COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2702-CR **Cir. Ct. No. 2008CF18**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARRIE L. METZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. A jury found Carrie L. Metz guilty of criminal neglect of a child, resulting in death, in violation of WIS. STAT. § 948.21(1) (2009-

10).[1] We disagree with Metz that the prosecution was duplicitous, that she was denied a unanimous verdict, that her lawyer was ineffective or that the trial court erred in denying her postconviction motion without first holding a ***Machner***[2] hearing. We affirm the judgment and order.

¶2 Metz's two-and-a-half-year-old son, Benjamin, died of methadone toxicity after apparently consuming some from an open bottle Metz left on the kitchen counter. Metz was preparing her dose of methadone when a child for whom she was babysitting began crying in another room. She set the open bottle of the liquid on the counter and left the room for "less than 60 seconds." On her return, she saw that Benjamin evidently had pulled out a drawer to use as a step, as she had seen him do in the past, and had reached the bottle. The jury heard conflicting testimony about Benjamin's position vis-à-vis the bottle, and about whether he had his hand on it and whether some of the contents had spilled on the counter or the floor. Metz testified that she tried to determine if he had consumed any methadone by making him spit in her hand and swabbing his mouth with a baby wipe. She was satisfied that he had not because she saw no evidence of methadone's distinctive pink color. Still, she remained "very watchful" of him for a while, then put him down for a nap. About two hours later, she found him bluish and unresponsive. Extensive resuscitation efforts proved futile.

¶3 The one-count complaint charged Metz with criminal child neglect through her "failure to act." At trial, the State argued that the jury could find that Metz failed to act in either of two ways: by failing to protect Benjamin from

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

gaining access to the methadone, or by failing to seek medical attention as soon as she was aware of even the possibility that he had consumed methadone. The jury found Metz guilty.

¶4 Metz moved to vacate the judgment and sentence on grounds that the duplicitous charge and prosecution deprived her of sufficient notice[3] of the allegedly criminal conduct and of a unanimous verdict, and that her trial attorney's failure to object to the duplicity constituted ineffective assistance of counsel. After oral argument, the court denied the motion from the bench.

¶5 Here on appeal, Metz again raises a duplicity argument, asserting that the duplicitous prosecution violated her right to a unanimous jury verdict.[4] Duplicity is the joining of two or more separate offenses in a single count. ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983). Our duplicity analysis entails the following:

> The first step is to determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. If more than one crime is presented to the jury, unanimity is required as to each. If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.

Id. at 592 (internal citation omitted).

[3] Metz again raised the notice issue on appeal but abandoned it in her reply brief.

[4] Metz also complains that the trial court failed to give a unanimity instruction. Metz did not object at the instruction conference, however, and thus has waived that issue. *See* ***State v. McDowell***, 2003 WI App 168, ¶73, 266 Wis. 2d 599, 669 N.W.2d 204.

¶6 In contrast to her postconviction motion, Metz concedes on appeal that the criminal complaint and information were not duplicitous "because they each charged that the crime was Metz's *failure to act*." Rather, she claims, it was the prosecution that was duplicitous because it was based on two alternative theories of conduct, one an act—leaving the methadone within Benjamin's reach—and the other a failure to act—not seeking medical attention when there was reason to believe he may have ingested some of it.

¶7 Metz's argument fails on the facts and on the law. The prosecutor did not draw some allegedly impermissible distinction between acting and failing to act. To the contrary, he plainly told the jury in his opening statement and in his closing and rebuttal arguments that the State's evidence would establish Metz's two *failures* to act—specifically, her failure to protect Benjamin from the methadone and her failure to seek medical care for him when she realized he might have ingested the drug. We fail to see how the prosecutor's arguments differ materially from the charging documents Metz agrees were not duplicitous.

¶8 More importantly, the statute under which Metz was charged provides that "[a]ny 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 D felony if death is a consequence of the neglect. WIS. STAT. § 948.21(1)(d). Thus, whether leaving the methadone accessible to Benjamin is framed as an affirmative act or as a failure to take protective action, the statute expressly contemplates that neglect can take either form.

¶9 If Metz's objection simply is that the prosecutor presented alternatives—whether cast as acts or failures to act—from which the jury could choose, that also fails. When a statute establishes different modes or means by

which an offense may be committed, and the alternate modes of commission are not so dissimilar in concept or moral equivalency as to implicate fundamental fairness, unanimity is not required. ***State v. Derango***, 2000 WI 89, ¶25, 236 Wis. 2d 721, 613 N.W.2d 833.

¶10 Here, Metz testified that less than a minute elapsed between her leaving the uncapped bottle of liquid methadone on the counter and her realizing that a possibility existed that Benjamin had ingested some of it. She also testified that she decided it was unnecessary to seek medical assistance at that point or at any time before putting him down for a nap. Failing to protect Benjamin from accessing the methadone and failing to summon help when he may have ingested it were two alternate but conceptually similar means of committing child neglect.

¶11 Thus, the State presented evidence of "one continuous, unlawful event, committed by the same person during a short period of time relating to one continuous transaction." ***State v. Briggs***, 214 Wis. 2d 281, 290, 571 N.W.2d 881 (Ct. App. 1997). It was within the State's discretion to charge this as one count. ***Lomagro***, 113 Wis. 2d at 587. Although the prosecutor introduced evidence of multiple acts that separately made up the offense, because those acts were conceptually similar, the jurors did not have to unanimously agree as to which specific act Metz committed in order to find her guilty. *See* ***id.*** at 592. Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged. ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979). It is not required with respect to the alternative means or ways in which the crime can be committed. ***Id.***

¶12 Finally, Metz contends that the unanimity issue was further clouded because the jury may have been confused about which of her two affirmative

defenses, accident and mistake, applied to which act of neglect. We concur with the State that this argument is but a repackaged version of her claim that the jury must unanimously agree on the form of the neglect. We are satisfied that the evidence showed a single continuous offense of criminal child neglect with death as a result. We address her claim no further.

¶13 Metz next asserts she was denied effective assistance of counsel when her lawyer failed to object to the duplicitous proof, and failed to request a curative instruction regarding the need for unanimity on the particular act. To prevail on a claim that trial counsel rendered ineffective assistance, the defendant must show that the representation was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***Thiel***, 264 Wis. 2d 571, ¶21. This court will uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** Whether counsel's performance was constitutionally ineffective is a question of law, which we review de novo. ***Id.***

¶14 Trial counsel explained at the postconviction motion hearing that he did not object to the alleged duplicity because he could "think of no reason" why he would have wanted to expose her to two counts when he "view[ed] this as one act, not two or three." The trial court agreed, and found that the prosecution was not duplicitous and that separating the acts into two counts "would have been a high-risk strategy."

¶15 Those findings are not clearly erroneous. Trial counsel could have insisted that the single-count complaint or information be amended to a two-count

document to conform to the proof. We conclude, however, that it was a reasonable strategy not to expose Metz to the real risk of two convictions.

¶16 Metz next argues that the court erroneously exercised its discretion in denying the ***Machner*** hearing she requested. At the postconviction motion hearing, the trial court heard oral arguments and denied the motion after simply giving defense counsel the opportunity to make an unsworn oral statement.

¶17 The court concluded, and we agree, that the prosecution was not duplicitous. As such, the record did not conclusively demonstrate that Metz was entitled to relief. Accordingly, it was within the court's discretion to deny the postconviction motion without a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

By the Court.—Judgment and order affirmed.

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