

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-0775-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-325

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMY L. BEIER,

DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Tammy L. Beier appeals from the judgment of conviction entered against her. The issue on appeal is whether there was sufficient evidence to support the jury's verdict. Because we conclude that there was sufficient evidence to support the verdict, we affirm.

¶2 Beier was convicted of five counts of failing to act to prevent bodily harm, six counts of intentionally contributing to the neglect of a child, and one count of intentional causation of bodily harm. The charges all stemmed from injuries suffered by six of her children. Beier appeals from all but the single count of intentional causation of bodily harm.

¶3 Beier is the mother of seven children. At the relevant time, the first six children ranged in age from fourteen years to about twenty months. The seventh child was born after the incidents alleged took place. The two oldest children are Emily and Adam. The father of Beier's youngest two children is James Hau.

¶4 The testimony at trial was extensive and, at times, contradictory. There was evidence supporting the following facts. Hau and Beier dated for about two years, during which time they lived with each other off and on and would stay at each other's residences. After the birth of her sixth child, Beier moved from Oshkosh to Fond du Lac in 1999 to be closer to Hau. Hau often babysat for the children while Beier was working.

¶5 During the course of their relationship, Beier reported to the police on more than one occasion that Hau had injured her children. In one instance, Beier reported that Hau had thrown Emily and Adam to the ground, and had hit Emily on her bare buttocks with a vacuum cleaner cord. In another instance, Beier reported that Hau had choked Emily until she passed out. Beier also reported that Hau twice pushed Adam off of his bicycle.

¶6 In October 1999, Hau was interviewed by a police detective and signed a written statement. In the statement, Hau stated that he had taken care of the children almost every weekend that Beier worked during the past six months.

Hau further stated that he had hurt the children by slapping them in the face, kicking them in the legs and bottom while wearing boots, that he had banged Adam's head into a wall, and that he had put his knee into Adam's chest. He also admitted to grabbing all the children by the arm and possibly leaving marks on them. His trial testimony contradicted some of his written statement.

¶7 The children also testified that Hau had hurt them. One of the children testified that Hau had hit him in the stomach with his fist, and had burned his brother with a cigarette lighter. This child also testified that he had told his mother about these incidents when she returned from work. Another child testified that Hau would push them and sometimes hit them with a metal stick. She testified that sometimes she would tell her mother and sometimes her mother told her to act nice so that Hau would not hurt her. She also testified that the children had a secret code to use when their mother called up to let her know whether Hau was being mean to them.

¶8 Adam testified that Hau hit and kicked him and his siblings on their shins and bottoms, and that Hau had hit and kicked him more than fifty times. He also testified, among other things, that Hau had pushed his head against a wall, and had burned his finger with a cigarette lighter. Adam testified that Hau was responsible for the marks that were on him when he was removed from Beier's home.

¶9 Emily testified that Hau hit them with his hand and that he had hit her on her face a couple of times. She also testified that she told her mother a couple of times that Hau had hurt her, and that her mother had been present a couple of times when Hau hit her.

¶10 At trial, Hau denied that he had ever hit, slapped, or kicked the children. He denied being responsible for any of the marks found on the children when they were removed from their home. Beier also testified that she had no concerns about Hau being abusive to her children. She testified that any scratches they had on them were from each other, particularly from Adam and Emily fighting with each other. Others testified that Adam and Emily fought quite a bit.

¶11 There was also testimony about who was responsible for the children's care when Beier was at work. Emily, who was fourteen at the time the children were removed from the home, testified that she was primarily responsible for her siblings' care, but that Hau would watch them at times when Beier was at work. Beier testified that Adam would have his own babysitter because of his behavior problems but that Emily would watch the other children. Beier testified that she did not like to leave Emily and Adam alone together because they fought. There was testimony about one instance when Adam was arrested at 3 o'clock in the morning on a night when Hau was supposed to be watching him at his own apartment.

¶12 Beier also testified about another instance when she left her children to be watched by her mother when she went to work in the morning. The date was October 3, 1999. When she returned close to midnight, her mother was not there, she could smell fuel in the house, and the children were injured and covered with soot. Beier testified that the children told her that Beier's mother left them alone. They then built a fire in the garage using drywall in order to cook some frozen brats. The fire got out of hand and Emily and Adam got into a fight. The next day, October 4, Beier met with a professional counselor to discuss what had happened, and attempted to meet with a social worker.

¶13 On October 8, 1999, a police officer and two social workers went to Beier's house. She did not answer the telephone or knocks on the door. Eventually, she came outside to go to her van and the police officer spoke with her. She was apparently getting ready to go to work. She testified that Hau was coming over to get some of the children. One of the social workers testified that Hau arrived while she was in the home.

