DA 16-0444

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 154N

CITY OF GREAT FALLS,

Plaintiff and Appellee,

v.

TAYLOR ROSE WAGNER,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. CDC 16-17
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Ryan Aikin, Assistant Attorney General, Helena, Montana

Sara Sexe, Great Falls City Attorney, Cassidy R. Blomgren, Deputy Prosecutor, Great Falls, Montana

Submitted on Briefs: April 25, 2018

Decided: June 19, 2018

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Taylor Rose Wagner appeals the Order by the Eighth Judicial District Court, Cascade County, affirming the City of Great Falls Municipal Court's conviction for endangering the welfare of a child under § 45-5-622(1), MCA. We address whether the State presented sufficient evidence to support a conviction of child endangerment. We affirm.

¶3 On June 26, 2015, around 6:30 a.m., Officer Adam Olson of the Great Falls Police Department responded to a call regarding a heavily intoxicated female with a child. At Wagner's apartment, Olson testified he observed Wagner was upset and emotional, her breath smelled of alcohol, her speech was slurred, her shirt had blood on it below the collar, she had what appeared to be fresh scratches on her neck, she did not have a phone, and she was the only adult present. Olson believed Wagner may have been assaulted, but, when asked, she responded nothing had happened. Wagner admitted to drinking the night before, but stated she had arranged for a babysitter to stay the night and was unsure where the babysitter was. James Rusterholz, the on-call Department of Family Services caseworker, arrived and called Wagner's grandmother, Patricia Guardipee, to come take the child while Wagner sobered up. Olson cited Wagner for endangering the welfare of her child in

violation of § 45-5-622, MCA, based on the allegation that she violated a duty of care by being heavily intoxicated while supervising her child. Wagner pled not guilty.

¶4 On January 13, 2016, the Municipal Court held a bench trial. Wagner testified that she arranged for Paula Valenzuela to babysit her two-year-old son before going out for drinks with friends. Wagner testified that after she returned home and went to her room to sleep, Valenzuela left the apartment. Wagner testified that shortly after she laid down, she heard Olson's knock at her backdoor.

¶5 The Municipal Court found Wagner guilty. While acknowledging Wagner's testimony that she had a babysitter, the Municipal Court reasoned, "if she's going to have a babysitter, she's gotta have one that's gonna be there." On appeal to the District Court, the District Court affirmed, determining Wagner failed to provide general supervision while she was intoxicated and alone with her child.

¶6 When district courts serve as intermediate appellate courts for cases tried in municipal courts, we review its appellate decision under the applicable standard of review as if originally appealed to this Court. *City of Helena v. Grove*, 2017 MT 111, ¶ 4, 387 Mont. 378, 394 P.3d 189; *see also* § 3-6-110, MCA. We review de novo whether sufficient evidence supports a conviction in the light most favorable to the prosecution. *State v. Torres*, 2013 MT 101, ¶ 16, 369 Mont. 516, 299 P.3d 804; *State v. Trujillo*, 2008 MT 101, ¶ 8, 342 Mont. 319, 180 P.3d 1153. Sufficient evidence exists to support a conviction if any rational trier of fact could have found the essential elements of the offense beyond a

reasonable doubt. *State v. Bekemans*, 2013 MT 11, ¶ 20, 368 Mont. 235, 293 P.3d 843. We affirm.

¶7 Wagner does not dispute that she was incapable of caring for her child in her intoxicated state. Wagner's defense is that she had arranged for Valenzuela, a sober adult, to care for her child while she was intoxicated, and she could not foresee that Valenzuela would leave the home while Wagner was still intoxicated. Because Valenzuela left without Wagner's knowledge, therefore, Wagner contends that she did not knowingly endanger her child's welfare.

¶8 The evidence, as Wagner presented it to the Municipal Court, supported a viable defense to the charge of child endangerment. However, that is not the issue before us on appeal. The determinative issue here is not whether Wagner presented evidence that supported her acquittal; it is whether sufficient evidence was presented, viewed in the light most favorable to the prosecution, to support a finding that Wagner knowingly endangered her child's welfare by violating a duty of care. If any rational trier of fact could have made such a finding beyond a reasonable doubt, we must affirm the conviction. Although Wagner testified that she had a babysitter who was supposed to be there until she sobered up, there is no dispute that when Olson arrived at 6:30 a.m., Wagner was highly intoxicated and alone with her child. Those facts alone support a finding that Wagner knowingly endangered her child's welfare. That Wagner presented evidence that would have supported a contrary finding is not the point. "We will defer to a [trial] court's resolution of conflicting evidence if the evidence sufficiently supports a factual finding, even where

evidence in the record supports a contrary finding." *Vintage Constr., Inc. v. Feighner*, 2017 MT 109, ¶ 15, 387 Mont. 354, 394 P.3d 179.

