COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3027-CR **Cir. Ct. No. 98-CF-146**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LINDA T. SOBISH,

DEFENDANT-APPELLANT.

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

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Linda Sobish appeals a judgment convicting her of second-degree murder based on the death of an infant in her care over twenty years ago. The sole issue on appeal is whether the jury should have been instructed on the lesser-included offense of reckless homicide. We conclude that the trial court properly denied the requested jury instruction and affirm.

¶2 "The submission of a lesser-included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). We review the question independently, as a matter of law. ***State v. Weeks***, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

¶3 The parties agree that, under the statutes in effect at the time of the baby's death, reckless homicide was a lesser-included offense of second-degree murder. WIS. STAT. § 939.66(2) (1977).[1] Under WIS. STAT. § 940.06(2), reckless homicide consisted of causing the death of a person by:

> an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury.

Under the version of WIS. STAT. § 940.02(1) then in effect, one way in which to commit second-degree murder was to cause the death of a person:

> [b]y conduct imminently dangerous to another and evincing a depraved mind, regardless of human life.

According to the standard jury instruction in effect at the time:

> The depravity of mind referred to in second degree murder exists when the conduct causing death demonstrates an utter lack of concern for the life and safety of another and for which conduct there is no justification or excuse.

[1] Except as otherwise noted, all references to the Wisconsin Statutes in the opinion are to the 1977 version which was in effect at the time of the offense.

WIS JI—CRIMINAL 1110 (1966). Relevant considerations include the nature of the defendant's act, the reason behind the act, the extent of the victim's injuries, the degree of force required to cause those injuries, the victim's age, vulnerability and fragility, the relationship of the victim to the defendant and whether the defendant's conduct demonstrates any regard for the victim's life. ***State v. Edmunds***, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999).[2]

¶4 Sobish sets forth three theories under which she argues that the jury could have determined her conduct was reckless, but still have concluded that it did not evince a depraved mind: (1) her conduct was the result of ignorance, rather than a lack of regard for the baby's life; (2) her conduct was an overreaction to a stressful situation; or (3) the amount of force required to cause the injuries could have been inflicted in a manner that did not suggest conduct regardless of life. We consider each theory in turn.

¶5 First, the State presented considerable evidence that the baby's death was the result of what is termed "shaken baby syndrome." In response, Sobish presented evidence that the syndrome was not well understood in the 1970's and, at that time, significant portions of the population were either unaware of the danger of shaking a baby or grossly underestimated the potential for serious injury. We agree with the trial court, however, that if the jury were persuaded that a reasonable person in the 1970's would not have realized that violent shaking of an infant could cause serious injury, it could not have found such actions satisfied

[2] Because the former crime of second-degree murder is largely analogous to the current offense of first-degree reckless homicide, which uses the term "utter disregard for human life," we consider cases discussing the latter to be applicable to cases discussing the former. *See* ***State v. Edmunds***, 229 Wis. 2d 67, 75-76, 598 N.W.2d 290 (Ct. App. 1999) (applying prior case law to current statute); *see also* WIS. STAT. § 940.02(1) (1999-2000).

the statutory directive of "a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury." WIS. STAT. § 940.06(2). In other words, the evidence was such that the jury could find that a person in Sobish's position either should or should not have recognized the inherent danger of violently shaking a baby. If Sobish should have recognized the danger, the lack of general knowledge about the syndrome provided no justification or excuse for violently shaking the baby. If Sobish should not have recognized the danger, her conduct was neither reckless nor depraved.

¶6 Sobish told the police that the baby started to choke while she was feeding him strained peaches. Although she initially claimed she did no more than thump the baby on the back and that he suddenly stiffened and hit his head on a table, she conceded in one interview that she may have shaken him up and down as she held him upside down to clear his throat. Because the nurse at the hospital found food remains in the baby's mouth, because the State offered no other explanation for why the incident occurred and because there was no evidence that Sobish had committed prior abuses, Sobish argues that the jury could have concluded that she shook the baby more than she admitted, but also have concluded that the reason she did so was because she believed the baby was choking. However, even assuming that the episode was triggered by a choking incident, we are not persuaded that a jury could reasonably find Sobish's subsequent actions to be reckless but not depraved.

¶7 The injuries which caused the infant's death were severe. As one doctor testified:

> [T]here's clear evidence of severe injury to the substance of the brain; not just the effects of a cardiac arrest or a respiratory arrest leading to cardiac arrest, but in fact mechanical injury to the brain of a very, very severe nature.

> In fact, the injury that we see is comparable to the injuries that you see in children who fall out of second- or third-story windows or who are in 50-mile-an-hour motor vehicle crashes and tossed around the car or the inside of a car. They're of that magnitude.

There can be no dispute that the baby was vulnerable and dependent on Sobish for his safety. As we have already pointed out, in order to find Sobish guilty of either offense, the jury would have to have been convinced that she should have known that violent shaking presented an inherent danger of serious injury. A jury could not reasonably find that the alleged choking would excuse or justify subjecting the baby to such a danger.

¶8 Finally, the record reflects that one of the expert witnesses demonstrated the degree of force required to produce the injury by shaking a mannequin twice such that the head thrust back and forth in a fairly rapid and violent fashion. Sobish claims that because the doctor only shook the mannequin twice, a jury could find that the requisite shaking was not of sufficient duration as to evince a depraved mind. Again, however, the degree of force necessary to inflict the injuries with only a few shakes was so extreme that a jury could not reasonably have concluded that the shaking represented anything other than an utter disregard for the baby's life.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).