COURT OF APPEALS
DECISION
DATED AND RELEASED

September 17, 1997

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

NOTICE

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No. 96-3285-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK R. UMHOEFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: RICHARD T. BECKER, Judge. *Affirmed.*

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

PER CURIAM. Mark R. Umhoefer appeals from a judgment of conviction of causing great bodily harm to a child. He challenges the sufficiency of the evidence and argues that a mistrial should have been granted when the prosecutor improperly asked an expert witness about an essential element of the crime. We affirm the judgment.

Umhoefer was charged with intentionally placing a five-week-old baby's hand in a bowl of hot soup. The baby, Valerie, and her mother, Mary Umhoefer, were staying at Umhoefer's apartment. At that time, Mary was still married to Umhoefer, but the Umhoefers' marriage was marked by periods of separation and attempted reconciliations. Umhoefer is not Valerie's father.

On the night that Valerie's hand was burned, Mary had taken a bowl of cream soup and placed it on the floor near the head of a mattress lying on the floor. She planned to nurse Valerie while eating the soup. A few minutes later she laid Valerie on her back at the foot of the mattress and returned to the kitchen to prepare some vegetables. Umhoefer returned from the store where he had gone to obtain medicine for Mary and their son Joshua. Umhoefer went into a bedroom to administer the medicine to his son. He subsequently brought Valerie into the kitchen where Mary was working and told her the baby had been burned. He said he had discovered the baby face down with her hand in the soup.

Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We reject Umhoefer's contention that the evidence must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with his innocence. In reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507-08, 451 N.W.2d 752, 758 (1990). The jury may reject a theory of innocence and this court may not substitute its judgment for the jury's overall evaluation of the evidence.

See ***id.*** at 506, 451 N.W.2d at 757. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See* ***id.*** at 508, 451 N.W.2d at 758.

Umhoefer argues that there was not sufficient evidence that he intentionally injured Valerie. An expert physician testified that Valerie had suffered a second-degree burn not by a splattering of or contact with a hot liquid. The uniformity of the burn around the fingers and ending in a line around the wrist indicated that the burn was caused by the immersion of Valerie's hand into a hot liquid. He also stated that it was impossible for a five-week-old baby to roll over or move laterally upon her own so as to reach the soup bowl independently. There was also evidence that Umhoefer was the only person in the room with Valerie when the injury occurred. Mary testified that after placing Valerie on the mattress she remained in the kitchen area. Umhoefer's statement to police confirmed that Mary did not have an opportunity to do something to the child. There was sufficient, albeit circumstantial, evidence that the baby's hand was immersed in the soup and that Umhoefer was the person who did it.

Umhoefer attempts to negate an inference that he acted with the requisite intent by reliance on his action to administer first aid and the decision to take the baby to the hospital for treatment. Umhoefer's subsequent magnanimous conduct is not relevant to his intent at the time Valerie was injured. Indeed, his stepping in to assist Mary with the baby's injury was entirely consistent with his possible motive of demonstrating to Mary that she still needed him. It was reasonable for the jury to consider Umhoefer's subsequent conduct to be a product of his remorse or possible surprise that the injury was so severe.

Umhoefer also asserts as a weakness in the evidence the prosecution's failure to firmly establish a motive for injuring the baby. The evidence established that the Umhoefers had filed for divorce in 1993 but since that time had experienced periods of separation and attempted reconciliation. The divorce was pending when the crime was committed. It was apparent from Umhoefer's testimony that he wanted Mary to return to their marriage. Umhoefer testified that Mary was over-protective of the baby and held the baby all the time. The evidence permits inferences that Umhoefer was either jealous of the attention Mary gave the baby, that he desired to hurt Mary by having her witness an injury to her child, or that he wanted to make Mary need him. The prosecution was not obligated to support these possible inferences of motive by expert testimony on the possible psychological phenomena at play. Although the prosecution was obligated to adduce sufficient evidence that Umhoefer acted intentionally, it was not required to prove motive. We conclude there was sufficient evidence to convict Umhoefer.

The expert physician was asked whether he had an opinion "as to whether this injury was intentionally caused?" The defense objected. After discussion outside the presence of the jury, the objection was sustained. No answer was given to the question and the trial court immediately instructed the jury that:

> I have sustained the objection to that question. One of the instructions that you'll get at the end of the trial will tell you about intent, and that intent is an element in the crime that is charged. It is up to you, the jury, to decide whether there was an intentional act here, and that issue is one that the jury is every bit as qualified as everyone else to make a decision on, and we don't really need the expert testimony on that issue.

Umhoefer argues that the trial court should have granted his motion for a mistrial based on the prosecutor's question on an ultimate fact. The decision of whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. *See* ***State v. Bunch***, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). When the basis for the mistrial is the prosecution's overreaching, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights. *See* ***State v. Barthels***, 174 Wis.2d 173, 184, 495 N.W.2d 341, 346 (1993). In such a situation, a mistrial is allowed only if there is a "manifest necessity" for termination of the trial. *See* ***id.*** at 183, 495 N.W.2d at 346.

Even assuming that the question was improper because it tended to invade the province of the jury, there was no basis for granting a mistrial. The question was never answered. The expert never gave an opinion as to whether the baby was intentionally injured. The jury never heard the potentially prejudicial answer. Although the framing of the question may have been suggestive of the answer, the trial court gave a curative instruction. The jury was told that it was to determine intent. Potential prejudice to a defendant is presumptively erased when admonitory instructions are properly given by a trial court. *See* ***State v. Williamson***, 84 Wis.2d 370, 391, 267 N.W.2d 337, 347 (1978). There was no manifest necessity justifying a mistrial.

By the Court.—Judgment affirmed.

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