STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2016AP1956-CR, 2016AP1957-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRIN K. TAYLOR,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE MARY KAY WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was the evidence at trial sufficient to support Darrin Taylor's convictions for causing mental harm to a child as a party to the crime and a related count of bail jumping?

The circuit court determined that the evidence was sufficient to support Taylor's conviction on the mental-harm count and did not address the related bail-jumping count. This Court should conclude that the evidence was sufficient to support both convictions.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established principles to the facts of the case. Publication of this Court's opinion might be warranted because little published case law interprets the statutes at issue, Wis. Stat. §§ 948.01(2) and 948.04(1).

STATEMENT OF THE CASE

In April 2013, the State charged Darrin Taylor with two counts of first-degree sexual assault of a child and two related counts of felony bail jumping in Kenosha County case number 2013CF453. (1.)[1] According to the criminal complaint, Taylor performed cunnilingus on his then-live-in girlfriend's ten-year-old daughter, S.F., while she was asleep

[1] This appeal includes two separate electronically filed records. This brief cites to the record for appeal number 2016AP1956-CR unless otherwise noted. Citations to the record for appeal number 2016AP1957-CR will use the format "[1957] document:page."

in bed until she awoke and pushed him away. (1:2–3.) The complaint further alleged that Taylor squeezed S.F.'s buttocks while she was lying in bed in March or April 2013. (1:3.)

Taylor was arrested, was unable to post bond, and remained in jail. ([1957] 1:4.) The circuit court ordered Taylor to have no contact with S.F., her mother, or anyone else under age 18. ([1957] 1:4.) From May 2013 through November 2013, Taylor communicated with S.F., her mother, and her siblings numerous times by telephone and by having them visit him in jail. ([1957] 1:4–9.) In November 2013, S.F. disclosed that Taylor had sexually assaulted her several times in addition to the two assaults charged in case number 2013CF453. ([1957] 1:6–7.)

Accordingly, in November 2013, the State filed a criminal complaint against Taylor in Kenosha County case number 2013CF1256. ([1957] 1.) Based on S.F.'s more recently disclosed assaults, the State charged Taylor with one count of repeated sexual assault of a child. ([1957] 1:1.) As a result of Taylor's communications with S.F. and her mother and siblings while he was in jail, the State charged him with seven counts of felony bail jumping, five counts of contempt of court as a party to the crime, one count of intimidation of a victim as a party to a crime, and one count of causing mental harm to a child as a party to the crime. ([1957] 1:1–3.) Between the two cases, the State charged Taylor with 19 total criminal counts.

The circuit court granted the State's request to join the two cases for trial without objection from Taylor. (80:13.) He had a jury trial in September and October 2014. (85; 86; 87; 88; 89.) The jury acquitted Taylor of two counts: the sexual-assault count for allegedly touching S.F.'s buttocks and the related bail-jumping count in case number 2013CF453.

(89:106.) It found him guilty of the other 17 counts. (89:105–11.) Taylor filed notices of appeal from his judgments of conviction. (66; [1957] 72.)

ARGUMENT

On appeal, Taylor argues that the evidence at his trial was insufficient to support his convictions for the mental-harm count and the related bail-jumping count in case number 2013CF1256. (Taylor Br. 12–19.) His argument is unavailing for the following reasons.

The evidence was sufficient to support Taylor's conviction for causing mental harm to a child as a party to the crime and his related bail-jumping conviction.

A. Controlling legal principles.

When determining whether evidence at trial was sufficient to support a conviction, an appellate court "consider[s] the evidence in the light most favorable to the State and reverse[s] the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). "Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it." *Id.* (citation omitted).

A court reviews de novo whether evidence was sufficient to support a conviction. *Smith*, 342 Wis. 2d 710, ¶ 24. "[A]n appellate court must consider the totality of the

evidence when conducting a sufficiency of the evidence inquiry." *Id.* ¶ 36.

When a defendant's insufficient-evidence claim argues that his conduct fell outside the scope of a criminal statute, the defendant is raising an issue of statutory interpretation, which is subject to de novo review. *State v. Wille*, 2007 WI App 27, ¶ 4, 299 Wis. 2d 531, 728 N.W.2d 343. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the statute's language. *Id.* ¶ 45. A court does not rewrite a statute to add words or requirements the Legislature did not include. *State v. Simmelink*, 2014 WI App 102, ¶ 11, 357 Wis. 2d 430, 855 N.W.2d 437.

B. The evidence was sufficient to support Taylor's conviction for causing mental harm to a child as a party to the crime.

Taylor challenges his conviction for causing mental harm to S.F. as a party to the crime in violation of Wis. Stat. § 948.04. (Taylor Br. 12–19.) This statute provides that "[w]hoever is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child is guilty of a Class F felony." Wis. Stat. § 948.04(1).

To prove that a defendant violated section 948.04, the State must prove that (1) the defendant was exercising temporary or permanent control of the victim, (2) the victim suffered mental harm, (3) the defendant caused mental harm to the victim, (4) the defendant caused mental harm by

conduct that demonstrated substantial disregard for the mental well-being of the victim, and (5) the victim was under age 18 when the alleged harm occurred. Wis. JI-Criminal 2116 (2009).

Another statute defines "mental harm" as follows:

> "Mental harm" means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Wis. Stat. § 948.01(2).

Taylor argues that the evidence was insufficient at trial to establish the second and third elements under section 948.04, i.e., that S.F. suffered mental harm and that Taylor caused mental harm. (Taylor Br. 13–18.) His argument is unavailing.

1. The evidence was sufficient to show that S.F. suffered mental harm.

With respect to the second element under Wis. Stat. § 948.04, the evidence was sufficient to show that S.F. suffered mental harm. The State introduced the following three pieces of evidence at trial supporting the charge:

First, during a May 2013 interview with a child protective services investigator, S.F. appeared to feel "very guilty" for Taylor's incarceration and she worried about how

his absence from home would affect her mother and siblings. (87:147.)

Second, S.F.'s mother testified that she noticed a change in S.F.'s behavior in the summer of 2013. (86:160.) During that time, S.F. told her mother that she wanted to live with her biological father instead of her mother. (86:160.) S.F. also "would wake up in the middle of the night very upset" and "was always crying." (86:161, 162). During that time, S.F. also had nightmares that a clown was chasing her, although apparently she had been having that nightmare since before Taylor began sexually assaulting her. (86:139; 87:27–28, 145–46.)

Third, similar to S.F.'s mother's testimony, S.F.'s father testified that he observed a change in S.F.'s behavior in the summer and fall of 2013. (87:159–60.) When S.F. went to her father's house, she no longer wanted to return to her mother's house. (87:160.) S.F. became afraid of the dark and did not want to sleep alone. (87:161.) "At times" her father "would find her crying." (87:160). Her father testified that she was "deeply affected by all this." (87:168).

Taylor argues that, under *M.Q. v. Z.Q.*, 152 Wis. 2d 701, 449 N.W.2d 75 (Ct. App. 1989), the evidence was insufficient to establish mental harm. (Taylor Br. 15–17.) But *M.Q.* is distinguishable.

In *M.Q.*, the court of appeals determined that the circuit court erred by granting an injunction against a father because it had erroneously determined that the father caused emotional damage to his children. *M.Q.*, 152 Wis. 2d at 708–09. The relevant statute defined "emotional damage" as "harm to a child's psychological or intellectual functioning which is exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those

behaviors." *Id.* at 704 (quoting Wis. Stat. § 813.122(1)(e)). The court of appeals concluded that the record contained no evidence that the children "exhibited such behavior. That one or both of the children were 'upset' or 'concerned' about their father does not, in the absence of expert testimony, equal severe anxiety or depression." *Id.* at 709. "That a child became upset and cried twice in six months because of a parent's acts and dislikes being with the parent when he or she has been drinking is insufficient for a finding of emotional damage, in the absence of expert testimony." *Id.*

M.Q. is distinguishable from Taylor's case because the evidence of S.F.'s emotional harm was much greater than the evidence of the children's emotional damage in *M.Q.* Unlike the children in *M.Q.*, S.F. cried often, developed a fear of the dark, did not want to sleep alone, awoke during the night very upset, had nightmares, and no longer wanted to live at her mother's home where Taylor had been living.

Taylor further argues that, under *M.Q.*, expert testimony was required to establish S.F.'s mental harm. (Taylor Br. 16.) But "expert testimony is required only if the issue to be decided by the jury is beyond the general knowledge and experience of the average juror." *State v. Perkins*, 2004 WI App 213, ¶ 16, 277 Wis. 2d 243, 689 N.W.2d 684 (citation omitted). "[R]equiring expert testimony . . . represents an extraordinary step, one to be taken only when 'unusually complex or esoteric issues are before the jury' . . . ." *Id.* (first bracket and second ellipsis added) (citation omitted). Courts have held, for example, that expert testimony was not "required in every case" to establish mental illness. *Id.* ¶ 21.

Here, Taylor has not explained why the issue of S.F.'s mental harm was so complex or esoteric that it required expert testimony. And in any event, as noted above, the

evidence of S.F.'s mental harm was far stronger than the nonexistent evidence of the children's emotional harm in *M.Q.*

Taylor contends that *M.Q.* "was a civil case requiring a much lower burden of proof than the State's burden of proof in the present case." (Taylor Br. 17.) But, that one party could not satisfy a lower standard at trial in *M.Q.* with virtually no evidence does not mean that the State could not meet a higher burden in Taylor's trial with much more evidence. And Taylor's argument overlooks his burden on appeal. The State is not required to prove a defendant's guilt beyond a reasonable doubt on appeal. *Poellinger*, 153 Wis. 2d at 503. Rather, *the defendant* "bears a heavy burden" on appeal when challenging the sufficiency of the evidence to support a conviction. *State v. Klingelhoets*, 2012 WI App 55, ¶ 10, 341 Wis. 2d 432, 814 N.W.2d 885 (citations omitted).

Taylor further argues that the evidence of S.F.'s mental harm was insufficient because the State did not establish that her new behavior was outside of the normal range for her age. (Taylor Br. 17.) But the State was not required to establish that point. The State was required to prove that S.F. suffered mental harm. Wis. Stat. § 948.04(1). The relevant statute provides that mental harm "*may be evidenced* by a substantial degree of certain characteristics of the child *including, but not limited to*, anxiety, depression, withdrawal or outward aggressive behavior." Wis. Stat. § 948.01(2) (emphases added). Mental harm also "*may be demonstrated* by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development." *Id.* (emphasis added). "Use of the word 'may' creates a presumption that the statute is permissive. This general principle can be rebutted if construing 'may' as mandatory is necessary to reflect legislative intent."

McGuire v. McGuire, 2003 WI App 44, ¶ 26, 260 Wis. 2d 815, 660 N.W.2d 308 (citation omitted).

That presumption applies here and, thus, section 948.01 does not require the State to prove mental harm in any particular way. This statute's use of the word "may" and the phrase "including, but not limited to" shows that the specified behaviors are a non-exhaustive list of ways in which the State could establish mental harm. The State is not required to prove one or more of those listed behaviors. Further, although the phrase "not within the normal range for the child's age and stage of development" modifies "cognition" and perhaps modifies "behavior" and "emotional response" as well, it does *not* modify "anxiety, depression, withdrawal or outward aggressive behavior." *See* Wis. Stat. § 948.01(2). For these reasons, the State was not required to prove that S.F. exhibited behavior outside of the normal range for her age and development.

In sum, the State introduced sufficient evidence to establish S.F.'s mental harm.

2. The evidence was sufficient to show that Taylor's conduct caused S.F.'s mental harm.

With respect to the third element under Wis. Stat. § 948.04, the State introduced sufficient evidence to prove that Taylor caused S.F.'s mental harm. The mental-harm charge alleged that S.F. suffered mental harm as a result of Taylor's communications with her while he was in jail after being arrested for sexually assaulting her. (87:12; 89:48–49.)

The State introduced the following evidence at trial. Taylor first called S.F.'s mother while he was in jail in April 2013. (87:174.) In a May 2013 phone call, Taylor asked S.F.'s

mother for her and her children to help him and talk to "the courts." (86:134–36.) In another May 2013 phone call, Taylor complained to S.F.'s mother that S.F. did not want to talk to him and did not like him. (86:143–45, 149.) During that same call, Taylor talked to S.F. and her siblings via speaker phone. (86:145.) Taylor asked S.F.'s mother over the phone to bring her children to visit him in jail. (86:146, 152.)

