COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1572-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD J. MYERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. Donald J. Myers appeals from a judgment convicting him of second-degree reckless homicide. He was charged and tried for the offense of

first-degree reckless homicide, which was submitted to the jury along with the lesser included offense of which he was ultimately convicted.

¶2 Myers's conviction arose out of the death of his infant son, who died as a result of injuries sustained while Myers was caring for him. The child's death was later determined to have been caused by being shaken. Myers raises three issues on appeal: (1) whether the trial court erroneously exercised its discretion when it denied his motion to dismiss the charge at the close of the State's case; (2) whether sufficient evidence was presented to establish that Myers was "subjectively aware" of the risk of shaking the child; and (3) whether the court erred in allowing the jury to view an evidentiary demonstration.

The Motion to Dismiss

¶3 In ***State v. Simplot***, 180 Wis. 2d 383, 399-400, 509 N.W.2d 338 (Ct. App. 1993), we held that a defendant who moves for dismissal at the close of the state's case and then chooses to introduce evidence waives the motion. That is precisely what happened here, and Myers has thus waived any appeal from the denial of his motion.

¶4 Myers argues that the ***Simplot*** rule violates due process, but he does not support the argument with any citations to authority; and we have often said that we will not consider arguments that are unexplained or undeveloped, or unsupported by citations to authority or references to the record. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988).

Sufficiency of the Evidence

¶5 Myers next argues that the evidence was insufficient to support his conviction for second-degree reckless homicide. Specifically, he claims that the State failed to carry its burden of proving that he had a "subjective awareness" of the risks involved in shaking an infant. In order to obtain a conviction for second-degree reckless homicide, the State must prove both that the defendant's conduct created an objectively unreasonable and substantial risk of death or great bodily harm and that the defendant had a "subjective awareness of that risk." ***State v. Blair***, 164 Wis. 2d 64, 70, 473 N.W.2d 566 (Ct. App. 1991).

¶6 Myers points to the testimony of at least one expert witness conceding that the scientific community has only a general sense of the amount of force or number of shakes required to produce injuries consistent with those suffered by the infant in this case. And he claims that, as a result, the State's case was simply that "everybody knows" the dangers and that "[no] evidence whatsoever" was presented relating to his state of mind during the incident.

¶7 We analyze challenges to the sufficiency of the evidence under the following rules:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. 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, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted).

¶8 The question presented is one relating to the defendant's mental state, of which direct proof is rare. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 200, 316 N.W.2d 143 (Ct. App. 1982). It is also true, however, that convictions may be based wholly on circumstantial evidence, *see* ***State v. Marshall***, 92 Wis. 2d 101, 121, 284 N.W.2d 592 (1979); indeed, "[c]ircumstantial evidence may often be stronger and more convincing than direct evidence." WIS JI—CRIMINAL 170. Certainly circumstantial evidence can give rise to an inference that a defendant was aware of the possible consequences of his or her actions. It has long been recognized, for example, that a person's state of mind "may reasonably be ascertained from [his or her] acts and conduct … and the inferences fairly deducible from the circumstances." ***Jacobs v. State***, 50 Wis. 2d 361, 365, 184 N.W.2d 113 (1971). In this case, in the absence of eyewitness testimony, the State offered expert evidence as to the nature of the child's injuries and the type of force necessary to inflict them. Myers claims the testimony in this regard was so imprecise as to be valueless.

¶9 None of the State's experts was able to identify precisely how much force it takes to cause an infant's death. Dr. John-Peter Temple, a pediatric neurologist, testified that, while he had no way of quantifying the force required to produce the child's injuries, he was satisfied they would not occur "in the course of normal handling of babies" but rather were "several orders of magnitude above" what a child would experience while being picked up or played with. Another witness, Dr. William Perloff, a medical doctor with a Ph.D. in civil engineering, testified that while it is not known exactly what force or duration of shaking is necessary to produce injuries of the type suffered by the child in this case, it has

been established that injuries are more severe when the shaking is repetitive. Another physician, Dr. Richard Strauss, testified that in a postmortem examination he saw extensive bleeding in the retinas of both of the child's eyes, and that this was consistent with the infliction of "sudden, violent, extraordinary force" created by shaking or hitting the child. He also noted that "major bleeding" and a swelling of the child's brain was apparent in a CAT scan. Dr. Dennis Ryan, a pediatric opthalmologist, testified that the hemorrhaging in the child's eyes was similar to that seen in victims of automobile, train or airplane accidents where the eye is "directly hit."

¶10 Dr. David Lautz, a radiologist, also examined the child's CT scan and characterized the brain injuries as resulting from "significant trauma, relatively severe, serious intracranial trauma." He said that these injuries weren't "something that you get falling out of a high chair [or] rolling off a couch," but were the result of "vigorous[]", or "serious trauma." Dr. Temple described the child's injuries as "the result of … being violently shaken back and forth" and a forensic pathologist, Linda Biedrzycki, used similar language, stating that, in her opinion, the child had been shaken "very rapidly and violently" and with "a great deal of force". Biedrzycki also testified that "[t]he violence necessary to cause [the observed injuries] in a shaken baby is more than anyone would think would not hurt a baby" and that "the force and the violence necessary is so great that no one would think it was a benign action."

¶11 Under the deferential rules applicable to our review of the sufficiency of the evidence to support a jury's verdict, we believe this testimony was adequate. The jury could reasonably infer from the extensive evidence on the general measure of force necessary to inflict the injuries actually suffered by the

child that the shaking in this case was so violent as to leave no doubt that it could cause serious injury or death—and that Myers had to have been subjectively aware that he was using such force.

¶12 We agree with Myers that there appears to be a consensus among the experts that the medical community cannot quantify precisely how much force is required to cause an infant's death. But we do not agree that that fact *per se* prohibits a finding that he was subjectively aware of the risks involved in his course of conduct. If we were to hold that "subjective awareness" could not be inferred in this case because the exact point at which shaking turns from relatively harmless to potentially fatal cannot be determined with precision, it would be practically impossible to convict anyone of the charged offense. Where, as here, the injuries to the victim are so severe as to leave no doubt that the force required to inflict them was harmful, the fact that we cannot determine precisely when that risk comes into play is irrelevant. When a car is driven at 120 miles per hour on a traveled highway, it is irrefutable that the driver's excessive speed creates a risk. And attempts to ascertain the precise speed at which that risk comes into play is pointless when it is apparent that the actual conditions undeniably create a risk of serious injury or death. Indeed, to require—as Myers suggests—proof that he actually knew the precise point at which innocent play ends and dangerous shaking begins—especially when that line can't even be drawn by the experts—would effectively nullify the offense.

The Evidentiary Demonstration

¶13 One of the State's experts, Dr. Perloff, demonstrated to the jury the type of shaking that would be required to produce the child's injuries by using a doll of approximately the same size and weight as the victim. During the demonstration, the doll's leg became dislodged from its body and fell off. Myers contends that the demonstration was prejudicial to his defense and that Perloff's opinion was "inadequate" and his testimony "irrelevant."

¶14 "Whether demonstrative evidence is to be received rests largely with the trial court's discretion." ***Ellsworth v. Schelbrock***, 229 Wis. 2d 542, 564, 600 N.W.2d 247 (Ct. App. 1999). As long as the record reveals a reasonable basis for the decision, we will defer to the trial court's ruling. *See* ***id.*** And we said in ***Ellsworth*** that "[t]he court should [admit the demonstration] if enough of the obviously important factors in the case are duplicated in the [demonstration], if the failure to control other possibly relevant variables is explained, and if the jury is aided by the evidence's admission." ***Id.***

¶15 Here, several relevant factors were duplicated. The doll was the same size and weight as the victim and the movement of the doll's head and neck (which were the focus of the inquiry and the location of the child's injuries) reflected the actual movement of a real child. While it is true that the exact force Perloff used to shake the doll was not scientifically quantifiable, he explained the method he used in arriving at the force he demonstrated, stating that it was based on his studies of

injuries suffered by children in other shaken-baby cases and in falls. Perloff told the jury that the number of shakes and the force used were not precise measures, but that it was known that the more times a baby is shaken, the more serious the resulting injuries. He also focused the jury's attention during the demonstration, not on the force he was using, but on the motion of the doll's head and neck, which, he said, is what makes infants particularly vulnerable to this type of injury. In short, Perloff's demonstration served to illustrate the oral testimony of the State's expert witnesses, who had previously described the child's injuries as having been caused by rapid acceleration and deceleration—terms which, in the abstract, may not have given the jurors a clear idea of the type of movement being described. The demonstration was not excessively long, nor did it focus undue or improper attention on the victim. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 456, 304 N.W.2d 742 (1981). Given its explanatory value, the qualifications of the witness offering it, and the accompanying testimony, the circuit court did not err in allowing the demonstration.

¶16 Finally, we are satisfied that the detachment of the doll's leg during the demonstration was not prejudicial to Myers. The trial court noted at the time, for example, that the jury's reaction to the incident was not shock, but laughter. The event was obviously perceived, not as a reflection of how much force Dr. Perloff was using, but as a simple accident. And Perloff explained to the jury that the doll had been used numerous times to demonstrate forceful shaking and that the mishap was no doubt caused by the cumulative effect of those prior

demonstrations. An error is prejudicial only if there is a reasonable probability that it contributed to the defendant's conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). That is not the case here.

By the Court.—Judgment affirmed.

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