COURT OF APPEALS
DECISION
DATED AND RELEASED

February 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0503-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS J. FLECK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Thomas J. Fleck appeals from a judgment of conviction of first-degree reckless homicide for causing the death of his infant son. He also appeals from an order denying his postconviction motion for sentence modification. The issues raised on appeal are whether the evidence was sufficient to support the conviction and whether the twenty-year prison sentence is unduly harsh and excessive. We affirm the judgment and the order.

On Sunday, December 12, 1993, Fleck was caring for his six-week-old son at his residence. The infant's mother left for work at approximately 12:30 p.m. that day. She testified that the infant was healthy and normal when she left. But for a five- to seven-minute period when Fleck's mother cared for the infant while he took his other children home, Fleck had been responsible for the infant since 12:30 p.m. At approximately 2:15 p.m., paramedics were called to Fleck's residence. There they gave medical attention to Fleck's six-week-old son who was pulseless and not breathing. The infant was transported to the hospital. He was pronounced dead as a result of brain injuries caused by intense, vigorous shaking, otherwise known as shaken-baby syndrome.

The State must prove each essential element of the crime beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Our review of the sufficiency of the evidence is to determine whether 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. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 290-91 (Ct. App. 1992). In reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. ***Poellinger***, 153 Wis.2d at 507-08, 451 N.W.2d at 758. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. ***Id.*** at 508, 451 N.W.2d at 758. We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 507, 451 N.W.2d at 757.

To establish the crime of first-degree reckless homicide, the prosecution must prove that: (1) the defendant caused the death of the victim; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* § 940.02(1), STATS. Fleck only challenges the sufficiency of the evidence to satisfy the third element of "utter disregard for human life."[1]

[1] In his reply brief, Fleck states that the evidence did not establish that he caused the infant's death. He argues that because he, like the infant's mother and grandmother, denied any abusive conduct, the record is open to the interpretation that no one shook the infant or the possibility that any person could have shook the infant to cause his death. At best, his argument raises a credibility

Before examining the evidence on that element, we address Fleck's contention that the evidence, at best, only established second-degree reckless homicide. The lesser charge does not require a finding of utter disregard for human life. Fleck acknowledges that given the nature of the medical evidence, there was "going to be a finding of guilt as to something." He argues that if the jury had been allowed to consider the lesser charge, it would not have found that Fleck acted with utter disregard for human life. He suggests that the trial court had a sua sponte duty to instruct the jury on second-degree reckless homicide.

Fleck's contention that the trial court had a sua sponte duty to instruct the jury on the lesser offense is undeveloped and not supported by any authority. We will not address arguments inadequately briefed and which lack citation to proper legal authority. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Further, the record reflects that Fleck personally made the decision not to request instructions on lesser-included offenses.[2] This appears to have been a strategic decision based on his belief that the prosecution had failed to prove an utter disregard for human life. The trial court did not have a sua sponte duty to instruct on the lesser offense in the face of Fleck's waiver. A deliberate and knowing election between alternative courses of action as a matter of strategy, in effect, estops the defendant from claiming error. ***State v. Ruud***, 41 Wis.2d 720, 726, 165 N.W.2d 153, 156 (1969).

The element of acting with utter disregard for human life codifies judicial interpretations of "conduct evincing a depraved mind, regardless of

(..continued)

determination which was for the jury to make. That Fleck caused the infant's death is also supported by medical opinions that the shaking occurred one to two hours before death and that a child who had been subjected to this type of injury would immediately look profoundly devastated and incapable of normal interaction.

[2] In his reply brief, Fleck asserts that he cannot be deemed to have waived the instructional error because the trial court did not engage in an in-depth personal colloquy of the subject of lesser-included offenses. The argument is not supported by any authority that a colloquy is necessary to waive instructional error. We do not consider it. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992); ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989) (as a general rule we will not consider arguments raised for the first time in a reply brief). We reject Fleck's general argument that the insufficiency of the colloquy provides a basis for remanding the case for a new trial. Grounds for exercising our discretionary power of reversal under § 752.35, STATS., are not present.

human life." Judicial Council Note, 1988, § 940.02, STATS. "[T]he qualities of the act as imminently dangerous and evincing a depraved mind regardless of human life are to be found in the act itself and the circumstances of its commission." ***State v. Weso***, 60 Wis.2d 404, 409, 210 N.W.2d 442, 444 (1973).

The medical testimony described the brain hemorrhages and ocular hemorrhages observed in the infant. One doctor characterized the infant as having suffered from "profound retinal hemorrhages in both eyes." Shaken-baby syndrome was described as involving a rapid and violent shaking when an infant's head is unsupported and it moves either backwards, forward or laterally on the neck. The medical evidence also explained the degree of force necessary to produce the injuries observed in the infant as "massive," "quite vigorous" and requiring a "great deal of force." The force necessary was distinguished from bouncing a baby on one's knee or the trauma an infant may experience in falling off a bed or someone's lap. The infliction of such injuries to a six-week-old infant creates a reasonable inference of an utter lack of concern for the infant's life.

The vulnerability of the infant brain to rapid movements was explained to the jury. Fleck had three other children and the jury could infer that he had knowledge about the vulnerability of an infant's head. Even though Fleck testified that he merely "bounced" the infant, the jury could disregard his characterization and rely on the type of shaking the police detective demonstrated as having been demonstrated to him by Fleck. The jury could believe that Fleck engaged in conduct which demonstrates a depraved mind, that is, one which lacks "an appreciation of life, is unreasonable and lacks judgment" or has "consciousness of the nature of the acts and possible result but lacks the specific intent to do the harm." *See* ***Weso***, 60 Wis.2d at 411-12, 210 N.W.2d at 446. The evidence was sufficient to sustain the conviction.

Fleck was sentenced to the maximum prison term—twenty years. He contends that the sentence is unduly harsh because he had no prior record and he had never engaged in any type of abusive behavior before.

Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). This court will honor the strong policy against

interfering with the discretion of the sentencing court unless no reasonable basis exists for its determination. *See* ***id.***

Inherent in the sentencing court's exercise of discretion is a consideration of numerous factors. The primary ones to be considered are the gravity of the offense, the character of the offender and the need to protect the public. ***Id.*** The court may also consider other factors, and the weight to be accorded each factor is within the sentencing court's discretion. *See* ***id.***

At sentencing, the court demonstrated consideration of the appropriate factors. The seriousness of the crime was uppermost in the court's reasoning and the sentence was set so as to not depreciate its seriousness. The court also looked to Fleck's past behavior, which the court concluded reflected a pattern of violent, aggressive and abusive behavior. The court found that Fleck had anger control problems and that lengthy incarceration was necessary to protect the public and provide rehabilitation with respect to that problem. The sentence was not the result of an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

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