State of Wisconsin
Court of Appeals
District 2
Appeal No. 2011AP000531

State of Wisconsin,

Plaintiff-Respondent,

v.

Abelina Zalazar,

Defendant-Appellant.

On appeal from a judgment of the Kenosha County Circuit Court, The Honorable Bruce E. Schroeder, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

I. Whether the evidence was sufficient, as a matter of law, to convict Zalazar of first degree reckless homicide, where: (1) there was no evidence that, in putting the deceased child into a cold shower, Zalazar was aware that her conduct created a risk of death or great bodily harm; and, (2) once Zalazar realized that the child was ill, she took steps to warm him (i.e. she acted with *some regard for human life*)

Answered by the trial court: Yes.

Summary of the Argument

The evidence was insufficient to sustain Zalazar's conviction for first degree reckless homicide. Firstly, there was no credible evidence in the record that Zalazar subjectively knew that placing a child in a cold shower created an unreasonable risk of death or great bodily harm. Additionally, the evidence did not establish that placing a child in a cold shower, without restraining him there, in fact created a risk of death or great bodily harm. And, finally, Zalazar exhibited

some concern for human life in that she had a reason for placing the child in the shower, she did not take steps to restrain him there, and, once she discovered that he was unconscious, she attempted to help him.

Statement of the Case

I. Procedural History

The defendant-appellant, Abelina Zalazar (hereinafter "Zalazar") was charged in a criminal complaint with five felony counts arising out of the death of her son, Uriel. Zalazar's charges were: (1) first degree reckless homicide; (2) child abuse, intentionally causing harm; (3) child abuse, intentionally causing harm; (4) false imprisonment; and, (5) obstructing an officer. (R:1) After a preliminary hearing, Zalazar entered not guilty pleas to all counts.

Zalazar filed a pretrial motion to sever counts three and four[1] on the grounds that, although properly joined in the first instance, it was unfairly prejudicial to Zalazar to proceed to trial on all counts. (R:21) The court denied the motion. (R:68-14)

Zalazar also filed a pretrial motion to suppress statements she made to the police. (R:12) The court conducted several hearings into the motion. On the morning of trial, the court summarized the court's ruling on Zalazar's motion to suppress her statement. (R:74-2) The motion was

[1]Count three alleges child abuse; and count four alleges false imprisonment

granted in part, and denied in part. Essentially, the court found that Zalazar was interrogated on three separate occasions. The court found that part of the way through the first interrogation, the officer decided to arrest Zalazar and, at that point, the officer gave Zalazar the Miranda warning. However, the manner in which the officer gave the warning left Zalazar with the impression that she could either have a lawyer, or continue on with her statement-- but not both. (R:74-3) Thus, the court reasoned, the balance of the "first" statement should be suppressed. *Ibid.* During the second and third distinct interrogations, though, the officer gave the correct warning-- making it clear that the lawyer could be with Zalazar during the time she made her statement-- and this cured the original defect. Thus, the statements made during the second and third interrogations were admissible. (R:74-23)

The next day, the court placed its finding and rationale on the record. (R:75-2, et seq.)

The matter eventually proceeded to jury trial. The jury returned verdicts finding Zalazar guilty of counts 1, 2, 3, and 5; but not guilty of court 4 (false imprisonment) (R:84-15).

Thereafter, the court sentenced Zalazar on count one (first degree reckless homicide) to sixty years in prison, bifurcated as thirty-five years initial confinement, and twenty-five years extended supervision. (R:51) On the remaining counts, the court placed Zalazar on probation.

Zalazar filed no postconviction motions.

II. Factual Background

A. The evidence presented at trial

On February 23, 2008, at about 1:17 p.m., Kenosha Police and paramedics responded to a call for assistance at a residence where there was a report of an "unresponsive child". When the paramedics arrived, they found Uriel Zalazar, an approximately eight year-old boy lying on a bed. (R:76-7) Upon entry into the residence, the paramedics noticed a strong smell of rubbing alcohol (R:76-41) The paramedics performed cardio-pulmonary rescusitation on Uriel. (R:76-14) Later, one of the paramedics noticed a large red mark on Uriel's sternum. (R:76-12)

At the scene, police collected wet bedding and clothing, a pair a children's shoes that were in the bathroom, and a half-full bottle of isopropyl alcohol. (R:79-216 to 224)

Uriel was dead on arrival at the hospital. (R:75-159) Doctors in the emergency room found Uriel's body temperature to be approximately eighty degrees Fahrenheit. (R:75-147)

Later in the day on February 28, 2008, police questioned Zalazar about the circumstances of Uriel's death. Zalazar told the police that she was the primary care-giver for Uriel. (R:81-12). Zalazar initially said that she did not know how Uriel got the "whip marks" on his body; however, she later admitted that she hit him with the cord from the vacuum cleaner. (R:81-14) At first, Zalazar also denied that she forced Uriel to take a cold

shower that day as a punishment (R:81-17). She explained that she had done that approximately one year earlier. (R:81-17) According to Zalazar, that day Uriel had been running around, and he decided to take a shower on his own. (R:81-18). After he got out of the shower, he said he was cold, and so she wrapped him in a blanket. (R:81-18). She then went to do laundry. Zalazar said that when she came back, Uriel "looked bad". (R:81-18) Later in the interview, Zalazar admitted that she punished Uriel that day by making him take a cold shower. (R:81-26)

Zalazar also testified at trial. She said that she was in the habit of using rubbing alcohol to treat pain. (R:81-148) Zalazar also explained that she sometimes used a cold shower as punishment for Uriel because she did not want to hit him. (R:81-160)

On the day in question, Zalazar explained, Uriel had hit another child ("Jorgito") (R:81-163) As punishment, Zalazar whipped him one time with the cord from the vacuum cleaner (R:81-164). After that, she took his clothes off and put him in the shower, though she claimed that she never told him anything about the temperature. (R:81-165) This was contradicted by a Kenosha police officer, who testified that Zalazar told him that she deliberately turned the water on cold (R:85-43) Zalazar testified that she did not think that anything would happen to Uriel in the shower. (R:81-167) However, when Zalazar came back into the bathroom, she found Uriel

kneeling in the shower. She warmed up the water and started hugging him. *Ibid.* Zalazar took the child into the bedroom where-- in an attempt to warm him up-- put rubbing alcohol all over his body. (R:81-176) Significantly, Zalazar did not immediately call for medical assistance. She told the officers that she did not call because she was afraid that the police would see the injuries on Uriel's body. (R:81-37)[2]

Mary Mainland, M.D. conducted an autopsy on Uriel's body. She found that the cause of death was hypothermia. (R:77-33) Dr. Mainland also noticed numerous blunt trauma injuries on Uriel's body, and "whip marks" on his back and buttocks. (R:77-54) According to Dr. Mainland, alcohol poisoning was not a factor in Uriel's death.(R:77-39)

A pathologist, Dr. Randall Alexander, reviewed the autopsy protocol, and agreed that the cause of death was hypothermia. (R:75-212) A third pathologist, Dr. Brian Peterson, also agreed. (R:80-33) Significantly, it was Dr. Alexander's opinion that the bruises on Uriel's chest were not caused by cardio-pulminary resusitation. (R:75-228)

The State also called a toxicologist, Dr. Christopher Long, who examined tissue samples taken from Uriel. Dr. Long

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[2]Exactly how long it was from the time Zalazar found Uriel unresponsive in the tub, until the time 9-1-1 was called was not firmly established at trial. Jorge Vilchez testified that he lived with Zalazar. On the day in question, he was out and at approximately 11:30 a.m. he received a call from Zalazar, who indicated that Uriel was bad, sickly and white; and so Vilchez bought some rubbing alcohol on the way home. (R:80-130) Police were dispatched to the scene at about 1:17 p.m. (R:75-117) A fair estimate, then, is that the paramedics were not called for approximately two hours after Uriel was found in the tub.

found .03 gram percent isopropanol in the serum and .026 in the postmortem blood, and .046 in the stomach . (R:76-161) Dr. Long testified that this was a low-level, non-fatal amount of isopropanol in Uriel's system. *Ibid.* Dr. Long said that it is impossible that Uriel died from isopropanol poisoning. (R:76-170)

Johnathon Dugas is a professor of kinesiology. (R:76-226) Professor Dugas told the jury that children lose heat from their bodies more readily than do adults. He said that he would expect a child's core temperature to drop within fifteen minutes of entering a cold shower (R:76-244) Applying rubbing alcohol to the skin would increase the rate of heat loss (R:76-251) According to Dugas, even severe hypothermia is survivable if treated properly. (R:76-236) In the case of severe hypothermia, the heart will stop twenty to ninety minutes after being removed from the shower.[3] (R:76-261)

Janice Ophoven, M.D., on the other hand, reviewed the autopsy protocol, and testified that the autopsy protocol is consistent with isopropyl poisoning (R:77-153) According to Dr. Ophoven, since alcohol was drawn twenty-four hours after death, the results are not consistent with what they would have been at the time of death (R:77-162) Dr. Opoven's opinion was that the cause of Uriel's death was isopropyl poisoning

[3]Regarding this estimate, Dugas said at trial, "I admit that's a big range but again, we don't know quite how long exactly he was in the shower. We not [sic] quite sure what the temperature was exactly when exiting the shower. If you know those things, you can kind of work it out . . . When it gets to that point-- again, it's not black and white . . . " (R:76-261)

combined with hypothermia in the emergency room (R:77-164).

Argument

I. The evidence was insufficient as a matter of law to convict Zalazar of first degree reckless homicide.

A. Standard of Appellate Review

The standard of appellate review on challenges to the sufficiency of the evidence to support a verdict in a criminal case is well-known. In *State v. Poellinger*, 153 Wis. 2d 493, 501 (Wis. 1990), the Supreme Court held:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction 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.

B. The elements of the offense

To prove first-degree reckless homicide, the State must show 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. "Criminally reckless conduct" means: the conduct created a risk of death or great bodily harm to another person; and

the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that her conduct created the unreasonable and substantial risk of death or great bodily harm. Wis. JI-Criminal 1020

C. There was no subjective evidence that Zalazar knew that her conduct created a risk of death or great bodily harm; nor that the risk was unreasonable and substantial.

On appeal, the court must view the evidence in the light most favorable to the verdict, and the State is entitled to all reasonable inferences. This being the case, we must assume that the cause of Uriel's death was as testified to by the State's experts: hypothermia.

The question then becomes, is there any credible evidence in the record that Zalazar subjectively knew that placing Uriel in a cold shower created an unreasonable and substantial risk of death or great bodily harm.

1. Subjective knowledge

Criminal recklessness requires the *subjective knowledge* on the part of the defendant that her conduct created a substantial risk of death or great bodily harm. Sec. 939.24(1), Stats., provides:

> **(1)** In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being *and the actor is aware of that risk*, except that for purposes of ss. 940.02 (1m), 940.06 (2)

> and 940.23 (1) (b) and (2) (b), "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to an unborn child, to the woman who is pregnant with that unborn child or to another and the actor is aware of that risk.

Even though this element requires subjective knowledge on the part of the defendant, it is similar to intent. It is not possible to delve into the mind of the defendant. Therefore, this subjective knowledge may be proved by the defendant's statements and actions.

Here, regarding her statements, Zalazar testified that she did not think that anything would happen to Uriel while he was in the shower. (R:81-167) Rather, she explained to the jury that the cold shower was a punishment in lieu of hitting the child. (R:81-160) As misguided as it ultimately was, Zalazar believed that a cold shower was a less cruel punishment than striking a child. There was nothing in the statements that Zalazar made to the police that is inconsistent with this fact. Thus, there were no statements from Zalazar to the effect that she subjectively knew that her conduct created an unreasonable and substantial risk of death or great bodily harm.

What, then, about her conduct? After Zalazar placed Uriel in the shower, she *went to go do her laundry.* This, almost more than any evidence in the case, suggests that Zalazar truly did not think that her behavior created an unreasonable and substantial risk of death. Certainly, if one is aware that one's conduct creates a risk of death or great bodily

harm, it stands to reason that the person will stand by, vigilantly observing the situation, ready and willing to act in the event that harm is actually caused.

Thus, Zalazar's behavior after she placed Uriel in the shower clearly suggests that she did not anticipate that any harm would come to the child.

Even the State did not sincerely believe that an average layperson-- a person of Zalazar's intelligence and education; or, pehaps, a layperson on the jury-- would be aware of the risk in placing a child in a cold shower. This is evidenced by the fact that the State called an *expert witness*-- a man with a doctoral degree in kinesiology-- to testify about the process of hypothermia in children who are placed in a cold shower. Where a defendant fires a shotgun into a crowded room, it is not necessary to call an expert witness to testify about the risk that is created in so doing. Placing a child in a cold shower, though, is very different from firing a shotgun into a crowded room. The risk is not apparent to a layperson. Rather, in order to appreciate the risk, it is arguably necessary for one to have a degree in kinesiology.

For these reasons, there is no credible evidence in the record to establish that Zalazar was subjectively aware that her conduct created an unreasonable and substantial risk of death or great bodily harm.

2. Unreasonable and substantial risk

The next question, then, is whether there is any credible

evidence in the record that the risk of death created by placing a child in a cold shower-- without taking any steps to confine the child in the shower-- is, in fact, unreasonable and substantial?

According to the State's kinesiology expert, a child must remain in a cold shower for approximately fifteen minutes before even mild hypothermia will occur. Here, Zalazar placed Uriel in the cold shower, but she did not confine him there. Rather, she left the room. It was a reasonable assumption on Zalazar's part that if the cold shower became unbearable for Uriel, he could simply turn the water off, or step out of the shower.

Thus, the act of placing Uriel in the shower, in and of itself, did not create an unreasonable and substantial risk of death. Rather, it is the process of remaining in the shower for fifteen minutes that created the risk. There was no evidence that Zalazar did anything to physically restrain Uriel in the shower. Thus, her conduct did not create the risk.

D. Zalazar's failure to summon medical help is not criminally reckless conduct; and, nonetheless, there was no evidence presented as to the point at which it became impossible to resuscitate Uriel; and, therefore, it is impossible to determine whether Zalazar's failure to call for medical help was reckless.

At trial, the State argued that one element of Zalazar's criminally reckless conduct was her failure to immediately

summon medical help once she became aware of the fact that Uriel was unconscious. It is doubtful that a "failure to act" to obtain medical assistance is criminally reckless conduct at all. In order for conduct to be criminally reckless, it is required that the conduct be imminently dangerous to human life. *See* *State v. Blanco*, 125 Wis. 2d 276, 281, 371 N.W.2d 406 (Ct. App. 1985). In other words, the conduct must be such that, in and of itself, it creates a substantial risk of death or great bodily harm. The failure to act-- even by one who may have a duty to act, such as a mother-- does not, in and of itself, create a risk of imminent death or great bodily harm.

Even so, the state was unable to establish the point at which it became impossible to resuscitate Uriel. Put another way, the State failed to establish the point at which, if Zalazar had called 9-1-1, Uriel could have been saved. In the absence of such evidence, it is impossible to find that any failure on Zalazar's part to summon help was a causative factor in Uriel's death. We know that it was not possible to resuscitate Uriel at the time 9-1-1 was actually called (some two hours later). But, based on the evidence in this record, it would be pure speculation to say that had Zalazar called 9-1-1 immediately, or five minutes later, or thirty minutes later, that Uriel could have been saved.

Thus, even if Zalazar's failure to act was reckless, in the absence of evidence establishing the point at which it became impossible to resuscitate Uriel, it simply is not possible to

determine that, had Zalazar acted earlier, Uriel would not have died. [4]

E. There is no objective evidence that Zalazar acted with "utter disregard for human life"

Regarding the element of "utter disregard for human life", the Supreme Court has consistently held that where the defendant, under the totality of the circumstances, evidences some regard for human life, the evidence will be insufficient. For example, in *Wagner v. State*, 76 Wis. 2d 30, 46-47 (Wis. 1977), where the defendant was racing his car down a street, but swerved at the last minute to avoid a pedestrian, the court wrote:

> While the defendant created a situation of unreasonable risk and high probability of death or great bodily harm which demonstrated a conscious disregard for the safety of another, his conduct did not demonstrate a state of mind ". . . devoid of regard for the life of another. . ." *State v. Weso*, supra, 411. At the very least, his attempt to avoid striking the victim by swerving to the left indicates some regard for the life of the victim.

See, also, Balistreri v. State, 83 Wis.2d 440, 451, 265 N.W.2d 290, 295 (1978). However, "After-the-fact regard for human life does not negate 'utter disregard' otherwise established by the circumstances before and during the crime." *State v. Jensen,* 2000 WI 84 (Wis. 2000). In *Jensen*, after the

[4]The evidence seems to suggest that Uriel could have been saved int his case. The emergency room doctor measured Uriel's body temperature at eighty degrees Fahrenheit. One example that Dugas gave was of a woman who fell into a frozen pond, had her core temperature drop to forty-five degree and, yet, she was saved.

defendant violently shook his baby into unconsciousness, he called 9-1-1, and then claimed on appeal that his behavior evidenced some regard for human life.

Is Zalazar's situation more like *Wagner* or more like *Jensen*? During the commission of the crime, Zalazar evidenced the following regard for human life: (1) As misguided as it may have been, Zalazar had a *reason* for making Uriel stand in the shower (to punish him for striking another child); (2) Uriel was not in any way physically restrained while in the cold shower, and Zalazar left the room; an objective inference from this fact is that Uriel was free to leave the shower if it became unbearable; (3) Zalazar came back to check on Uriel and, when she learned that he was unconscious, she tried to warm him up; and, (4) Zalazar called others for help. Unlike in *Jensen*, Zalazar's concern for human life did not first manifest itself after-the-fact.

Conclusion

For these reasons, it is respectfully requested that the court reverse Zalazar's conviction for first degree reckless homicide.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2011.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3,444 words.

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Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No.

State of Wisconsin,

Plaintiff-Respondent,

v.

John Doe,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law

to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of June, 2011.

_____

Jeffrey W. Jensen