IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACIE DIANE SCHULER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57578

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder, child endangerment, and child abuse and/or neglect resulting in substantial bodily harm or death. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. Appellant Tracie Schuler raises two issues.

First, Schuler claims that her second-degree felony-murder conviction must be reversed because of a legally insufficient jury instruction. Specifically, Schuler contends that language instructing the jury that the State had to prove that "the Defendant's neglect did in fact cause the death of the child" failed to conform to the requirements of our caselaw that "there must be an immediate and direct causal connection" between the neglect and the child's death. Ramirez v. State, 126 Nev. ___, ___, 235 P.3d 619, 622 (2010). Because the language of the instruction—to which Schuler failed to object—is essentially the same as that mandated by our caselaw and requires the State to meet the same burden of proof as to causation, we conclude that the jury was properly instructed and

therefore discern no plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).[1]

Second, Schuler claims that her conviction for child abuse and/or neglect resulting in substantial bodily harm or death must be reversed because it is a lesser-included offense of second-degree felony murder. We agree.[2] While this court has determined that our legislature intended separate punishments for felony murder and for the underlying felony in some instances, see Talancon v. State, 102 Nev. 294, 300, 721 P.2d 764, 768 (1986); Koza v. State, 100 Nev. 245, 255, 681 P.2d 44, 50 (1984), we have also concluded that "the legislature intended only one punishment for murder by child abuse," Athey v. State, 106 Nev. 520, 524, 797 P.2d 956, 958 (1990); see also Jones v. Thomas, 491 U.S. 376, 381 (1989) ("The purpose [of the multiple-punishments limitation in the

---

[1]To the extent that Schuler argues that the State failed to adduce sufficient evidence to prove that Schuler's actions caused her child's death, we conclude that, viewing the evidence produced at trial in the light most favorable to the prosecution, a rational juror could have found that Schuler either (1) permitted her daughter to drink a lethal amount of methadone or (2) directly administered the lethal dose. Therefore, sufficient evidence exists to support the jury's verdict on either of the second-degree murder theories charged. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); NRS 200.010(2); NRS 200.070.

[2]While Schuler was charged with second-degree murder under alternative theories, the jury issued a general verdict that did not specify the theory under which it found Schuler guilty. Cf. People v. Anderson, 233 N.W.2d 620, 623-24 (Mich. Ct. App. 1975) ("Since it cannot be said with certainty that the jury did not find defendant guilty of armed robbery and guilty of first-degree murder based on a killing which took place during the perpetration of that armed robbery, defendant's conviction for armed robbery must be reversed.").

Double Jeopardy Clause] is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments."). If the legislature did not specifically authorize multiple punishments and neither of the criminal statutes in question requires a different proof of fact, then one of the convictions must be vacated. Ball v. United States, 470 U.S. 856, 864 (1985). In this case, we conclude that nothing in either the felony child neglect statute or the second-degree felony-murder statute "specifically authorizes cumulative punishment." Athey, 106 Nev. at 524, 797 P.2d at 958; see NRS 200.508; NRS 200.070. We therefore affirm Schuler's convictions for second-degree murder and child endangerment, but remand with instructions to the district court to vacate her conviction for child abuse and/or neglect resulting in substantial bodily harm or death.[3]

Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

[3]Because we reverse this conviction, we have not considered Schuler's appeal claims attacking its validity.

cc: Hon. Steven R. Kosach, District Judge
Edward T. Reed
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk