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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP2534-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLEN ARTHEUS BEAL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established legal principles.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Relevant information will be included where appropriate in the State's argument.

INTRODUCTION

Defendant-Appellant Glen Artheus Beal appeals a judgment of conviction entered on a jury's verdicts for one count of child abuse as a party to the crime, and one count of disorderly conduct, both as a repeater (23; 26; 27).[1] *See* Wis. Stat. §§ 948.03(2)(b), 939.05, 947.01(1), 939.62(1)(a) and (b).

Beal was convicted of these crimes for abusing thirteen-year-old JG, the daughter of his fiancée Aretha Strong (2; 7). Beal committed these crimes when he and Strong went to forcibly take JG home from her friend's house. JG and other witnesses testified that Beal punched JG in the face during the incident and also restrained her while Strong hit her (47:27-28, 30, 100-02; 48:11-12). According to JG, Beal placed her in the back seat of a car (47:31-32). Strong then continued to beat her while Beal drove back to their house (47:33-35). JG said that, while driving, Beal told Strong to "beat her up" (47:33).

On appeal, Beal claims that he "should have been allowed to assert a defense based on the mother's constitutional right and on the reasonable discipline privile[ ]ge because he was charged as party to crime" (Beal's brief at 7). *See* Wis. Stat. § 939.45(5). Specifically, Beal

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[1] The jury also convicted Beal of conspiracy to commit victim intimidation (49:5-6). That charge was filed under a separate case number and Beal does not appeal that judgment of conviction (28).

contends that although he would not be entitled to invoke the privilege for any abuse of JG that he directly committed, he should have been allowed to assert the privilege as a defense to his actions in aiding Strong in "what he believed to be [her] reasonable discipline of [JG]" (Beal's brief at 9-10, internal quotation marks omitted).

This court should affirm Beal's convictions. First, Beal forfeited his claim that he was entitled to assert that his actions were privileged under Wis. Stat. § 939.45(5) because he did not make the same argument in the circuit court that he is now making on appeal. Second, Beal has failed to show that he was entitled to assert the defense. Beal's argument is largely undeveloped. He has not established that as a legal matter, a person who is not a child's parent is entitled to assert § 939.45(5) as a privilege when aiding and abetting a parent in disciplining the child. And even if Beal had shown the defense was legally available to such a person, he has not explained how Strong's actions, viewed in their best light, amounted to reasonable discipline and would have supported instructing the jury on the defense. Beal is not entitled to relief.

ARGUMENT

I. Beal forfeited his claim that he should have been allowed to assert the reasonable discipline privilege because he did not make the same argument in circuit court that he now raises on appeal.

This court should decline to address Beal's argument that he was entitled to raise the reasonable privilege defense. As the State understands Beal's argument, he is claiming that because Strong could assert the reasonable discipline privilege as a defense to abusing JG, then he should also have been allowed to assert the defense for his

actions in assisting Strong in disciplining JG. Or, as Beal puts in his brief, “If he aided and abetted the coactor to practice reasonable discipline, there would be no crime” (Beal’s brief at 10).

If this is what Beal is claiming, then he forfeited his right to appellate review by not making the same argument to the circuit court. The failure to raise specific challenges in the circuit court forfeits a party’s right to raise them on appeal. *See State v. Lippold*, 2008 WI App 130, ¶ 8 n.3, 313 Wis. 2d 699, 757 N.W.2d 825 (citing *State v. Rogers*, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995)); *see also State v. Kaczmarski*, 2009 WI App 117, ¶¶ 7-8, 320 Wis. 2d 811, 772 N.W.2d 702.

Beal never argued in circuit court that he should be allowed to assert the reasonable discipline privilege for his actions in assisting Strong. Instead, at a pretrial hearing, in response to the State’s motion in limine to prohibit Beal from asserting the privilege, Beal’s attorney said he was not asking to use the defense (46:9-10, 37).[2] Counsel admitted Beal did not have the privilege and disclaimed that he had ever argued Beal had it, saying “the case law is pretty clear on that” (46:38). After conceding Beal could not invoke the privilege, counsel told the court, “I think it’s important that the jury knows that the mother of the alleged victim does enjoy the privilege” (46:40). The court refused this request and prohibited Beal from eliciting any testimony about whether Strong’s actions amounted to reasonable discipline (46:40).

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[2] The motion is not in the record. According to the minute sheet, the State filed it on December 3, 2013 (1:4).

