COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2541-CR **Cir. Ct. No. 2009CF1490**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN A. RIKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK and EUGENE A. GASIORKIEWICZ, Judges. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. A jury found Sean Riker guilty of five counts of physical abuse of a child, three counts of first-degree recklessly endangering safety, two counts of causing mental harm to a child, and one count each of

strangulation and suffocation, misdemeanor battery, repeated sexual assault of a child, first-degree sexual assault of a child, possession of a firearm by a felon, and possession of a short-barreled rifle. All carried a repeater penalty enhancer. The court imposed consecutive sentences on the sixteen counts for a total sentence of 269 years.[1] Riker contends he merits resentencing because insufficient evidence supported the jury verdicts on the three counts of reckless endangerment, two of the five counts of physical abuse of a child, and the causing-mental-harm-to-a-child and sexual-assault counts. We disagree and affirm the judgment.

¶2 A jury's verdict may not be reversed for insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is for the jury to "decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." ***Id.*** at 503. Thus, within the bounds of reason, the jury may reject evidence and testimony suggestive of innocence. ***Id.*** Whether the evidence is sufficient to sustain the jury's verdict is a question of law. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

Reckless Endangerment

¶3 Riker was convicted of three counts of violating WIS. STAT. § 941.30(1) (2011-12),[2] first-degree recklessly endangering safety. The charges

[1] Judge Marik presided over Riker's trial; Judge Gasiorkiewicz sentenced him.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

were based on allegations that he threatened to kill his wife, Tayler, his eight-year-old stepdaughter, K.S., and his eleven-month-old son, held a sawed-off shotgun to their heads, and pulled the trigger. He contends the evidence was insufficient to convict him as the evidence showed that they knew the gun was not loaded.

¶4 To show that Riker violated the statute, the State had to prove: (1) that he endangered the safety of another human being (2) by criminally reckless conduct (3) that showed utter disregard for human life. *See* WIS JI-CRIMINAL 1345. "Criminally reckless conduct" means conduct that Riker was aware created an unreasonable and substantial risk of death or great bodily harm to another person. ***Id.*** "Utter disregard for human life" requires considering Riker's conduct, its dangerousness, the obviousness of the danger, and whether it showed any regard for life. ***Id.***

¶5 "[A]ny device designed as a weapon and capable of producing death or great bodily harm" is a dangerous weapon. WIS. STAT. § 939.22(10). A firearm, loaded or not, is a dangerous weapon. ***Id.*** A sawed-off shotgun is a firearm, even if inoperable. *See* ***State v. Rardon***, 185 Wis. 2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994). The statutory definition "does not require that to be dangerous the weapon must be capable of producing great bodily harm only when used in the manner for which it was intended." ***State v. Antes***, 74 Wis. 2d 317, 325, 246 N.W.2d 671 (1976).

¶6 There was testimony that the gun was not loaded when police recovered it and that Tayler and the children thought it was unloaded. The police did not recover the gun, however, until the new tenant found it hidden behind the furnace and the family came by its belief because that is what Riker told them. That the gun did not discharge the first and second time he pulled the trigger did

not prove it was not loaded. There was evidence that Tayler pled with Riker to "stop it" because "there might be a bullet right at the end and trying to come out and it might hit someone." Perhaps Riker knew for certain that the gun was not loaded but, as was his right, he did not testify.

¶7 There was other evidence that Riker's abusive eruptions against the family increased in severity and became nearly daily occurrences. The jury heard that he kicked and punched them, threw dishes at them, pushed the children down the stairs, grabbed them by the hair and banged their heads together, bashed their heads against doors and walls, and made them stand on one leg in a corner for hours. The jury reasonably could have concluded that this escalation of established abuse—saying he would kill them all, holding a gun to their heads, and pulling the trigger—posed an unreasonable and substantial risk of death or great bodily harm and evinced utter disregard for their lives. When we inquire into the sufficiency of the evidence, we must consider the totality of the evidence. ***State v. Smith***, 2012 WI 91, ¶36, 342 Wis. 2d 710, 817 N.W.2d 410. Viewing the evidence collectively and most favorably to the State and the conviction, we have no trouble affirming the jury finding.

Physical Abuse of a Child

¶8 Riker was charged with five counts of violating WIS. STAT. § 948.03(2)(b), on grounds that he intentionally caused bodily harm to a child. He challenges the sufficiency of the evidence as to one of the counts (the "lockout incident") against K.S. and one (the "hand-on-the-leg incident") against his nine-year-old stepdaughter, C.J. He contends the State failed to prove that he caused physical harm, pain, or injury. We disagree.

¶9 In the lockout incident, the family was about to leave for an errand and K.S. ran back into the house for something. On their return, Riker grew angry because the door was locked with the house key inside. Blaming K.S., he grabbed her by the hair and "slammed" her head against the door. The incident went unreported so there was no record of any injuries.

¶10 Riker's argument presumes that to satisfy the bodily harm element, the harm to the victim must be severe enough to require medical treatment. The statute contains no such requirement. Bodily harm is defined as "physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4); WIS JI-CRIMINAL 2109.

