

IN THE COURT OF APPEALS OF IOWA

No. 3-234 / 12-1771
Filed May 30, 2013

TAMMY SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Humboldt County, Gary L. McMinimee, Judge.

Plaintiff appeals a district court decision dismissing her wrongful imprisonment suit. **AFFIRMED.**

Derek Johnson, Fort Dodge, and Dani L. Eisentrager, Eagle Grove, for appellant.

Thomas J. Miller, Attorney General, and William Hill, Assistant Attorney General, for appellee State.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

Tammy Smith appeals the district court's order dismissing her petition for wrongful imprisonment under Iowa Code chapter 663A (2011). She argues the district court erred in finding she failed to establish by clear and convincing evidence the child endangerment offense for which she was convicted was not committed by her or any individual. We agree with the district court that although the newly discovered evidence casts some doubt as to Smith's involvement with the child's injury, given her multiple versions of the incident, she did not establish by clear and convincing evidence that she did not commit the offense. We therefore affirm the district court.

I. Background Facts and Proceedings

Smith's four-year-old, nonverbal, developmentally-delayed son (G.S.) received multiple breaks in his right arm while in Smith's care.¹ On June 1, 2006, after a jury trial, Smith was found guilty of child endangerment resulting in serious injury, in violation of Iowa Code section 726.6(1)(a) and 726.6(5) (2005). She was sentenced to a term not to exceed ten years. Finding sufficient evidence to uphold the jury verdict, we affirmed the conviction on appeal. *State v. Smith*, No. 07-1406, 2008 WL 3916768 (Iowa Ct. App. Aug. 27, 2008). We found Smith's inconsistent statements—the five different versions of how G.S. was injured—were probative circumstantial evidence from which the jury may infer guilt. *Id.* at *3.

¹ The pediatric orthopedist who operated on the child's arm testified he had two breaks in the distal forearm, one break in the proximal forearm, one dislocation in the proximal forearm, and a fracture of the humerus.

The postconviction court denied her application, but on appeal we reversed the conviction, and the matter was remanded for a new trial. *Smith v. State*, No. 10-1020, 2011 WL 1565972 (Iowa Ct. App. Apr. 27, 2011).² We determined the testimony of G.S., who had progressed from being a non-verbal four-year-old at the time of the 2006 trial to a more verbal nine-year-old at the 2010 postconviction hearing, was “newly discovered evidence.” *Id.* at *7. He was able to articulate that he caused his own injury by sticking his arm into a front-loading washing machine while it was on the spin cycle, and that action caused the injury. *Id.* at *6. We found “with the child’s testimony there is a reasonable likelihood that the result of the trial would be different.” *Id.* at *7. On remand the district court vacated Smith’s conviction and “restore[d] her status in [the criminal] matter as being presumed innocent until proven guilty.” The district court then granted the county attorney’s motion to dismiss the case against Smith “in the interest of justice.”

Smith filed a petition for wrongful imprisonment under Iowa Code chapter 663A on November 21, 2011.³ At trial, both Smith and G.S. testified, and the

² The district court took judicial notice of the underlying criminal file and the postconviction file. However, neither of these files were provided to us on appeal. It is the responsibility of the appellant to request the district court send us the entire record. Iowa R. App. P. 6.802(2).

³ The Iowa wrongful imprisonment statute creates a cause of action for wrongful imprisonment that permits a person to commence an action for damages under the State Tort Claims Act. See *generally* Iowa Code ch. 663A. Like other persons permitted to bring a tort action against the state, a wrongfully imprisoned person is given the right to sue the state in district court for damages after first presenting the claim to the State Appeals Board. See Iowa Code §§ 669.3-5. However, a wrongfully imprisoned person must first clear a hurdle not set for other state tort claimants. *State v. McCoy*, 742 N.W.2d 593, 596 (Iowa 2007). A wrongfully imprisoned person may not proceed with a lawsuit under the State Tort Claims Act until the district court has conducted a predicate review and assessment of the claim and found the person is entitled to commence a civil action based on two preliminary findings. See *State v. Dohlman*, 725 N.W.2d 428, 430-

district court took judicial notice of the underlying case files. The court concluded that given Smith's lack of credibility, she had not established by clear and convincing evidence that the child endangerment offense was not committed by her or by anyone else. Smith appeals.