¶14 When they entered the house, the house itself was very dark, with curtains and blankets over the windows. The children were all in one bedroom. All of the children except for the youngest had marks, scars, or bruises on their faces and arms. The children were all photographed and removed from the home.

¶15 A doctor subsequently examined each of the children. They all had bruises on various parts of their body, and many of them had scratches and bite marks. Emily had a large cut on her forehead with swelling, and a swollen and bruised spot on her arm. Her ability to move her arm was reduced because of the swelling and bruises. Two of the children had sparse patches of hair, as if the hair had been pulled out.

¶16 There was also testimony at trial that Beier locked the children in a closet, and at times handcuffed Emily and Adam together, sometimes by their hands and sometimes by their legs. Hau testified that Beier had told him she would leave the children in a bedroom with a cooler when she went to work. Beier denied that she ever locked the children in a closet or handcuffed them together. Handcuffs were found in the house.

¶17 The complaint charged Beier with five counts of failing to act to prevent bodily harm between September 1 and October 4, 1999. She was also charged with intentionally contributing to the neglect of her six children between

October 2 and 4, 1999. The complaint erroneously stated that the police went to Beier's house on October 4, 1999. They in fact went to her house on October 8, 1999.

¶18 Beier argues on appeal that the evidence was insufficient to establish that she was guilty of the charges within the charged timeframe. Specifically, she asserts that the State did not establish that Hau injured the children and that she failed to take action between September 1 and October 4, 1999.

¶19 When considering a challenge to the sufficiency of the evidence, this court must affirm "if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt.... [T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). If more than one inference can be drawn, the inference which supports the jury's verdict must be followed unless the evidence was incredible as a matter of law. *Id.* at 377.

[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶20 Beier was charged with violating WIS. STAT. § 948.03(4)(b) (1999-2000),¹ which provides:

A person responsible for the child's welfare is guilty of a Class D felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

Beier argues that since the State did not prove that Hau injured the children between September 1 and October 4, 1999, her conviction on the first five counts cannot be upheld. We disagree for two reasons.

¶21 First, we conclude that there was evidence presented at trial from which a jury could reasonably have found that Hau injured the children during that time period. Second, however, the statute does not require that the harm have occurred during the time period charged. The gravamen of the offense lies in the failure to take preventative action during the time period when the defendant has knowledge that the person has caused bodily harm to the child.

¶22 The evidence established that Beier knew that Hau had abused the children. She had, in fact, at least twice reported such incidents to the police. Further, the evidence also established that she did not take action to prevent Hau from babysitting for the children or otherwise having access to them. There was sufficient evidence presented at trial from which a reasonable jury could find that

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Beier was guilty of failing to prevent her children from being exposed to the risk of bodily harm.²

¶23 Beier also argues that the evidence was insufficient to establish that she intentionally contributed to the neglect of her children during the time period of October 2 to October 4, 1999. WIS. STAT. § 948.21(1).³ Again, Beier argues that the evidence was insufficient to establish that she contributed to the neglect of her children either through her own action or her failure to take action on or about October 2–4, 1999. And again, we disagree.

¶24 First, the evidence established that the incident with the fire in the garage occurred on October 3, 1999. This evidence established that Beier failed to provide the necessary care for her children that day and seriously endangered their physical safety by failing to do so.

¶25 Second, although the complaint alleged the date incorrectly, the evidence concerning the day the police came to Beier’s house established that Beier was leaving for work, leaving the children alone in one room or in Hau’s

² We also note that the statute does not require that the person harming the children be another adult. There was practically undisputed testimony that Beier’s children frequently injured each other, that Beier knew about it and did not prevent it.

³ WISCONSIN STAT. § 948.21, entitled “Neglecting a child,” provides:

(1) Any person who is responsible for a child’s welfare who, through his or her actions or failure to take action, intentionally contributes to the neglect of the child is guilty of a Class A misdemeanor or, if death is a consequence, a Class C felony.

(2) Under sub. (1), a person responsible for the child’s welfare contributes to the neglect of the child although the child does not actually become neglected if the natural and probable consequences of the person’s actions or failure to take action would be to cause the child to become neglected.

care. When the time of the commission of an offense is not a material element of the offense charged, it need not be alleged precisely. *State v. Copening*, 103 Wis. 2d 564, 574, 309 N.W.2d 850 (Ct. App. 1981). Although the State should have alleged the time period as October 2 to October 8, 1999, all of the facts concerning the October 8 incident were alleged in the complaint, and proved at trial. Time was not a material element of the offense, nor has Beier established that she was in any way prejudiced by the fact that the date was incorrectly stated in the complaint. Therefore, for the reasons stated, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

