COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0425-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JULIE ANN QUINN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

EICH, J. Julie Ann Quinn was charged with first-degree intentional homicide of her newborn infant. The jury found her guilty of the lesser-included offense of first-degree reckless homicide, and concealing a corpse. She appeals from the judgment of conviction, and also from an order denying her motion for postconviction relief, arguing: (1) that the trial court erred in allowing evidence

(a) that she had been pregnant and delivered a child several years earlier, (b) that she failed to disclose the pregnancy that led to the filing of the instant charges, and (c) that she was known not to like children; (2) that expert testimony regarding the cause of the infant's death was improperly admitted; (3) that the court improperly instructed the jury on "causation" and what constitutes "life," and on the lesser included offense of first-degree reckless homicide; and (4) that her twenty-five year sentence was unreasonably harsh. We reject her arguments and affirm the judgment and order.

On December 21, 1995, Quinn gave birth to what appeared to be a full-term baby boy.[1] She testified that she had passed out in her bathtub, delivering the infant while she was unconscious. She testified that when she regained consciousness the infant appeared to be dead: "[H]e was blue and the cord was around his neck, and he wasn't moving, and there was blood everywhere." At one point, the infant made a "gurgling" sound so she put her hand over its mouth "to see if [he was] breathing." She then put her hands on the infant's chest "to see if there was any kind of heartbeat." She stated: "He didn't make another sound, and he wasn't moving, and ... he was dead."

Quinn wrapped the infant in a plastic bag and placed it in an unheated breezeway in her home. She didn't tell anyone about her pregnancy or the delivery—including her live-in boyfriend, the infant's father—until several days later, after she became ill and was hospitalized. Nurse Donna Sorenson testified that Quinn told her: "I do think the baby was breathing and I think I may

[1] A pathologist, testifying for the State, stated that the infant was "well-formed … appearing to be full-term both by size and by the fact that finger and toenails were present and well-developed."

have killed it." She said: "The placenta and blood and everything was so ugly, so I took a blanket and wrapped the baby up and put my hand over the baby so it wouldn't breathe."

As indicated, Quinn was charged with first-degree intentional homicide and hiding a corpse. She challenges only the first on this appeal.

At trial, two defense experts testified that the infant died in the womb of natural causes and never breathed after birth. The State, however, presented expert testimony that the infant was born alive and died from suffocation—or possibly hypothermia—either when Quinn placed her hand over its mouth, or from being sealed in the plastic bag. At the State's request, the court instructed the jury on the lesser-included offense of first-degree reckless homicide.

After a five-day trial, the jury found Quinn guilty of first-degree reckless homicide (and hiding a corpse) and she was sentenced to twenty-five years in prison.

I. Evidentiary Rulings

Quinn argues first that the court erred in allowing evidence that, ten years earlier, she had been pregnant and delivered a baby. Initially, the court ruled that such evidence was inadmissible "other acts" character evidence. The court indicated at that time, however, that the issue could be revisited at trial if it appeared appropriate as rebuttal evidence.

In his opening statement, defense counsel characterized Quinn as being confused and surprised by her pregnancy. He said that when she realized she was pregnant, "she didn't know what to do." Later, during her cross-examination, Quinn was asked by the prosecutor whether she was "familiar with

what a woman's body goes through" during pregnancy, and she replied: "Not terribly. My first pregnancy was an exceptional pregnancy." The prosecutor requested a conference outside the jury's presence and argued to the court that Quinn had "opened the door" for further questioning regarding her first pregnancy. He contended that the evidence was relevant in light of Quinn's testimony that she didn't know what to do when she learned she was pregnant, that she thought her labor pains were simply a case of food poisoning, and that she thought the delivery was a miscarriage; and he argued that the evidence of her earlier pregnancy and delivery would show that she was in fact "fully aware of the rigors of pregnancy," "fully aware of what types of changes would occur in her body during pregnancy," and "fully aware of what to expect during the delivery of her child." The trial court agreed, reversing its earlier ruling and declaring the evidence to be admissible—not as evidence of bad character, but rather to show Quinn's familiarity with pregnancy and child-delivery.