S.F. and her mother visited Taylor in jail at least twice in May 2013 and at least once in June 2013. (86:148, 150, 152; 87:179–81.) The first time that S.F. visited Taylor in jail, he asked her "to help Daddy" and "to make sure everybody knows that Daddy's not bad." (88:77.) Taylor testified that he had asked S.F. to help him get out of jail. (88:118.)

Further, Taylor wrote a letter to S.F. in June 2013 in which he wished her a happy birthday and stated that he would "get her something fun." (88:88.) Taylor also called one of his sisters from jail and asked her to tell S.F. happy birthday for him. (88:80.) He further asked his sister to tell S.F. and her siblings that he loved and missed them. (88:81.)

In one phone call, Taylor told S.F.'s mother that she and S.F. should say that he had not done anything "bad." (86:147–48.) S.F.'s mother told S.F. to say that "it" was a dream. (88:85–86.) When S.F. said to her mother that she was unsure whether it had been a dream, her mother raised her voice and said that it had been a dream. (88:86.) In a phone call with Taylor, S.F.'s mother blamed S.F. for Taylor's incarceration and for breaking up their family. (86:160; 88:117.) S.F.'s mother was unsure whether S.F. had overheard that particular phone call, but S.F. did overhear a conversation that her mother had had with Taylor over the phone. (86:160; 87:148.)

The foregoing evidence was sufficient to show that Taylor caused S.F.'s mental harm. As explained above, S.F.'s behavioral changes in summer and fall 2013 showed that she was experiencing mental harm. The jury reasonably inferred that Taylor's communications with S.F. and her mother during May and June of that year caused the mental harm. Significantly, Taylor sexually assaulted S.F. several times from 2011 through March 2013. (86:27, 38; 89:105, 107.)[2] About two months after the final assault, Taylor began communicating with S.F. over the phone from jail, and her mother began taking her to visit him in jail. Although Taylor thought that S.F. did not want to talk to him, he asked her to exculpate him and help to get him out of jail. S.F.'s behavior changed a short time later. For instance, she began crying often and no longer wanted to live at her mother's house where Taylor had been living. The nature and timing of S.F.'s behavioral changes indicate that Taylor's communications with her from jail caused her mental harm.

Taylor argues that the evidence was insufficient to show that his conduct caused S.F.'s mental harm because several different factors may have caused that harm. (Taylor Br. 17–18.) His argument is unpersuasive for two reasons. First, an actor's conduct causes a particular result if his conduct is a substantial factor in producing that result, even if it is not the sole or primary factor. *State v. Miller*, 231 Wis. 2d 447, 456–57, 605 N.W.2d 567 (Ct. App. 1999). Taylor's communications with S.F. from jail were a substantial factor in causing her mental harm as explained above.

[2] Taylor does not challenge those convictions on appeal.

Second, "when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 506–07 (citing *Jackson v. Virginia*, 443 U.S. 307, 326 (1979); *State v. Wilson*, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989)). Here, the evidence at trial supported the inference that Taylor caused S.F. mental harm by communicating with her from jail. Taylor does not argue that the evidence on which that inference is based is incredible as a matter of law, nor can he. This Court must accept that inference.

In sum, the evidence was sufficient to establish the mental-harm count's two elements that Taylor challenges on appeal.

C. The evidence was sufficient to support Taylor's related conviction for felony bail jumping.

Taylor argues that because the evidence was insufficient to support his conviction for causing mental harm to S.F., it was insufficient to support his related bail-jumping conviction. (Taylor Br. 18–19.) He is wrong. A sufficiency of the evidence challenge to a bail-jumping conviction fails if it depends on a losing argument that the evidence was insufficient to support a conviction for the underlying crime. *See State v. Griffin*, 220 Wis. 2d 371, 385–86, 584 N.W.2d 127 (Ct. App. 1998). Here, because the evidence was sufficient to support Taylor's mental-harm conviction, it was sufficient to support his related bail-jumping conviction.

CONCLUSION

The State respectfully requests this Court to affirm Taylor's judgment of conviction.

Dated this 2nd day of March, 2017.

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 3209 words.

_____
SCOTT E. ROSENOW
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 2nd day of March, 2017.

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SCOTT E. ROSENOW
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