COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1023-CR **Cir. Ct. No. 2014CF1768**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON A. WENDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. After a jury trial, the circuit court entered judgment convicting Jason Wendt of 10 counts of felony failure to pay child support. Wendt argues that the circuit court made two errors during the trial, both relating to Wendt's alleged inability to provide support. First, Wendt argues that the court

erred by refusing to submit to the jury the statutory affirmative defense of inability to provide support. Second, Wendt argues that the court relieved the State of its burden to prove intent by instructing the jury that this defense was not at issue. We reject these arguments and, accordingly, we affirm the judgment.

Background

¶2 Beginning in March 2008, Wendt had a court-ordered child support obligation of $51 per week plus an additional $9 per week to be paid toward arrears. Wendt was sometimes employed at least part-time and sometimes made payments toward this support obligation; at other times Wendt made no payments.

¶3 In September 2014, the State charged Wendt with 11 counts of felony failure to pay child support corresponding to 11 separate periods of 120 consecutive days or more in which Wendt made no payments. The applicable statute, WIS. STAT. § 948.22,[1] provides, in pertinent part:

> **(2)** Any person who intentionally fails for 120 or more consecutive days to provide … child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class I felony.

¶4 At the beginning of the trial, the jury was told that Wendt "has stated as a defense" that he was unable to provide support. After the close of evidence, however, the circuit court concluded that there was insufficient evidence to submit this defense to the jury. Thus, the court instructed the jury that "a defense of …

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. Because there have been no recent changes to the pertinent statutes, we refer to the current version of the statutes when discussing statutes applicable to Wendt.

inability to provide support … is not at issue in the case." The jury found Wendt guilty on 10 of the 11 counts.

¶5 We reference additional facts as needed below.

Discussion

A. Court's Refusal to Submit Affirmative Defense to Jury

¶6 As noted, Wendt first argues that the circuit court erred by refusing to submit to the jury the inability-to-provide-support defense. For the following reasons, we disagree.

¶7 "A defendant is not automatically entitled to a jury instruction on an offered defense." ***State v. Stoehr***, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986). "However, a defendant in a criminal case, when [the defendant makes a proper request], is entitled to have the jury consider any defense which is supported by the evidence." ***Id.*** The question is whether a reasonable construction of the evidence, viewed most favorably to the defendant, supports the alleged defense. ***State v. Coleman***, 206 Wis. 2d 199, 213, 556 N.W.2d 701 (1996). We review this question de novo. ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604.

¶8 The statutory affirmative defense at issue requires the defendant to prove "inability to provide ... support." WIS. STAT. § 948.22(6). There is no general definition of "inability" in the statute, but the statute *does* specify that the

defendant must show a "reasonable excuse" if claiming inability based on a lack of sufficient employment. *See* ***id.***[2]

¶9 In arguing that the evidence here supported submitting this defense to the jury, Wendt relies on two types of evidence: (1) evidence that Wendt received jail sentences after twice being found in contempt for failure to pay; and (2) evidence that Wendt suffered from a mental illness that impaired his ability to obtain and maintain employment. Wendt fails to persuade us that either type of evidence justified submitting the inability-to-provide-support defense to the jury.

¶10 As to the evidence of jail sentences, we acknowledge that "incarceration is relevant to a defense of inability to pay because, depending on the circumstances of incarceration, incarceration may prevent a person from being employed, and therefore may prevent a person from having earnings with which to pay child support." ***State v. Stutesman***, 221 Wis. 2d 178, 184, 585 N.W.2d 181 (Ct. App. 1998). Here, however, regardless of other circumstances, the jury learned that Wendt had Huber work privileges for the jail sentences. Wendt does not dispute the evidence of his Huber work privileges and, in fact, affirmatively cites to that evidence in his briefing. Further, Wendt points to no other evidence suggesting that the jail sentences prevented him from being employed. Thus, the

[2] WISCONSIN STAT. § 948.22(6) provides:

> Under this section ["Failure to support"], affirmative defenses include but are not limited to inability to provide child … support. A person may not demonstrate inability to provide child … support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets. A person who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

jail sentences did not justify submitting an inability-to-provide-support defense to the jury.

¶11 As to evidence of Wendt's mental illness, Wendt relies on the trial testimony of his mother and a clinical social worker. As we explain further below, we agree with the State that Wendt's reliance on this evidence is misplaced because Wendt fails to link his mental illness to any particular 120-day period of non-support that was charged.

