UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8555
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHARON EVETTE ROSS,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(W-92-CR-30)

(May 31, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Sharon Evette Ross appeals her conviction for second degree murder on a government reservation. Finding no error, we affirm.

Background

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Tamala Sherard engaged Ross to baby-sit her newborn daughter upon expiration of her maternity leave from her military duties at Fort Hood, Texas. Early on June 12, 1991, approximately two and one-half weeks into the arrangement, Sherard routinely delivered the ll-week-old baby to Ross at her home on Fort Hood. According to both Sherard and Ross, the baby was in normal condition. Ross also was caring for a neighbor's child and her own two children, all less than six years of age. At 9:00 a.m. Ross fed the baby the formula that Sherard had prepared and at 11:00 a.m. the baby was given juice. The baby drank both without incident. At 12:30 p.m. Ross brought the baby and the other children to her neighbor and friend, Laura Knight, to mind while she shopped at the commissary. She returned about an hour later and Knight helped her bring the children back to the Ross house. According to both Knight and Ross, the baby appeared normal at that time.

Within an hour Knight received a telephone call from Ross, asking her to come check whether the baby was breathing. Knight hurried over and found that the baby was not breathing. An ambulance was called and the baby was rushed to the hospital where resuscitative measures were taken. The treating physician found massive brain damage caused by major non-accidental trauma. The infant died the next day.

Ross was indicted for second degree murder on a government reservation in violation of 18 U.S.C. § 1111. The first trial ended in a mistrial; the retrial resulted in the instant conviction. Sentenced to 210 months imprisonment, Ross timely

appealed.

Analysis

Ross's only challenge is to the sufficiency of the evidence.[1] She insists that the evidence is insufficient to prove beyond a reasonable doubt that she injured the infant. Ross did not renew her motion for a judgment of acquittal after the close of evidence; we examine only for a manifest miscarriage of justice.[2]

> Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or because the evidence on a key element of the offense was so tenuous that a conviction would be shocking. In making this determination, the evidence, as with the regular standard for review for insufficiency of evidence claims, must be considered in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices.[3]

After a detailed consideration of the record, we cannot say that the evidence, albeit circumstantial, is either so lacking or so tenuous as to render Ross's conviction shocking.

To obtain a conviction under 18 U.S.C. § 1111, the government must prove the defendant unlawfully caused the death of another with malice aforethought. The *mens rea* requirement can be

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[1] We note that Ross raised no objection to the trial court's failure to charge the jury with the lesser included offense of manslaughter. **United States v. Browner**, 889 F.2d 549 (5th Cir. 1989).

[2] **United States v. Ruiz**, 860 F.2d 615 (5th Cir. 1988).

[3] **Id.**, 860 F.2d at 617 (internal quotations and citations omitted).

satisfied by proof of intent to kill, intent to cause serious bodily harm or extreme recklessness or wanton disregard for human life.[4] Ross emphatically testified that the baby suffered no injury while in her care. We are convinced that the evidence permits the contrary inference that Ross intentionally or with extreme recklessness swung the baby's head against a stationary object with great force and thereby caused her death. The medical evidence that the baby was fatally injured in such a manner is uncontroverted. Ross's own testimony, as well as that of Knight and Sherard, supports the compelling inference that the injury occurred at Ross's hand.

The government presented the testimony of three doctors attesting that the infant had suffered trauma to the head: the emergency room physician who treated the baby when she first arrived at the hospital; the specialist in critical care pediatrics to whose care the baby was transferred; and a forensic pathologist specializing in child abuse who reviewed the medical records. According to Dr. David Hardy, the critical care pediatrician, the infant sustained diffuse cerebral injury resulting in hemorrhaging and swelling of the brain when her head was swung or thrown with substantial force against an immobile object. Dr. Hardy testified that the injury was too severe to have been caused by a fall from a bed or a couch or a person's arms; if it had been caused by a fall, the fall would have to have been two or three floors to a

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[4] **Browner**.

hard pavement. Dr. Hardy also ruled out complications that arose during birth as a possible cause of the baby's respiratory failure. Finally, Dr. Hardy insisted that the infant must have been "drastically abnormal, i.e., dying, at the time of this injury." The symptoms, he testified, would have appeared instantaneously.

Dr. Linda Norton, the forensic pathologist, concurred. She further testified that a pre-pubescent child would not have the strength to inflict so serious an injury. An injury this severe, she reiterated, would immediately render an infant comatose or at least stuporous; "as soon as injury this severe is inflicted, this child is not going to act normally after that period of time, they are going to begin to immediately manifest the signs that their brain is injured so severely that they are mortally wounded, they are . . . about to die."[5]

Sherard testified that the baby was normal when placed in Ross's care on the morning of June 12, 1991. Ross agreed. Knight testified that the baby was normal around midday while she cared for her. Ross agreed. Within an hour after Ross took the baby back to her house, however, the baby stopped breathing. Ross agreed. The jury was entitled to infer that the injury occurred during the intervening hour and that Ross, the sole adult with the

[5] Ross tries to show a conflict between the physicians by pointing to Dr. Hardy's statement that the infant could have been injured at any time within 24 hours before he first saw her. Dr. Hardy made clear, however, that whenever the injury occurred within the 24-hour period, the child would appear to be dying immediately thereafter. There was no inconsistency with Dr. Norton's testimony.

baby during that period, caused the injury.[6]

AFFIRMED.

[6] Cf. **United States v. Boise**, 916 F.2d 497 (9th Cir. 1990) (evidence is sufficient to prove that the defendant killed the victim when the defendant was the only adult with the child in the three hours prior to his death and the adults who were with the child before that observed no symptoms of the injuries from which he died), cert. denied, _____ U.S. _____, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991).