

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 7, 1995

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. 94-3327-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN D. BOBBITT, JR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
GERALD C. NICHOL, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Defendant, John D. Bobbitt, Jr., presents the following issue:

Was the evidence insufficient to support the defendant's conviction for First Degree Recklessly Endangering Safety because the evidence did not

show, beyond a reasonable doubt, that the defendant acted with "utter disregard for human life"?

The State agrees that this is the issue before us. We conclude that the evidence was sufficient to support Bobbitt's conviction. We affirm.

On March 8, 1991, Bobbitt was involved in a robbery in Waukesha County. He drove the victim's vehicle to Madison and abandoned it when it ran out of gas. At a gas station, he approached a customer and obtained a ride to near the Capitol Square, where they were stopped by the police. At the command of the police, the operator got out of the car but Bobbitt slid into the driver's seat and drove off, with the police in pursuit. The chase ended abruptly, after about thirteen blocks, when Bobbitt struck the side of another vehicle.

Bobbitt argues that the evidence was insufficient to convict him of first-degree reckless endangerment, contrary to § 941.30(1), STATS. An element of first-degree reckless endangerment is "utter disregard for human life." *Id.* Bobbitt argues that the State did not show beyond a reasonable doubt that he operated the motor vehicle with "utter disregard for human life." The evidence as to his operation of the motor vehicle is undisputed. With the police in pursuit, Bobbitt turned off the Capitol Square onto Hamilton Street, turned right onto Gorham Street, and operated the vehicle against traffic on a one-way street. As he tried to elude the pursuing police officer, he constantly accelerated until he reached speeds of seventy to eighty-five miles per hour, just before the accident which stopped his vehicle. Bobbitt admitted he knew he was on a one-way street proceeding in the wrong direction. Despite this knowledge, he did not try to take one of the intersecting streets. The police officer testified that he did not see Bobbitt's brake lights go on at any time during the chase, nor did he observe Bobbitt slow the vehicle at any time.

The vehicle Bobbitt struck was operated by Mohamed Nassik. His wife, Tamie, who was in the final month of her pregnancy, was a passenger. Fortunately, Tamie was uninjured; Mohamed suffered a fractured sternum.

Bobbitt relies on *Balistreri v. State*, 83 Wis.2d 440, 265 N.W.2d 290 (1978). The supreme court reversed Balistreri's conviction because during a high speed chase in downtown Milwaukee he had tried to avoid collisions by

turning on his lights, honking his horn, and applying his brakes. The supreme court concluded that Balistreri's operation of his vehicle showed "some regard" for human life. *Id.* at 457, 265 N.W.2d at 298.

Bobbitt also cites *Wagner v. State*, 76 Wis.2d 30, 250 N.W.2d 331 (1977), where the supreme court reversed Wagner's conviction for second-degree murder after he hit and killed a pedestrian, because the undisputed evidence showed that Wagner had swerved to avoid hitting the pedestrian he killed and thus demonstrated "some concern for the life and safety of others." *Id.* at 44, 250 N.W.2d at 339.

We must review the evidence in the light most favorable to the verdict:

The test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether this court can conclude that the trier of fact could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true. Reversal is only required when the evidence considered 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 facts acting reasonably could be convinced ... "beyond a reasonable doubt."

State v. Stanfield, 105 Wis.2d 553, 564, 314 N.W.2d 339, 344 (1982) (quoting *State v. Burkman*, 96 Wis.2d 630, 643, 292 N.W.2d 641, 647 (1980)), *overruled on other grounds by State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

Bobbitt argues that the State does not dispute that he successfully weaved to avoid oncoming traffic during the high speed chase down Gorham Street. Bobbitt is incorrect. The State argues that the trial court properly relied on Tamie Nassik's testimony that the lights on the vehicle operated by Bobbitt did not indicate that Bobbitt was making any effort to avoid the car in which she was riding. Bobbitt testified that he swerved to attempt to avoid the Nassik vehicle. The jury was entitled to believe Tamie Nassik and reject Bobbitt's

testimony. See *State v. Fry*, 131 Wis.2d 153, 182-83, 388 N.W.2d 565, 578, cert. denied, 479 U.S. 989 (1986).

In any event, Bobbitt demonstrated utter disregard for the Nassiks' lives when he jumped from the car as it headed toward the Nassik vehicle. His car was still going fast enough that the impact with the Nassik car sheared off everything behind the front seat. The two halves of the Nassik vehicle came to rest some twenty or thirty yards apart.

The trial court concluded that, with the exception of the fatalities, this case closely parallels *State v. Spears*, 147 Wis.2d 429, 433 N.W.2d 595 (Ct. App. 1988). Spears was convicted of two counts of second-degree murder when he operated his vehicle under the influence on a crowded street in the City of LaCrosse at speeds up to eighty miles per hour, attempted to brake at an intersection, hit two parked cars, and accelerated again, passing through the parking lot where his car struck and killed two pedestrians. An element of second-degree murder was that defendant's conduct demonstrated a depraved mind. *Id.* at 436, 433 N.W.2d at 598. That element is identical to "utter disregard for human life." WIS J I--CRIMINAL 1020 n.5. The majority of the court concluded that Spears's conduct evinced a depraved mind.

Bobbitt admits that his objective was to elude the police because he had on him evidence tying him to the robbery in Waukesha County. The evidence was such that the trial court could have found that Bobbitt had no concern for the safety of anyone else using the street. His objective was to elude police, regardless of the consequences to others.

The trial court analyzed the law and the facts comprehensively. We conclude that adopting the trial court's decision will be helpful to an understanding of the facts and the law. We therefore adopt the trial court's decision.

By the Court.--Judgment affirmed.

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

AN EXHIBIT HAS BEEN ATTACHED TO THIS
OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE
COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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