COURT OF APPEALS DECISION DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2885-CR

Cir. Ct. No. 2005CF006187

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN A. KOBIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. A jury found Sean A. Kobin guilty of first-degree reckless injury. *See* WIS. STAT. § 940.23(1) (2005-06).[1] The court imposed a

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

twenty-five year term of imprisonment, comprised of fifteen years of initial confinement and ten years of extended supervision. Kobin filed a postconviction motion in which he contended that: (1) the jury was incorrectly instructed on the meaning of "utter disregard for human life," one of the elements of first-degree reckless injury; and (2) the evidence was insufficient to support the guilty verdict. The circuit court denied Kobin's motion. On appeal, he renews his postconviction arguments. Because neither of Kobin's arguments are persuasive, we affirm.

BACKGROUND

¶2 The criminal complaint alleged the following facts. On November 8, 2005, Kobin offered Crystal Kolinski $20 if she would drink a liquid prepared by him while he videotaped her.[2] Because Kolinski thought that it was a joke that would not hurt her, she agreed. After driving to the parking lot of a closed shopping center, Kobin put a white powdery substance into a half-filled bottle of water. Kobin put the cap on, shook the bottle, and gave it to Kolinski to drink. Kobin got his video camera ready and told Kolinski to take "a big swig." As Kobin videotaped her, Kolinski drank some of the liquid. Kolinski fell to the ground and began vomiting blood. Kobin continued to videotape Kolinski as she was vomiting.

¶3 The liquid that Kolinski drank at Kobin's request was sodium hydroxide, commonly known as lye. In a post-arrest statement to police, Kobin admitted mixing about eight ounces of water with "30 to 40 pellets" of sodium hydroxide and then giving the mixture to Kolinski to drink. Kobin told police that

[2] Kolinski's name is spelled several ways in the record. When she testified at trial, Kolinski spelled her name "Crystal," and at sentencing, she spelled her name "Khrystal."

he knew there was a risk that Kolinski would get burned but that he did not know how bad any burns would be. He also said that he knew sodium hydroxide was similar to bleach and that it was not safe to consume it. Kobin used sodium hydroxide at work to strip aluminum from copper. Kobin also told police that he has asked women to drink things in the past and that it gets him excited. Further facts as presented to the jury will be stated below as necessary.

MEANING OF "UTTER DISREGARD FOR HUMAN LIFE"

¶4 In ***State v. Jensen***, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170, the supreme court considered whether the standard for proving utter disregard for human life was objective or subjective. The court rejected the argument that the State was required to prove subjective awareness that the defendant's conduct showed an utter disregard for human life and held that "the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known." ***Id.***, ¶17.

¶5 In this case, the court gave the jury the standard instruction for first-degree reckless homicide, WIS JI—CRIMINAL 1250, an instruction that is consistent with ***Jensen***. On appeal, Kobin contends that ***Jensen*** "is ripe for review," and he argues that the State should have proved his subjective awareness. This court is bound by supreme court precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Any review of ***Jensen*** cannot come from this

court.[3] Because the instruction given to the jury was proper under ***Jensen***, we reject Kobin's claim of error.[4]

SUFFICIENCY OF THE EVIDENCE

¶6 Kobin contends that the guilty verdict is not supported by sufficient evidence. Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988).

¶7 Kobin relies on the following evidence to support his argument that the evidence was insufficient as a matter of law:

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[3] In his reply brief, Kobin suggests that we certify this appeal to the supreme court for decision. *See* WIS. STAT. RULE 809.61. We see no need for certification.

[4] Kobin notes that both he and the State asked that the court modify the standard instruction, thereby indicating that ***State v. Jensen***, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170, was in need of appellate scrutiny. We are not persuaded. Kobin's requested jury instruction included a subjective element not supported by ***Jensen***. The State's requested supplemental jury instruction focused on Kobin's call to 911 after Kolinski drank the sodium hydroxide. Because the State's proposed supplemental instruction was based on ***Jensen***, 236 Wis. 2d 521, ¶32, the request does not suggest that ***Jensen*** is no longer good law.

- Kobin told police that he did not believe that he did anything wrong;
- Kolinski did not ask what the substance was before drinking it and she drank it of her own free will;
- Kobin cooperated with police and readily provided police with the videotape of the incident;
- Kobin called 911 after Kolinski began vomiting, did not try to leave the scene, and asked to ride with Kolinski in the ambulance;
- The effect of drinking sodium hydroxide varied according to the concentration;
- Persons associated with Kobin's employer testified that they did not have any "first-hand knowledge" of Kobin's understanding of the dangers posed by sodium hydroxide;
- Kobin's ability to easily take sodium hydroxide from his workplace suggested that the chemical was not a hazardous substance;
- Kobin testified that he understood that the liquid had the potential to burn but he was not intentionally trying to hurt Kolinski;
- Kobin did not think that Kolinski would be harmed by drinking the liquid and Kobin regretted that she had been.

Much of the above evidence speaks to Kobin's subjective awareness of the danger created by his conduct, which ***Jensen*** holds is not controlling. *See* ***Jensen***, 236 Wis. 2d 521, ¶¶17-23. Rather, whether Kobin acted with utter disregard for human life "is measured objectively, on the basis of what a reasonable person in

the defendant's position would have known." *See* ***id.***, ¶17. The State met that burden.

¶8 The jury heard the following evidence. Kobin used sodium hydroxide in his job. He had been trained about the hazardous and caustic nature of sodium hydroxide, the need for special handling and protective clothing, and the possibility of serious injury if sodium hydroxide came in contact with unprotected skin and of fatal injury if sodium hydroxide was ingested or swallowed. In statements to police, Kobin acknowledged knowing that sodium hydroxide was a hazardous chemical.

¶9 The physician who treated Kolinski in the emergency room testified that the sodium hydroxide that Kolinski drank was "very concentrated, much higher than what [is found] in any household materials." Because some of the sodium hydroxide remained in solid form, Kolinski's stomach was also damaged.[5]

¶10 Kolinski testified that she met Kobin when he began frequenting her place of employment. Kobin began asking Kolinski if she would drink something that she did not know what it was if he asked her to or if he dared her to. Kolinski testified that Kobin explained that he would like her to drink "sodium" and that Kolinski thought he was referring to salt. Kolinski testified that Kobin never used the word "hydroxide" when talking about what he wanted her to drink. Kolinski had told Kobin about her precarious financial condition and Kobin offered to give her $20 if she would drink an unknown "shot." Kolinski testified that she asked Kobin if she was going to get sick, and Kobin told her, "no, you should be fine."

[5] The physician testified that if the sodium hydroxide solution had been a "pure liquid," the damage would have been "mostly … contained to the esophagus."

Kobin did not tell her that the liquid would burn or was anything other than sodium. Kolinski watched Kobin take some "white rocks" that looked like salt pellets used to melt ice in the winter from a bag and put them into a bottle of water. The liquid "fizz[ed] a little" and Kobin then put the rest of the bag's contents into the bottle. Kobin asked Kolinski to step out of his car because he did not want her to throw up in his car. Kobin then retrieved a video camera and began taping Kolinski. Kolinski testified that she drank the unknown liquid because she trusted Kobin and she had no reason to believe that the liquid was a dangerous chemical. Kobin never referred to the substance as sodium hydroxide and if she had known what was in the liquid she never would have drunk it. Kolinski testified that she took a "pretty big swig," swallowed some and spit the rest out onto the pavement. Kolinski then fell to her knees as "everything start[ed] to burn, [her] stomach, … throat, [and] mouth." Kolinski began vomiting and soon was vomiting blood. Kolinski suffered serious external chemical burns and life-threatening and permanent injuries to her esophagus, stomach, and intestinal tract.

¶11 The jury viewed the videotape of the incident which showed Kolinski drinking the sodium hydroxide and water mixture at Kobin's request and her subsequent choking and vomiting. Kobin continued to videotape Kolinski and asked her to describe what she was feeling. Detectives who interrogated Kobin after the incident related Kobin's statements in which he admitted getting sexual gratification from seeing women in pain and that seeing and hearing women choke or vomit was a sexual fetish.

¶12 After Kolinski drank the liquid, she was able to call her then-boyfriend and ask for help. When her boyfriend arrived at the scene, he confronted Kobin who denied knowing what Kolinski had drank.

¶13 Kobin's reliance on his 911 call after the incident is misplaced. Kobin contends that "a person [who] despite having set in motion potentially fatal forces, deliberately takes action to minimize the risk … [can]not [be] guilty of an utter disregard of life." The court in ***Jensen*** expressly rejected an identical argument, holding that "[a]fter-the-fact regard for human life does not negate 'utter disregard' otherwise established by the circumstances before and during the crime." ***Id.***, ¶32. Kobin's call to 911 "may be considered by the factfinder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life." *See* ***id.***

¶14 In sum, we fully concur in the State's description of Kobin's conduct as "evil" and far beyond Kobin's concession that it was "unusual." Sufficient evidence supports the guilty verdict.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.