IN THE COURT OF APPEALS OF IOWA

No. 1-705 / 11-0009
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONTAY DAKWAN SANFORD,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan, District Associate Judge.

Dontay Sanford appeals his judgment and sentences for two counts of child endangerment. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Dustin Lies, Assistant County Attorney, and Ernie Rose, Legal Student Intern, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

VAITHESWARAN, J.

Dontay Sanford, the father of two young children, appeals his judgment and sentences for two counts of child endangerment arising out of the children's exposure to marijuana smoke. He asserts there was insufficient evidence to support the jury's findings of guilt.

I. Sufficiency of the Evidence

The State charged Sanford with two alternatives of child endangerment, the first requiring proof that he knowingly acted in a manner that created a substantial risk to the children's physical, mental, or emotional health or safety, and the second requiring proof that he deprived the children of necessary food, clothing, shelter, health care, or supervision, thereby substantially harming their physical, mental, or emotional health. Iowa Code § 726.6(1)(a), (d) (2009). The jury found Sanford guilty of child endangerment without specifying whether it relied on both theories or only one.

The State concedes there is insufficient evidence to support the second alternative. Therefore, we need only examine the sufficiency of the evidence supporting the first alternative. On this theory, the jury received the following instruction:

> The State must prove all of the following elements of child endangerment:
>
> 1. On or about the 8th day of June, 2009, the defendant was the parent of D.S.
> 2. D.S. was under the age of fourteen years.
> 3. . . . The defendant acted with knowledge that he was creating a substantial risk to D.S.'s physical, mental or emotional health or safety. . . .

The same instruction was given with respect to the count involving the other child.

Sanford challenges the proof on the third element—whether he acted with the knowledge that he was creating a substantial risk to the children's physical, mental or emotional health, or safety. *See State v. Webb*, 648 N.W.2d 72, 81–82 (Iowa 2002) (setting forth elements under section 726.6(1)(a)).

We are obligated to view the evidence in the light most favorable to the State. *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004). Viewed in this light, we find the evidence sufficient to support the jury's finding of guilt.

The record reflects Sanford went to the apartment of the children's mother to pick up the children for a visit. With him was a relative who had been asked by the mother to help Sanford with the children. Shortly after Sanford arrived at the apartment, the building manager knocked on the door to serve the mother with a past-due rent notice. After a long pause, the mother opened the door. The manager immediately noticed a strong smell of burnt marijuana coming from inside the apartment. The manager also noticed Sanford going in and out of the bedroom while she was talking to the mother, which she thought was odd.

The manager called the police. Before they arrived, the relative took the older child to the car. The relative was later found to have marijuana rolling papers in her purse. The younger child, who had a heart condition, remained in a car seat in the living room of the apartment. When police arrived at the complex, they saw Sanford wearing a red coat and walking out of the apartment with the younger child. One of the officers asked Sanford to return to the apartment. There, the officers confirmed the manager's assessment that the

smell of marijuana was coming from inside the apartment and they obtained the mother's permission to search the apartment. They noticed a haze of smoke in the residence and uncovered marijuana in various locations, including in the bedroom and bathroom and in a pocket of the red coat Sanford had been wearing.

The jury could have reasonably inferred from this circumstantial evidence that either Sanford, or someone else in the apartment, smoked marijuana in the presence of the children. Indeed, Sanford concedes the "rational inference arising from the observations made by the apartment complex manager and the police is that someone in that apartment had recently smoked marijuana."

We recognize there is no direct evidence that Sanford himself smoked marijuana. But this is not a required element of the charges. All the State had to prove was Sanford acted with knowledge that he was creating a substantial risk to the health or safety of the children. Sanford essentially conceded that exposure to marijuana smoke created such a risk. While he denied smelling marijuana smoke in the apartment, the jury was free to disbelieve this denial in light of the numerous witnesses who testified otherwise. *See State v. Millbrook*, 788 N.W.2d 647, 653 (Iowa 2010) (stating the jury is free to disbelieve a defendant's self-serving testimony).

Having found the evidence sufficient to support the jury's findings of guilt on this alternative of child endangerment, we turn to the disposition.

