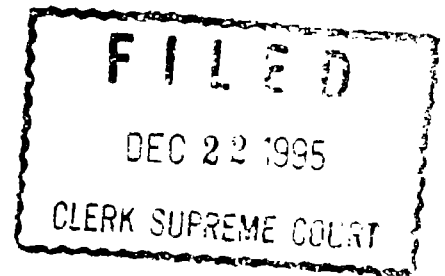


IN THE COURT OF APPEALS OF IOWA

No 5-570 / 94-1822



STATE OF IOWA.

Appellee.

vs

KELLY JANE LINHART,

Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas.
Judge.

Kelly Linhart appeals her conviction and sentence for child endangerment
resulting in bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John F. Fatino, Assistant State
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
and Denver D. Dillard, County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

HUTTINK, J.

The defendant, Kelly Linhart, babysat for Doug and Dawana M.'s two-month-old child, Dustin. On November 24, 1993, Linhart, crying, called Dawana and asked her to come over quickly because Dustin would not wake up. Dawana arrived at Linhart's home to find Dustin extremely pale and still, with his eyes rolled back into his head. As Dawana left, Linhart stated she hoped it was nothing she had done. Dustin was rushed to the hospital. Following an examination, doctors concluded Dustin was suffering from massive contusions to the brain and a broken tibia. The doctors maintained Dustin exhibited classic symptoms of shaken baby syndrome.

The police questioned Dawana and Doug regarding Dustin's injuries. Both denied shaking the baby. In Linhart's first interview with the police, she stated she had lightly shaken the baby while trying to wake him. The following day, in a signed written statement, Linhart admitted she shook the baby two or three times, before he became unresponsive, which caused his head to go forward and back.

On January 5, 1994, Linhart was charged by trial information with child endangerment resulting in serious injury in violation of Iowa Code section 726.6(1)(b) (1993). Linhart plead not guilty. At trial, Linhart testified she shook Dustin while she was dancing with him and she did not believe it was hard enough to injure him. Several doctors testified regarding Dustin's head injuries. They testified there is a possibility Dustin will suffer long-term seizures and will be mentally retarded to some

uncertain degree because a significant portion of his brain was destroyed. They opined Dustin will require long-term care and might never be able to walk.

The jury returned a verdict finding Linhart guilty of the lesser-included offense of child endangerment resulting in bodily injury. Linhart was sentenced to a two-year prison term. Linhart appeals. Linhart contends the district court erred when it instructed the jury that child endangerment resulting in bodily injury is a general intent crime rather than a specific intent crime. Linhart further contends the district court abused its discretion in sentencing her to the maximum two-year punishment allowed by law.

I. Jury Instructions.

Our review is for correction of errors at law. Iowa R. App. P. 4.

Defendant was charged under Iowa Code section 726.6(1)(b) (1993), which provides:

1. A person . . . having custody or control over a child . . . commits child endangerment when the person does any of the following.
- b. By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty that results in physical injury, or that is intended to cause serious injury.

Iowa Code § 726.6(1)(b).

This code provision has been interpreted as dividing itself into two separate alternatives. *State v. Heacock*, 521 N.W.2d 707, 709 (Iowa 1994). Under the first alternative, child endangerment occurs “when a person commits an intentional act (or

series of acts or uses unreasonable force, torture or cruelty) that *results in physical injury*.” *Id.* This alternative is considered a general intent crime. *Id.* General intent exists when the prohibited result may be expected to follow from the offender’s voluntary act, irrespective of any subjective desire to have accomplished the result. *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976)

Under the second alternative, child endangerment occurs “when a person commits an intentional act (or a series of acts or uses unreasonable force, torture or cruelty) that *is intended to cause serious injury*.” *Heacock*, 521 N.W.2d at 709. This alternative is considered a specific intent crime. *Id.* Specific intent is present when the offender subjectively desired the prohibited result. *Redmon*, 244 N.W.2d at 797.

The State claims Linhart was charged under the first alternative. Linhart, on the other hand, claims she was charged under the second alternative. We find the Linn County Attorney charged defendant under the first alternative, stating the defendant did: “Intentionally act in a manner using unreasonable force against Dustin, that resulted in serious injury.” Clearly, the State was not asserting Linhart intended to cause serious injury as required by the second alternative. The charge only required Linhart to intentionally commit an act which caused bodily harm, irrespective of Linhart’s subjective desire.

II. Sentencing.

Linhart's challenge

A district court's sentencing decision will not be disturbed unless there is an abuse of discretion or other defect such as the sentencing court's consideration of impermissible factors. *State v. Dvorsky*, 322 N.W.2d 62, 66-67 (Iowa 1982) (abuse of discretion in basing sentence solely on nature of the offense); *State v. McKeever*, 276 N.W.2d 385, 386-89 (no abuse of discretion in refusing a deferred or suspended sentence, sentence vacated because of consideration of an impermissible factor). Consideration of another crime the defendant has neither admitted nor been convicted of is impermissible. *State v. Black*, 324 N.W.2d 312, 315-16 (Iowa 1982).

Although the district court expressly disagreed with the jury's implicit finding that Linhart did not cause a serious injury, the court clearly indicated it could not and would not consider the greater offense. The district court stated:

The defendant cannot be sentenced for the offense of Child Endangerment Resulting in Serious Injury which would require that she be incarcerated for an indeterminate term not to exceed ten years.

The district court further acknowledged its dilemma in these terms:

Do I sentence you to prison based on the consequences to the child when the jury did not find you guilty of the greater offense.

We do not believe the district court's acknowledgment of this dilemma implicates the greater offense as one of its sentencing considerations. Dustin's injuries and the resulting consequences were among several well-established sentencing criteria considered by the district court in arriving at its sentencing decision in this case. Linhart has not shown her sentence was based on impermissible sentencing considerations, and we accordingly affirm on this issue.

We are also unable to find Linhart's sentence was singularly based on the seriousness of the offense she committed. When the district court's remarks are considered in their entirety, it is apparent that the court considered all relevant sentencing factors. Contrary to Linhart's assertions, we find the district court considered her prospects for rehabilitation. The district court, however, found any mitigating circumstances were outweighed by the seriousness of this offense, general and individual deterrence, and the consequences resulting from Linhart's criminal

conduct. *See State v. Wagner*, 359 N.W.2d 487, 490 (Iowa 1984). We find no abuse of the district court's sentencing discretion.

The judgment of the district court is affirmed in its entirety.

AFFIRMED.