II. Standard of Review

Our review from the district court's ruling on an application to file a claim as a "wrongfully imprisoned person" is for correction of errors at law. *Dohlman*, 725 N.W.2d at 430. We uphold the findings of the district court if supported by substantial evidence. *McCoy*, 742 N.W.2d at 596. "Evidence is not insubstantial merely because we may draw different conclusions from [the evidence]; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding." *Dohlman*, 725 N.W.2d at 430.

III. Iowa Code section 663A

A person is a "wrongfully imprisoned person" for the purposes of chapter 663A if all of the following criteria are met:

- a. The individual was charged, by indictment or information, with the commission of a public offense classified as an aggravated misdemeanor or felony.
- b. The individual did not plead guilty to the public offense charged, or to any lesser included offense, but was convicted by the court or by a jury of an offense classified as an aggravated misdemeanor or felony.
- c. The individual was sentenced to incarceration for a term of imprisonment not to exceed two years if the offense was an aggravated misdemeanor or to an indeterminate term of years under chapter 902 if the offense was a felony, as a result of the conviction.

31 (Iowa 20 6). This additional procedure permits the district court to serve as a gatekeeper of such claims to insure only meritorious claims for damages will be filed with the State Appeals Board. *McCoy*, 742 N.W.2d at 596.

d. The individual's conviction was vacated or dismissed, or was reversed, and no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction.

e. The individual was imprisoned solely on the basis of the conviction that was vacated, dismissed, or reversed and on which no further proceedings can be or will be had.

Iowa Code § 663A.1(1). The code further provides:

Upon receipt of an order vacating, dismissing, or reversing the conviction and sentence in a case for which no further proceedings can be or will be held against an individual on any facts and circumstances alleged in the proceedings which resulted in the conviction, the district court shall make a determination whether there is clear and convincing evidence to establish either of the following findings:

a. That the offense for which the individual was convicted, sentenced, and imprisoned, including any lesser included offenses, was not committed by the individual.

b. That the offense for which the individual was convicted, sentenced, and imprisoned was not committed by any person, including the individual.

Id. § 663A.1(2). These two separate findings from subparagraph one and subparagraph two reveal the right to sue the State not only requires the person qualify as a “wrongfully imprisoned person,” but also requires that person prove he or she did not commit the offense or the offense was not committed by any person. *McCoy*, 742 N.W.2d at 597; *see also Dohman*, 725 N.W.2d at 431 (finding a person is not entitled to sue even if he meets the five criteria of section 663A.1(1) yet fails to establish he did not commit the offense). This means “the lynchpin of a wrongful imprisonment proceeding before the district court is innocence.” *McCoy*, N.W.2d 742 at 598. To prove the negative by clear and convincing evidence, “it is not enough for a wrongfully imprisoned person to merely create questions and doubts” about her involvement in the crime; “[i]nstead, the person must affirmatively answer those doubts and questions to

the point that the district court will be convinced the person did not commit the crime or any lesser included crime.” *Id.*

Here, the State does not contest the five criteria of section 663A.1(1) are met. The fighting issue is whether Smith proved by clear and convincing evidence she did not commit the offense, nor did any other person. See Iowa Code § 663A.1(2). This is a fact intensive inquiry and a difficult burden to meet. *McCoy*, 742 N.W.2d at 598. Smith argues neither she nor anyone else was responsible for a criminal offense—G.S. breaking his arm was an accident, and “accidents happen all the time to children, but don’t necessarily lead to criminal liability.” We agree with that basic premise, but there was much more to this situation.