¶12 Wendt's principal brief summarizes the mental illness evidence at trial as follows:

> As a clinical social worker with the Dunn County Department of Human Services, Douglas Kunick provided therapy to Mr. Wendt under the supervision of Wendt's treating psychiatrist. Kunick first met with Wendt in December of 2012, shortly after Wendt had completed a civil commitment for mental health treatment. In July of 2012, the county had detained and hospitalized Wendt and sought to civilly commit him for mental health treatment, a proceeding that was resolved with a settlement agreement consisting of a 90-day commitment.
>
> Kunick testified that Mr. Wendt, who was 36 at the time of trial, was being treated for bipolar affective disorder, a condition with which he was first diagnosed at age 16. He described the condition as involving phases of mania and depression. In the former, the person may be irritable, reactive, impulsive and even violent. In the latter, the person may become reclusive and have difficulty communicating with and relating to others. A person may be "stuck" in one phase "for an extended period of time." It is a life-long illness. Mr. Wendt was on mood stabilizing medications prescribed by the treating psychiatrist when he was seen by Kunick.
>
> At his first therapy session, Mr. Wendt was "fairly upbeat" and "positive minded," but six weeks later he had a flat affect, was "struggling financially, did not have a job." Wendt had applied for disability, which was subsequently denied. Kunick testified that the manic phase "can lead to spending sprees" and the depressive phase can lead to job

> loss because the person is "not leaving the house, not motivated to do anything …."
>
> [Wendt's mother] testified that … [w]hen [Wendt] was a child, they repeatedly took him to psychiatrists and counselors because they could tell "he was very different than the other kids." He was hospitalized at age 16 due to attempts at self-harm. As an adult, he has had trouble finding and keeping a job…. Even when on prescribed medication, Ms. Wendt doubted whether her son had the ability to work full time. [She testified:]
>
> > ... He is on medication now, and he's come a long way. But it's not stabilized completely, and I don't think he could hold a full-time job. I think he could hold a part time job, but you would have to have a certain kind, and it would have to have some flexibility in it, and the owner or the manager would have to understand a lot of restraints which, you know … you're not going to find, but certainly not full-time.
>
> She thought he could maybe work two to ten hours a week. Ms. Wendt testified that her son has no income and has been living with she and her husband.

(Record citations omitted.)

¶13 Notably, Wendt does *not* argue that this evidence specifically linked his mental illness to any particular 120-day period of non-support that was charged. Thus, we do not address the evidence as to any particular 120-day period. Rather, Wendt makes the more general argument that the mental illness evidence "provides a reasonable explanation of why Mr. Wendt made payments on some occasions but made no payments during other periods." Similarly, Wendt makes the general argument that "a reasonable construction of the evidence is that Mr. Wendt made payments when he was able to but failed to make payments when his mental illness impaired his capacity to obtain and maintain employment." In making these arguments, Wendt implicitly acknowledges

undisputed evidence that, despite his mental illness, Wendt sometimes worked at least part-time and was able to make some support payments.

¶14 Accepting Wendt's own summary of the evidence as accurate, Wendt still fails to persuade us that the evidence was sufficient to submit the inability-to-provide-support defense to the jury. We agree instead with the State that Wendt needed to do more to link his mental illness to one or more of the particular 120-day periods of non-support that were charged. Given the undisputed evidence that Wendt sometimes worked at least part-time and sometimes made payments, anything less would have invited the jury to speculate as to whether Wendt's mental illness was the cause of Wendt's failure to provide support for the particular charged periods. *Cf.* ***State v. Sarnowski***, 2005 WI App 48, ¶¶2, 6, 280 Wis. 2d 243, 694 N.W.2d 498 (defense for non-support between October 1, 2000, and May 1, 2001, based on testimony that defendant lost his construction job in September 2000 and was unable to find subsequent employment during a slow construction period).

B. Instruction That Inability-to-Provide-Support Defense Was Not at Issue

¶15 Having rejected Wendt's argument that the circuit court erred by refusing to submit the inability-to-provide-support defense to the jury, we turn to Wendt's challenge to a related, case-specific instruction given during closing arguments. We reject this challenge as well.

¶16 As noted in the background section, the jury was initially informed that Wendt had "stated" an inability-to-provide-support defense. However, after evidence was presented, the circuit court concluded that the evidence was insufficient to support that defense. During closing arguments, when argument touched on inability-to-provide-support evidence, the circuit court paused the

argument and instructed the jury that "a defense of … inability to provide support … is not at issue in the case." More fully, the court instructed the jury as follows:

> Members of the jury, … when I gave you the opening instructions, I indicated that there may be an issue in the case about what we have referred to as a defense of Mr. Wendt's inability to provide support. I have determined that that is not at issue in the case, and that is why the instruction that I gave you here this morning and the instruction that you should follow here does not address that in any fashion.

¶17 Wendt argues that, even if his inability-to-provide-support evidence was insufficient to support getting an inability-to-provide-support-defense instruction, the evidence was nonetheless relevant for purposes of deciding whether the State proved Wendt's intent to fail to pay support. It follows, according to Wendt, that the instruction quoted above erroneously told the jury to disregard this relevant intent evidence. Wendt further asserts: "[T]here is a reasonable likelihood that the court's instruction that his inability to provide support was not an issue in the case relieved the state of its burden to prove that Mr. Wendt intentionally failed to provide support." For the reasons that follow, we are not persuaded.

