COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3175-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEPHEN L. JENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Stephen Jensen appeals his conviction of first-degree reckless injury, contrary to § 940.23(1), STATS. He contends that there was insufficient evidence to prove "utter disregard for human life," a necessary

element of the crime of first-degree reckless injury.[1] Because we conclude that the evidence was sufficient to prove the utter disregard element required of first-degree reckless injury, we affirm the judgment of conviction.

BACKGROUND

C.D. was born September 14, 1996, to Darlene D. and Stephen Jensen, who have never been married. Shortly after C.D.'s birth, Darlene informed Jensen that he had a son and asked him if he wanted to be a part of the child's life. He said that he did and Darlene set about trying to permit that to happen in an appropriate fashion.

At first, Jensen saw C.D. with Jensen's mother or Darlene present, but after he had handled the child on several occasions, with no apparent difficulty, he and Darlene agreed that C.D. could spend the night at Jensen's home, without supervision. Prior to trusting C.D. to Jensen's care, Darlene taught him how to change the baby's diapers, to feed him and to hold him. She informed him that C.D. was very fragile and needed help holding up his head. At trial, Jensen acknowledged that Darlene had emphasized the fragility of C.D.'s neck and the importance of holding up his head. He agreed that Darlene was very careful in her handling of the baby.

On the evening of November 22, 1996, C.D., who was then ten weeks old and weighed twelve pounds, was entrusted to Jensen's care for an overnight visit. Early on the morning of November 23rd, C.D. awoke, crying.

[1] Jensen pled guilty to physical abuse of the child, contrary to § 948.03(3)(a), STATS. Second-degree reckless injury, pursuant to § 940.23(2), STATS., includes physical abuse of a child.

Jensen testified that it was between 4:30 and 4:45 in the morning. He got up to get a bottle for C.D., and he attempted to calm the baby by feeding him. However, C.D. began to cry harder, with a "piercing sound," and Jensen was unable to calm his crying. Jensen testified at trial that the crying was driving him "nuts" and making him extremely angry. He said that he was screaming at the baby. When C.D. continued to refuse to take his bottle and continued to cry, Jensen grabbed him and began to shake him. Jensen said he shook him ten to fifteen times. He testified that he remembered seeing his son's head snap forward and hit his chest and snap back again and that he saw that action repeatedly happen, yet he kept on shaking him. He further testified that all of a sudden C.D. stopped crying. He stopped shaking him and he noticed that C.D. was having difficulty breathing. Jensen waited twenty-five to thirty seconds and when it became clear that C.D. was having a great deal of difficulty, he called 911.

On the 911 tape, he stated:

> I just had an accident with my son. He's just barely over 2 months old. I was coming out for a nighttime changing and that, and I tripped over the phone cord. We both went down. I held him close to me. He's breathing and that still, it's just, I don't know, I'm not real sure that he's 100% ok.

After Jensen's call, an ambulance and a squad car were sent to his address in order to convey C.D. to the hospital. When Officer Ash first met Jensen at his apartment, he told the officer the same story, about tripping over a phone cord. He also relayed that story to Darlene when he called her from the emergency room at University Hospital to tell her that C.D. was in the hospital. He also told it to the social worker and C.D.'s attending physician, Dr. William Perloff.

Dr. Perloff, a pediatrician at University Hospital, who has extensive experience in closed head injuries of children, examined C.D. on his arrival. At that time, C.D. was having difficulties breathing and had very low blood pressure. Dr. Perloff's examination showed extensive bleeding in the back of the baby's eyes. A Computer Assisted Tomographic brain scan was performed that morning and it showed severe bleeding in C.D.'s brain. Dr. Perloff determined that the baby's injuries were very severe and consistent with those a very young child sustains from a closed head injury, such as being severely shaken. After his examination, Dr. Perloff talked to Darlene and Jensen and made it clear that the type of injury he was seeing was inconsistent with Jensen's story. However, Jensen stuck to his story.

A few days later, while C.D. was still in intensive care, Jensen fled the state. He was apprehended several months later in Orlando, Florida and returned to Madison for trial. As a result of Jensen's actions, C.D., who was once a normal infant, is blind, retarded, unable to walk and requires constant care.

Jensen waived a jury trial and a trial was held to the court. At the conclusion of the testimony, the circuit court determined that the State had proven each and every element of first-degree reckless injury, including the element of "utter disregard for human life." Jensen was sentenced and this appeal followed.

DISCUSSION

Standard of Review.

In examining the sufficiency of the evidence, we do not substitute our judgment for that of the fact-finder merely because the evidence is in conflict or because there is evidence which could have supported a different result.

Instead, we review whether the evidence is so insufficient in probative value and force that as a matter of law, no finder of fact could have determined guilt beyond a reasonable doubt. *See* ***State v. Edmunds***, No. 98-2171-CR, slip op. at 4 (Wis. Ct. App. June 24, 1999, ordered published July 21, 1999) (citations omitted). We review the evidence, and all reasonable inferences therefrom, in the light most favorable to sustaining the fact-finder's decision. *See* ***State v. Pankow***, 144 Wis.2d 23, 30, 422 N.W.2d 913, 914 (Ct. App. 1988).

Utter Disregard.

Jensen argues that while he admitted that he shook C.D. with sufficient force to cause the injuries, nevertheless, his conduct is insufficient to prove the "utter disregard" element of first-degree reckless injury for the following reasons: (1) there is no evidence that Jensen was aware, prior to shaking C.D., that his conduct would create an unreasonable and substantial risk of death or great bodily harm, and a general awareness of the danger of shaking a ten-week old infant is insufficient to show utter disregard; and (2) he called 911 when he saw that C.D. was having difficulty breathing.

In order to be guilty of first-degree reckless injury, the State must prove beyond a reasonable doubt that: (1) the defendant caused great bodily harm to another human being; (2) the defendant's actions created an unreasonable and substantial risk of death or great bodily harm; (3) the defendant was aware of that risk; and (4) the circumstances showed the defendant's utter disregard for human life. *See* ***Edmunds***, slip op. at 5 (citation omitted); § 940.23(1), STATS.

The reckless standard of § 940.23(1), STATS., requires "criminal recklessness" and encompasses two of the elements that the State must prove. *See* ***Edmunds***, slip op. at 5. A person acts with criminal recklessness when he or she

"'creates an unreasonable and substantial risk of death or great bodily harm to another human being and … is aware of that risk.'" ***Id.*** (citation omitted). "Recklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk." ***State v. Blair***, 164 Wis.2d 64, 70, 473 N.W.2d 566, 569 (Ct. App. 1991).

Jensen admits there was proof sufficient for the elements which constitute criminal recklessness. It is only the fourth element, that of utter disregard for human life, for which Jensen contends that the proof was insufficient.

The element of utter disregard was first enacted in 1988, effective January 1, 1989. *See* 1987 Wis. Act 399, §§ 472zki, 3204(57)(ag). Utter disregard is a standard that replaced the old standard of "conduct evincing a depraved mind, regardless of human life." *See* ***Blair***, 164 Wis.2d at 69, 473 N.W.2d at 569. Apparently, the "depraved mind" language was changed in 1988 in order to clarify that a mental disorder was not involved in the commission of the crime. *See* ***id.*** In determining whether utter disregard for human life was proven, we note that the State does not have to prove utter disregard "in fact"; rather, the State satisfies its burden when it proves the conduct of the defendant and the surrounding circumstances, as generally considered by mankind, are sufficient to evince utter disregard for human life. *See* ***State v. Weso***, 60 Wis.2d 404, 411, 210 N.W.2d 442, 446 (1973). Therefore, we apply an objective standard to the conduct which caused C.D.'s injuries. *See* ***Edmunds***, slip op. at 6. Stated another way, the qualities of the act itself and the circumstances surrounding its commission must be such that a reasonable person in the position of the defendant

would not have acted as the defendant did. *See* ***Weso***, 60 Wis.2d at 409, 210 N.W.2d at 444.

1. Jensen's knowledge.

Jensen argues that there is no evidence that he knew that shaking his ten-week old son would cause the catastrophic injuries C.D. sustained. However, the State is not required to prove that Jensen had such knowledge. *See* ***Edmunds***, slip op. at 7 (citing ***Weso***, 60 Wis.2d at 411, 210 N.W.2d at 446). It is not what Jensen knew in fact, but what a reasonable person in Jensen's position is presumed to have known that is relevant to the element of utter disregard. *See* ***Edmunds***, slip op. at 7-8.

In considering what a reasonable person in Jensen's position is presumed to know, we consider the totality of the circumstances surrounding the injury. Here, his son, C.D., was only ten weeks old and he weighed just twelve pounds. Darlene had repeatedly told Jensen that C.D. was very fragile and had to be handled with care, including supporting his head, as he was unable to do that for himself.

The fact-finder heard Jensen testify that C.D. had been crying for only fifteen to twenty minutes and the only thing Jensen had tried to do to comfort him was to give him a bottle. He said he had not changed his diapers, walked him, rocked him, rubbed his back, given him his pacifier or any of the many things one can do to comfort a fussy infant. Instead, Jensen testified that he became very angry and screamed at C.D. When the infant did not stop crying, he grabbed him by the shoulders and shook him. He told the fact-finder that as he shook him, he watched the baby's head snap forward and strike his chest and then snap back, repeatedly. He continued to shake him until, "his screaming and crying stopped

real suddenly" and he realized that C.D. wasn't breathing normally, but was gasping for breath. Based on this testimony, we conclude that the finder of fact could have found that a reasonable father who was entrusted with the safety of his ten-week-old son would not have treated his infant son in such an aggressive, violent, callous manner.

2. 911 Call.

Jensen maintains that his call to 911 after he saw that C.D. had been injured shows he did not have an utter disregard for human life, either as a matter of law or of fact. We are unpersuaded, as was the fact-finder. It was a positive act to call 911 to get assistance for C.D., even though Jensen lied about what had happened to his son. However, we have held that such a call, in and of itself, when combined with the violence perpetrated against so fragile a victim, does not require a fact-finder to find that the defendant's conduct, when taken as a whole, did not demonstrate an utter disregard for human life. *See* ***Edmunds***, slip op. at 8-9. We come to the same legal conclusion here. While it is a factor that the finder of fact may consider in the totality of the circumstances presented for its review, it is not dispositive of whether the proof has been sufficient to show this element of first-degree reckless injury. Therefore, we conclude that sufficient evidence was presented during Jensen's trial to convict him of first-degree reckless injury, contrary to § 940.23(1), STATS. Accordingly, we affirm the judgment of the circuit court.

CONCLUSION

We affirm the judgment of conviction because we conclude that the evidence was sufficient to prove all the elements of § 940.23(1), STATS.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.