¶9 Although Wagner characterizes her testimony that Valenzuela was to remain at the home until she sobered up, and left without her knowledge, as "undisputed evidence," the Municipal Court was not bound to accept Wagner's testimony at face value. The Municipal Court expressed skepticism at Wagner's version of events, noting that although Wagner testified that Valenzuela left unexpectedly and was supposedly locked out of the house,

> [Valenzuela] never does call until she calls grandma to get back in the house after it's all over.
>
> I think there's a little more . . . that we're not hearing here that's part of the story. If [Valenzuela is] out getting cigarettes, why wasn't she right back? And if she was right back, why didn't she stay there and pound on the door? And if she did, did [Wagner] listen, hear her? Did the baby hear her? No, I think there's more to it.

As the fact finder, it was the Municipal Court's prerogative to choose which evidence to credit. "It remains the function of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony." *State v. Hudson*, 2005 MT 142, ¶ 22, 327 Mont. 286, 114 P.3d 210 (internal citations omitted).

¶10 The State presented sufficient evidence to support Wagner's conviction of child endangerment. We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶11 Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ JIM RICE
/S/ BETH BAKER

Justice Ingrid Gustafson, dissenting.

¶12 I dissent from the majority's affirmation of Wagner's conviction for endangering the welfare of a child under § 45-5-622(1), MCA. I believe the Municipal Court and District Court did not apply the correct result-based definition of "knowingly."

¶13 On June 26, 2015, the City of Great Falls charged Wagner with Endangering the Welfare of a Child in violation of § 45-5-622, MCA. Wagner pled not guilty. On January 13, 2016, the Municipal Court held a non-jury trial and, after hearing the following testimony, found Wagner guilty.

¶14 Officer Adam Olson of the Great Falls Police Department testified that dispatch received a call "in regards to a heavily intoxicated female who had a child around." At 6:30 a.m., Olson first spoke to Wagner through her back door, and she asked him to come to the front door. Olson observed Wagner was the only adult in the apartment with her son, she was upset, her shirt had blood on it below the collar, and she had what appeared to be fresh scratches on her neck. Olson believed Wagner may have been assaulted, but when asked, she responded nothing had happened. At trial, Wagner testified she suffers

from eczema that causes her to "always itch," and often leads to bad outbreaks during the summer that cause her to bleed. Olson testified Wagner admitted to drinking the night before, but stated she had arranged a babysitter to stay the night, and was unsure where the babysitter was. Olson believed Wagner was highly intoxicated because of her actions, slurred speech, and the smell of alcohol on her breath.[1]

¶15 While at Wagner's apartment, Olson observed a two-year-old playing on the floor of the living room then the kitchen. He also observed an open can of Sparks, a malt beverage, sitting on the living room floor, but did not investigate whether it was empty. Wagner later testified the can was empty. Olson also testified Wagner repeatedly told him she wanted him to leave so she could go back to bed. When Olson asked Wagner if she had a phone to call for help in an emergency, she replied she did not. Based on a "totality of the circumstances," Olson charged Wagner with violating a duty of care to her child because there was no sober adult present to care for the two-year-old and he was concerned Wagner could not respond to an emergency should one arise. Olson called Department of Family Services and stayed until caseworker James Rusterholz arrived.

¶16 Rusterholz responded to the call that morning, and testified Wagner sat down on the couch, started talking, and was cooperative when he arrived. Wagner told Rusterholz she had gone out drinking the night before, but arranged to have a babysitter stay the night.

[1] Olson's citation notes he administered a portable breath test with results indicating Wagner's blood alcohol content was .229; however, the State did not admit the results into evidence. On appeal, the State conceded that the Municipal Court erred in considering the portable breath test results, and the District Court concluded its use was harmless error.

Rusterholz testified he called Wagner's grandmother, Patricia Guardipee, to take the child while Wagner sobered up. Rusterholz followed up with Wagner and the babysitter later that day, and confirmed Wagner had arranged for the babysitter to stay the night. Rusterholz observed the child was not injured, the apartment was appropriate, and the child appeared to be cared for other than the fact that Wagner was intoxicated and the only adult present. Rusterholz also testified that he has not received any substantiated claims against Wagner.

¶17 Wagner testified that on June 25, 2015, she arranged for Paula Valenzuela to babysit her two-year-old son before going out for drinks with friends. Valenzuela, who is the boy's aunt, lived with Wagner and her son at the time, and had previously watched the boy. When Wagner returned home early the next morning, her son was asleep, and she laid down to try and sleep, too. After Wagner went to her room to sleep, Valenzuela left the apartment unbeknownst to Wagner. Wagner heard a knock at her back door around 6:30 a.m., at which time her son also woke up.

¶18 Guardipee testified Wagner is a good mother who is young, does not neglect her children, and does not put her children in harm's way. Guardipee explained Wagner suffers from asthma, and Guardipee tries to make sure someone is always around Wagner to get help if she needs it. She testified Wagner does not go out to drink often, and she often watches Wagner's children or makes sure Wagner has a babysitter. Guardipee corroborated Wagner's testimony that Valenzuela lived with Wagner at the time of the incident, she is the child's aunt, and she is a good babysitter. Guardipee also testified after

Olson and Rusterholz left, she returned to Wagner's apartment to let Valenzuela in the locked door. At trial, Wagner speculated Valenzuela got locked out of the apartment after getting cigarettes, and did not return to the apartment while the police were present because Valenzuela had outstanding warrants. Valenzuela did not testify at trial.

¶19 Before pronouncing judgment, the Municipal Court remarked: "what would have happened had Ms. Wagner had a[n] asthma attack, and uh, was unconscious, uh, while she was drunk? Nobody would have gotten in there. That child would have been left alone." The Municipal Court ruled:

> I find that she did endanger and knowingly endanger the child's welfare by violating a duty of care, protection and support under 45-5-622. She knowingly did this by – um – getting intoxicated, she had the babysitter, but if she's gonna have a babysitter she gotta have one that's gonna be there.
>
> Now you could say well she couldn't foresee that, well she said babysitter had warrants. Alright. We didn't even get into that. So babysitter's got warrants, and babysitter – she's – fine enough to leave her with the two year old. Umm. I've got questions about that. And then she never does call until she does call grandma to get back in the house after it's all over. I think there's a little more than what – that – not hearing here that's part of the story.
>
> If she's out getting cigarettes, why wasn't she right back? And if she was right back, then why didn't she stay there and pound on the door? And if she did, Taylor listen – hear her? Did the baby hear her? Nah, I think there's more to it.

The Municipal Court imposed a 180-day sentence with all suspended, subject to probationary conditions including alcohol monitoring, and fines and costs.

¶20 On appeal, the District Court affirmed the Municipal Court's conviction, concluding the Municipal Court had sufficient evidence to find Wagner guilty. The District Court determined, "She violated her duty of care to the child when she was highly intoxicated

and functioning as the child's sole caretaker. That she had a babysitter earlier in the evening does not negate the other evidence showing that for a period of time (no matter how short) there was no sober adult present to supervise and care for the child."

¶21 Wagner argues the State failed to prove the essential element of "knowingly" beyond a reasonable doubt when the undisputed evidence shows Wagner was asleep with no idea her babysitter left her alone in an intoxicated state with her two-year-old son. Wagner maintains the child endangerment offense requires the State to prove a result-based offense, not a conduct-based offense, and that both the Municipal and District Courts applied the wrong conduct-based definition of "knowingly" to the wrong conduct of her getting intoxicated. *See State v. Azure*, 2005 MT 328, ¶¶ 20-22, 329 Mont. 536, 125 P.3d 1116. Wagner argues the issue is not whether for a period of time no sober adult was present to supervise and care for her child, as the State asserts. Rather, the issue is whether Wagner knowingly created that situation by engaging in conduct with a high probability there would be no sober adult present; or alternatively, whether Wagner had sufficient time to realize the babysitter had left her alone and she failed to take action to avoid being the child's sole caregiver while intoxicated. Thus, the State had the burden to prove beyond a reasonable doubt Wagner knowingly put herself in a situation where she endangered her child's welfare by being the only adult present to supervise her child while she was intoxicated. Wagner contends the State presented no evidence that the babysitter was not a reliable caregiver, that Wagner could reasonably foresee the live-in babysitter would leave before she was sober enough to care for her child, or that Wagner had sufficient time

to realize the babysitter left and that she failed to act to avoid being the sole caregiver of her child while intoxicated.

¶22 Wagner argues the undisputed facts in the record show: Wagner arranged for Valenzuela to supervise her child all night at her apartment before she went out drinking with friends; Valenzuela lived with Wagner at the time of the incident; Valenzuela is the child's aunt and previously supervised the child without problems; Valenzuela was present with the child when Wagner left home, and was present when Wagner returned home highly intoxicated; Wagner went to bed with her child, who was sleeping through the night; Wagner was in her room trying to sleep when Valenzuela left the apartment; Wagner was not aware that Valenzuela was locked out of the apartment until after the incident; and Wagner was only made aware that Valenzuela left the apartment when the police woke her by knocking on her back door.