¶11 The jury heard that Riker worked out almost daily and is "very strong," that eight-year-old K.S. got a "big bump" on her head from him slamming her head against the door, and that, once inside the house, he "choked" her, "press[ing] down" so that she could "barely breathe." The jury was instructed to employ its common sense and life experience. *See* WIS JI-CRIMINAL 50. The evidence was sufficient for the jury to find that Riker caused K.S. bodily harm.

¶12 In the "hand-on-the-leg incident," C.J. was in the front passenger seat as Riker drove the car. C.J. told the forensic interviewer that Riker put his hand "right there" making her "upset." Riker argues that laying his hand on her or being "upset" is not "bodily harm." He also contends the State did not prove that the incident occurred during the charging period.

¶13 K.S. and Tayler also testified about the incident. K.S. testified that "we were driving on the highway" and Riker "was putting his hand on [C.J.'s] leg and like rubbing against it, and she told him not to and he got really mad and smacked—um, hit her, punched her in the face and told her to get in the back."

Tayler testified that the family was traveling from their Racine county home to Milwaukee, and Riker, who was driving, "tried to caress the inner part of [C.J.'s] left leg" as she sat in the front passenger seat. C.J. "told him to stop and tried to push his hand off of her leg," but Riker "just pushed it back on her leg," and when "she continued to try and push it away and say no he began punching her leg."

¶14 The jury reasonably could have inferred from the testimony that nine-year-old C.J. felt physical pain when a "really mad" Riker "smacked" or "hit" or "punched" her in the face and on her leg. That satisfies the element of bodily harm. It was shown that the trip to Milwaukee occurred during the relevant time period. This challenge fails.

Causing Mental Harm to a Child

¶15 Riker next asserts that the evidence was insufficient to convict him for causing mental harm to K.S. and C.J.. He was arrested within a week of moving to Wisconsin. The clinical and forensic psychologist who examined the girls acknowledged that their significant anxiety, signs of depression, and risk for post-traumatic stress disorder stemmed from before they moved here.

¶16 Tayler testified that Riker's outbursts increased to "every single day" in Wisconsin and "were getting more extreme." In the short time before he was arrested, he engaged in the lockout, hand-on-the-leg, and trigger-pulling incidents, and sexually assaulted both girls. He destroyed K.S.'s notebooks and school supplies and told her she now would be homeschooled. The jury reasonably could have rejected the notion that Riker was merely exercising legitimate parental authority and instead accepted the evidence that K.S. loved school, perhaps because it was her only zone of safety. Riker also punched C.J. in the stomach for rebuffing his sexual advances, causing her to involuntarily urinate on the futon she

was lying on, then made her suck up the urine with her mouth. The evidence allowed the jury to conclude that Riker caused the girls additional mental harm in Wisconsin.

Repeated Sexual Assault of C.J.

¶17 The jury was instructed that the sexual contact involved vaginal contact. C.J. testified that Riker made her sleep in the same bed as him, both of them naked, Riker against C.J.'s back. He also made her shower with him. He would put his "butt" and "private part" in her face rub her buttocks and "front private" with a bar of soap. Riker contends these acts did not constitute sexual assault because in bed he did not touch her vagina and in the shower he touched her vaginal area with a bar of soap only to "ensur[e] the proper hygiene of his daughter," not for his sexual gratification. *See* WIS. STAT. § 948.01(5)(a)1.

¶18 The State concedes that Riker's repeated penis-to-body contact with C.J. in bed does not satisfy the touching element of the charged crime. But C.J. also testified that Riker often walked around the house naked and would "wave" his "private part" in her face and tell her to "put it in [her] mouth." That sexualized conduct provided sufficient evidence from which the jury reasonably could have found that even if he used a bar of soap to touch her vagina in the shower, he did it for purposes of his sexual gratification.

Repeated Sexual Assault of K.S.

¶19 The jury found Riker guilty of first-degree sexual assault of K.S. He argues that the State did not present sufficient definitive evidence that any sexual assault occurred in Wisconsin. We disagree.

¶20 K.S. told the forensic interviewer that Riker would "put[] his finger in my front private part and wiggle[] his finger around" when they lived in "[t]he one [the house] we live in right now and the one in [Utah]." When asked, "How are your clothes when that happened at the house you live in now?" K.S. responded, "I probably when it was summer or something I guess. I like to wear pants only." At trial she testified that the assaults at the Wisconsin house occurred "probably … not every day. It was probably like a pattern…. Like first he did it and then not the other day. Probably the other day, he probably did it at night or morning … and any time he felt like it."

¶21 We reject Riker's contention that K.S.'s reference to summer, as the family arrived in Wisconsin in November, and her use of "probably" present a fatal lack of particularity as to time and place. "Young children cannot be held to an adult's ability to comprehend and recall dates and other specifics." ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988). Because child sexual abuse "often encompasses a period of time and a pattern of conduct … [t]he vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony …." ***Id.*** at 254. The jury could have believed K.S.'s testimony about the sexual assault in Wisconsin without believing that it occurred in the summer. *See* ***State v. Balistreri***, 106 Wis. 2d 741, 762, 317 N.W.2d 493 (1982).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.