Beal's circuit court arguments did not preserve his claim for appeal. By specifically telling the circuit court he was not asking to rely on Wis. Stat. § 939.45(5), Beal forfeited his appellate claim that the circuit court erred by not allowing him to use the defense. *See State v. Washington*, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987) (party forfeits a claim on appeal by taking a contrary position in the circuit court).

Further, Beal's request that the circuit court inform the jury that Strong had the privilege to use reasonable discipline was insufficient to preserve his current claim. Beal is now arguing that he was entitled to have the jury instructed that it could find him not guilty of child abuse if it found that he aided Strong in disciplining JG because he could not aid Strong in doing something that was not a crime. This is not the argument Beal asserted in the circuit court. Beal's request was simply that the circuit court tell the jury about Strong's privilege, not for a specific jury instruction that the jury could find Beal not guilty if it found that he merely assisted Strong in actions she was privileged to take. Beal forfeited his appellate claim by not raising it first in the circuit court and this court should not address it.

II. Beal failed to establish that he should have been allowed to raise the reasonable discipline privilege.

Should this court conclude that Beal did not forfeit his claim, it should hold that he has not shown that the circuit court should have allowed him to assert the reasonable discipline privilege as a defense. Beal's appellate brief fails to establish as a legal matter that the privilege could apply to someone aiding another in disciplining her child. Further, even had Beal shown that the privilege is available to such a

person, his brief does not demonstrate that it was available to him under the facts of his case.

A. Beal has not shown that he was legally entitled to invoke the reasonable discipline privilege.

As noted, Beal argues that he should have been allowed to assert that his actions in abusing JG were privileged under Wis. Stat. § 939.45(5) because the jury could have concluded that he merely assisted Strong in disciplining her daughter (Beal's brief at 7-10). Put another way, Beal is claiming that because he was charged as a party to the crime of child abuse, he is permitted to invoke the reasonable discipline privilege because his coactor had it available to her.

This court should reject these arguments because Beal has not shown that the privilege should apply to someone who commits child abuse with a person who may assert the privilege.

1. Applicable law.

Wisconsin Stat. § 939.45(5) provides:

> **Privilege.** The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:
>
> . . . .
>
> (5) (a) In this subsection:
>
> 1. "Child" has the meaning specified in s. 948.01 (1).
>
> 3. "Person responsible for the child's welfare" includes the child's parent, stepparent or guardian; an employee of a public or private residential home, institution or agency in

> which the child resides or is confined or that provides services to the child; or any other person legally responsible for the child's welfare in a residential setting.
>
> (b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

Beal was convicted of abusing JG as a party to the crime. A person may be convicted of being a party to the crime if he either: (1) directly commits the crime; (2) intentionally aids and abets the commission of the crime; or (3) is a party to a conspiracy to commit the crime. Wis. Stat. § 939.05. The court instructed the jury that it could convict Beal if it found he either directly committed the crime or aided and abetted another in committing it (41:9-11).

Beal argues that he should have been allowed to assert the privilege only as it related to his conduct in aiding and abetting Strong's actions. Whether a defendant may invoke the reasonable discipline privilege held by a person the defendant aids and abets involves interpretation of Wis. Stat. §§ 939.05 and 939.45(5). Statutory interpretation is a question of law this court reviews de novo. *State v. Dodd*, 185 Wis. 2d 560, 564, 518 N.W.2d 300 (Ct. App. 1994).

2. A defendant who aids and abets a person who can claim the reasonable discipline privilege is not himself permitted to assert the privilege.

Beal's brief does not establish that as a legal matter, a defendant can assert the reasonable discipline privilege if he aids and abets another person in committing child abuse if that person can claim the privilege. Although the brief

recites the relevant jury instructions, statutes, and the burden of proof at trial when an affirmative defense is at issue, it contains no analysis of the language of Wis. Stat. § 939.45(5) or Wis. Stat. § 939.05, and does not attempt to show how that language allowed him to assert the privilege. Beal's claim is a legal conclusion without any supporting argument that this court has no obligation to address. *See State v. Blanck*, 2001 WI App 288, ¶ 27, 249 Wis. 2d 364, 638 N.W.2d 910 (this court does not review issues that are inadequately briefed, or claims that are broadly stated but not specifically argued) (citation omitted).

Beal points to this court's unpublished decision in *State v. Caminiti*, 2014 WI App 45, 353 Wis. 2d 553, 846 N.W.2d 34 (R-Ap. 101-11), in support of his claim. In that case, the State charged Caminiti, a religious leader, with inchoate conspiracy to commit child abuse for instructing members of his congregation to discipline their children by striking them. *Id.* ¶¶ 4, 10-19 (R-Ap. 101, 102-03). In his defense, Caminiti relied on the parents' reasonable discipline privilege. *Id.* ¶ 5 (R-Ap. 101-02). This court noted that the parties did not dispute that Caminiti could assert this defense. *Id.* ¶ 6 (R-Ap. 102).

Caminiti does not support Beal's argument. Beal does not explain how it does. Although he briefly summarizes the case's facts and states that there was no dispute that Caminiti was allowed to assert the privilege, Beal makes no argument why the case should control here. And it should not. The decision is not binding precedent. As an unpublished decision, it has only persuasive value. *See* Wis. Stat. § 809.23(3)(b). Further, because the parties never disputed whether Caminiti could claim the privilege, this court's statements about his entitlement to use it are dicta, not holdings. *See State v. Mueller*, 201 Wis. 2d 121, 136 n.5, 549 N.W.2d 455 (Ct. App. 1996) (judicial discussion of issue

not raised or briefed on appeal is dicta) (citation omitted). Neither *Caminiti* nor Beal's brief contains any legal reasoning that supports Beal's argument that he should have been permitted to assert the reasonable discipline privilege.

In addition, the language of Wis. Stat. §§ 939.05 and 939.45(5) demonstrate that Beal was not legally entitled to assert the privilege. Beal's argument is that if Strong was disciplining JG, then she committed no crime that Beal could be convicted of aiding and abetting. This is wrong for two reasons.

First, that Strong might have been exercising the reasonable discipline privilege does not mean her actions were not criminal. "The fact that an actor's conduct is privileged, *although otherwise criminal*, is a defense to prosecution for any crime based on that conduct." Wis. Stat. § 939.45 (emphasis added). The privilege is an affirmative defense. *See State v. Kimberly B.*, 2005 WI App 115, ¶ 37, 283 Wis. 2d 731, 699 N.W.2d 641. A person who successfully raises an affirmative defense may be found not guilty even though the State proves guilt. *See State v. Watkins*, 2002 WI 101, ¶¶ 39-40, 255 Wis. 2d 265, 647 N.W.2d 244. The defense does not implicate proof of the crime's elements or negative any facts the State is required to prove to convict. *Id.* Even if Strong was engaging in reasonable discipline, her actions would still be criminal, though she could not be punished for them because of the privilege. *Cf. State v. Horn*, 126 Wis. 2d 447, 455, 377 N.W.2d 176 (Ct. App. 1985) (recognition of privilege of coercion under Wis. Stat. §§ 939.45(1) and 939.46 "reflect[s] the social policy that one is justified in violating the letter of the law in order to avoid death or great bodily harm."). Thus, Beal could be convicted of aiding and abetting Strong's crime, even if she could not be punished.

Second, the language of Wis. Stat. § 939.05(1) shows that Beal could still be held liable as an aider and abetter to Strong's actions even if she could not be convicted. That statute permits the conviction of a defendant as a party to the crime "although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act." Wis. Stat. § 939.05(1). Conviction of a defendant's coactor is not required to convict the defendant of aiding and abetting the coactor. If a defendant can be convicted for aiding and abetting a person who is acquitted of a crime, the defendant can also be convicted for aiding and abetting a person who can assert a defense of privilege to the crime. *Cf. Fritz v. State*, 25 Wis. 2d 91, 97-98, 130 N.W.2d 279 (1964) (defendant could not claim conviction for murder as a party to the crime was improper when her coactor, who directly committed the crime, had been found not guilty by reason of insanity; liability under § 939.05(1) does not require that person who actually committed the crime be convicted, and it does not matter whether the acquittal is based on a finding of not guilty or not guilty by reason of insanity).

Beal does not claim that he could directly assert the reasonable discipline privilege. He is not a person responsible for JG's welfare within the meaning of Wis. Stat. § 939.45(5)(a)3. *See Dodd*, 185 Wis. 2d at 564-67 (mother's live-in boyfriend not a "person responsible for child's welfare" under § 939.45(5)(a)3). He has also failed to show that the law permits him to assert the privilege because Strong possessed it. Beal is not entitled to relief from this court.

B. Even if Beal could assert the reasonable discipline privilege, he has not established that the facts of the case would have required the court to instruct the jury on the privilege.

Finally, should this court conclude that Beal was legally entitled to rely on the reasonable discipline privilege, he has failed to show that the evidence introduced at his trial would have supported the circuit court instructing the jury on it because he has not shown that Strong's actions amounted to reasonable discipline.

"To support a requested jury instruction on a statutory defense to criminal liability, the defendant has the initial burden of producing evidence to establish [that] statutory defense." *State v. Giminski*, 2001 WI App 211, ¶ 11, 247 Wis. 2d 750, 634 N.W.2d 604 (internal quotation marks and quoted source omitted). Whether to give an instruction on a defense depends on a case-by-case review of the evidence and each case stands on its own facts. *Id*. "Whether the evidence, viewed in the light most favorable to the defendant and the instruction, establishes a sufficient basis for the instruction presents a question of law, which [this court] review[s] *de novo*." *Id*. (citation omitted).

The evidence, viewed most favorably to Beal, does not provide a sufficient basis for the court to instruct the jury that it could conclude Strong was reasonably disciplining JG. The most favorable interpretation of the evidence for Beal is if Strong's testimony is believed. Called as a defense witness, Strong admitted that she slapped JG twice across the head with an open hand (40:43, 46, 54). Strong said she did this because she could not believe that JG was trying to strike her with her purse, which contained a can of corn

(40:42-43). She denied that either she or Beal punched JG, and said that all Beal did was hold JG (40:44, 46).

Nowhere in his brief does Beal explain how this shows that Strong was engaging in reasonable discipline of JG. He has thus failed to show that even if the defense was available to him as a matter of law, he was entitled to have the jury instructed on it under the specific facts of his case.

Further, Strong's testimony would not have entitled Beal to an instruction on reasonable discipline.[3] Strong slapped her teenage daughter twice across the head while she and Beal were attempting to forcibly take her home from a friend's house. There is no way such behavior can be considered reasonably disciplinary.

The privilege of reasonable parental discipline presents a two-part inquiry. "First, the force used must be disciplinary, and not imposed with a malicious desire to inflict pain." *State v. Williams*, 2006 WI App 212, ¶ 29, 296 Wis. 2d 834, 723 N.W.2d 719, quoting *Kimberly B.*, 283 Wis. 2d 731, ¶ 33 (internal quotation marks omitted). There must be a genuine effort to correct the child by proper means. *Kimberly B.*, 283 Wis. 2d 731, ¶ 33. If the acts are not disciplinary, but instead an expression of rage or

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[3] The State acknowledges that the circuit court prohibited Strong from testifying that she was disciplining JG (40:28-30). This does not prevent review of whether the facts show Beal was entitled to the instruction. Strong's testimony about her actions toward JG would not have been any different had she been allowed to say she was disciplining her. This court can assume that Strong would have said she was disciplining JG when she struck her had she been allowed to, and determine whether her testimony supported a privilege instruction. The State notes, though, that the pre-testimony colloquy with Strong and her attorney suggests she thought she was acting in self-defense, not to discipline JG (40:29).

frustration toward the child, they are not protected. *Williams*, 296 Wis. 2d 834, ¶ 29.

Second, if the acts are disciplinary, they are privileged if the nature and amount of force used is reasonable and not inflicted "immoderately, cruelly, or mercilessly." *Williams*, 296 Wis. 2d 834, ¶ 29 (quoted source omitted). Discipline is reasonable if: (1) the use of force is reasonably necessary; (2) the amount and nature of the force is reasonable; and (3) the force must not be known to cause or create a substantial risk of great bodily harm or death. *Id*. This is an objective standard, determined from the defendant's standpoint at the time of the acts. *Id*. ¶¶ 29-30. The age, sex, physical and mental conditions and disposition of the child, the child's conduct, the nature of the discipline, and the surrounding circumstances are all relevant to considering whether the discipline was reasonable. *Id*. ¶ 30.

Strong's twice slapping JG in the head as part of an effort to take her home from her friend's house was not reasonable discipline. Nothing suggests that Strong was trying to correct anything JG did or that slapping her was a proper means of doing so. Strong said she hit JG because she could not believe that JG had attempted to strike her. Strong actions were thus retaliatory, not disciplinary, and the result of Strong's frustration with her daughter's behavior. Further, there is no reason that slapping a thirteen-year-old girl because she was at a friend's house when she was supposed to be at home, or, for that matter, slapping a thirteen-year-old girl for any reason, is ever reasonably necessary to impose discipline. Strong had no disciplinary reason to hit JG, and there would have been no basis for the court to instruct the jury on the privilege even if Beal was not legally prohibited from relying on it.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court affirm the circuit court's judgment of conviction.

Dated this 11th day of May, 2015.

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 3,609 words.

Dated this 11th day of May, 2015.

____

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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 11th day of May, 2015.

____

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