IN THE COURT OF APPEALS OF IOWA

No. 7-751 / 06-1841
Filed December 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYRON CRAIG JORDAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Paul R. Huscher, Judge.

Tyron Jordan appeals from his conviction for neglect of a dependent person. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Steve Johnson, County Attorney, and Michael K. Jacobsen, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Tyron Jordan appeals from his conviction for neglect of a dependent person in violation of Iowa Code section 726.3 (2005). He claims there was insufficient evidence to support his conviction. He also claims his trial counsel was ineffective for failing to request and object to certain jury instructions and failing to challenge section 726.3 as unconstitutional. We preserve Jordan's ineffective assistance claim concerning the failure to request certain jury instructions for possible postconviction relief proceedings. We reject Jordan's remaining claims and affirm his conviction.

I. Background Facts and Proceedings.

The jury could have reasonably found the following facts from the evidence presented in this case: Jordan is a twenty-year-old father of two young children, Jaren, eighteen months, and Mia, seven months. Jordan lived with his children; their mother, Whitney Wilcox; and her two children from a previous relationship, six-year-old Tristan and four-year-old Bianca. He stayed at home and cared for the children while Wilcox worked at a nursing home.

On the morning of February 10, 2006, Jaren suffered severe first and second-degree burns while in his father's care. Jordan called Wilcox at work between 8:30 and 8:45 a.m. and informed her there was an emergency. She left work and called 911 upon arriving at her house.

Paramedics and a police officer were dispatched to the couple's home shortly after 9:00 a.m. Wilcox was holding Jaren in a blanket when the paramedics and a police officer arrived at the couple's home. Mark Vickroy, the lead paramedic, took the blanket off Jaren, who was naked, and placed him on

the floor to ascertain the extent of his injuries. Vickroy saw "from the waist down," Jaren was "just cherry red, almost uniform, with blistering starting to form," which indicated to him that Jaren had been "immersed into a hot liquid."

Michael Knoll, a firefighter/paramedic, spoke with Jordan upon arriving at the scene. Jordan told Knoll "he was giving the child a bath, was using a handheld shower, when the water went from warm to very hot very fast." Jordan told the police officer at the scene, Randall Camp, the same story and informed him "they had been having problems with the water heater in the house" because the "water could get hot really quick."

Jaren was airlifted to the burn unit at the University of Iowa Hospitals and Clinics (UIHC) where he was treated by Dr. Gerald Kealey, the medical director of the burn treatment center. Dr. Kealey stated that upon his arrival, Jaren had "life-threatening" first and second-degree "burns over the lower part of his body, including feet, lower legs, thighs, . . . a portion of his abdomen, and his external genitals. . . . And he had some burns on his right arm." The right side of his body was "more extensively burned than the left." The palm of Jaren's left hand was spared as was the area "right behind the knee of the right and left side." Based on the pattern of the burns, Dr. Kealey likewise believed Jaren was "lowered into hot water."

The director of the child protection program at the University of Iowa, Dr. Resmiye Oral, also examined Jaren during his eleven-day hospitalization at the UIHC because of "concerns about the inflicted trauma." She concurred with Dr. Kealey's opinion that Jaren had been immersed in hot water. Her conclusion was based on the "sharp demarcation" or "line from the white -- or the regular

skin to the red skin" present on Jaren's body. When such a demarcation is present, "with no splash marks beyond that sharp mark," Dr. Oral stated there is a concern "that the child was stable in hot water. . . . And that tells us that this may not be an accident."

The incident was reported to the Iowa Department of Human Services (DHS) due to possible child abuse concerns. As a part of the DHS investigation, two caseworkers tested the water temperature at the family's house and learned the highest temperature the water could reach was 132 degrees Fahrenheit. According to Dr. Oral, based on that water temperature, Jaren probably would have "had to be in the water at least eight seconds or so" to suffer the burns he received. DHS initiated child in need of assistance proceedings following its investigation because Jaren's injuries were not consistent with Jordan's explanation of how the incident occurred.

About three months after Jaren was burned, Jordan changed his account of how the incident happened. In an interview with Detective Wayne Winchell in April 2006, he informed the detective that "he was cleaning house that morning, and he instructed Bianca, who was four, to run the bathwater and to give Jaren . . . a bath." Jordan told the detective he heard Jaren "cry out," so he "ran to the bathroom" and "saw that Bianca . . . was trying to hold Jaren into the bathwater, and Jaren was crying, screaming, and trying to get out of the bathwater . . . on his hands and knees."

On June 9, 2006, the State filed a trial information charging Jordan with neglect of a dependent person in violation of Iowa Code section 726.3. The matter proceeded to a jury trial on September 20, 2006. Jordan moved for a

directed verdict both at the close of the State's case in chief and at the close of all evidence. The district court denied the motions. The jury found Jordan guilty of neglect of a dependent person, and he was sentenced to an indeterminate term of imprisonment not to exceed ten years.