Quinn then testified that, when it was discovered that she was pregnant ten years earlier, her parents placed her in a hospital-affiliated home for unwed mothers. She stayed at the home for one month, during which time she received limited instruction and counseling, and underwent physical examinations. Quinn said that her first child was born prematurely, that she never saw the child after delivery and placed it for adoption.

The acceptance or rejection of evidence is discretionary with the trial court, ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982), and "[w]e will not reverse a discretionary determination ... if the record shows that discretion was ... exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). We do not test a trial court's discretionary rulings by some subjective

standard, or even by our sense of what might be a "right" or "wrong" decision; the court's ruling will stand unless "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). If, however, a discretionary decision rests upon an error of law, the decision exceeds the limits of the court's discretion. ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990).

Quinn argues that her testimony is inadmissible "other acts" evidence, under § 904.04(2), STATS., which provides:

> (2) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To qualify for admission under the statute, other-acts evidence must first fall within one of the recognized exceptions. If it does, the court must then determine whether its probative value is substantially outweighed by the danger of undue prejudice resulting from its admission. ***State v. Ingram***, 204 Wis.2d 177, 184, 554 N.W.2d 833, 836 (1996). Stressing that circumstances surrounding her earlier pregnancy did not prepare her "to give prenatal care" or "make appropriate crisis decisions" a decade later, Quinn argues that the evidence is irrelevant and prejudicial, and does not come within any of the statutory exceptions to the character-evidence rule.

We disagree. Section 904.04(2), STATS., allows other acts evidence if it is relevant to something other than character. *See* ***State v. Johnson***, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence. Section 904.01, STATS. Evidence that Quinn experienced a previous pregnancy is relevant to show "absence of mistake or accident" in that it tends to show—contrary to her direct testimony—her awareness of the necessity of prenatal care and the potential complications that can arise during pregnancy and delivery. In allowing the evidence, the trial court stated:

> [T]he testimony of the defendant was that she didn't know how far along she was in the pregnancy, and she didn't – she was sick, and nauseous and was feverish. And the State is wishing to bring in this prior pregnancy to show that she would have had some experience in it and that she would have knowledge as to how far along she was in her pregnancy, having experienced it before …. I don't think it's being brought in for purposes of bad character, and that's why I excluded it in the pretrial. I think that the State has demonstrated relevance, and I'm going to allow the State to cross-examine in this area. I think it does have relevance and some probative value….

As to balancing the probative value of the evidence against the possibility of undue prejudice, while the court did not expressly engage in a balancing analysis, it did state that, when it made the pretrial ruling excluding the evidence, it was "concern[ed]" that the evidence would be offered solely in the context of showing Quinn's "bad character" because she had a prior out-of-wedlock child.

> The concern the Court had in the pretrial motion … [was] whether … this was going to be brought in simply as bad character from the standpoint that a person had a pregnancy 10 years ago, or had any previous pregnancies out of wedlock, that it's in some respect—certainly it isn't in today's society looked—looked upon in the same was as it may have been 20 or 30 years ago in terms of bad

> character, but it certainly does have a certain connotation to it, and I didn't think it would be relevant evidence just taken out of any type of context.

As indicated, the court went on to consider the evidence in the context of the testimony presented at trial, and permitted it. And while we often have stressed the importance of a trial court's explanation of the reasons underlying a discretionary decision, we have also said that "[i]t is enough that [the court's on-the-record statements] indicate to the reviewing court that the … court "under[took] a reasonable inquiry and examination of the facts" and "the record shows a reasonable basis for the … court's determination." ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991). We are satisfied that, on this record, the trial court could reasonably determine that the probative value of the evidence of Quinn's earlier pregnancy outweighed any danger of undue prejudice; and that is all that is required for a discretionary ruling to be sustained on appeal.

