

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2012

A. John Voelker
Acting 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. 2011AP531-CR

Cir. Ct. No. 2008CF204

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ABELINA ZALAZAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Abelina Zalazar has appealed from a judgment convicting her of one count of first-degree reckless homicide in violation of WIS.

STAT. § 940.02(1) (2009-10).¹ The sole issue on appeal is whether the evidence was sufficient to convict her of first-degree reckless homicide.² We conclude that the evidence was sufficient and affirm the judgment.

¶2 Zalazar was convicted of first-degree reckless homicide after a lengthy jury trial. The charge arose from the death of Zalazar's eight-year-old son, Uriel. Evidence at trial indicated that Uriel died from hypothermia after being required by Zalazar to take a shower in cold water. Evidence at trial indicated that the shower's cold water temperature setting was thirty-eight degrees Fahrenheit.

¶3 In reviewing the sufficiency of the evidence to support a conviction, this court views the evidence in the light most favorable to the conviction. *State v. Kimbrough*, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. The conviction may not be reversed 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. *State v. Watkins*, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244. The credibility of the witnesses and the weight of the evidence is for the jury. *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). Because the evidence at trial clearly permitted the jury to find beyond a reasonable doubt that Zalazar was guilty of first-degree reckless homicide, no basis exists to disturb her conviction.

¹ All references to Wisconsin Statutes are to the 2009-10 version.

² Zalazar was also convicted of two counts of child abuse and one count of obstructing an officer, but has not challenged those convictions on appeal.

¶4 A person is guilty of first-degree reckless homicide if she recklessly causes the death of another human being under circumstances which show an utter disregard for human life. WIS. STAT. § 940.02(1). Criminally reckless conduct means that the actor's conduct created an unreasonable and substantial risk of death or great bodily harm to another person, and the actor was aware that her conduct created an unreasonable and substantial risk of death or great bodily harm. WIS. STAT. § 939.24(1); WIS JI—CRIMINAL 1020.

¶5 Zalazar contends that the evidence was insufficient to prove that her conduct created an unreasonable and substantial risk of death or great bodily harm, or that she was subjectively aware that her conduct created an unreasonable and substantial risk of death or great bodily harm. We disagree.

¶6 At trial, the parties stipulated that Zalazar told Officer Pablo Torres that on February 23, 2008, she made Uriel take a cold shower as punishment for hitting his younger brother, Jorgito. Testimony indicated that Jorgito told Torres that his mother made Uriel take cold baths as a form of punishment, and that this is what happened that day. Zalazar's live-in boyfriend, Jorge Vilchez Alvarez (Vilchez), and Sandra King, the long-time girlfriend of Zalazar's brother, both testified that Zalazar began disciplining Uriel with cold showers in late 2007 and that they told her not to do it. Vilchez testified that Zalazar frequently punished Uriel with cold showers, and that Uriel would be shaking with cold. Vilchez testified that he specifically told Zalazar that the cold showers would harm Uriel.

¶7 Evidence indicated that paramedics arrived at Zalazar's home at 1:18 p.m. on February 23, 2008, almost immediately after being called by King on Zalazar's phone. Testimony indicated that Uriel was not breathing and had no heartbeat when paramedics arrived. Uriel was taken to the hospital approximately

twenty minutes after paramedics arrived and after their efforts to resuscitate him had failed. Upon arrival at the hospital, Uriel had a core body temperature of eighty degrees Fahrenheit, with no signs of life. He was pronounced dead twenty minutes after he arrived.

¶8 Multiple expert witnesses testified that Uriel died of hypothermia, and explained how they ruled out other causes of death, including blunt force trauma and isopropyl poisoning, as opined by Dr. Janice Ophoven, a defense expert.³ Numerous witnesses also detailed the multiple signs of physical abuse on Uriel's body, including whip marks on his back and buttocks. Dr. Randell Alexander, a specialist in forensic pediatrics, testified that the evidence reviewed by him demonstrated that Uriel had been subjected to multiple acts of physical abuse over multiple times.

¶9 The record also includes numerous inconsistent statements made by Zalazar to Torres, initially denying abusing Uriel or requiring him to take a cold shower, but ultimately admitting that on February 23, 2008, she made Uriel run in the living room for five to ten minutes, struck him with the electric cord to the vacuum cleaner, and then made him go to the bathroom and take a cold shower.⁴ Zalazar told Torres that Uriel "obeyed" when she told him to take a cold shower. Torres testified that he asked Zalazar what the temperature was supposed to be

³ Isopropyl poisoning was considered because paramedics noticed a strong odor of rubbing alcohol when they arrived at the scene and, as discussed below, evidence indicated that after discovering Uriel unresponsive in the bathtub, Zalazar put rubbing alcohol over his body in an attempt to revive him. Dr. Ophoven opined that the cause of Uriel's death was consistent with isopropyl poisoning with complications of hypothermia evident in the emergency room.

⁴ The evidence indicated that Zalazar also lied to the paramedics about what had happened to Uriel when they arrived at her home on February 23, 2008, in response to the 911 call made by Sandra King.

when she was using the shower for punishment and she said “cold.” Torres testified that when he asked her whether she meant “all the way on cold,” Zalazar responded, “[y]es.” Torres testified that Zalazar told him that when Uriel took a shower she would make sure the water was on cold.