Jordan appeals. He claims there was insufficient evidence to support his conviction. He further claims his trial counsel provided ineffective assistance because he did not request certain jury instructions, and he did not challenge section 726.3 as unconstitutional.

II. Scope and Standards of Review.

We review sufficiency of the evidence claims for the correction of errors at law. *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). A claim of ineffective assistance of counsel, on the other hand, is reviewed de novo because the claim is derived from the Sixth Amendment of the United States Constitution. *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001).

III. Discussion.

A. Sufficiency of the Evidence.

The jury was instructed the State would have to prove the following elements in order to find Jordan guilty of the crime of neglect of a dependent person in violation of section 726.3:

1. On the 10th day of February, 2006, the defendant was the father of Jaren Jordan.
2. Jaren Jordan was a person under the age of fourteen years.
3. The defendant knowingly or recklessly exposed Jaren Jordan to a hazard or danger against which Jaren Jordan could not reasonably be expected to protect himself.

The jury was further instructed that a person is "reckless" or acts "recklessly"

> when he willfully disregards the safety of a person. It is more than a lack of reasonable care which may cause unintentional injury. Recklessness is conduct which is consciously done with willful disregard of the consequences. For recklessness to exist, the act must be highly dangerous. In addition the danger must be so obvious that the actor knows or should reasonably foresee that harm will more likely than not result from the act. Though recklessness is willful, it is not intentional in the sense that harm is intended to result.

Jordan argues the district court erred in overruling his motions for directed verdict because the evidence presented at trial was insufficient to prove he acted "knowingly or recklessly." We do not agree.

We will uphold a guilty verdict if it is supported by substantial evidence. *Smith*, 739 N.W.2d at 293. Evidence is substantial if it would "convince a rational jury of a defendant's guilt beyond a reasonable doubt." *State v. Smitherman*, 733 N.W.2d 341, 345 (Iowa 2007). When we determine the sufficiency of the evidence supporting a conviction, we consider all the evidence in the record, not just the evidence supporting the defendant's guilt. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). However, when we make this determination, we consider the evidence in the light most favorable to the State, and we include legitimate inferences and presumptions that may reasonably be deduced from the record. *Id.*

Jordan initially told the paramedics, police officer, physicians, and DHS caseworkers Jaren was accidentally burned when he was giving him a bath. He stated he "ran about five to six inches of water into the bathtub," tested its temperature, and placed Jaren into the bathtub. He said he then attempted to add more water to the bathtub using either the showerhead or a handheld shower nozzle, and the water came out scalding. However, all of the physicians

indicated the lack of splash marks and the sharp demarcation between the areas of Jaren's body that were burned and the areas that were spared suggested Jaren was instead lowered into scalding water.

Dr. Kealey testified,

> You have no splash pattern. So if they were sitting in water, the hot water would be splashing on them. You haven't got a run-down pattern. If they were standing in a jet of water, that would come down across their body, and it would burn the top more. . . . You've got a pattern here where the burns are deeper on the feet and get more superficial as you go up the body.

Dr. Oral likewise stated,

> [I]f the child was in a comfortable temperature zone in the hot water, as soon as it reached a certain level, which would be 105, 110 degrees Fahrenheit, the child would try to move away from that environment. . . . Since there is no indication of splash marks or various levels of burns, it is safe to speculate that this child went into water after the water got hot.

Jordan claimed he had experienced problems with hot water surges before and had told his landlord about it but nothing had been done. The landlord, however, denied that he had ever received any complaints about the water heater in Jordan's residence.

Jordan changed his account of the incident prior to trial. He testified at trial that he told four-year-old Bianca to bathe Jaren, while he finished cleaning the kitchen. "About three or four minutes later," he heard Jaren scream. He ran to the bathroom and saw "Bianca was pushing him back, and she said, 'He won't -- He won't sit down.'" Jordan testified that Jaren was "trying to get up . . . . His hands were down. He had one knee down. He was toward the back of the bathtub." Jordan admitted at trial that allowing Bianca to bathe Jaren was

inappropriate and a mistake. He testified he lied to the paramedics, physicians, Officer Camp, and the DHS in order to protect Bianca.

Dr. Oral, however, testified that Jordan's amended version as to how Jaren was burned was also inconsistent with his injuries. She explained that with a lack of splash marks and the sharp demarcation line, "we get concerned that the child was *stable* in hot water, allowing the hot water burn to that level the exposed skin" (emphasis added.) In addition, Detective Winchell testified there were no "splash marks, anything that would show there was a struggle," and Jaren's knees were less burned than the rest of his body.