Quinn also argues that testimony concerning her failure to disclose her most recent pregnancy should have been excluded. However, because she never objected to the introduction of this evidence at trial, she has waived her right to raise this claim on appeal. Section 901.03(1)(a), STATS.; ***Caccitolo v. State***, 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975). Quinn urges us to consider the issue despite her waiver, claiming that that this case "illustrates the need to more fully develop the law about the use of a person's silence." We have often expressed our reluctance to address unpreserved issues unless the case presents "the most unusual circumstances which go directly to issue of guilt," ***State v. Gove*** 148 Wis.2d 936, 943-44, 437 N.W.2d 218, 221 (1989) (citation omitted), and neither the record before us, nor Quinn's arguments, have persuaded us that exceptional or unusual circumstances exist that would warrant relieving Quinn of the effect of her failure to object.

Quinn next argues that the court erred in allowing evidence that she didn't like children and that her live-in boyfriend was unable to father children. Here, too, we see no error. This testimony, coupled with evidence that her boyfriend also dislikes children, is also relevant to her motive and intent to kill the infant and its probative value, although slight, is not outweighed by the danger of unfair prejudice. Quinn had ample opportunity to explain her misstatements and let the jurors arrive at their own conclusions.

II. Expert Testimony

Quinn next argues that the court improperly allowed Dr. Jeffrey Jentzen to testify that hypothermia was a possible cause of the infant's death: that it died "as a result of asphyxia and with the possible addition that there was hypothermia and exposure."

Quinn had objected to Jentzen's testimony at the preliminary hearing that the infant's death was caused by asphyxia and neglect. Defense counsel moved to exclude the testimony concerning neglect, and the trial court reserved a ruling on the point. Counsel renewed the objection at trial and, in an off-the-record discussion, the court ruled that there was inadequate foundation to allow Jentzen to testify that the infant's death was caused in part by neglect on Quinn's part. Jentzen then stated that he was prepared to testify that the death was "not accidental." When the jury returned, Jentzen testified that, in his opinion, "the child died as a result of asphyxia and with the possible addition that there was hypothermia or exposure."

On appeal, Quinn argues that Jentzen's testimony was inconsistent with his off-the-record representation and that the court erred in allowing it "because the defense had no notice of the testing which supported the conclusion

of Dr. Jentzen." And she says that "[t]he introduction of such testimony by Doctor Jentzen on his own warrants … a new trial." The argument is not explained further.

It is well-established that a trial court cannot be faulted on appeal for failing to exercise discretion if it was never asked to do so. ***State v. Bustamante***, 201 Wis.2d 562, 573, 549 N.W.2d 746, 750 (Ct. App. 1996); ***McClelland v. State***, 84 Wis.2d 145, 157-58, 267 N.W.2d 843, 848-49 (1978). In ***Whitty v. State***, 34 Wis.2d 278, 290, 149 N.W.2d 557, 562 (1967), the supreme court stated that it "has not looked with favor upon claims of prejudicial error based upon the trial court's failure to act when no action was requested by counsel." Quinn never objected to Jentzen's testimony based on a lack of notice; her sole objection was lack of foundation. Nor did she request any immediate remedy—such as striking the testimony or permitting her counsel additional time to prepare a cross-examination—at the time. Quinn has not persuaded us that the court erroneously exercised its discretion in allowing the testimony.

III. Jury Instructions

Quinn argues first that the court inadequately instructed the jury by failing to adequately define the concepts of "causation" and "what constitutes life." She concedes that she never objected to the proposed instructions at the instruction conference, and that she never submitted any alternative instructions to the court. It follows that she has waived her right to claim error on appeal. *See* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988); ***State v. Zelenka***, 130 Wis.2d 34, 44, 387 N.W.2d 55, 59 (1986) (failure to object to a jury instruction before the trial court constitutes a waiver of the error).

