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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1445**

State of Minnesota,
Respondent,

vs.

Rosalee Ann Grace Pickett,
Appellant.

**Filed June 24, 2019
Reversed
Reilly, Judge**

Wadena County District Court
File No. 80-CR-17-431

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Michelle D. Mahlen, Assistant County Attorney,
Wadena, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

Because there is insufficient evidence to support appellant's child-endangerment
conviction, we reverse.

FACTS

Appellant Rosalee Pickett is a single mother of four children. In the summer of 2017, three of her children lived with her in Sebeka: fourteen-year-old AB, eleven-year-old CD, and two-year-old EF.¹ On June 14, 2017, AB, CD, and EF were home without an adult present after Pickett left for her 6:00 p.m. to 11:30 p.m. shift at work. Because the Sebeka Police Department received an anonymous tip that there was a child being held captive in a bedroom at Pickett's home, a Sebeka police officer conducted a welfare check around 9:45 p.m. Pickett's two older sons, AB and CD, let the officer in and gave him a tour. Behind a locked door, the officer found EF lying on the floor wrapped in a blanket. EF's room did not contain a bed or any other furniture. The officer saw clutter, dirty diapers on the floor, and feces smeared on the walls. There was a broken fan, with a cord, within EF's reach. The officer called for assistance and a county sheriff's officer arrived at the home.

AB and CD told the officers that they were babysitting EF because Pickett was at work. Pickett directed AB and CD to put EF to bed around 9:30 p.m. and to lock the door to EF's bedroom once they put him to bed. According to AB and CD, it was a normal occurrence to leave EF in his room overnight and let him out of his room the next morning.

Later that night, the officers interviewed Pickett. During the recorded interview, Pickett stated that EF has a sensory-development issue, which results in his continually

¹ The children were assigned alias initials in the complaint filed with the district court. The district court used these initials to identify the children during trial, and we therefore continue to use the initials to identify the children in this appeal.

taking off his diapers and rubbing his feces on things, including his toys, his bed, and the walls. Pickett had been dealing with the issue for almost a year, including having professionals come to her home to work with her and EF. Normally, Pickett's 25-year-old nephew babysat the children, but because he was unavailable Pickett left EF in the care of AB and CD that night. Pickett stated that it was normal to lock EF in his room during bedtime and nap times because the stairs outside his bedroom door were dangerous.

The state charged Pickett with three counts of child neglect in violation of Minn. Stat. § 609.378, subd. 1(a)(1) (2016), regarding AB, CD, and EF, and one count of child endangerment in violation of Minn. Stat. § 609.378, subd. 1(b) (2016), regarding EF. During the two-day jury trial, the responding officers, AB, CD, and Pickett testified. At the conclusion of the evidentiary portion of the trial, the district court granted Pickett's motion for a directed verdict on the two child neglect counts regarding AB and CD. The remaining two counts regarding EF were submitted to the jury. The jury found Pickett guilty of child endangerment and not guilty of child neglect.

Pickett appeals, arguing that the evidence is insufficient to support her child-endangerment conviction.

D E C I S I O N

I. Standard of Review

When reviewing the sufficiency of the evidence, this court undertakes “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We must assume that the

fact-finder “believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We will “not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

II. The evidence presented at trial was insufficient to support Pickett’s conviction for child endangerment.

Under Minn. Stat. § 609.378, subd. 1(b), the state was required to prove that Pickett intentionally or recklessly caused or permitted EF to be placed in a situation likely to substantially harm his physical, mental or emotional health or cause his death. “The word ‘likely,’ as it is used in the statutory definitions of child neglect and child endangerment, means ‘more likely than not.’” *State v. Tice*, 686 N.W.2d 351, 351-52 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). The child-endangerment statute requires “more than ordinary civil negligence” and “more than a simple deviation from the standard of care.” *Id.* at 355 (emphasis omitted).

a. Physical Harm

Because the standard jury instructions provide that “[t]here is no precise definition for the term ‘substantially harms the child’s physical, mental, or emotional health,’” Pickett argues that this court should look to the definition of “substantial bodily injury.”² See 10

² Generally, Minnesota Statutes define “substantial bodily harm” as “bodily injury which involves a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily members” Minn. Stat. § 609.02, subd. 7a (2018).

Minnesota Practice CRIMJIG 13.92 (2016). The state concedes that the definition could have been relevant to the jury at the time of trial, but argues that because the district court omitted the definition for “substantial physical harm” in its jury instructions, and no objection was made at trial, the definition is not relevant on review.³

We need not reach the argument regarding the relevance of the definition of “substantial bodily harm” because the facts presented by the state do not indicate that EF was either physically harmed or was likely to sustain substantial physical injury. This court has affirmed a district court’s dismissal of child-endangerment charges where the children were unlikely to sustain substantial physical injury. *Tice*, 686 N.W.2d at 355. In *Tice*, the children were left alone in a locked vehicle for a short amount of time while their parents were inside a store. *Id.* at 352. This court determined that the child-endangerment statute requires “more than a simple deviation from the standard of care” and that the conduct must be “more likely than not” to result in harm. *Id.* at 355. Consistent with *Tice*, here, the state did not present any evidence of actual physical harm to EF. Instead, the responding officer testified that EF did not display any sign of physical trauma.

