COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP601-CR **Cir. Ct. No. 2011CF336**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REYMUNDO A. PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Reymundo Perez appeals a judgment of conviction for first-degree reckless homicide and child abuse—recklessly causing great harm. For the reasons discussed below, we reject the sufficiency of the evidence and

suppression issues that Perez raises on appeal and affirm the judgment of conviction.

STANDARD OF REVIEW

¶2 We review the sufficiency of the evidence to support a criminal conviction by comparing the evidence with the instructions given to the jury, so long as those instructions conform to the statutory requirements of the charged offense. ***State v. Beamon***, 2013 WI 47, ¶22, 347 Wis. 2d 559, 830 N.W.2d 681. In doing so, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. In this context, "we consider all of the evidence produced at trial, including evidence that the defendant challenges as being improperly admitted." ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29.

¶3 When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2013-14)[1]; ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. ***Id.***

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

DISCUSSION

Sufficiency of the Evidence

¶4 We begin by addressing the sufficiency of the evidence, both because discussing the evidence produced at trial places the suppression issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal, rather than a retrial.

¶5 As the circuit court properly instructed the jury, the elements the State needed to prove for the reckless homicide count were that: (1) Perez's conduct "was a substantial factor in producing the death" of the child; (2) Perez "was aware that his … conduct created an unreasonable and substantial risk of death or great bodily harm" to the child; and (3) "[t]he circumstances of [Perez's] conduct showed utter disregard for human life." WIS JI—CRIMINAL 1020 (alteration in original; footnote omitted). The elements that the State needed to prove for the child abuse count were that: (1) Perez caused great bodily harm to the child—meaning "injury which creates a substantial risk of death, or which causes a … permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury"; (2) by reckless conduct—meaning conduct that "created a situation of unreasonable risk of harm … and demonstrated a conscious disregard for the [child's] safety"; and (3) the child "had not attained the age of 18." WIS JI—CRIMINAL 2111.

¶6 The parties stipulated that Perez made a 911 call at 10:37 on the morning of October 26, 2011, to report that his girlfriend's son—who had been left alone with him while his girlfriend went to work—had "fall[en] asleep" and was "not breathing right." The child's mother testified that her son appeared fine and was behaving normally before she left for work.

¶7 First responder Diane Kollock testified that when she arrived the child was unresponsive with fixed and partially dilated pupils and with agonal respiration—meaning that she could hear gurgling from fluid in the child's lungs as he breathed. Kollock and her partner, Corrine Guinn, attempted to intubate the child to get a clear airway, but removed the tube when the child exhibited a gag reflex. Guinn testified that the removed tube had blood on it; that the child began retching after the tube was removed; and that the vomit had blood in it.

¶8 Kollock asked Perez how long the child had been in the state he was in, to which Perez replied eight minutes. Perez told Kollock the child had been fine when he had left the room, and then when he came back into the room, the child was not fine. Perez told Guinn that the child stood up from his chair, was breathing funny, and then fell down.

¶9 Paul Mattlin, who served as a fire department paramedic as well as chief deputy county coroner, also responded to the scene and treated the child in the ambulance. Mattlin testified that the child was unresponsive when he arrived at the scene, had a Glasgow Coma Scale reading of 3, and had a pink, frothy sputum coming from his mouth. The child's oxygen saturation was high enough that Mattlin did not intubate him with a breathing tube, but continued providing oxygen. Perez told Mattlin that the child had been sick, and that his mother had been giving him Tylenol.

¶10 Portage County Deputy Sheriff Chad McClellan was also dispatched to the scene and questioned Perez about what had led to the child's condition. Perez told McClellan that he had been playing video games with the child nearby when the child just suddenly slouched over. When Perez attempted to wake the boy he briefly came around, grabbed the television remote, and simulated playing

video games, but then he lost consciousness again, at which point Perez called 911.

¶11 The emergency room physician, Dr. Michael Curtis, observed that the child appeared comatose and obviously distressed when he arrived at the hospital. Dr. Curtis placed a nasogastric tube through the child's throat to his stomach and noted that there was no gag reflex. Dr. Curtis testified that the lack of a gag reflex was significant for two reasons. First, it implied that there was a severe degree of neurologic injury. Second, given that the first responders had observed a gag reflex when they attempted to intubate the child at the scene, the lack of a gag reflex at the hospital indicated to Dr. Curtis that the child's condition was rapidly progressing, and therefore, that the causal injury must have taken place within a short window of time.

¶12 Additionally, Dr. Curtis determined that the child had recent fractures to his right clavicle and forearm, which would have been very painful and would have severely diminished the use of his right arm, rendering him unable to hold a remote or video game control. Similarly, Dr. Curtis testified in response to a hypothetical question that a distraction or separation injury to the child's spinal column would make it very difficult for the child to walk or bear weight. Dr. Curtis concluded that such injuries would have had to have happened after the mother left for work, if it was true that the child was in his usual state of health at that time.

¶13 Dr. Curtis also observed a retinal hemorrhage in the child's eye similar to that which occurs in shaken baby cases. Dr. Curtis viewed the severity of the injury to be inconsistent with or out of proportion to Perez's account that the child became unresponsive while playing a video game, which led Dr. Curtis to

inform McClellan that he suspected child abuse. The child was then transferred to a pediatric intensive care unit at another hospital.

¶14 At about the time of this transfer, Detectives Gary Koehmstedt and Joshua Ostrowski separately interviewed the mother and Perez, who both indicated that the child had been fine in the morning before the mother left for work. Perez stated that the child had just fallen asleep while Perez was playing video games, and then Perez noticed that the child's breathing was slow.

¶15 Koehmstedt arrested Perez later that day for alleged child abuse based upon the information from Dr. Curtis and the opinion of a doctor at the second hospital that the child had suffered a serious and probably fatal brain injury that was likely the result of abuse and had likely occurred during the time when the child was alone with Perez. During a second interview conducted later that evening, Perez said that the child had fallen in the bathroom when Perez had left him alone to go potty. When the child would not stop crying, Perez threw him down on the floor, then shook him, then threw him down again until he was quiet.

¶16 The child died two days later. The cause of death was listed as homicide by acute multiple blunt force trauma to the head, thorax and spine. Dr. Robert Corliss, the pathologist who performed the autopsy, testified that there was no iron staining from multiple internal thoracic and cerebral hemorrhages in the child's body, indicating that the blood had not had time to break down, and that the injuries could be no more than two days old—including the two days that the child spent in the hospital on a respirator. Furthermore, the minimal amount of blood from subdural cerebral hemorrhaging indicated that the brain had undergone immediate and catastrophic swelling from trauma, which had prevented further hemorrhaging. Dr. Corliss explained that such a brain injury would have been

incapacitating, and that the child would not have had any meaningful interactive activity or lucid interval after sustaining it. Dr. Corliss also found a severe fracture distraction of the lumbar spine that would have paralyzed the child below the level of the injury, and prevented him from walking. Dr. Corliss concluded that the degree of force necessary to cause the spinal injury could not have been caused merely by falling down, even from the height of a counter.

¶17 If believed, this evidence was more than sufficient to satisfy every element of the child abuse and reckless homicide charges. Perez attempts to challenge the credibility of the testimony provided by Drs. Curtis and Corliss in comparison to the contradictory opinions about the time and/or mechanism of death reached by the defense experts. Such credibility determinations were, however, solely within the domain of the jury and do not provide grounds for reversal on appeal.

Probable Cause for Arrest

¶18 Probable cause for arrest exists when "the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. The standard requires "more than a possibility or suspicion that [the] defendant committed an offense, but the evidence need not reach the level … that guilt is more likely than not." ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). When competing reasonable inferences could be drawn, the officer is entitled to rely on the one justifying arrest. ***Kutz***, 267 Wis. 2d 531, ¶12.

¶19 Here, we conclude that the arresting officer had probable cause to believe that Perez had committed child abuse. The officer had information that the

child had suffered a retinal hemorrhage of the type typically associated with child abuse; the child's rapid deterioration indicated that the injury was very recent; the child had been in the sole care of Perez during the time period in which the injury was most likely to have occurred, and had been observed by others to be functioning normally immediately prior to having been left in Perez's care; and Perez's account of how the child had behaved and how his symptoms had manifested did not match the injuries found. It was not necessary to have determined the precise time or cause of the child's injury, or to have eliminated other possible suspects, in order to believe that Perez had probably done something to cause the child's condition.

Custodial Statements

¶20 Before introducing a statement made by a defendant during custodial interrogation, the State must establish by the preponderance of the evidence both that the statement was given voluntarily, and that it was made with a knowing and intelligent understanding of the constitutional rights being waived. ***Hindsley***, 237 Wis. 2d 358; *see also* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965) (discussing standard for voluntariness); ***Miranda v. Arizona***, 384 U.S. 436 (1966) (discussing "knowing and intelligent" standard). Absent countervailing evidence, a defendant's custodial statement may be admitted upon a prima facie showing that the defendant was informed of his rights, that he indicated that he understood them and was willing to make a statement, that the statement sought to be introduced was in fact made by the defendant, and that the statement was not the result of duress, threats, coercion or promises. ***State v. Lee***, 175 Wis. 2d 348, 360-61, 499 N.W.2d 250 (Ct. App. 1993). If the court is presented with countervailing evidence, it must proceed to a balancing test under the totality of the circumstances. ***Id.*** at 361.

¶21 Perez first argues that he did not understand the ***Miranda*** warnings that were given to him because Spanish is his native language. However, the circuit court's factual finding that Perez understood his basic rights is not clearly erroneous. Perez asked some questions about the ***Miranda*** information officers provided before saying that he understood his rights, and he did not ask for an interpreter. His statements during his interrogations were responsive to the questions asked, and indicated awareness that he could go to jail if he told officers what really happened. Perez also did not use an interpreter at a subsequent interrogation at which counsel was present.

¶22 Second, Perez argues that the interviewing techniques used by the police were coercive, given his suggestibility. However, the circuit court found that the officers made no threats, that they did not deprive Perez of any necessities, and that the interrogations were not unduly lengthy. The officers repeatedly confronted Perez with the fact that his account of what happened did not match up with what the doctors had found; they sympathized with him about how a child's incessant crying could drive a person to snap and do something uncharacteristic, without meaning to seriously harm the child; and they suggested that knowing exactly how the child was injured could help the doctors determine the proper treatment for the child. These interviewing techniques were appropriate and not coercive under the totality of the circumstances. *See generally* ***State v. Jerrell C.J.***, 2005 WI 105, ¶¶18-20, 283 Wis. 2d 145, 699 N.W.2d 110.

By the Court.—Judgment affirmed.

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