IN THE COURT OF APPEALS OF IOWA

FILED
AUG 17 1995
CLERK SUPREME COURT

No. 5-325 / 94-681

STATE OF IOWA,

Appellee,

vs.

DAWN MARIE JOHNSON,

Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Johnson appeals her convictions of two counts of first-degree murder, two counts of child endangerment, and two counts of willful injury. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

PER CURIAM

Dawn Marie Johnson's five-month-old daughter, Ashley, was discovered dead in her crib on July 21, 1991. Her death was ruled a result of sudden infant death syndrome. On November 15, 1992, Johnson's five-month-old son, Gordon, was found dead in his crib. The autopsy report indicated the primary cause of death was not conclusively determined.

On March 6, 1993, Johnson was interrogated at the sheriff's office by deputy Mike Brown. Johnson told Brown she last saw Gordon alive and crying about 1 a.m. She gave him a pacifier and pulled a blanket up around him. Brown indicated he believed Johnson caused Gordon's death and repeatedly encouraged her to admit her involvement. After a couple hours of interrogation, Johnson admitted she may have pulled the blanket tight on Gordon's face. Later, she would again deny any responsibility for either child's death.

Johnson was charged with two counts of first-degree murder, two counts of child endangerment, and two counts of willful injury. Johnson waived her right to a jury trial. Several expert witnesses testified at her bench trial. Their opinions as to the cause of each child's death varied considerably. Johnson characterizes the expert testimony as "more of [a] medical, philosophical debate than a discovery of proof beyond a reasonable doubt." Johnson presented evidence her husband, Michael Johnson, suffered from mental disorders, was prone to violence, feared hurting his children, and was present in the home when each child died.

Johnson was convicted of two counts of felony murder, two counts of child endangerment, and two counts of willful injury. The trial court imposed sentences (concurrent life terms) on the first-degree murder counts only. The court ruled although she found defendant guilty on the counts of child endangerment and willful injury, those convictions were subsumed in the class A judgments. No sentences were imposed on these offenses.

Johnson appeals, contending the evidence is insufficient to sustain the convictions. She argues her purported confession was coerced and therefore unreliable. Even if reliable, she contends her statements were uncorroborated. She also argues the submitted expert opinions were so varied as to be unreliable and they cannot be considered corroboration. We separately address the evidence supporting the charges of felony murder of Gordon and Ashley Johnson.

I. Felony Murder of Gordon Johnson.

A. Voluntariness of Confession. Defendant confessed, and later recanted, to Officer Brown she murdered her son, Gordon. In her appellate brief, defendant argues her videotaped confession to Deputy Brown was coerced. This issue was waived at trial, however. Defendant's withdrawal of her motion to suppress the confession, coupled with her nonobjection at trial, waived the issue of voluntariness of her confession. *State v. Schmidt*, 312 N.W.2d 517, 518 (Iowa 1981) ("Defendant cannot have it both ways. He cannot both object and consent to evidence if he expects to preserve error for appeal.") (citing *In re Kaiser's Estate*, 34 N.W.2d 366, 374-75 (Neb

1948) (where defense counsel objected to evidence but then said he "would be glad to have the jury see [the evidence]," error was waived)). As error was not preserved at trial, we need not consider this issue on appeal.

B. Corroboration of Confession. The Iowa Rules of Criminal Procedure provide the confession of a criminal defendant, unless made in open court, will not warrant a conviction unless it is accompanied by other proof the defendant committed the offense. Iowa R. Cr. P. 20(4). The existence of corroborating evidence is a legal issue to be decided by the court. *State v. Gregory*, 327 N.W.2d 218, 221 (Iowa 1982), *cert. denied*, 464 U.S. 833 (1983). Corroboration "need not be strong nor need it go to the whole of the case so long as it confirms some material fact connecting the defendant with the crime." *State v. White*, 319 N.W.2d 213, 214 (Iowa 1982); *see also State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976). The corroboration requirement can be satisfied by evidence of other behavior of the defendant. *White*, 319 N.W.2d at 214 (flight, hiding, recovered shotgun shells). Verification of details by other witnesses may also suffice. *Gregory*, 327 N.W.2d at 221.