¶18 Wendt's argument fails to come to grips with the fact that intent for purposes of his failure-to-support crime has two alternatives. The State needs to prove that the defendant "*either* has a purpose to do the thing or cause the result specified, *or is aware that his or her conduct is practically certain to cause that result*." *See* WIS. STAT. § 939.23(3) and (4) (emphasis added). Even assuming without deciding that directing a jury to ignore evidence of inability to provide support relieves the State of the burden to prove the "purpose" alternative of the intent element, directing a jury to ignore evidence of inability to provide support plainly does *not* relieve the State of the burden to prove the "aware[ness]"

alternative. That is, under the second alternative, a person may be *both* unable to pay *and* aware that his or her conduct—for example, the failure to work because of an inability to work—is certain to result in nonpayment of required support. This difference matters.

¶19 As the State's argument reveals, in ***Davis v. Barber***, 853 F.2d 1418 (7th Cir. 1988), the Seventh Circuit Court of Appeals relied on these different ways of showing intent to address a challenge to a similar statutory scheme from Indiana. ***Davis*** states:

> Under Indiana law, a person acts "intentionally" when it is his conscious objective to engage in the conduct. Ind.Code. § 35-41-2-2(a). However, a person acts "knowingly" when he is aware of a high probability that he is engaging in the prohibited conduct. Ind.Code § 35-41-2-2(b). Thus, under the nonsupport statute, which permits conviction for *either* an intentional *or* a knowing act, the prosecution has the burden of proving beyond a reasonable doubt that the defendant *either* had the conscious objective *or* was aware of a high probability that he was failing to provide support. A person may be aware of a high probability that he is failing to provide support and still be unable to provide that support.

Id. at 1424. Based on this reasoning, the ***Davis*** court concluded that "inability to provide support does not negate the mental element of 'knowingly,' which is sufficient in Indiana to hold a person criminally responsible for failure to provide support to a dependent child." ***Id.***

¶20 Indiana's two alternative definitions of intent parallel Wisconsin's two alternatives. In particular, Indiana's "knowing" alternative, as discussed in ***Davis***, is similar to Wisconsin's "aware[ness]"-of-conduct-practically-certain-to-cause-a-result alternative to proving intent. Thus, applying the reasoning of ***Davis***, directing a jury to ignore evidence of inability to provide support does not relieve

the State of the burden to prove the intent element, when one considers the second alternative for proving intent under Wisconsin law. *See* ***id.***; *see also* ***State v. Duprey***, 149 Wis. 2d 655, 659-61, 439 N.W.2d 837 (Ct. App. 1989) (relying on ***Davis*** to conclude that it was permissible for inability to provide support to be an affirmative defense that the defendant must prove).

¶21 Despite references to ***Davis*** in both the State's briefing and commentary to the pattern jury instructions that Wendt cites, Wendt does not address ***Davis***. Nor does Wendt otherwise deal with the second alternative for proving intent under Wisconsin law. We reject Wendt's argument on that basis.

¶22 We note that Wendt relies on ***State v. Schleusner***, 154 Wis. 2d 821, 454 N.W.2d 51 (Ct. App. 1990). We acknowledge that ***Schleusner*** sometimes appears to treat intent and inability to provide support as opposite sides of the same coin. However, in ***Schleusner*** we were addressing the statutory scheme prior to when the current definitions of "intent" and "intentionally" came into effect. Under the prior definitions, there was no alternative for proving intent based on a person's awareness that his or her conduct was practically certain to cause a proscribed result. *See* ***id.*** at 823-25 (referring to the 1985-86 version of the statutes); WIS. STAT. § 939.23(3) and (4) (1985-86) (containing definitions of "intent" and "intentionally" that lack this alternative). Thus, ***Schleusner*** does nothing to undercut our reliance on ***Davis***.

¶23 In sum, we understand Wendt's only argument on this topic to depend on the proposition that directing a jury to ignore inability to provide support relieves the State of the burden to prove "intent" as defined in the current statutory scheme, and we reject that argument because Wendt fails to persuade us that this proposition is true.

¶24 Although it is not necessary, we make the further observation that the challenged instruction appears to be justified as an appropriate direction that the jury disregard relevant but unduly confusing evidence.

¶25 As we explained in our discussion addressing why it was proper for the circuit court to decline to give the inability-to-provide-support-defense instruction, Wendt failed to link the inability-to-provide-support evidence to any one or more of the particular relevant time periods. In this circumstance, the circuit court would have been justified in excluding the evidence based on WIS. STAT. § 904.03, which authorizes the exclusion of relevant evidence on grounds of confusion. *See* § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of … confusion of the issues ….") . Because the inability evidence was weak at best and would not have clearly undercut intent as to any particular charged time period, that evidence had the potential to confuse the jury. Of course, the circuit court here did *not* in fact exclude the evidence, but a circuit court may direct a jury to disregard evidence that the court has concluded should not have been admitted. Here, accepting Wendt's interpretation of the jury instruction as a directive to disregard inability evidence, it is fair to say that the circuit court did nothing more than direct the jury to disregard evidence with limited relevance, the probative value of which was offset by the potential for confusion.

Conclusion

¶26 For the reasons stated, we affirm the judgment against Wendt.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).