II. Disposition

As noted, the jury did not specify the alternative on which its findings of guilt were predicated. For that reason, Sanford argues "this Court must reverse

the convictions and remand for a new trial." The State counters that reversal is not required. The State relies on *Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371, 382–83 (1991), which rejected the defendant's argument that a general verdict was reversible where it left in doubt whether the jury based its finding of guilt on a theory supported by sufficient proof or a theory unsupported by sufficient proof. The State also relies on an apparent conflict in our state's precedent on the question. *Compare State v. Heptonstall*, 209 Iowa 123, 131, 227 N.W. 616, 619 (1929) ("'[I]t is not necessary to prove each disjunctive. If the evidence sustains one,' it is enough."), *with Williams*, 674 N.W.2d at 71 ("We have recognized, however, if the instructions allow the jury to consider multiple theories of culpability, only some of which are supported by the evidence, and a general verdict of guilty is returned, a reversal is required because 'we have no way of determining which theory the jury accepted.'" (quoting *State v. Hogrefe*, 557 N.W.2d 871, 880–81 (Iowa 1996))).

The State is correct that *Griffin* supports its position. But our state's recent precedent does not. In particular, the Iowa Supreme Court's statement in *Williams* is squarely on point. As in that case, the jury here was allowed to consider two different theories of culpability on the child endangerment charges. Only one of those theories was supported by substantial evidence. Because the jury returned a general verdict of guilty, "'we have no way of determining which theory the jury accepted.'" *Williams*, 674 N.W.2d at 71 (citation omitted). Therefore, a reversal and remand for new trial is required.

REVERSED AND REMANDED.

Sackett, C.J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully dissent. For the most part, I agree with the majority decision. I agree the record reveals substantial evidence for one of two theories of child endangerment presented to the jury. And I agree the United States Supreme Court's decision in *Griffin v. United States*, 502 U.S. 46, 49,112 S. Ct. 466, 469, 116 L. Ed. 2d 371, 376 (1991) supports the State's position that a general verdict can stand as long as it is supportable on one of the submitted grounds—even though we have no assurance the jurors all relied on the valid ground.

But I disagree that our supreme court's statement in *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004), concerning general verdicts requires us to reverse and remand for a new trial. Without mentioning *Griffin*, the *Williams* court rejected the defendant's challenge to one of three theories of theft presented to the jury, stating:

> [I]f the instructions allow the jury to consider multiple theories of culpability, only some of which are supported by the evidence, and a general verdict of guilty is returned, a reversal is required because "we have no way of determining which theory the jury accepted." *State v. Hogrefe,* 557 N.W.2d 871, 880–81 (Iowa 1996).

Williams, 674 N.W.2d at 71. I disagree with the majority that *Williams* is "squarely on point." Because *Williams* ultimately upheld the theft conviction at issue, *id.* at 71–72, its discussion of when a reversal is required was obiter dicta and should not bind us in this appeal. *See Westinghouse Credit Corp. v. Crotts,* 250 Iowa 1273, 1280, 98 N.W.2d 843, 848 (1959) (describing statements in opinion which were not necessary to a determination of the case as "mere dicta and not authority to be followed").

Moreover, *Williams* relies on *Hogrefe*, which involved a challenge to the marshalling instruction—a legal error, not an appeal alleging the factual insufficiency of the evidence supporting the jury's verdict. *See Hogrefe,* 557 N.W.2d at 876 ("Hogrefe concludes, the district court—based on our decision in [*State v. McFadden*, 467 N.W.2d 578 (1991)]—should not have instructed the jury to consider the seven checks on the question of deception."), 881 ("Because the district court erred in giving the marshalling instruction, we reverse and remand for a new trial."). This distinction is important because a legal error in the jury instructions allows for a retrial, but insufficient evidence requires dismissal under the double jeopardy clause. *See State v. Heemstra*, 759 N.W.2d 151, 152–53 (Iowa Ct. App. 2008).

In the instant case, Sanford cites only his motion for judgment of acquittal as the basis for error preservation. He does not allege on appeal that he objected to the marshalling instruction on the "actual harm" element of Iowa Code section 726.6(1)(d) (2009). Accordingly, unlike the defendant in Hogrefe, the remedy of a new trial is not available to Sanford.

Griffin rebuffed the "semantical" argument that the distinction between "legal error" and "insufficiency of proof" is "illusory, since judgments that are not supported by the requisite minimum of proof are invalid *as a matter of law*—and indeed, in the criminal law field at least, are *constitutionally required* to be set aside." *Griffin,* 502 U.S. at 58–59, 112 S. Ct. at 474, 116 L. Ed. 2d at 382. Justice Scalia explained:

> In one sense "legal error" includes inadequacy of evidence—namely, when the phrase is used as a term of art to designate those mistakes that it is the business of judges (in jury cases) and

> of appellate courts to identify and correct. In this sense "legal error" occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient. But in another sense—a more natural and less artful sense—the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence. The answer to petitioner's objection is simply that we are using "legal error" in the latter sense.

