No. 86
The People &c.,
Respondent,
v.
Zahira Matos,
Appellant.

Margaret E. Knight, for appellant.
Vincent Rivellese, for respondent.

CIPARICK, J.:

We are asked to consider whether the evidence was sufficient to show that defendant possessed the culpable mental state of depraved indifference to human life to warrant a conviction for murder in the second degree as per (Penal Law § 125.25 [4]) (depraved indifference murder of a child under 11 years old). We hold that the record does not support such a

finding and that the conviction for second-degree depraved indifference murder of a child must be vacated.

I

In the early evening hours of September 18, 2004, while defendant was out shopping, defendant's partner, Carmen Molina, severely beat defendant's 23-month-old son. In the course of the beating, the child's leg and several ribs were broken. Additionally, the child suffered injuries to his liver and lungs, which caused severe internal bleeding. When defendant returned home at approximately 7:00 P.M., Molina informed defendant that she would be upset and that her son was injured. Defendant knew at this time her son "was hurt bad." She claimed that her son had "a bump on his head and one on his leg." She testified that she did not, however, believe he was "seriously" injured or "that he was going to die." At Molina's urging, defendant initially elected not to call for help. Molina told defendant that if they called the police they would both get in trouble and defendant would lose her children. Instead, again at Molina's request, defendant went to a local pharmacy to purchase a splint for her son's leg. The pharmacy did not carry splints so defendant purchased ACE bandages, and Molina and defendant created a makeshift splint using the bandages and slats from a crib. After splinting the leg, defendant gave her son some children's ibuprofen and laid him down to sleep. She claimed that just prior to laying the child down, he said "night night." After

placing the child in bed, defendant smoked a cigarette and then went outside to make some phone calls from a pay phone at a local sandwich shop. Defendant called Molina's mother and her own mother. She did not mention her child's condition to either during these phone calls. She returned home and approximately seven hours after she discovered that her child had been severely injured, she claims she heard him whimpering. She picked him up and discovered blood flowing from his rectum. Molina took the child from defendant and ordered defendant to clean up the bloody clothes and sheets. Defendant disposed of them as well as the makeshift splint. Defendant then called the police from a neighbor's phone. The police and EMS arrived. According to defendant, the child became unresponsive prior to the arrival of EMS. The EMS technicians were unable to revive the child and he was rushed to the hospital. Doctors at the hospital were also unable to revive the child, and he was pronounced dead at 2:26 A.M.

During questioning by the police, defendant provided varying accounts of what had happened to her son. Initially she claimed that her son fell at approximately 9:00 P.M. while she was bathing him. Additionally, she claimed that her son would bang his head against the wall during the night. She subsequently accused the child's father, who was in Michigan, of using witchcraft and causing the bruises. When confronted by the police that her stories simply could not be true she eventually

admitted that Molina had beaten the child and that she had assisted Molina in splinting the leg and attempting to dispose of the bloody clothes and bandages. After being advised of her Miranda rights, defendant executed a written and oral statement confirming that Molina had beaten the child and that defendant had helped to hide the evidence.

The medical evidence presented at trial showed that the child had died from "fatal child abuse syndrome" and had multiple blunt impacts to his head, torso and extremities that fractured his leg and ribs and lacerated his liver. The medical experts at the trial opined that the child would have been in severe pain for several hours before going into shock and that gradually his vital organs would have shut down. Additionally, the medical experts stated that it was unlikely that the child, after suffering these injuries, would have slept peacefully or woken up after having lost consciousness.

Defendant and Molina were arrested and a grand jury returned an indictment charging both women with two counts each of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder resulting from conduct creating a grave risk of death] and Penal Law § 125.25 [4] [depraved indifference murder resulting from conduct creating a grave risk of serious injury or death of a child under 11])[1], and two counts of

[1] Penal Law § 125.25 (2) provides: "Under circumstances evincing a depraved indifference to human life, he recklessly

endangering the welfare of a child with regard to defendant's older daughter (Penal Law § 260.10 [1], [2]). Defendant and Molina each moved to suppress their statements and evidence seized from their apartment. Supreme Court denied the motions. On April 25, 2007, Molina pleaded guilty to second-degree murder and was sentenced to an indeterminate period of imprisonment of 15 years to life. On January 25, 2008, defendant proceeded to trial before a jury. On February 7, 2008, the jury acquitted defendant of depraved indifference murder, but convicted her of depraved indifference murder of a child and both counts of endangering the welfare of a child. She was sentenced to an indeterminate period of imprisonment of 20 years to life. The Appellate Division affirmed (see People v Matos, 83 AD3d 529 [1st Dept 2011]). A judge of this Court granted defendant leave to appeal (17 NY3d 808 [2011]) and we now modify by vacating the murder count.

II

We have visited the issue of depraved indifference

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engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (emphasis added).

Penal Law § 125.25 (4) provides: "Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of that person" (emphasis added).

murder on several occasions. In People v Feingold (7 NY3d 288 [2006]), we explained that "[d]epraved indifference to human life is a culpable mental state" that "is best understood as an utter disregard for the value of human life -- a willingness to act not because one intends harm, but because one simply doesn't care whether grevious harm results or not" (id. at 296, quoting People v Suarez, 6 NY3d 202, 214 [2005]).

The issue presented in this case is similar to the one presented in People v Lewie (17 NY3d 348 [2011]), where we examined the culpable mental state of a mother whose boyfriend fatally abused her child.[2] In Lewie the mother of the decedent brought her child into the hospital where he expired (see id. at 353). At the time of the child's death he "had injuries consistent with very severe abuse" (id. at 354).

The mother in Lewie was prosecuted on two theories: first that she failed to seek medical attention in the last two or three days of her child's life, when she knew that her child had life-threatening injuries, and second that she left the child in the care of her boyfriend when she knew that to do so would

[2] In Lewie the mother was charged with reckless endangerment (Penal Law § 120.25) as opposed to second degree murder. We stated that because the only difference in the two statutes is that "the murder statute adds the words 'and thereby causes the death of another person'" (id. at 358), and because the child actually did die "we [could] not uphold her reckless endangerment conviction unless we would uphold a murder conviction on the same facts" (id.).

place the child in danger (see id.).[3] In Lewie we focused on the mother's decision to leave the child with the boyfriend (see id. at 355).[4] Here, we are focused on defendant's failure to seek medical attention. While we concede that defendant's behavior fell egregiously short of what we would expect from an ordinary person, faced with a child in such distress, to say nothing of a mother of said child, it does not rise to the level of "wickedness, evil or inhumanity" so "as to render the actor as culpable as one whose conscious objective is to kill" (Suarez, 6 NY3d at 214). Indeed, while she did, as the Appellate Division found, "place[] her own interests ahead of her son's need for medical treatment" (Matos, 83 AD3d at 531), the People failed to prove that she did not care whether her son lived or died. The evidence showed that she splinted her son's leg, gave him ibuprofen and exhibited other, albeit woefully inadequate, measures to comfort him. Additionally, when she found him bleeding and unresponsive, she did, in fact, call for help. It is undeniable that this behavior was a quintessential case of far too little, far too late; it does however, demonstrate that while

[3] In the instant case, while there is evidence that defendant knew that Molina was a danger to her child, the People proceeded only on the theory that defendant failed to act during the last seven hours of the child's life.

[4] The Appellate Division rejected the failure to seek medical attention theory and the People did not pursue that theory in their argument before us (see id.).

the evidence clearly shows that defendant "cared much too little about her child's safety, it cannot support a finding that she did not care at all" (Lewie, 17 NY3d at 359). As for the fact that she attempted to conceal the crime, that also does not evince a mental state of depraved indifference. "Trying to cover up a crime does not prove indifference to it" (id. at 360). Thus, the evidence of depraved indifference was legally insufficient, and the conviction for second degree murder cannot be sustained.