¶10 Torres testified that, in explaining why she put Uriel in the shower on February 23, 2008, Zalazar said she was mad and that she could not control herself. Zalazar also ultimately told Torres that after going to the basement to do laundry, she went into the bathroom and found Uriel slumped forward in the bathtub with the water hitting him. She told Torres that Uriel was conscious and opened his mouth, but no words would come out.

¶11 Zalazar testified at trial, stating that after she watched Uriel get in the shower and turn the water on, she went to the basement to do laundry. She testified that she did not expect anything to happen to Uriel while he was in the shower, but when she returned to the bathroom, she found him kneeling in the tub. She testified that she gave him a hug, started running warm water, and carried him to a bed where she covered him up. She testified that she also rubbed him with rubbing alcohol to warm him up, eventually calling Vilchez, King, and her brother, Oscar, and asking them to come to the house. Vilchez testified that Zalazar called him at around 11:25 a.m. and 11:30 a.m., telling him to come home quickly and that Uriel was sick, turning white, and breathing but “in a fainted way.” Vilchez described Uriel as “passed out,” “cold,” and “changing color” when he got there at about 12:00 p.m. He testified that they tried mouth-to-mouth resuscitation and dumping alcohol on Uriel’s head, and that he told Zalazar to call 911 at a little after 12:15 p.m. King testified that she arrived shortly after Zalazar called her at 1:10 p.m., and was told by Zalazar’s brother that he thought Uriel was dead. King testified that she found Uriel lying alone, dressed, and cold and

unresponsive in the bedroom, while Zalazar and Vilchez stood in the living room. King testified that she was scared because she knew Uriel “was gone.” She testified that she asked for the telephone to call 911, and Zalazar told her that she was afraid of having anyone see the marks on Uriel’s body. King then called 911 on Zalazar’s phone at 1:16 p.m.

¶12 Telephone records for February 23, 2008, which were admitted into evidence at trial, established more than ten calls between Zalazar’s phone and Vilchez’s phone between 11:03 a.m. and 11:55 a.m., eight calls between Zalazar’s phone and her brother’s phone between 11:32 a.m. and 12:58 p.m., a call at 1:03 p.m. to King’s phone, and a 1:16 p.m. call to 911. Officer Todd Thorne testified that he measured the shower’s cold water temperature two days after Uriel’s death, and it quickly dropped to thirty-eight degrees Fahrenheit, remaining there for the twenty minutes he measured it.

¶13 Zalazar initially told Torres that she did not call 911 because she did not speak English, but later admitted that she was concerned that the police were going to see the injuries and marks on Uriel’s body. Zalazar admitted striking Uriel with a belt, vacuum cleaner electrical cord, a stick, and a sandal, and tying him to the bed on multiple occasions. When asked by Torres about injuries to Uriel’s toes, Zalazar admitted hitting his feet with a wooden stick that had a hammer-shaped handle. Zalazar told Torres that she was the sole disciplinarian of Uriel. Additional evidence described Zalazar’s anger toward Uriel, her history of favoring her other son, and her history of being emotionally and physically abusive to Uriel.

¶14 At trial, the State also presented testimony from a kinesiology professor, Jonathan Dugas, who testified about the causes and effects of

hypothermia and how the body responds to cold temperatures. He described the factors that lead to hypothermia, the stages of hypothermia, and explained how body temperature continues to drop after a person is removed from cold water. He agreed that the evidence regarding Uriel's core body temperature of eighty degrees Fahrenheit, the two-hour wait before calling 911, and Uriel's lack of cardiac activity when paramedics arrived was consistent with death due to hypothermia.⁵ He theorized that Uriel could have reached a "critically limiting temperature" "where ... physiologically things don't work anymore" anywhere from twenty to ninety minutes after he exited the shower.

¶15 Based upon this evidence, we conclude that a jury, acting reasonably, could find beyond a reasonable doubt that Zalazar's conduct created an unreasonable and substantial risk of death or great bodily harm to Uriel, and that she was subjectively aware that her conduct created such a risk. A jury could reasonably conclude that Zalazar's conduct in ordering a small eight-year-old child to take a shower in near-freezing water, coupled with her failure to call for medical assistance when she found him slumped over and unable to talk, created an unreasonable and substantial risk of great bodily harm or death to that child.

¶16 The jury could also reasonably conclude that Zalazar was aware that her conduct created an unreasonable and substantial risk of death or great bodily harm. The jury was entitled to accept as true the testimony that Vilchez and King told Zalazar not to discipline Uriel with cold showers, and that Vilchez told her it

⁵ While the precise amount of time that passed between Zalazar's discovery of Uriel slumped or kneeling in the bathtub and King's 911 call was unknown, as acknowledged by Zalazar on appeal, a fair estimate was that the call was not made until two hours after Uriel was found in the tub.

would harm Uriel. The jury also could reasonably conclude that even if Zalazar did not realize how dangerous it was at the time she ordered Uriel into the shower on February 23, 2008, she was clearly aware of the danger when she returned to find him slumped over in the running water, still opening his mouth but unable to talk.⁶ The jury could reasonably conclude that Zalazar's failure to call for medical aid when it was apparent that Uriel was in dire condition as a result of her cold-shower punishment, combined with her calls and statements to Vilchez and King, demonstrated that she was subjectively aware that her conduct had created an unreasonable and substantial risk of death or great bodily harm to Uriel, and was avoiding calling for medical assistance only because she did not want authorities to discover her prior physical abuse of Uriel.

¶17 Zalazar also contends that the judgment must be reversed because the evidence did not indicate that she physically restrained Uriel in the shower, and thus cannot support a finding that she created an unreasonable and substantial risk of death or great bodily harm to him. However, this argument ignores the fact that Uriel was only eight years old, and had been physically abused by Zalazar on multiple occasions. The jury could reasonably infer that he stayed in the cold shower as directed by her from fear of her, even to the point where his life was endangered and he collapsed.

¶18 Zalazar also contends that because the State did not establish the point at which it became impossible to resuscitate Uriel, the jury could not find

⁶ Zalazar contends that the fact that she left Uriel alone in the shower suggests that she did not believe that her behavior created an unreasonable and substantial risk of death or great bodily harm. However, as pointed out by the State, the jury could also have viewed her conduct in leaving Uriel alone as reflecting her lack of concern for his well-being.

that Zalazar's failure to summon medical help created a risk of death or great bodily harm and was a causative factor in Uriel's death. We disagree. The State was not required to prove the precise moment at which Uriel died or could no longer be saved. As already discussed, conduct that creates an unreasonable and substantial risk of death or great bodily harm to another person is criminally reckless within the meaning of WIS. STAT. §§ 939.24(1) and 940.02(1). The evidence supported the jury's finding that Zalazar created a substantial risk of death or great bodily harm by requiring Uriel to shower in near freezing water and then failing to call 911 as he went from bad to worse, even though it was clear he needed medical attention and Vilchez suggested that she call 911 one hour before the call was made.

¶19 Zalazar's final argument is that the evidence was insufficient to establish that she acted with utter disregard for human life. The element of utter disregard for human life is measured objectively, based on what a reasonable person in the defendant's position would have known. *State v. Jensen*, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. It codifies prior judicial interpretations of "conduct evincing a depraved mind, regardless of life." *Id.*, ¶¶18-19. In determining whether conduct showed an utter disregard for human life, a jury is required to consider what the defendant was doing and why; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for human life; and all other facts and circumstances relating to the conduct. WIS JI—CRIMINAL 1020. The jury may consider the extent of the victim's injuries and the degree of force needed to cause those injuries; the type of victim; the victim's age, vulnerability, fragility, and relationship to the perpetrator; and whether the totality of the circumstances showed any regard for the victim's life. *Jensen*, 236 Wis. 2d 521, ¶24.

¶20 The evidence supports the jury’s finding that Zalazar’s conduct evinced an utter disregard for Uriel’s life. As discussed above, Zalazar chose to punish her young son by compelling him to take a shower in near freezing water, and failed to call for medical assistance for him over the course of two hours as he turned unnaturally cold, white and unable to speak, became unresponsive, and his breathing first slowed, then stopped. The evidence indicated that Zalazar refused to call 911 for fear her prior physical abuse of Uriel would be discovered. The jury could reasonably find that these circumstances showed an utter disregard for Uriel’s life.

¶21 In reaching this conclusion, we reject Zalazar’s argument that her situation is akin to *Wagner v. State*, 76 Wis. 2d 30, 250 N.W.2d 331 (1977). In that case, the court held that the evidence was insufficient to prove beyond a reasonable doubt that the defendant’s conduct evinced a depraved mind regardless of human life. *Id.* at 48-49. The court relied on the fact that the defendant swerved when a pedestrian unexpectedly appeared in his path during a drag race. *Id.* at 43-44, 46-47. The defendant in *Wagner* thus attempted to avoid inflicting injury before it occurred. *Jensen*, 236 Wis. 2d 521, ¶30.

¶22 Zalazar contends that she showed regard for Uriel because she did not physically restrain him in the shower and returned to check on him, trying to warm him up and calling others for help when he collapsed. As in *Jensen*, Zalazar’s attempts at aiding Uriel occurred after she had already injured him. While the jury could consider her efforts in evaluating the total factual picture, “[a]fter-the-fact regard for human life does not negate ‘utter disregard’ otherwise established by the circumstances before and during the crime.” *Id.*, ¶32.

¶23 In contrast to the situation in *Wagner*, Zalazar targeted Uriel by forcing him to take a freezing cold shower. She did not initiate even minimal efforts to help him until after he collapsed in the shower and much of the harm was done. She chose not to call 911, even though it was obvious that Uriel required immediate emergency medical care, because she was concerned about protecting herself from abuse charges. Ultimately, it was King who called 911. Under these circumstances, a reasonable jury could find beyond a reasonable doubt that Zalazar's conduct evinced an utter disregard for human life.

By the Court.—Judgment affirmed.

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