Id. at 59, 112 S. Ct. at 474, 116 L. Ed. 2d at 382.

In the only reported Iowa decision discussing *Griffin*, our supreme court recognized the difference between "a question of insufficiency of the evidence" as analyzed by the United States Supreme Court, and a claim that "pertains to legal errors and constitutional protections." *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). In *Martens*, the defendant complained that his counsel should have asked the trial court to instruct the jury that pubic hair was not part of the genitalia for purposes of defining a sex act. *Id*. at 484–85. The State responded that regardless of the merits of the jury instruction issue, "there was sufficient evidence to convict defendant of committing a sex act by defendant's illegal contact with other parts of [the victim's] body, specifically her anus." *Id.* at 485.

The *Martens* court explained the need for a new trial when one theory supporting conviction was invalid based on "legal error":

> We have said that "[w]ith a general verdict of guilty, we have no way of determining which theory the jury accepted." *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996). For this reason, we reversed and remanded the case for a new trial in *Hogrefe.* Thus, the validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error.

Id.

Sanford does not allege a "legal error" as *Griffin* defined that term. Instead he claims factual inadequacy to prove the "actual harm" element of section 726.6(1)(d). *Griffin* explained why we should trust jurors to reject a theory not supported by the facts, as opposed to expecting lay people serving on juries to understand when an alternative is legally unsound:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence . . . .

Griffin, 502 U.S. at 59, 112 S. Ct. at 474, 116 L. Ed. 2d at 382–83.

Our supreme court has not announced its intent to depart from the logical distinction between legal error and factual insufficiency expressed in *Griffin*. The dicta cited above from *Williams* cannot be read as a clear departure given that the Iowa Supreme Court did not even cite *Griffin*. I also find it significant that Sanford does not discuss *Williams* or *Griffin* in his appellate brief. Instead, for his general verdict argument, Sanford relies on *Martens* and *Hogrefe*, both cases that involved legal challenges to the jury instructions and not straight sufficiency-of-the-evidence challenges.

I believe that we should follow the United States Supreme Court's holding in *Griffin* unless and until the Iowa Supreme Court explicitly rejects that federal constitutional precedent on state law grounds. State courts are, of course, free to decide questions under their own constitutions. Indeed, a few state courts

have declined to follow *Griffin* on state law grounds. *See, e.g.*, *State v. Jones*, 29 P.3d 351, 371 (Haw. 2001); *Commonwealth v. Plunkett*, 664 N.E.2d 833, 837 (Mass. 1996); *State v. Ortega-Martinez*, 881 P.2d 231, 235 (Wash. 1994). But a majority of jurisdictions that have passed on the general verdict question since 1991 have applied the *Griffin* rule. *See, e.g.*, *People v. Guiton*, 847 P.2d 45, 51 (Cal. 1993); *Atwater v. State*, 626 So. 2d 1325, 1327–28 n.1 (Fla.1993), *cert. denied*, 511 U.S. 1046, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); *State v. Enyeart*, 849 P.2d 125, 129 (Idaho Ct. App. 1993); *State v. Grissom*, 840 P.2d 1142, 1171 (Kan. 1992); *State v. Olguin*, 906 P.2d 731, 732 (N.M. 1995).

Our supreme court has not been reluctant to interpret a clause of our state constitution as affording citizens more protection than its federal counterpart when the court believed a different interpretation was appropriate. *See, e.g.*, *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (applying Iowa's search and seizure clause (article I, section 8) rather than Fourth Amendment); *State v. Bruegger*, 773 N.W.2d 862, 882–83 (Iowa 2009) (applying Iowa's cruel and unusual punishment clause (article I, section 17) rather than Eighth Amendment); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6–7 (Iowa 2004) (applying Iowa's equal protection clause (article I, section 6) rather than Fourteenth Amendment). The court has not taken this step when it comes to *Griffin*, due process, and general verdicts of guilty. In the absence of an explicit directive from our supreme court that we are not to follow United States Supreme Court case law, I would affirm the jury's verdict on the child endangerment theory that was backed by substantial evidence at trial.