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DISTRICT IV

April 16, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP499-CR

State of Wisconsin v. Lynne A. Nelson (L.C. # 2011CF241)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Lynne Nelson appeals from a bindover order on a charge of intentional physical abuse of a child by causing bodily harm.¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We conclude that Nelson's assertion of a teacher's privilege under WIS. STAT.

¹ Nelson's petition for leave to appeal the order was granted. *See* WIS. STAT. RULE 809.50 (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

§ 118.31(3)(h) is an affirmative defense at trial and is not to be considered at the preliminary hearing. We affirm the order and remand for further proceedings.

Nelson was substitute teaching a third-grade class when she instructed the students to sit in a line on the floor. Some boys in the class did not comply with Nelson's instruction and she put her hand on the back of the neck of a nine-year-old boy to push him toward the seated position. The boy testified at the preliminary hearing that the way Nelson touched his neck hurt him and left a mark. At the conclusion of the preliminary hearing, Nelson asserted that the evidence failed to rebut the applicable privilege under WIS. STAT. § 118.31(3)(h).² Following bindover, Nelson moved to dismiss the action and argued that only one conclusion could be drawn from the evidence at the preliminary hearing—that grabbing the child's neck and directing the child to a seated position was not anything other than incidental, minor, and reasonable contact. Nelson's motion to dismiss was denied.

Nelson does not dispute that the State presented adequate evidence at the preliminary hearing to establish probable cause with respect to the elements of the charged crime—intentional physical abuse of a child by causing bodily harm. She asserts her conduct was lawful or privileged under WIS. STAT. § 118.31(3)(h). Nelson's request that the statute be applied to determine as a matter of law that she is not criminally responsible for her conduct presents questions of law involving the interpretation and application of statutes to the facts; our review is de novo. See *State v. Keyes*, 2008 WI 54, ¶18, 309 Wis. 2d 516, 750 N.W.2d 30.

² WISCONSIN STAT. § 118.31(3)(h) prohibits a teacher from subjecting a student to corporal punishment but allows “[u]sing incidental, minor or reasonable physical contact designed to maintain order and control.”

WISCONSIN STAT. § 939.45 provides that the fact that a defendant's conduct is privileged is a defense to the prosecution for any crime based on that conduct. Section 939.45(6) permits the defense of privilege to be asserted when the defendant's conduct "is privileged by the statutory or common law of this state." Thus, the privilege recognized in WIS. STAT. § 118.31(3)(h) is applied in criminal proceedings under § 939.45(6), and applied as a defense.³

A preliminary hearing is not for the purpose of testing a defense to the charges but only determines whether there is probable cause to believe the defendant committed a felony. *State v. Dunn*, 121 Wis. 2d 389, 394, 359 N.W.2d 151 (1984). It is not a full evidentiary trial on the issue of guilt or innocence. *Id.* at 396. The State is not required to present all the incriminating evidence it may possess.

A defense of privilege is a matter to be asserted, proven, and defended against at trial. See *State v. McGee*, 2005 WI App 97, ¶12, 281 Wis. 2d 756, 698 N.W.2d 850 (affirming denial of motion to dismiss after the preliminary hearing because the disobedience exception in WIS. STAT. § 118.15(5)(b)2 "is an affirmative defense to the charge here and thus should be presented to the fact-finder during the trial for resolution"). The motion to dismiss was properly denied.

Upon the foregoing reasons,

³ The State observes that a comment by the Criminal Jury Instructions Committee could be read to suggest that WIS. STAT. § 118.31 does not provide an independent basis for a defense of privilege when the reasonable discipline privilege for a person responsible for the child's welfare under WIS. STAT. § 939.45(5) applies. See WIS JI—CRIMINAL 950 (2006), cmt. 3. The State disagrees with the comment's suggestion and adopts the position that § 118.31, "by its plain language, provides a limited right for 'an official, employee or agent of a school board' to use corporal punishment." In light of the State's position, we need not consider the meaning of the Committee's comment.

IT IS ORDERED that the order is summarily affirmed and the cause remanded pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals