

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP1610-CR

Cir. Ct. No. 2007CF50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANDRA P. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Sandra Scott appeals from a judgment of conviction of first-degree reckless homicide of a two-and-one-half year-old child. She argues that the evidence was insufficient to establish that she had a subjective awareness that her conduct would created a substantial risk of death or great

bodily harm or that her conduct showed an utter disregard for life. We conclude that evidence that Scott punched the child in the stomach twice and failed to seek medical attention for the child when the child exhibited problems established all elements of the offense. We affirm the judgment of conviction.

¶2 Our standard of review to determine whether the evidence was sufficient to support the conviction is that we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Hayes*, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203. We must accept the reasonable inferences drawn from the evidence by the jury. *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). It is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. *Id.* at 506.

¶3 To convict Scott of first-degree reckless homicide the jury had to be convinced beyond a reasonable doubt that: 1) Scott caused the child's death; 2) that Scott caused the child's death by criminally reckless conduct; and 3) that the circumstances of Scott's conduct displayed an utter disregard for human life. WIS. STAT. § 940.02(1) (2007-08),¹ WIS JI—CRIMINAL 1022. Criminally reckless conduct requires both the creation of an objectively unreasonable and substantial risk of death or great bodily harm and a subjective awareness of that risk. *State v. Blair*, 164 Wis. 2d 64, 70, 473 N.W.2d 566 (Ct. App. 1991). Scott contends that

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

there was no evidence that she was subjectively aware of a substantial risk of death or great bodily harm.

¶4 The jury heard Scott's written statement to police. Scott indicated that she had cared for her god daughter, two-year-and-one-half year-old Alizay, overnight at the home of Scott's mother. After noon the next day Scott directed Alizay to get up and fold up some blankets she had been sleeping on. Alizay didn't comply and in anger, Scott punched Alizay in the stomach. She punched Alizay a second time in the stomach almost right away and Alizay fell backward and hit her head on a bottle of gin that was on the floor. When Alizay started to cry Scott scooped her up by one arm and held her hand over Alizay's mouth telling her to "shut up." Alizay was limp at that point and her eyes were rolling around. Scott, with the assistance of her mother, put Alizay in her coat. When Scott's mother commented that there was something wrong with Alizay, Scott brushed it off saying Alizay was just tired. Scott, her mother, and Alizay drove to the bank. While Scott's mother was in the bank, Scott was concerned about Alizay because Alizay's eyes kept rolling around. She questioned Alizay about her name and Scott's name and Alizay answered the questions correctly. They drove Scott's mother home and Scott's boyfriend got in the car. They drove to return Alizay home; Scott was driving. On the way she realized something was seriously wrong with Alizay. She stopped on a highway exit ramp, called 911, and drove Alizay to the nearest hospital.

¶5 Alizay was pronounced dead at the hospital. An autopsy revealed that Alizay bled to death after an artery in her stomach cavity was torn in half. The medical examiner testified that it takes a great deal of force to cause the injuries he observed during Alizay's autopsy. He indicated that the massive laceration happened up to four hours before Alizay died.

¶6 At trial Scott testified that she hit Alizay twice with her fist. She covered Alizay's mouth because she didn't want others in the house to hear the child crying. She had to put Alizay in her coat because the child could not stand up. While Scott's mother was inside the bank, Scott asked Alizay questions because her eyes were rolling around. She pulled over when she noticed Alizay hunched over in her booster seat and nonresponsive to the call of her name. Scott indicated that when she punched Alizay she didn't think it would cause any kind of injury.

¶7 The jury was free to reject Scott's testimony that she actually did not think punching the child would cause injury. The use of a closed fist and the force with which the blows had to be delivered to cause the massive laceration permit an inference of subjective awareness that the punches could cause great bodily injury. Scott delivered a second punch even after the child was clutching her stomach in pain from the first one. Further, Scott ignored obvious signs that the child was in distress immediately after the punches. The child's eyes were rolling around and the child was unable to stand on her own. Scott tried to cover up the child's distress by covering her mouth to stop her crying and dismissing the child's lethargy by saying she was tired. Despite her concerns over the child's condition, Scott dismissed them on the child's ability to answer simple questions. Scott's observation of the child's distress was sufficient to permit a conclusion that she was subjectively aware that the failure to get the child help in the period immediately following the punches created a risk of great bodily injury or death. Her entire course of conduct was criminally reckless.

¶8 The standard for determining whether conduct displayed an utter disregard for human life is "measured objectively, on the basis of what a reasonable person in the defendant's position would have known." *State v.*

Jensen, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. The factfinder is to consider:

the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force that was required to cause those injuries. We also consider the type of victim, the victim's age, vulnerability, fragility, and relationship to the perpetrator. And finally, we consider whether the totality of the circumstances showed any regard for the victim's life.

Id., ¶24; quoting *State v. Edmunds*, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999).

¶9 The same evidence supporting a finding of criminal recklessness supports a determination that Scott acted with utter disregard for life. Not only did Scott deliver two forceful blows with her fist but she did so to a small and vulnerable child. Not only did Scott ignore obvious signs of the child's distress but did so in a manner to conceal and excuse those signs. Rather than seek medical attention for the child, Scott proceeded to drive the child away from medical facilities in an effort to deliver the child to her mother. It was a complete abrogation of responsibility to care for and protect the child. The evidence supports the jury's determination that Scott acted with utter disregard for life.

By the Court.—Judgment affirmed.

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