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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1061

State of Minnesota,
Respondent,

vs.

Cindy Kaye Adler,
Appellant.

Filed May 9, 2011
Affirmed
Randall, Judge[*]

Ramsey County District Court
File No. 62-CR-09-2965

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

Appellant challenges the jury verdict convicting her of two counts of depriving another of parental rights for taking her children away from their father for four months. Appellant raises additional issues in her pro se supplemental brief. We affirm.

FACTS

Appellant Cindy Kaye Adler and Rafael Espinosa have two children, M.A.E. (age 11) and R.E. (age 8). When their relationship ended several years ago, Adler had legal and physical custody of M.A.E. and R.E. But Espinosa was granted temporary legal custody in August 2005 and permanent sole legal and sole physical custody in January 2007. Adler was granted parenting time of every other weekend and one weekday.

On February 6, 2009, Adler picked up M.A.E. and R.E. for a scheduled weekend visit. She was to return the children to Espinosa and his wife, Rainbow, the following Monday. She did not return the children. Police tracked Adler four months later in Fargo, North Dakota, where she admitted she had taken the children because she believed their father and stepmother were abusing them. Police arrested Adler.

The State of Minnesota charged Adler with two counts of depriving Espinosa of his parental rights, under Minn. Stat. § 609.26, subd. 1(3) (2010). Adler pleaded not guilty and had a jury trial in Ramsey County District Court, raising the affirmative defense that she reasonably believed her action was necessary to protect her children from physical or sexual assault or substantial emotional harm, under Minn. Stat.

§ 609.26, subd. 2(1) (2010). The state had the burden of refuting Adler's affirmative defense beyond a reasonable doubt.

Adler testified at trial that she took her children from their father in violation of a court order because she was "afraid for their safety physically, emotionally, sexually, in every way possible." She testified that M.A.E. and R.E. had told her on several occasions that their father and stepmother had abused them and that she reported the abuse to the Midwest Children's Resource Center (MCRC) and the police. But neither MCRC nor the police could ever corroborate the allegations, because the children would either recant their statements or no physical evidence would be found. Adler believed the authorities were ignoring the abuse, prompting her to take the children from their father.

At trial, the Espinosas testified that the allegations of abuse were false. Rafael Espinosa testified that Adler took M.A.E. to the doctor a total of 72 times for various ailments in one year. A social worker involved in investigating all of the allegations and interviewing and physically examining the children testified that she believed the children had not been abused. Six police officers who had investigated the various allegations of abuse testified that they never found any evidence of abuse. Also, M.A.E. testified that her prior allegations of abuse were untrue and that she alleged abuse so her mother would love her. She testified that she had "been telling these lies for a very long time" but was not lying during her testimony.

The jury found Adler guilty of two counts of deprivation of parental rights. The imposition of Adler's sentence was stayed on the condition that she serve 90 days in jail and pay restitution in the amount of $7,500. Adler appeals the jury verdict. She claims

that the state did not meet its burden of proving beyond a reasonable doubt that she did not believe her actions were necessary to protect her children from harm. She also raises claims in her pro se supplemental brief.

D E C I S I O N

Insufficient Evidence

Adler was convicted of violating Minn. Stat. § 609.26, subd. 1(3), for failing to return M.A.E. and R.E. to Rafael Espinosa, in violation of a court order, with "an intent substantially to deprive [Espinosa] of rights to parenting time or custody." At her trial, Adler raised the affirmative defense that she "reasonably believed the action taken was necessary to protect the child[ren] from physical or sexual assault or substantial emotional harm." *Id.* at subd. 2(1). It was Adler's burden to "produce sufficient evidence to fairly make the statutory defense an issue in the case." *State v. Niska*, 514 N.W.2d 260, 265 (Minn. 1994). The burden then shifted to the state to disprove the affirmative defense beyond a reasonable doubt. *Id.* The jury found Adler guilty. Adler contends the state did not prove its case beyond a reasonable doubt.

In considering a claim of insufficient evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v.*

Pieschke, 295 N.W.2d 580, 584 (Minn. 1980). Weighing the credibility of witnesses is the exclusive function of the jury. *Id.* We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). In all, "[an appellant] bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

The jury heard five days of testimony from 23 witnesses, including Rafael Espinosa; Rainbow Espinosa; three officers who investigated the children's disappearance; six officers and a social worker who investigated the allegations of abuse; two people Adler asked for transportation outside the state in February 2009; a therapist who had treated Adler; Adler; Adler's mother; a pastor who reported the children's abuse; a doctor who had examined the children; a case screener in a child-protection unit; a child-protection intake worker; and M.A.E.

The jury heard the Espinosas testify that they had never abused M.A.E. or R.E. The jury heard that no police officer or social-services worker who had investigated the children's allegations of abuse had ever concluded that the children had been abused. The jury heard Rafael Espinosa testify that Adler took M.A.E. to the doctor 72 times in one year. The jury also heard M.A.E. testify that all of her allegations of abuse had been false. The jury found the testimony given by the state's witnesses credible, and, by inference, more credible than the testimony offered by Adler and her witnesses. *See Moore*, 438 N.W.2d at 108.

On appeal, Adler contends that "[a]ny reasonable person, faced with claims from a child of abuse, would report those claims to the authorities." It was the jury's job to determine whether Adler acted as a reasonable person would have acted when faced with these circumstances. The jury reached a conclusion supported by sufficient evidence in the record.

Adler's Pro Se Supplemental Brief

Adler's pro se supplemental brief lists claims not raised in her formal brief, including: (1) the children's step-grandfather and a journalist were improperly allowed in the courtroom during M.A.E.'s testimony; (2) the trial judge was biased; (3) the judge improperly excluded a psychiatric evaluation of Adler; (4) the judge improperly ordered a no-contact order between Adler and her children; (5) Adler was unaware she was waiving a right when she failed to request the judge's recusal; (6) her trial counsel was deficient for not informing the jury the judge may be biased; (7) some of Adler's evidence of the children's abuse was excluded; (8) some psychiatric reports were excluded; (9) some evidence that Adler was a fit parent was excluded; (10) the jury trial violated the Double Jeopardy Clause; (11) Ramsey County was an improper venue for trial; and (12) one of the jurors had read a newspaper during trial.

Adler's claims are not supported by any relevant law. Further, none of her claims include citations to the record, as required by Minn. R. Civ. App. P. 128.02, subd. 1(c). "Whenever these rules require that an act be done by a lawyer, the same duty is required of a party appearing pro se." Minn. R. Gen. Pract. 1.04. We decline to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512

N.W.2d 918, 919 n. 1 (Minn. App. 1994). An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

Adler alleges her trial judge was biased, because he realized in the middle of trial that a colleague of his is the step-grandfather of M.A.E. and R.E. The judge spoke on the record that he had no previous knowledge of his colleague's involvement in the case. He closely examined the situation and gave Adler's counsel time to discuss the matter with her. He stated on the record that he believed he could act impartially and was unbiased, and asked Adler many times whether she had any questions of him or any concerns with him continuing on as the judge in her jury trial. At that point, Adler explicitly waived her right to request the judge recuse himself, a right she thus continues to waive on appeal. *See Uselman v. Uselman*, 464 N.W.2d 130, 139 (Minn. 1990) (stating that party failing to remove judge before start of trial waives opportunity to do so without evidence of prejudice or "implied actual bias").

Adler also alleges that it was improper for the judge to have allowed the step-grandfather to remain in the courtroom while M.A.E. testified. In criminal sexual conduct cases in which the victim is under 18 years of age, the district court "may exclude the public from the courtroom during the victim's testimony . . . upon a showing that closure is necessary to protect a witness or ensure fairness in the trial." Minn. Stat. § 631.045 (2010). But whether closure is proper is ultimately a constitutional question. *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995); *see* U.S. Const. amend. VI

(providing that all criminal defendants have right to public trial); Minn. Const. art. I, § 6 (same). A defendant's right to a public trial "may give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984). "One recognized 'overriding interest' is safeguarding the physical and psychological well-being of a minor." *Fageroos*, 531 N.W.2d at 202. M.A.E. requested her step-grandfather's presence in the courtroom during her testimony. The judge's allowance of such was proper.

As for the evidentiary issues Adler raises, "[i]n the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). Aside from making broad statements about alleged evidentiary errors, Adler has not shown that the district court abused its discretion in excluding evidence.

Adler's other issues in her pro se supplemental brief are without merit. As such, we will not address them. *See Modern Recycling, Inc.*, 558 N.W.2d at 772.

Affirmed.