In this case, there is evidence corroborating defendant's confession. Trial testimony by lay witnesses corroborated the important fact defendant was the last person in Gordon's presence before he died. The State also presented evidence, through expert medical testimony, defendant caused Gordon's death by mechanical asphyxiation.

Under this record, there is sufficient evidence to support the trial court's conclusion defendant committed the forcible felonies of child endangerment and willful injury, which caused Gordon's death. We affirm the trial court's finding defendant guilty beyond a reasonable doubt of felony murder of Gordon Johnson.

II. Felony Murder of Ashley Johnson.

Defendant also contends there was insufficient evidence to convict her of the felony murder of Ashley Johnson. In our review of motions for new trial based on sufficiency of the evidence, we view the evidence in the light most favorable to the State. *State v. Rojas-Cardona*, 503 N.W.2d 591, 594 (Iowa 1993). We draw all fair and reasonable inferences from the evidence, taking all of the evidence into consideration. *Id.* We uphold a guilty verdict against a posttrial motion for new trial based on sufficiency of the evidence if there is substantial record evidence to support the verdict. *Id.* Evidence is substantial if it could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* (citing *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981)).

Proof defendant murdered Ashley begins with the medical conclusion her death did not result from natural causes. The medical experts were virtually unanimous on this point. Based on the medical evidence, the trial court could have reasonably concluded Ashley's death did not result from natural causes.

Further, there was circumstantial evidence defendant was the cause of Ashley's death, by suffocating her with a blanket or other object. Circumstantial evidence can

be sufficient to support a finding of guilt. Michael Johnson testified about the events before and after Ashley's death. Michael's testimony supports the finding defendant was alone with Ashley at the time she died and she stopped her from crying. Defendant's unusual conduct the next morning supports the finding she knew what she had done.

Specifically, Michael testified on the evening before Ashley's death his then-girlfriend, Sandy, and another couple stopped by to pick him up so the four of them could go out together. Johnson was left with the twins and baby Ashley. Michael got into an argument with Johnson about why he had to go out with his friends all the time. Despite defendant's disapproval, Michael left anyway. Michael returned home at about 10:30 p.m. When he entered the house he and defendant got into another argument. According to Michael's testimony, she was very angry and picked up Ashley, who was in a car seat, "and yanked it up and put it under her arm like a football and headed off to the bedroom." Ashley started crying and continued to do so for about an hour.

Michael testified he watched television until about midnight, when he went to bed. Defendant had already gone to bed, and Ashley was lying in her playpen near the foot of her parents' bed. Before getting into bed Michael looked at Ashley and assumed she was asleep because she didn't move. Although it was warm night in late July, there were two blankets covering Ashley's whole body and two more blankets underneath her.

During the night Michael remembered hearing a noise come from the twins' room, and Johnson may or may not have gotten up to check on them.

The next morning Michael and Johnson awoke at about 8:30 or 9:00. Defendant told Michael to get Ashley up and she would rouse the twins. This struck Michael as odd, because it was the first time defendant had ever asked him to wake up Ashley. He had never gotten Ashley up before. During the five months since Ashley was born, that had always been defendant's task. Further, Michael found it strange Johnson then stayed in bed rather than going to get the twins, as she had proposed. Defendant merely sat there for three or four minutes waiting for him to tend to Ashley.

Michael then tried to wake Ashley, but soon discovered she was dead, and had been for some time. He became somewhat hysterical, while Johnson acted very calm.

This evidence, coupled with the medical evidence, supports the trial court's finding defendant committed felony child endangerment and felony willful injury and thereby caused Ashley's death. We affirm the trial court's finding defendant guilty beyond a reasonable doubt of felony murder of Ashley Johnson.

AFFIRMED.