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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 LaCrosse County, the Honorable Elliott Levine Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

This Court Should Hold That the State Failed to Prove Steiner Abandoned His Child Because Steiner Did Not Intend to Permanently Leave His Child.

A. Steiner did not forfeit his claim.

The state does not dispute that when Steiner left his son alone at home, Steiner intended to return home. Thus, Steiner contends he was not guilty of child abandonment because "abandon" connotes a permanent leaving of the child. In response, the state first argues that Steiner has forfeited his claim because he did not ask for a jury instruction that "abandon" means to permanently leave the child, and he did not object to the prosecutor's closing argument that child abandonment need not be permanent. (State's brief at 4-6).

This court should reject the state's forfeiture argument for three reasons. Sufficiency of the evidence claims can be raised for the first time on appeal. The trial court here did have the opportunity to rule on the issue presented in response to Steiner's postconviction motion. And, this court has discretionary authority to decide issues raised for the first time on appeal.

Steiner challenges the sufficiency of the evidence for his conviction based on the common-sense definition of "abandon." The state partially concedes this appeal raises sufficiency of the evidence, writing that "the issue before this Court presents a novel question of statutory construction that relates to the sufficiency of the evidence." (State's brief at 3). Pursuant to Wis. Stat. § 809.30(2)(h), an appellant need not raise sufficiency of the evidence claims in the trial court. Likewise, Wis. Stat. § 974.02(2) provides that the "appellant

is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised."

And, in ***State v. Hayes***, 2004 WI 80, ¶54, 273 Wis. 2d 1, 681 N.W.2d 203, the Wisconsin Supreme Court held that a defendant may challenge the sufficiency of the evidence as a matter of right even when he has not raised the challenge at trial. The court cited three reasons for its holding. First, when the defendant challenges the sufficiency of the evidence, he or she is arguing that the state has not met its burden of proving a crime beyond a reasonable doubt. If that claim "can be proved but is deemed waived, a person whom the State has not proved guilty beyond a reasonable doubt would remain incarcerated." ***Id.*** at ¶45. Second, the possibility of sandbagging is minimal because a person facing incarceration would have little reason to delay in moving to dismiss because that person would be waiting in prison while an appeal is litigated. ***Id.*** at ¶51. Third, the same issue could be reached by way of an ineffective assistance of counsel claim; therefore, no additional resources are expended by resolving the claim on appeal. ***Id.*** at ¶52.

In addition, the trial court in this case *did* have an opportunity to rule on the issue presented because Steiner filed a postconviction motion and the court ordered briefs and argument. The court denied the motion.

Further, even if this court were to conclude the issue had been forfeited, this court may reach an issue that is raised for the first time on appeal, pursuant to Wis. Stat. § 752.35. ***Vollmer v. Luety***, 156 Wis. 2d 1, 13, 456 N.W.2d 797 (1990). This case presents two important reasons for the court to reach the substantive issue presented. First, if "abandon" means an intent to permanently leave a child, the state failed

to prove Steiner's guilt beyond a reasonable doubt.[1] Steiner should not be imprisoned for a crime he did not commit. Second, the question presented is an important legal issue. If this court concludes the evidence was insufficient, no new trial will be needed as would often be the case with other issues not raised at the time of trial.

B. "Abandon" means an intent to permanently leave the child.

The state argues that "abandon" within the context of abandonment of a child does not require proof that a defendant intended to permanently abandon the child. (State's brief at 6-12). In support, it asserts that the primary purpose of the child abandonment statute, Wis. Stat. § 948.20, is to protect "children from being left alone in a place where they may suffer neglect." (State's brief at 7). Under this argument, the primary evil the legislature intended to prevent is the leaving of a child alone because of the harm that may come to an unsupervised child.

The state's argument opens the door to vast array of situations where a parent could be charged with child abandonment. A parent who leaves a child unattended inside while she mows the lawn would be guilty of abandonment even though the parent had no intent to permanently leave that child. A parent who knowingly allows a child to play outside unsupervised where there is a pond or a pool would be guilty of child abandonment. A parent who allows her child to build a snowman without wearing a winter coat would be guilty of child abandonment. To list these scenarios shows the absurdity of the state's argument.

[1] He concedes, however, that the state did prove child neglect pursuant to Wis. Stat. § 948.21(1)(a).

In addition, the state's definition of abandonment as constituting a temporary leaving of the child makes the abandonment statute simply a type of neglect rather than a different crime altogether.

"Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Accordingly, child abandonment must be something different from child neglect. Steiner contends they are different because abandonment is an intent to permanently leave the child while the temporary leaving of a child is neglect.

The state counters that the crimes are different because they have different elements. The different element analysis is useful for double jeopardy purposes, but not for the question presented in his case. The state cannot dispute that its definition of child abandonment would also constitute neglect. A child who is left "in a place where the child may suffer because of neglect" is a neglected child under Wis. Stat. § 948.21. Something more must be required to constitute abandonment of that child; otherwise, abandonment of the child would simply be a subsection of the neglect statute. The common-sense difference between neglect and abandonment is time. Here, Steiner's intent to leave his son alone and return later is neglect. Had he intended to never return, he would be guilty of abandonment. Because it is undisputed that he intended to return and did return, he is guilty only of neglect.

