgment of conviction and order denying post-conviction relief.

Dated this 21st day of March, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,669 words.

Dated this 21st day of March, 2014.

_____
Donald V. Latorraca
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 21st day of March, 2014.

_____
Donald V. Latorraca
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