

Cite as 2009 Ark. App. 802

ARKANSAS COURT OF APPEALSDIVISION III
No. CACR 09-291MIRNA LUZ MARIN and JOSE E.
MARIN-MENDEZ

APPELLANTS

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 2, 2009APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
[NO. CR-2007-1267 (A) & (B)]HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Mirna Marin and Jose Marin-Mendez were convicted by a Sebastian County jury of negligent homicide in the death of their daughter, Estrella. On appeal, both appellants challenge the sufficiency of the evidence supporting their convictions. We affirm.

On the morning of September 22, 2007, appellants, Mirna's two sons (ages ten and twelve) and daughter (age five), and appellants' twenty-two-month-old daughter Estrella went to church. They returned home around 2:00 p.m., at which point Estrella was left in her car seat in the van when everyone else went inside. Mirna disciplined the five-year-old by putting her in time out; Mirna then took a nap. Jose, who was not feeling well, went to the restroom and then also took a nap. When the couple awoke around 5:00 p.m., they began looking for Estrella and found her unresponsive in the car. Temperatures were in the upper eighties that afternoon.

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Appellants drove Estrella to the hospital, where she was pronounced dead; the hospital contacted police. The medical examiner determined that Estrella had died of exposure to heat (hyperthermia). Appellants, who were both extremely upset, gave statements to police. Mirna told them that usually she or her husband would get Estrella out of the car, but sometimes the twelve-year-old would do it. Jose stated that he and his wife usually got her out of the car. Jose told police that he had gone into the bedroom and had seen that Estrella was not in her crib. He was going to ask his wife about it, but something came up and he never did. Investigators found no evidence of alcohol or drugs playing a part in Estrella's death.

A jury trial for both appellants was held on August 18, 2008. Testifying for the State were the two investigating detectives from the Fort Smith Police Department, the medical examiner who performed the autopsy, Mirna's ex-husband, and Mirna's then-thirteen-year-old son. The jury found appellants guilty of negligent homicide and sentenced both of them to six months in the county jail¹ and a \$1000 fine. Appellant Mirna Marin filed a "Motion and Brief for Directed Verdict or Judgment NOV or New Trial" on August 21, 2008. The circuit court denied the motion on September 15, 2008. This timely appeal followed.

¹ The circuit court permitted Mirna Marin to serve her sentence under home detention with electronic monitoring. Jose Marin-Mendez's amended judgment and commitment order reflects jail time credit of 331 days.

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Appellants, in separate briefs, challenge the sufficiency of the evidence supporting their convictions. Our standard of review has been set forth as follows:

[W]e treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is that “which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture.” . . . When we review a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the State, and only evidence supporting the verdict will be considered.

Holt v. State, 2009 Ark. 482, at 4–5, ___ S.W.3d ___, ___ (citations omitted).

A person commits negligent homicide if he or she negligently causes the death of another person. Ark. Code Ann. § 5-10-105(b)(1) (Repl. 2006). Negligent homicide is a Class A misdemeanor under this subsection. Ark. Code Ann. § 5-10-105(b)(2). Our criminal code defines “negligently” as follows:

(A) A person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of such a nature and degree that the actor’s failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation considering the nature and purpose of the actor’s conduct and the circumstances known to the actor.

Ark. Code Ann. § 5-2-202(4) (Repl. 2006). Our supreme court has noted that negligent conduct is distinguished from reckless conduct primarily in that it does not involve the conscious disregard of a perceived risk. *Law v. State*, 375 Ark. 505, 292 S.W.3d 277 (2009). In order to be held to have acted negligently, it is not necessary that the actor be

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fully aware of a perceived risk and recklessly disregard it. *Id.* It requires only a finding that under the circumstances he should have been aware of it and his failure to perceive it was a gross deviation from the care a reasonable, prudent person would exercise under those circumstances. *Id.*

Appellant Jose Marin-Mendez contends that “no evidence was introduced by the State to prove his mental state and that the General Assembly of Arkansas did not intend that persons be prosecuted based on mere inattention.” Appellant Mirna Marin makes similar arguments. (“Mere negligence does not rise to the level of criminal negligence, nor does mere inattention provide sufficient evidence for a conviction for negligent homicide.”) Mirna also argues that the testimony of her ex-husband and son should be discounted. Of course, credibility determinations are matters for the jury, not the appellate court. *See, e.g., Rounsaville v. State*, 2009 Ark. 479, ___ S.W.3d ___. Appellants essentially argue that their conduct did not rise to the level of criminal negligence and attempt to distinguish their case by comparing it to other negligent-homicide cases.

We recognize that this is a close case. However, it presents a classic jury question: Should appellants have been aware of the risk to Estrella and was their failure to protect her from that risk a gross deviation from the standard of care that a reasonable person would observe under the circumstances? The jury found appellants guilty of negligent homicide, and given this record—which includes appellants allowing three hours to pass

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without checking on or knowing the whereabouts of their twenty-two-month-old child—we cannot say that the verdicts are not supported by substantial evidence.

Affirmed.

ROBBINS and HENRY, JJ., agree.