¶23 The State counters that all the witnesses agreed that, at the time Olson discovered Wagner alone with her child, she was too intoxicated to provide supervision. The State asserts: Wagner's testimony is inconsistent regarding whether she was awake or asleep at the time the babysitter left; she was aware Valenzuela left "probably about a half hour" before Olson arrived; and she was also aware she was alone caring for the child for a period of time while intoxicated. The State contends the courts were free to disregard Wagner's account of events and conclude there was "more to" the story than Wagner presented. The State asserts the Municipal Court was entitled to infer Wagner acted knowingly based on her actions and the totality of the circumstances because she was discovered alone with her

child while highly intoxicated. Section 45-2-103(3), MCA (providing knowledge may be inferred from the acts of the accused and the facts and circumstances connected with the offense); *State v. Korell*, 213 Mont. 316, 323, 690 P.2d 992, 996 (1984) (whether the defendant acted with the requisite mental state is a question for the factfinder); *City of Helena v. Strobel*, 2017 MT 55, ¶ 8, 387 Mont. 17, 390 P.3d 921 (it is the function of the trier of fact to determine the credibility of witnesses and the weight to be given to their testimony).

¶24 We review questions on the sufficiency of the evidence in a criminal case to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Gunderson*, 2010 MT 166, ¶ 58, 357 Mont. 142, 237 P.3d 74. "[T]o justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rationale (i.e. reasonable) conclusion." *State v. Fitzpatrick*, 163 Mont. 220, 225, 516 P.2d 605, 609 (1973). A new trial cannot be granted where the evidence adduced at the first trial proves insufficient to support a conviction. *State v. Warren*, 192 Mont. 436, 442, 628 P.2d 292, 296 (1981) (citing *State v. Johnson*, 177 Mont. 182, 188, 580 P.2d 1387, 1390 (1978)). Once a reviewing court has found the evidence legally insufficient, the proper remedy is a judgment of acquittal. *Warren*, 192 Mont. at 442, 628 P.2d at 296 (citing *Burks v. United States*, 437 U.S. 1, 17–18, 98 S. Ct. 2141, 2150–51 (1978) (holding the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution

forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence that it failed to muster in the first proceeding).

¶25 A parent, guardian, or other person supervising a child endangers the welfare of a child if he or she "knowingly endangers the child's welfare by violating a duty of care, protection, or support." Section 45-5-622(1), MCA. Whether a parent violated "the duty of care, protection, and support, the following, in addition to all other admissible evidence, is admissible: cruel treatment; abuse; infliction of unnecessary and cruel punishment; abandonment; neglect; lack of proper medical care, clothing, shelter, and food; and evidence of past bodily injury." Section 45-5-622(6), MCA.

¶26 Notwithstanding what evidence is admissible, the State must provide evidence the person acted knowingly, and the correct definition of "knowingly" must then be applied to the appropriate conduct. Section 45-2-103(1), MCA; *see also State v. Johnston*, 2010 MT 152, ¶¶ 9-16, 357 Mont. 46, 237 P.3d 70 (trial court erred by giving the conduct-based jury instruction for "knowingly" for the offense of obstructing a police officer, § 45-7-302(1), MCA, which requires the State to prove that a defendant "knowingly obstructs, impairs, or hinders . . . the performance of a governmental function" because the conduct alone does not satisfy the elements of the offense); *see also Azure*, ¶¶ 20-21 (result-based jury instruction is proper for the offense of criminal endangerment, § 45-5-207(1), MCA, which requires the State to prove that a defendant "knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another").

¶27 In *State v. Lambert*, 280 Mont. 231, 234, 929 P.2d 846, 848 (1996), we addressed whether the District Court applied an incorrect mental-state element to the offense of criminal endangerment in its denial of the defendant's motion for acquittal after the State presented its case-in-chief. While intoxicated, Lambert turned into oncoming traffic, causing a head-on collision with the victims. Lambert claimed that the State had not proven beyond a reasonable doubt that Lambert had acted "knowingly," the requisite mental state for the offense of criminal endangerment. *Lambert*, 280 Mont. at 232-34, 929 P.2d at 847-48. In denying Lambert's motion for acquittal, the district court determined that "knowingly" could be established by evidence showing that a defendant was aware of his conduct, and decided the State had presented sufficient evidence on this issue for the case to go to the jury. *Lambert*, 280 Mont. at 234, 929 P.2d at 847-48. However, we determined the criminal endangerment statute emphasizes result over conduct:

> The portion of the statute that we are reviewing here does not particularize the conduct that, if engaged in, results in the commission of the offense. Rather, a person may engage in a wide variety of conduct and still commit the offense of criminal endangerment, provided that the conduct creates a substantial risk of death or serious bodily harm. *It is the avoidance of this singular result,* the risk of death or serious harm, *that the law attempts to maintain.*
>
> There being no particularized conduct which gives rise to criminal endangerment, applying to that offense's mental element the definition of "knowingly" that an accused need only be aware of his conduct is incorrect. *It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment; were it otherwise, where culpability could lie for mere appreciation of one's conduct . . . some very unfair results could follow.*

Lambert, 280 Mont. at 236, 929 P.2d at 849 (emphasis added).

¶28 Here, the offense of endangering the welfare of a child requires conduct—violating a duty of care, protection, and support—that causes a result—endangering the welfare of the child. Section 45-5-622(1), MCA. The offense of endangering the welfare of a child is a result-based offense that requires the State to prove whether the person knowingly created a situation by engaging in conduct with a high probability that the result would occur. Section 45-2-101(35); *accord* Mont. Crim. Jury Instr. 2-104.

¶29 On appeal, the State ignores Wagner's argument that the result-based definition of "knowingly" applies to endangering the welfare of a child, and mischaracterizes Wagner's testimony regarding her awareness of, and thus her culpability for, the babysitter's departure that left her the child's sole caregiver. In its closing, the State stated: "The issue is whether Ms. Wagner [while highly intoxicated] is a suitable caretaker for a two-year-old child." This interpretation of the child endangerment statute wholly removes the essential element of a result-based-knowingly mental state. The State went on to state: "[M]uch of the testimony about [Wagner] having a babysitter—the babysitter leaving is really not relevant to the fact of the matter that at the time the officer got there she was violating a duty of care. . . ." This demonstrates that the State believes it had no obligation to put on evidence of whether Wagner knew Valenzuela would leave her alone while intoxicated, or was aware Valenzuela left and failed to ensure her duty of care to her son was met. *See* § 45-2-101(35), MCA; *accord* Mont. Crim. Jury Instr. 2-104 (providing the person knowingly created a situation by engaging in conduct with a high probability that the result would occur). Had the State presented evidence regarding Valenzuela's activities after

Wagner returned home, or whether Wagner could foresee Valenzuela would leave Wagner alone before she sobered up, perhaps the Municipal Court and District Court would not have been left to speculate about the rest of the story.

¶30 Moreover, neither the Municipal Court nor the District Court applied the correct result-based definition of "knowingly," although they speculated as to a myriad of things that could potentially occur if something went amiss while a child was in the care of an intoxicated person. Both courts precipitously launched into discussions of which definition of "neglect" is appropriate based on what evidence is admissible under § 45-5-622(6), MCA, without ever addressing which definition of "knowingly" is appropriate, and therefore, misapprehended the State's burden. This is evident in the District Court disregarding Wagner's argument that the result-based "knowingly" definition applies to child endangerment. The District Court, reviewing the evidence in a light most favorable to the prosecution, found sufficient evidence that Wagner violated her duty of care when she was intoxicated and the child's sole caregiver, which is a conduct-based "knowingly" standard: "That she had a babysitter earlier in the evening does not negate the other evidence showing that for a period of time (no matter how short) there was no sober adult present to supervise and care for the child." The Municipal Court found Wagner knowingly violated her duty of care by getting intoxicated and being the sole caregiver; which erroneously applied a conduct-based "knowingly" to her conduct of getting intoxicated. "The general effect of the court's misinterpretation . . . was to alter the State's burden of proving beyond a reasonable doubt the elements of the offense: to prove that a defendant

was aware of his conduct is one thing; to prove that he was aware of the high probability of the risks posed by his conduct is quite another. The particular effect of the court's interpretation is a violation of due process rights as provided by Article II, Section 17 of the Montana Constitution." *Lambert*, 280 Mont. at 237, 929 P.2d at 850.

¶31 As the State failed to present evidence regarding whether Wagner knowingly put herself in a situation where she endangered her child's welfare by being the only adult present to supervise her child while she was intoxicated, I would conclude there is insufficient support for a conviction and would reverse and remand for judgment of acquittal. *See Warren*, 192 Mont. at 442, 628 P.2d at 296.

/S/ INGRID GUSTAFSON

Justices Laurie McKinnon and Dirk Sandefur join in the dissenting Opinion of Justice Gustafson.

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR