IN THE COURT OF APPEALS OF IOWA

No. 6-775 / 95-2080

STATE OF IOWA,

Plaintiff-Appellee,

vs.

NORMA JEAN AVRITT,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals from judgment and conviction entered, following a jury trial, for child endangerment in violation of Iowa Code sections 726.6(1)(b) and (2) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John Sarcone, County Attorney, and Karen A. Romano, Assistant County Attorney, for appellee.

Heard by Cady, P.J., and Huitink, J., and Schlegel, S.J.,* but decided en banc.

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

HUITINK, J.

Defendant Norma Jean Avritt appeals her conviction for child endangerment in violation of Iowa Code sections 726.6(1)(b) and 726.6(2) (1995). We affirm.

On April 6, 1995, Jerry and Sally Kampiyil left their six-month-old son, Jeremy, with Avritt for day care. Both testified that Jeremy was well when they left Avritt's home that morning. When the Kampiyils returned for Jeremy later that day he was unable to move his left arm and he cried when they touched his arm. An examination by a physician indicated Jeremy's left arm was broken. Avritt was questioned about the incident by the police and later charged with child endangerment.

Following a jury trial, Avritt was convicted of child endangerment in violation of Iowa Code sections 726.6(1)(b) and 726.6(2) (1995) and sentenced to an indeterminate ten-year term of imprisonment.

Avritt appeals challenging the sufficiency of the evidence supporting her conviction. Avritt also claims she was denied effective assistance of counsel.

I. Sufficiency of the Evidence.

A. Specific Intent. Avritt argues the State failed to prove she intended to injure Jeremy. Avritt cites testimony of two medical experts who both opined it was

impossible to determine whether Jeremy's injury was accidental or intentional. She also cites Dr. Randall Alexander's testimony that the history of these events was not sufficient to determine the cause of Jeremy's injury. He also testified Jeremy could have been injured in a fall against a padded object. Finally, Avritt cites her testimony that she did not intend to injure Jeremy and, if she did, she was not aware he was injured.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

Iowa Code Section 726.6(1)(b) (1995) provides:

> A person who is the parent, guardian, or person having custody or control over a child or a mentally or physically handicapped minor under the age of eighteen, commits child endangerment when the person does any of the following:
>
> . . . .
>
> b. By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty that results in physical injury, or that is intended to cause serious injury.
>
> . . . .

Avritt states that the child endangerment statute includes two alternatives: one, a general intent crime, and the other, a specific intent crime. Although the trial information and the marshaling instruction referred to the general intent alternative, the court instructed the jury that it had to find specific intent to cause serious injury to convict Avritt. Avritt argues that as a result of this instruction, specific intent became an essential element of this offense and, accordingly, became the law of the case. We need not address this contention because we conclude the evidence is sufficient to support a finding of specific intent to cause serious injury.

The record indicates Avritt was interviewed by police on the day after Jeremy was injured. Avritt stated Jeremy was fussy and that she grew frustrated with him. Avritt told the officers that she had laid Jeremy down hard in his crib on his back, grabbed his left arm firmly, and then flipped him over onto his stomach. Avritt admitted that she could have broken his arm when she put him down. In addition to these statements, we note five physicians testified regarding the substantial force required to cause Jeremy's injury. Three experts, including defense expert Dr. Alexander, opined that the injury was consistent with child abuse. We accordingly affirm on this issue.

B. Serious Injury. Avritt also contends the evidence was insufficient to establish the child sustained a "serious injury" as that term is defined. Iowa Code section 702.18 (1995) defines a serious injury as a "disabling mental illness, or bodily

injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Avritt correctly notes that not "all bone fractures . . . constitute a 'protracted loss or impairment.'" *See State v. Welton, 300 N.W.2d 157, 161 (Iowa 1981).* She argues that although the evidence demonstrated the child did not have the use of his arm for a period of eight weeks, there was no lay or expert opinion testimony indicating the degree of loss of function or impairment Jeremy experienced as a result of his injury. We disagree.

The term "protracted" as it is used in section 702.18 means to "draw out or lengthen in time or space." *Welton,* 300 N.W.2d at 160. In *Welton,* the court held that a fractured jaw which prevented the victim from chewing for six weeks was a protracted loss or impairment of the function of a bodily member or organ and was, therefore, a "serious injury." *Id.* The record indicates Jeremy's left arm was in a cast for eight weeks. Photos of Jeremy in his cast introduced at trial depict his immobility. These circumstances provide ample evidentiary support for the jury's determination that Jeremy's broken arm was a serious injury. We affirm on this issue.

II. Ineffective Assistance of Counsel.

Finally, Avritt argues her trial counsel was ineffective because he failed to object to a jury instruction stating a broken arm is a serious injury.[1] She contends this instruction was the equivalent of a directed verdict on this critical element of proof.

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow counsel an opportunity to respond. *See State v. Taylor,* 310 N.W.2d 174, 179 (Iowa 1981). We will, however, depart from this preference because the record is sufficient to dispose of Avritt's claim on direct appeal. *See State v. Schoelerman,* 315 N.W.2d 192, 195 (Iowa 1982).

Our ultimate concern in claims of ineffective assistance of counsel is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984):

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[1] Instruction 17 provides: An element of the crime charged is that the victim suffered a "serious injury." A broken arm is a serious injury.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

We may initially determine whether Avritt was prejudiced without addressing the duty element of the foregoing test. *State v. McKettrick,* 480 N.W.2d 52, 56 (Iowa 1992). Avritt bears the burden to show a reasonable probability that but for her trial attorney's alleged deficiencies, the outcome of her trial would have been different. *State v. Bumpus,* 459 N.W.2d 619, 627 (Iowa 1990).

The record includes abundant evidence indicating Jeremy sustained a serious injury. There is no reasonable probability that the jury would have found otherwise in the absence of the district court's instruction. Because Avritt has failed to establish the required prejudice component of the foregoing test, her ineffective assistance of counsel claim is without merit.

In reaching this conclusion, we have not ignored the Supreme Court's recent decision in *State v. Gordon*, 560 N.W.2d 4 (Iowa 1997). In *Gordon*, the Supreme Court expressly disapproved of the district court's "gratuitous addition" of instructional language stating a particular injury was bodily injury in an assault causing bodily injury prosecution. *Id.* at 6. The court found this presumptive

language was prejudicial because the determination of whether the defendant's actions in that case resulted in bodily injury was a "fact question peculiarly within the jury's common experience and for them to decide." *Id.* The supreme court reversed because the challenged instruction in effect "direct[ed] a verdict in favor of the State on bodily injury, a critical element of the offense." *Id.*

Avritt's circumstances are clearly distinguishable. Here there is direct evidence of Jeremy's protracted loss and impairment, while in *Gordon* there was no direct evidence of bodily injury. *Id.* at 6. Although instruction 17 includes a gratuitous addition similar to that in *Gordon*, it did not, because of this distinction, result in sufficient prejudice to warrant a new trial.

The judgment of the district court is affirmed.

AFFIRMED.