Additionally, upon review of the record, the only conditions that could be considered potentially dangerous to EF’s physical health are the fan’s cord and the closed window on a “muggy” summer night.⁴ Though these items could conceivably cause physical harm, we conclude that it is not “likely” that substantial physical harm would

³ Pickett does not raise an argument regarding the jury instructions on appeal.

⁴ The state elicited testimony at trial that if the window had been open it would have been a safety hazard for EF.

result. *Cf. State v. Hatfield*, 627 N.W.2d 715, 720 (Minn. App. 2001), (affirming the sufficiency of the evidence of the child-endangerment conviction and determining that physical harm was likely to result where father stored anhydrous ammonia in an altered propane tank in his home, in the proximity of his children, and officers suffered from burning sensation in eyes and difficult breathing upon entering the home) *aff'd*, 639 N.W.2d 372 (Minn. 2002); *State v. Huffman*, No. A15-0917, 2016 WL 1724163, at *4 (Minn. App. May 2, 2016) (affirming conviction for child endangerment where appellant drove under the influence of controlled substances with child seated on floor of car with three stacked tires overhead). Accordingly, we determine that no reasonable jury could convict Pickett for child endangerment based upon actual or likely physical harm to EF.

b. Emotional and Mental Harm

Pickett argues that the state failed to meet its burden of proof because the state did not offer evidence that Pickett permitted EF to be placed in a situation that was more likely than not to cause substantial mental or emotional harm.

We must review the evidence presented in the light most favorable to the guilty verdict. Here, the state's evidence showed that EF was locked in a room from the outside from approximately 9:30 p.m. until responding officers arrived at approximately 9:45 p.m. Pickett relied on her two other children, AB and CD, to put EF to bed by locking him in his room. EF had no bed to sleep on, because Pickett had previously removed EF's bed from his room in order to clean feces from it, and there was no other furniture in his room. The evidence shows that EF was left alone long enough to defecate in his diaper, remove his diaper, smear the feces on the wall, and fall asleep on the floor. It was a normal

occurrence to lock EF in his room during nap times and bedtime hours because the stairs outside his bedroom were dangerous.

In *State v. Peterson*, this court determined that there was insufficient evidence to support a conviction for child endangerment. No. A06-1226, 2007 WL 4168266, at *3 (Minn. App. Nov. 27, 2007). In *Peterson*, the state presented evidence that the children's mother spent the night with two men in a room separated by only a plywood and fabric partition from the area where her children slept. *Id.* In the area in which the mother slept, there was a glass pipe, butane torch, and cotton balls on a coffee table. *Id.* The room was messy, and the children slept on a bean bag chair and bedding on the floor rather than beds. *Id.* This court determined:

As much as we might disapprove of appellant's sleeping arrangements or of the presence of what was apparently drug paraphernalia, there is no evidence that the children were actually exposed to any drug or sexual activity. . . . Placing one's children in this setting and having them sleep in makeshift quarters in a messy basement may be child neglect. However, even in the light most favorable to conviction . . . the record is not adequate to support a finding that the children were in a situation likely to cause substantial harm to their physical, mental, or emotional health.

Id. at *4. Although *Peterson* is unpublished and therefore not precedential, we find its reasoning persuasive. Like *Peterson*, here EF did not have a bed to sleep on and his room was messy. We might disapprove of EF's sleeping arrangements, but the record is not adequate to support a finding that EF was in a situation likely to cause substantial harm to his mental or emotional health.

Nor, on this record, can we link EF's feces-smearing behavior with Pickett's decision to sequester him in his room at bedtime. Instead, the record suggests that EF's behavior was an on-going issue; Pickett had to clean feces off the walls often. And Pickett had worked with a professional to address EF's sensory-development issues.

Though an expert is not required, expert testimony can be helpful to establish the "link" between the traumatic event and "the resultant emotional harm." *State v. Williams*, 451 N.W.2d 886, 882 (Minn. 1990). Here, the state offered no expert evidence regarding mental or emotional harm to EF. Instead, the responding officer testified that when she saw EF he was not displaying any signs of emotional trauma. Moreover, Pickett's decision to lock EF in his bedroom throughout the night while she is working to support her family is distinguishable from the conduct in other child endangerment cases considered "likely" to cause substantial mental or emotional harm. *See State v. Meredith*, No. A06-2234, 2008 WL 942616, at *6 (Minn. App. Apr. 8, 2008) (affirming child-endangerment conviction where appellant invaded his daughter's privacy by peering on her while she was in the bathroom, groping her, pulling her clothes off, and exposing himself to her on numerous occasions). Accordingly, we determine that, on this record, no reasonable jury could conclude that Pickett was guilty of child endangerment.

Reversed.