She argues, however, that we should reach the issue in the exercise of our discretionary authority under § 752.35, STATS., which, among other things, allows us to order a new trial "if it appears from the record that the real controversy has not been fully tried." Quinn says that the "central" issues in the case are whether the infant was alive at delivery, and whether it appeared to be so to her, and she maintains that the pattern instructions given by the court "give a jury no guidance whatsoever concerning what constitutes life." Then, stating that because "[t]his particular issue is likely to take place in similar cases over an over again … [t]rial judges, lawyers, and juries need guidance on the subject," we should order "[a]dditonal briefing … on the question of whether the Quinn jury should have been more adequately instructed on the definition of life."

Quinn has not informed us of the instructions given by the court; nor has she suggested what instructions she believes the court should have given. Beyond that, she has not offered any legal authority in support of her position, and, as we have often said, we do not consider arguments unsupported by references to legal authority. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Quinn has filed two briefs in this case, and we see no need to provide any further opportunity to address the issue.[2] Quinn has offered no basis for the exercise of our discretionary authority under § 752.35,

[2] In her reply brief, she says that, from her perspective, "there is now plenty of time to brief this or any other issue which the Court of Appeals wants to decide," and repeats her offer to "write a supplemental brief … if ordered to do so." She then states that she is not "address[ing] this issue now because frankly no briefing on the subject could be adequate and still raise other issues in the case."

STATS., to order a new trial in the interest of justice based on the trial court's instructions to the jury.[3]

Quinn next argues that the court erred in granting the prosecutor's request for a jury instruction on the lesser-included offense of first-degree reckless homicide.

Whether a lesser-included offense should (or should not) have been submitted to the jury is a question of law which we review *de novo*. *See* ***State v. Martin***, 156 Wis.2d 399, 402, 456 N.W.2d 892, 894 (Ct. App. 1990). In making this determination, we invoke a two-step analysis. First, we consider whether the crime for which the instruction is requested is a lesser-included offense of the crime charged. If it is, we then consider whether there is a reasonable basis in the evidence for acquittal on the charged offense and conviction on the lesser offense. ***Id.*** In doing so, we view the evidence "in the light most favorable to the

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[3] Quinn's argument that the court misinstructed the jury with respect to "causation"—in its entirety—is as follows:

> The causation language was also inadequate. Dr. Jentzen testified that the infant's death in this case was caused in part by hypothermia. He talked about the "possible addition of hypothermia or exposure."
>
> Is the "possible additional" the equivalent substantial factor? The Quinn jury based upon this record did not know.
>
> The instruction concerning causation, like the instruction concerning what constitutes life, was inadequate.

As indicated, we are not informed either of what instructions the court gave on the subject, or what instructions Quinn feels should have been given. Where arguments "are not developed themes reflecting ... legal reasoning," but instead "are supported by only general statements," we will decline to review them as inadequately briefed." ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

defendant." *See* ***State v. Kramar***, 149 Wis.2d 767, 792, 440 N.W.2d 317, 327 (1989).

Quinn does not dispute the fact that first-degree reckless homicide is a lesser-included offense of the charged crime of first-degree intentional homicide; she argues only that the jury had no reasonable grounds to acquit her on the greater offense (intentional homicide), and convict her of the lesser (reckless homicide). We agree with the State that the jury was entitled to believe Quinn's testimony that she planned to either keep the baby or place it for adoption—that she "didn't know what to do"—and thus conclude that, however reckless her actions, she lacked intent to kill the baby. Without the requisite intent to kill, Quinn could not have been convicted of first-degree intentional homicide. The jury could also conclude from the evidence that the baby was born alive—that it was "gurgling" or breathing—and that it died from asphyxia when Quinn placed her hand over its mouth and compressed its chest. We are satisfied that the test for submission of first-degree reckless homicide as a lesser-included offense was met in this case.