The district court found Smith’s testimony was not credible, as she admitted at this trial she told several versions of how G.S.’s arm was broken during the criminal trial: (1) she left G.S. alone in the kitchen while she put her younger son in his room and upon returning, she heard G.S. whimper, standing at the bottom of the basement stairs; (2) she was with G.S. in the basement, pulling laundry from the dryer, and suddenly saw G.S. on the floor crying; (3) G.S. fell on the basement cement floor as he was trying to take clothes out of the dryer; (4) G.S. fell down the basement stairs; and (5) G.S. stuck his arm in a front loading washing machine in her presence. As the district court noted, it now appears Smith has attached herself to the version that would more closely support G.S.’s belated accounting of the incident. However, there is evidence in the record that G.S.’s father coached him in testifying about this newly discovered evidence, by telling G.S. Smith could come home if he told the truth

about being injured by the washing machine rather than by Smith. All of this raised serious doubt for the district court as to the weight and conclusiveness of G.S.'s testimony, particularly in light of the fact G.S. testified at this trial—now more than six years after the incident—he thought it was the washing machine that broke his arm, but qualified his memory because “it was a long time ago.” Smith’s attorney at oral argument even acknowledged G.S.’s testimony at this trial was not very compelling. G.S.’s testimony is not conclusive on the subject of the guilt or innocence of Smith; it just supports one of her multiple versions of how the injury occurred, including the detail that he was unattended in the basement when he stuck his arm in the washing machine.

As the district court found, even if a jury were to accept G.S.’s belated testimony as true, Smith could still be found guilty of child endangerment because she knowingly allowed the developmentally-delayed, four-year-old child to be alone in the basement with a defective and dangerous washing machine running. Again, one of the versions of the story Smith told was that she was aware the washer was defective in that the door could be opened while in the spin cycle.⁴ A person can commit child endangerment by failing to provide age appropriate supervision. Iowa Code § 726.6(d).⁵ There are doubts as to what

⁴ Smith made this statement to Dr. Amy Mooney, Ph.D., in a court-ordered, psychological evaluation in 2006.

⁵ Iowa Code section 726.6(1) provides in part:

A person who is the parent, guardian, or person having custody or control over a child . . . commits child endangerment when the person does any of the following:

. . . .
d. Willfully deprives a child or minor of necessary . . . supervision appropriate to the child or minor’s age, when the person is reasonably able to make the necessary provisions and which deprivation substantially harms.

point in time Smith knew the washing machine latch was faulty and as to the amount of time the child was left unattended. To satisfy her burden, Smith must have resolved these doubts. See *McCoy*, 742 N.W.2d at 598. She did not. Viewing the evidence in the light most favorable to the judgment, Smith has not proved by clear and convincing evidence she could not have been found guilty of failing to properly supervise the child.

IV. Conclusion

Because Smith has failed to prove by clear and convincing evidence she did not commit the offense of child endangerment for which she was convicted, we affirm the district court's decision dismissing her petition.

AFFIRMED.

Bower, J., concurs; Vaitheswaran, J., dissents.

VAITHESWARAN, J. (dissenting)

I respectfully dissent. As the majority states, “The lynchpin of a wrongful imprisonment proceeding before the district court is innocence.” *McCoy*, 742 N.W.2d at 598. In my view, Smith proved her innocence by clear and convincing evidence.

“Clear and convincing evidence is less burdensome than evidence establishing proof beyond a reasonable doubt, but more burdensome than a preponderance of the evidence.” *In re B.B.*, 826 N.W.2d 425, 428 (Iowa 2013). “It means that there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence.” *Id.* (quoting *In re J.P.*, 574 N.W.2d 340, 342 (Iowa 1998)).