Steiner's argument is supported by the relative gravity of the two crimes. Child abandonment under Wis. Stat. § 940.20 is a Class G felony. Child neglect, on the other hand, pursuant to Wis. Stat. § 948.21, is a misdemeanor

unless the child suffers harm. Neglect leading to bodily harm or death is a felony. Common sense suggests that a person who abandons his or her child with the intent to relinquish forever any interest in that child commits a more serious offense than a person who neglects his or her child.[2]

The state relies on ***State v. Schwarz***, 228 Or. App. 273, 208 P.3d 971, 973 (2009) to support its claim that abandonment of a child can be temporary. (State's brief at 7-8). The state's reliance is misplaced because the statute at issue was "criminal maltreatment" rather than child abandonment, and because Oregon has interpreted child abandonment to require an intent to leave the child permanently.

Oregon has both a criminal maltreatment statute (ORS § 163.205) and a child abandonment statute (ORS § 163.535). ***Schwarz*** involved the criminal maltreatment statute. The persons protected by Oregon's criminal maltreatment statute are "dependent" or "elderly" persons. Oregon's abandonment of a child statute relates solely to children.

Oregon's criminal maltreatment statute's subsections list several ways that a person can commit criminal maltreatment, including neglect and abandonment. For example, the state chose to charge Schwarz under subsection ORS §163.205(1)(b)(B), which includes the word "abandon." She allegedly "desert[ed] the dependent person or elderly person in a place *with the intent to abandon that person*." ***Id.*** at 972. (Emphasis added). In a separate subsection, a person commits criminal maltreatment when he or she

[2] The exception to this would be a parent who leaves his or her infant in a safe place under a "Safe Haven" law as discussed in Wis. Stat. § 48.195.

"leaves the dependent person or elderly person unattended at a place for such a period of time as may be likely to endanger the health or welfare of that person." ORS §163.205(1)(b)(C). This subsection connotes neglect.

Thus, under the Oregon statutory scheme, the offender commits the same crime whether the person abandons or neglects the dependent or elderly person. By contrast, the Wisconsin statutory scheme creates two different crimes; one is abandonment of a child; the other is neglect of a child. The Wisconsin legislature thus must have intended two different types of conduct.

The state's reliance on the Oregon case is also misplaced because the court in ***State v. Laemoa***, 20 Or. App. 516, 528, 533 P.2d 370 (1975), interpreted ORS § 163.535, Oregon's child abandonment statute, to require an intent to permanently abandon the child, not just leave the child alone temporarily. The court in ***Laemoa*** stated that one of the elements of the offense of child abandonment was that the parent intended to permanently forego all parental duties and relinquish all parental claims to the child. ***Id.*** While ***Schwarz*** dismissed this language in ***Laemoa*** as *dictum*, it did not overrule ***Laemoa***, and indeed, the two cases involve two different statutes. ***Schwarz***, 208 P.3d at 974.

The state also argues that child abandonment can be either temporary or permanent because the legislature knows how to differentiate between permanent and temporary elements in criminal statutes. (State's brief at 11). The state's argument, however, assumes the legislature believed it had to define "abandon" in a temporal sense. If, as Steiner contends, the common usage of the word "abandon" is to permanently leave a person or thing, the legislature had no need to

specifically state that "abandon" means to permanently abandon because that would be redundant.

In his brief-in-chief, Steiner argued that the only instruction the jury received regarding the definition of "abandonment" was through the prosecutor's closing argument. (Steiner's brief at 14-15). The state responds that the prosecutor did not err because he did not misstate the law, did not presume to speak for the court, and because the attorneys are given latitude in their arguments to the jury. (State's brief at 11-12).

If this court concludes that abandonment of a child requires an intent to permanently leave the child, then the prosecutor's argument to the jury was clearly error because it misstated the law. Further, the prosecutor's argument is troubling because his defining of this critical word ran the risk of telling the jury what that word must mean rather than allow the jury to decide, with its common sense and common knowledge, what it means to abandon a child. This leads to the final issue, which is that this court has the authority to overturn Steiner's conviction in the interest of justice.

C. This court can choose to decide the issue presented in its discretionary authority.

The state argues that this court should not reverse in the interest of justice because Steiner did not adequately develop that argument. (State's brief at 14). The court should reject this argument because Steiner's entire brief was about a single issue, and that is the meaning of abandon in the context of child abandonment. It would have been entirely repetitive to make the same argument under a theory of sufficiency of the evidence and in the interest of justice under Wis. Stat. § 752.35. If child abandonment means an intent to

permanently abandon the child, this court has the authority to reverse under the theory it deems appropriate.

CONCLUSION

For these reasons and those argued in his brief-in-chief, Addison F. Steiner respectfully requests that the court vacate his conviction for abandonment of a child.

Dated this 7th day of April, 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 2,040 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 7th day of April, 2014.

Signed:

_____

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