IV. Excessive Sentence

Finally, Quinn challenges her twenty-five year sentence, arguing that it is unreasonable and more severe than sentences imposed in other cases for similar acts.

Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a "clear" misuse of that discretion. ***McCleary v. State***, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Our limited review in this area reflects the strong public policy against interference with sentencing discretion; we presume that the trial court acted

reasonably, and we assign to the defendant the burden of "show[ing] some unreasonable or unjustified basis in the record for the sentence complained of." ***State v. Harris***, 119 Wis.2d 612, 622-623, 350 N.W.2d 633, 638-639 (1984). We do so, at least in part, because the trial court "has a great advantage in considering the relevant factors and the defendant's demeanor." ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (1987).

When imposing a sentence, a trial court may consider—in addition to the gravity of the offense, the offender's character and the public's need for protection—a variety of factors, including: the defendant's prior record of offenses; his or her age, personality, character and social traits; the viciousness or aggravated nature of the crime and the degree of the defendant's culpability; his or her demeanor, including remorse, repentance, or cooperation with authorities; the defendant's—and the victim's—rehabilitative needs; and the needs and rights of the public. ***State v. Thompson***, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732-33 (Ct. App. 1992). Whether a particular factor or characteristic will be considered an aggravating or mitigating circumstance will depend upon the particular defendant and the particular case. ***Id***. at 265, 493 N.W.2d at 733. This is a principle inherent in the concept of individualized sentencing. ***Id***.

Finally, we must not substitute our own sentencing preferences for that of the trial court in a particular case. ***McCleary,*** 49 Wis.2d at 281, 182 N.W.2d at 521. Indeed, we have a duty to affirm the sentence if the facts show it is sustainable as a proper discretionary act—even in cases where the court fails to adequately explain its reasons for selecting the sentence it did. ***Id***. at 282, 182 N.W.2d at 522.

We reject Quinn's argument that her sentence is unreasonably harsh because other offenders convicted of killing their newborn infants have received

lesser sentences. Lesser sentences for similar crimes in other cases provide no legal basis overturning Quinn's sentence—especially in the absence of some identifiable connection between Quinn and the particular details of her crimes and the other defendants and the details of their crimes.

> There is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences. On the contrary, individualized sentencing is a cornerstone to Wisconsin's system of indeterminate sentencing. No two convicted felons stand before the sentencing court on identical footing. The sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors. Imposing such a requirement would ignore the particular mitigating and aggravating factors in each case. The defendant here has failed to establish any connection between himself and his crimes and these defendants and crimes to which he has compared his sentence. Absent such connection, disparate sentences are totally irrelevant to the sentence imposed in this case.

State v. Lechner, 217 Wis.2d 392, 427-28, 576 N.W.2d 912, 928-29 (1998) (internal quotation marks and quoted sources omitted).

The transcript of the sentencing hearing indicates that the court carefully considered the trial testimony, counsel's sentencing arguments, the presentence investigation report and the relevant legal factors in imposing the sentence. In addition to considering the aggravated nature of the crime, the court specifically considered—and discussed at length: Quinn's personality, character, and social traits; the degree of her culpability; her demeanor at trial and truthfulness; her age, education and employment record; her history of undesirable behavior; her remorse and repentance; and her rehabilitative needs. The court commented on the severity of the offense, that Quinn had lied several times, that she "continues to fail to accept responsibility for her actions and that there isn't a lot of repentance or remorse," and that there was a need for "specific deterrence of

this individual as well as the general deterrence of other individuals ... from committing such acts."

The court carefully considered and weighed the relevant legal factors in imposing the sentence and we have consistently held that the weight to be given to any particular factor is left to the court's discretion. *See* ***Thompson***, 172 Wis.2d at 264, 493 N.W.2d at 732. Quinn has not persuaded us that the court erroneously exercised its discretion in selecting the sentence it did.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.