COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

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

No. 94-2975-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOEL N. NITKA,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

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

PER CURIAM. Joel N. Nitka appeals from a judgment of conviction for physical abuse of a child, contrary to § 948.03(2)(b) and (5), STATS. He contends that the evidence was insufficient to establish that his conduct was not privileged as reasonable discipline and that § 948.03(2)(b) is unconstitutional. We conclude that the evidence was sufficient and that Nitka waived his right to challenge the constitutionality of the statute. We affirm the judgment.

When Nitka returned home from work on July 26, 1993, he found his son Corey, age five, and his younger son throwing chestnuts at passing cars. He yelled at the boys to stop and proceeded up the stairs to his residence. When the boys did not stop, Nitka sent the other neighborhood boys home and told Corey to go inside for a spanking. Nitka then struck Corey on the buttocks three to five times with an army cloth webbed belt, which Nitka had looped so the metal buckles would not make contact. The blows missed and struck Corey on his right thigh where extensive bruises appeared that evening. The next evening an investigating police officer took photos of the bruises. Corey was then taken to the hospital for examination.

Nitka argues that his conduct toward Corey was reasonable discipline and that the State failed to prove that his conduct was not privileged. A defendant is not guilty of child abuse if he or she uses that amount of force that a reasonable person would believe is necessary to discipline the child. WIS J I—CRIMINAL 950. "Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of his acts. The standard is what an ordinary, prudent, and reasonably intelligent person would have believed in the position of the defendant ...." ***Id.***

Our review of the sufficiency of the evidence is to determine whether 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. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We must accept the reasonable inferences drawn from the evidence by the jury. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990).

The jury heard Corey's testimony that his father struck him with the belt. The jury saw the color photographs of the red and purple bruises on Corey's thigh. The examining physician testified that the bruises were twenty-four to forty-eight hours old when he saw them. The State's expert testified that Corey had been struck at least four times. He also indicated that the thigh and upper buttocks is a fatty area of the body and that it takes more force to cause a bruise there than on any other part of the body. It was his opinion that it took "significant force" to cause the injuries he saw on the pictures of Corey. This

evidence was sufficient to support the jury's conclusion that Nitka had used excessive force in administering his punishment.

Nitka specifically argues that the expert's testimony was based on information which the expert characterized as inaccurate or incomplete. This claim is not true. The expert's opinion was based on the color photographs taken by the investigating officer and the written report of the examining physician. Although the expert remarked that he was somewhat limited by the fact that photographs often do not depict nuances of color, he never suggested that he had inadequate information on which to base an opinion. The challenges Nitka mounts about the expert not examining Corey's thigh area to determine whether it was lean or fatty merely goes to the weight the jury may assign to the testimony. The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony. *See* ***State v. Wachsmuth,*** 166 Wis.2d 1014, 1023, 480 N.W.2d 842, 846 (Ct. App. 1992).

The same is true with respect to Nitka's claim that the social workers' and police officer's testimony was unduly prejudicial because it cast doubt on Nitka's credibility. The social workers testified that after the incident they had conversations with Nitka where he stated his mistake was in leaving bruises and that he had a "short fuse" and was trying to control it. The investigating officer testified about his conversation with Nitka about discipline philosophy. He indicated that it was Nitka's understanding that "if you spare the rod, you're spoiling the child." Nitka claims that these interviews were remote in time and circumstances to this incident. The circumstances of the interviews go to the weight of the evidence.

Nitka's claim that this testimony was unduly prejudicial to his credibility is without merit. Nitka testified that he thought it was appropriate to spank his child as a form of discipline, particularly if the child did not listen to instructions to stop undesirable behavior. The testimony of the social workers and the investigating officer does not suggest that Nitka cannot use such form of discipline. Rather, the testimony bears on the amount of force Nitka used. That was a contested issue and it was permissible to permit testimony which impeached Nitka's claim that he intended to administer a "light spanking."

Nitka further argues that there can be no finding that his conduct was unreasonable because his testimony and that of his wife and son did not establish any pattern or prior occurrence of unreasonable discipline. However, prior occurrences are not relevant to this incident. We look only at the evidence supporting the verdict. We conclude that the evidence, particularly the photographs, support the conviction.

Nitka's final argument is that when the child abuse standard in § 948.03(2)(b), STATS., was changed from "cruel maltreatment" to "intentional causation of bodily harm," the legislature abrogated a parent's fundamental liberty to direct the upbringing of a child. This constitutional challenge was not raised in the trial court. We deem the issue waived. *See* ***State v. Skamfer***, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). Although waiver is a rule of judicial administration, ***Waukesha County v. Pewaukee Marina, Inc.***, 187 Wis.2d 18, 22, 522 N.W.2d 536, 538 (Ct. App. 1994), we decline to address the waived issue in this case. The uniqueness of the issue requires full development of the issue and record, including possible expert testimony, at the trial court level before appellate review.

By the Court.—Judgment affirmed.

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