

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2005

Cornelia G. Clark
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. 04-1479-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000774

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIN L. HILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
TIMOTHY L. VOCKE, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Erin Hill appeals from a judgment convicting her of first-degree reckless homicide, abuse of a child, and second-degree sexual assault. She argues that there was insufficient evidence to support the verdict. We disagree and affirm.

¶2 “Our review for sufficiency of the evidence supporting a criminal conviction is limited.” *See State v. Johannes*, 229 Wis. 2d 215, 221, 598 N.W.2d 299 (Ct. App. 1999). We will sustain a verdict “unless 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.” *Id.* at 222 (citation omitted). “The jury determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from the evidence.” *Id.* “Our review is the same whether the evidence is direct or circumstantial.” *Id.* “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt” we will not overturn the verdict. *Id.*

¶3 Hill first argues that the evidence was insufficient to support her conviction of first-degree reckless homicide. A person is guilty of first-degree reckless homicide if they “recklessly cause[] the death of another human being under circumstances which show utter disregard for human life” *See* WIS. STAT. § 940.02(1) (2003-04).¹

¶4 Hill contends that there was insufficient evidence to show that she caused the death of two-year-old Tommy Burke because there were no witnesses to Tommy’s injuries. While it is true that there were no eyewitnesses, there was more than enough circumstantial evidence to support an inference by the jury that Hill caused Tommy’s injuries. Hill conceded that she was home alone with

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Tommy on the night he was taken to the hospital in grave medical condition, Hill gave conflicting accounts of how Tommy had been harmed, and the record is replete with medical evidence showing that Tommy suffered repeated injuries that could not have been accidentally inflicted. Hill also contends that there is insufficient evidence to show that she acted in a criminally reckless manner because she procured medical assistance for Tommy by calling 911. The fact that Hill summoned emergency services does not preclude a finding by the jury that she was criminally reckless because the jury could have concluded that Hill had a change of heart after she realized how severe Tommy's injuries were. There is sufficient evidence to support the verdict of first-degree reckless homicide.

¶5 Hill also argues that there was insufficient evidence to support her conviction of second-degree sexual assault. To show that Hill committed second-degree sexual assault, the State had to prove that: (1) Hill had sexual contact with Tommy B.;² (2) that Tommy B. did not consent to sexual contact; and (3) that Hill had sexual contact with Tommy B. by use or threat of force or violence. *See* WIS. STAT. § 940.225(5)(b)1. Tommy B.'s daycare provider testified that she changed his diaper the night before he went to the hospital, had an opportunity to observe his genital area, and there were no bruises or marking on his body. Lieutenant

² "Sexual contact" means:

Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19(1).

WIS. STAT. § 940.225(5)(b)1.

Kris Vervaeren testified that Tommy had pinch marks on his penis and scrotum. Dr. Virginia Greenbaum testified that the bruises on Tommy's scrotum and penis suggested pinch marks and that Tommy's injuries were indicative of severe physical abuse. Dr. Mark Witeck testified that Tommy B. had red bruises on his genitals that were indicative of direct blunt trauma and could be consistent either with a bite mark or direct blow from a fist or other instrument. This testimony provided sufficient basis for the jury to conclude that Hill had sexual contact with Tommy B. without his consent by use of force or violence.

By the Court.—Judgment affirmed.

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