Resolving conflicts in the evidence, passing upon the credibility of witnesses, and weighing the evidence are issues for the jury, and not issues to be resolved by motions for judgments of acquittal. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). Thus, the jury was free to discredit Jordan's differing stories explaining how Jaren was burned in favor of the contrary testimony of the physicians, the DHS caseworkers, and the police. *See State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006) (recognizing under our standard of review of jury verdicts in criminal cases, the jury is "free to reject certain evidence, and credit other evidence"); *see also State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984) (stating that guilt may be inferred from defendant changing his story). Furthermore, assuming the jury believed Jordan's testimony at trial, the jury could have found that he "willfully disregarded" Jaren's safety by directing a four-year-old child to give an eighteen-month-old child a bath without adult supervision.

We therefore conclude, after viewing the record in the light most favorable to the State and affording the State the legitimate inferences and presumptions that may reasonably be deduced from the record, that there is substantial evidence to establish Jordan knowingly or recklessly exposed Jaren to a danger from which he could not protect himself.

B. Ineffective Assistance of Counsel.

Jordan claims his trial counsel was ineffective for failing to request jury instructions defining "knowingly" or "willfully," failing to object to the jury instruction defining "recklessness" as an incorrect statement of the law, and failing to challenge section 726.3 "on the basis of void for vagueness, and violation of defendant's equal protection rights."

"Ineffective assistance claims are generally reserved for postconviction hearings, but may be determined on direct appeal when the record adequately presents them." *State v. Glaus*, 455 N.W.2d 274, 276 (Iowa Ct. App. 1990). The failure to request certain jury instructions is a matter more suited to postconviction relief. *State v. Slayton*, 417 N.W.2d 432, 436 (Iowa 1987). "At such a hearing trial counsel will have the opportunity to explain its conduct and performance and the court will have a complete record." *Id.* We find the record in this case is inadequate to address Jordan's ineffective-assistance-of-counsel claim regarding the failure to request jury instructions defining "knowingly" and "willfully." We therefore preserve this claim for postconviction relief proceedings.

However, we believe Jordan's remaining ineffective-assistance-of-counsel claims are capable of resolution on direct appeal. Jordan has the burden to establish by the preponderance of the evidence that his trial counsel was

ineffective. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). In order to show his counsel was ineffective, Jordan must prove his counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

We first address Jordan's claim that his trial counsel was ineffective for failing to object to the jury instruction defining "recklessness." This instruction follows the Iowa Criminal Jury Instruction on recklessness. *See* Iowa Crim. Jury Instruction 200.20. We are reluctant to disapprove uniform instructions. *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa Ct. App. 1995). We therefore find counsel did not breach an essential duty by failing to object to the instruction as an incorrect statement of the law. *See State v. Wills*, 696 N.W.2d 20, 25 (Iowa 2005) (finding trial counsel was not ineffective for failing to raise unmeritorious issue).

The constitutional challenges to section 726.3 that Jordan asserts his attorney should have raised have not been passed upon by the courts of this state. We do not require that counsel be a "crystal gazer" who must predict future changes in established rules of law in order to provide effective assistance to a criminal defendant. *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982). Instead, we ask whether a normally competent attorney could have concluded these questions were not worth raising. *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999).

We believe a normally competent attorney would conclude the issues of whether section 726.3 was unconstitutionally vague or violated Jordan's equal protection rights were not worth raising. Our supreme court has rejected similar

constitutional vagueness challenges to the comparable child endangerment statute, Iowa Code section 726.6. *See State v. Watkins*, 659 N.W.2d 526, 535 (Iowa 2003) (holding section 726.6 was not unconstitutionally vague or overbroad as applied to the defendant in that case); *accord State v. Anspach*, 627 N.W.2d 227, 232 (Iowa 2001).

We also see no merit in Jordan's apparent contention that section 726.3 violates his equal protection rights because it infringes on his fundamental right to parent. *See In re Marriage of Howard*, 661 N.W.2d 183, 190 (Iowa 2003) (noting a compelling state interest arises when substantial or potential harm is visited upon children); *see also State v. Johnson*, 528 N.W.2d 638, 641-42 (Iowa 1995) (finding section 726.3 is not limited to situations where an individual has "legal custody" of a child but instead applies to "all situations in which one individual may be charged with the care and control of another"). We therefore conclude Jordan's trial counsel was not ineffective for failing to raise the novel issues that section 726.3 is unconstitutionally vague or violates his equal protection rights.

IV. Conclusion.

There is sufficient evidence in the record when it is viewed in the light most favorable to the State to support Jordan's conviction for neglect of a dependent person. We reject Jordan's claims that his trial counsel was ineffective for failing to object to the recklessness jury instruction and failing to challenge section 726.3 as unconstitutional. However, we find the record in this case is inadequate to address Jordan's remaining claim that his trial counsel was ineffective for failing to request jury instructions defining "knowingly" and

"willfully." We accordingly affirm Jordan's conviction and preserve this claim for possible postconviction relief proceedings.

AFFIRMED.