We acknowledge that defendant's actions here may have come within Penal Law § 125.25 (4) when it was first enacted in 1990. It must be noted, however, that when the Legislature enacted Penal Law § 125.25 (4) "depraved indifference" was not considered to be a mens rea but simply a "definition of the factual setting in which the risk creating conduct must occur" (People v Register, 60 NY2d 270, 276 [1983]). However, in the wake of Feingold and its progeny we are constrained to interpret "depraved indifference" to human life as a culpable mental state which must be proven by the People (see 7 NY3d at 296). That element was not proven in this case. The Legislature may want to consider amending section 125.25 (4) in light of the Feingold decision.

As for defendant's remaining arguments, we find them to be without merit. We will not speculate, had the evidence been sufficient to sustain a depraved indifference murder of a child

conviction, as to whether the preclusion of defense expert witness testimony on the issue of abusive relationships was error, warranting reversal, since the testimony would not have been relevant to the remaining counts. Neither will we opine on whether a proper remedy would be a reduction of the murder count to manslaughter in the second degree or criminally negligent homicide, which were submitted as lesser included counts, but not reached by the jury. We have not yet decided the issue as to whether either crime is a proper lesser included offense of depraved indifference murder of a child (see People v Baker, 14 NY3d 266, 272 [2010]). We therefore dismiss the count of the indictment charging depraved indifference murder of a child, without prejudice to re-presentation of appropriate charges to a new grand jury.

Accordingly, the order of the Appellate Division should be modified by dismissing the count of the indictment charging depraved indifference murder of a child and remitting to Supreme Court for resentencing and, as so modified, affirmed, without prejudice to an application by the People to re-present any appropriate charges to another grand jury.

People v Matos

No. 86

PIGOTT, J. (dissenting):

Viewing the evidence in the light most favorable to the People, as we must when reviewing the sufficiency of the evidence when there is a jury verdict in their favor, the facts are these:

At approximately 7:00 p.m. on September 18, 2004, while defendant was out buying beer, defendant's partner, Carmen Molina, inflicted multiple blows to the tiny frame of defendant's 23-month-old son, resulting in a broken leg, a "crushing [and extensive] injury" to the left side of his liver (to the point where it was nearly torn from the right side), three broken ribs and bruising to the lungs and diaphragm muscle. When defendant returned and found her child in that condition, heard the accompanying cries and whimpers of pain, did defendant – who was no stranger to the emergency room for herself and her children – call an ambulance? No.

At Molina's direction, defendant went to a nearby pharmacy and purchased a bandage. Finding this unsatisfactory, Molina broke pieces of wood from a crib and attempted to fashion a splint. According to defendant herself, Molina wrapped the tape so hard that it hurt defendant to hold the wood while it was being taped. With the "splint" now secure, defendant gave her

child a baby ibuprofen and put him to sleep.

But, according to the medical testimony, defendant's child was not sleeping. For the next several hours, he lay in agony with "painful injuries," dying over a "period of . . . hours," first exhibiting pain through uncontrollable crying, whimpering or moaning. As he gradually went into shock due to the pain and internal bleeding, he would have started panting before losing consciousness. If defendant had lifted her finger to dial three digits, her child could have been saved. According to the People's medical expert:

> "There was a lot that could have been done for this child. First of all, he was in pain. His leg, every time his leg was moved, he felt pain. Every time he tried to breathe, he felt pain. So he could have been treated for the pain . . . They would have opened up his abdomen. They would have stopped the bleeding from the liver and they would have removed the damaged portion of the liver and taken out the blood from his abdomen. All of those things would have increased his chances of surviving."

While her child suffered, defendant smoked and watched television. She went outside and made two phone calls, one to Molina's mother concerning a birthday present for Molina's brother, and another to her own mother - never mentioning her child's condition to either of them. Did she call an ambulance at this point? No. She returned to the apartment and did nothing. In fact, she took no action until 2:00 a.m. when, according to her own testimony, she heard her child "whining" and noticed that he was bleeding from his rectum and sullying the

sheets. Did she call the ambulance then? No. Instead, approximately seven hours after the assault, when her son stopped breathing, defendant called 911; but not before she and Molina cleaned the blood from the bathroom floor, removed the splint and disposed of it along with the blood-soaked wipes and some of her child's blood-stained clothing. When help arrived, they found the child naked, battered and bloodied on a hallway floor - dead. When asked, defendant claimed her son had fallen in the bathtub and that he had a habit of banging his head against the wall when he slept.

In my view, based on the foregoing facts, there was "a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (People v Acosta, 80 NY2d 665, 672 [1993]). And, given this evidence, the jury could have rationally concluded that defendant's unwillingness to act did not demonstrate that she "cared much too little about her child's safety" but, rather, that "she did not care at all" (People v Lewie, 17 NY3d 348, 359 [2011]).

The majority reaches a contrary conclusion, stating that defendant "splinted her son's leg, gave him ibuprofen and exhibited other, albeit woefully inadequate, measures to comfort him," such that although her attempts to help her child were "far too little, far too late," that didn't mean that she was indifferent to his plight (maj op, at 8). This, to me, is not

construing the evidence in a light most favorable to the People, but, instead, substituting a different set of facts and conclusions for those reached by the jury. The jury could have reached a contrary conclusion but it didn't. Rather, under these facts, the jury easily concluded that defendant's "efforts" were part of her attempt to avoid having to take her child to the hospital (thereby potentially implicating herself in her child's abuse) and not the equivalent of caring "much too little." Given the medical testimony and defendant's omissions, there is sufficient evidence here for the jury to have concluded that defendant "did not care at all."

This case is plainly distinguishable from Lewie. First, the People's theory in Lewie was that the mother was guilty of reckless endangerment in the first degree for leaving her eight-month-old son with a known abuser during the day over a six-week period. The People's theory in this case was that defendant was guilty of depraved indifference murder pursuant to Penal Law § 125.25 (4) because she sat idly by while her nearly two-year-old son was dying over a seven-hour period as a result of significant injuries. Second, in Lewie, the baby's cause of death was a brain injury that was less than four days old, an injury not noticeable to a layperson, and the mother's conviction for manslaughter in the second degree for failing to seek medical attention was dismissed by the Appellate Division on sufficiency grounds. Here, the evidence showed that the child had

significant injuries, showed clear signs of pain and inability to breathe while defendant all but ignored her son, offering no protection whatsoever. Thus, while the mother in Lewie was hardly a sympathetic character, the People in that case failed to prove the critical element of whether she was indifferent to her baby's plight, whereas in this case, given the extent of the child's injuries and the insufferable amount of pain he was subjected to over seven hours, the jury could have rationally concluded that defendant did not care at all about his plight, the splint and ibuprofen notwithstanding.

In my view, this is a textbook case of a defendant whose failure to act demonstrated a "wanton cruelty, brutality or callousness directed at a particularly vulnerable victim [i.e., her own son], combined with utter indifference to the life or safety of the helpless target" as the result of her omissions (People v Suarez, 6 NY3d 202, 213 [2005]). Because on this evidence the jury could and did rationally conclude that defendant did not care at all about her own child's plight, I would affirm the order of the Appellate Division.

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Order modified by dismissing the count of the indictment charging depraved indifference murder of a child and remitting to Supreme Court, New York County, for resentencing and, as so modified, affirmed, without prejudice to an application by the People to re-present any appropriate charges to another grand jury. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Smith and Jones concur. Judge Pigott dissents and votes to affirm in an opinion in which Judge Read concurs.

Decided May 31, 2012