The majority relies on Smith’s inconsistent pretrial narratives of what transpired, as recounted by physicians who treated the child at the hospital and a chief deputy sheriff who later interviewed Smith. In an earlier opinion, we found these inconsistencies, together with other evidence, sufficient to support the jury’s finding of guilt. *Smith*, 2008 WL 3916768, at *4. If that were the sum and substance of the record, I would have no trouble concurring in the majority opinion. See *McCoy*, 742 N.W.2d at 599 (“Normally, a transcript of the evidence at a criminal trial, by itself, will not provide the evidence necessary to establish innocence under section 663A.1(2).”). Here, the record contains much more.

Smith did not testify at trial or at her postconviction relief hearing, but, in all her pretrial renditions of events, Smith never wavered from her assertion that she did not see how the child injured his arm. The only witness who could testify

first-hand to what happened was the child. Given developmental delays, including difficulty speaking, he was deemed incompetent to testify at trial.

The child's communication abilities had changed by the time of Smith's postconviction relief hearing. At that time, the child was able to speak cogently about the incident. When asked how he broke his arm, he stated, "Broke my arm in the washing machine, that's how." He stated his mother was upstairs at the time. On cross-examination, the prosecutor suggested his father coached him to say this. She asked the child, "Did your dad tell you the truth was that—you broke your arm in the washing machine?" The child responded, "I tell the truth to him." He also stated that, after the injury, he "was trying to" tell people how he broke his arm, but he "couldn't talk."

The child's testimony was corroborated by Smith's former counselor, who supervised visits between the child and his parents. At the postconviction relief hearing, the counselor began by noting that the child never appeared scared or threatened by his mother. He stated, "[T]hey would hug and kiss and hold each other." He also noted the child "was always trying to talk to" them but they could not often understand what he was saying because of "of his lack of ability to communicate clearly at the time." He testified that, "from the beginning," the child would "make noises like rer, rer, rer," and make a motion with his arm. A couple of times, the child was around a washing machine during a visit with his parents and "he put his arm in" the machine. At one point, he clearly told them he broke his arm in the washing machine.

The counselor was specifically asked whether the parents told the child he broke his arm in a washing machine. The counselor categorically responded,

“They never told him that.” He noted that the child made the “rer, rer” sounds “from day one.” He later clarified that he saw the child making the sounds and moving his arm during his first or second visit with the child and the child’s father only mentioned that the child might be alluding to a washing machine “after [the child] started doing that.” Without objection, the counselor also vouched for the credibility of the child, stating he did not “remember [the child] ever lying.”

Smith’s trial attorney also testified at the postconviction relief hearing. He stated he was informed that the washing machine in the basement of Smith’s home did not work properly. He and his investigator examined the machine and determined that one could in fact open the door of the machine during the spin cycle. He stated the child’s rotational injuries to his arm were consistent with the theory that the child opened the door and put his arm in the machine.

Notably, none of the physicians who testified at trial about the cause of the injury discounted this theory. The first emergency room physician who saw him only testified that the injury was not consistent with falling to the floor; she did not opine on whether a rotating washing machine could have caused the injury. Similarly, an orthopedic surgeon who treated the child opined that the injuries were not consistent with a slip and fall but said nothing about the washing machine scenario. Finally, a pediatric orthopedic surgeon who performed surgery on the child stated the child was not likely to have received the injuries from falling down the stairs.⁶

⁶ This surgeon testified that the parents told him the child fell down the stairs. He could not definitively attribute that rendition of events to the mother.

At Smith's chapter 663A hearing, the district court took judicial notice of all this testimony. Additionally, the court heard Smith testify for the first time. She denied injuring her child's arm and confirmed she discovered a defect in the machine after he got injured. The child also testified again. While he recollected few of the details, his limited testimony did not deviate from his core statements made during the postconviction relief hearing.

Based on this record, I would conclude that Smith established her innocence. With the postconviction testimony of her son and counselor and her own testimony at the chapter 663A hearing, she "affirmatively answer[ed] . . . doubts and questions" about her role in the incident. *McCoy*, 742 N.W.2d at 599. For that reason, I would reverse the district court and remand for entry of an order finding she had the right to sue the State as a wrongfully-imprisoned person.