IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-84

No. COA20-225

Filed 16 March 2021

Forsyth County, Nos. 18 CRS 52962-63

STATE OF NORTH CAROLINA

v.

ROBERT D. MILLER, III

Appeal by defendant from judgments entered 14 February 2019 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann K. Cosper, for the State.

Mary McCullers Reece for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Robert D. Miller, III, appeals from judgments entered upon his convictions for two counts of misdemeanor child abuse. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

¶ 2 At around 9:00 p.m. on 3 April 2018, Deputy R.P. Rae of the Forsyth County

Sheriff's Office was on patrol in a marked Chevrolet Tahoe when he observed an SUV exiting a car-wash parking lot "at a higher rate of speed than normal." Deputy Rae noticed the vehicle because "the headlights went up and down, [and] the vehicle went up and down as if it had hit . . . a large bump at a higher rate of speed." Although the SUV appeared to be moving at a normal speed as it passed him on Clemmonsville Road, Deputy Rae turned his vehicle around to follow the SUV.

¶ 3 Deputy Rae noticed that the SUV had accelerated and was "much farther down the road than it would have [been] if it was traveling at the speed limit on that road." He estimated that the SUV was traveling at 80 miles per hour in a zone where the speed limit increased from 35 to 55 miles per hour. Deputy Rae caught up with the SUV when it stopped at a traffic light, and he activated his patrol vehicle's blue lights once he was immediately behind the SUV.

¶ 4 Although there were several places that Defendant could have pulled over, he instead continued to drive, crossing the double-yellow center line of the two-lane road to pass other vehicles. Oncoming vehicles were forced to stop in order to avoid a collision. As Deputy Rae followed, Defendant activated the SUV's four-way flashing lights and drove into a residential development, which Deputy Rae perceived as a signal that the driver of the SUV "acknowledged [his] presence." Defendant again crossed the center line to pass another vehicle, and then eventually stopped in front of a residence.

¶ 5 Deputy Rae and three other deputies conducted a "felony vehicle stop" and ordered the SUV's occupants to exit the vehicle one at a time. When Deputy Rae subsequently identified Defendant as the driver of the vehicle, he learned that Defendant's license was revoked. There were also two minor children in the vehicle, a four-year-old child and a one-year-old infant. When Deputy Rae asked Defendant to explain his dangerous driving, Defendant replied that he knew his license was expired, and he believed that he was going to be arrested, so he drove to his cousin's residence to drop off his children because he did not want them to witness his arrest.

¶ 6 On 13 August 2018, a Forsyth County grand jury returned true bills of indictment charging Defendant with felonious operation of a motor vehicle to elude arrest; driving while license revoked for impaired driving; and two counts of misdemeanor child abuse. On 28 January 2019, Defendant pleaded guilty to the charge of driving while license revoked for impaired driving.

¶ 7 Defendant's case came on for trial on 12 February 2019 in Forsyth County Superior Court before the Honorable Eric C. Morgan. On 14 February 2019, the jury returned its verdicts finding Defendant not guilty of felonious operation of a motor vehicle to elude arrest, but guilty of both counts of misdemeanor child abuse. The trial court sentenced Defendant to two consecutive terms of 150 days in the custody of the Misdemeanant Confinement Program, suspended the sentences, and placed Defendant on 18 months of supervised probation with a term of 30 days in split-

sentence special-probation incarceration. Defendant filed his handwritten notice of appeal on 21 February 2019.[1]

Discussion

¶ 8 On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the two counts of misdemeanor child abuse for insufficient evidence. After careful review, we disagree.

I. Standard of Review

¶ 9 We review de novo a trial court's denial of a defendant's motion to dismiss. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept

[1] Defendant also petitioned this Court to issue its writ of certiorari, should we deem his *pro se* notice of appeal defective for failure to include a certificate of service as required by Rule 4(a)(2) of the North Carolina Rules of Appellate Procedure. However, "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal." *State v. Ragland*, 226 N.C. App. 547, 552, 739 S.E.2d 616, 620 (citation omitted), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013). Here, the State has not raised the issue of service by motion to dismiss or otherwise, has not responded to Defendant's petition for writ of certiorari, and has participated without objection in this appeal. Accordingly, the State has waived any objection to this issue. Therefore, we dismiss the petition. *See id.*

as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

II. Analysis

¶ 10 In order to survive a defendant's motion to dismiss a charge of misdemeanor child abuse, the State must produce substantial evidence of one of the three distinct acts set forth in N.C. Gen. Stat. § 14-318.2(a) (2019). *State v. Watkins*, 247 N.C. App. 391, 395, 785 S.E.2d 175, 177, *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). "That is, the State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury." *Id.*

¶ 11 The parties agree that this case involves the third act described by § 14-318.2(a), the exposure of the children to a substantial risk of physical injury. This provision was addressed by this Court in *Watkins*, in which the defendant- mother of a 19-month-old boy was alleged to have left her son buckled into his car seat on a cold and snowy afternoon while she went inside the Sheriff's Office "for at least six-and-

a-half minutes." *Id.* at 392, 785 S.E.2d at 176. Although disputed by the defendant, the State's evidence tended to show that "the vehicle was not running and that the driver's side rear window was rolled more than halfway down." *Id.* at 392–93, 785 S.E.2d at 176.

¶ 12 The *Watkins* Court noted "the paucity of cases applying" the "substantial risk of physical injury" provision of § 14-318.2(a). *Id.* at 395, 785 S.E.2d at 177–78. Accordingly, the defendant in *Watkins* "attempt[ed] to draw an analogy to cases addressing whether a child was properly adjudicated to be a neglected juvenile under Chapter 7B of the North Carolina General Statutes." *Id.* at 395, 785 S.E.2d at 178. However, this Court observed that, "while these cases . . . illustrate *some* circumstances that can create a substantial risk of harm to a juvenile, they do not resolve the issue presently before us—that is, whether the State's evidence here was sufficient to raise a jury question regarding a violation" of § 14-318.2(a). *Id.* Ultimately, considering "the harsh weather conditions, [the boy's] young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway," this Court concluded that "a reasonable juror could have found that [the d]efendant 'created a substantial risk of physical injury' to him by other than accidental means." *Id.* at 395–96, 785 S.E.2d at 178 (quoting N.C. Gen. Stat. § 14-318.2(a) (2015)).

¶ 13 Here, Defendant attempts the same strategy as the defendant in *Watkins*:

analogizing the "substantial risk of physical injury" language from § 14-318.2(a) to our jurisprudence on the adjudication of neglected juveniles under Chapter 7B of our General Statutes. From our neglected-juvenile precedents, Defendant divines his argument that a "substantial risk of physical injury" could arise either from a parent leaving the parent's child unsupervised in an injurious environment, *see In re D.C.*, 183 N.C. App. 344, 353, 644 S.E.2d 640, 645 (2007), or from a pattern of "severe substance abuse" affecting a parent's ability to care for the parent's children, *Powers v. Powers*, 130 N.C. App. 37, 43, 502 S.E.2d 398, 402, *disc. review denied*, 349 N.C. 530, 526 S.E.2d 180 (1998). Defendant then cites counterexamples in support of his argument that "not every parental lapse gives rise to neglect."

¶ 14 Essentially, Defendant imports these examples from our neglected-juvenile case law to establish that the State failed to meet its burden to show that he created or allowed to be created a substantial risk of physical injury to the children. Defendant asserts that, unlike *Watkins*, "lack of supervision was not an issue" here. Similarly, "briefly exceeding the speed limit does not demonstrate the type of purposeful parental decision-making that resulted in conviction" in *Watkins* or other cases. These comparisons are unavailing.

¶ 15 As in *Watkins*, the juvenile-neglect cases that Defendant cites "illustrate *some* circumstances that can create a substantial risk of harm to a juvenile, [but] they do not resolve the issue presently before us[.]" *Watkins*, 247 N.C. App. at 395, 785 S.E.2d

at 178. Accordingly, neither "lack of supervision" nor "purposeful parental decision-making" is a requisite to conviction of misdemeanor child abuse, as Defendant seems to suggest. Rather, as the *Watkins* Court noted, the question before us is merely "whether the State's evidence here was sufficient to raise a jury question regarding a violation of N.C. Gen. Stat. § 14-318.2(a) by Defendant." *Id.*

¶ 16 In his brief on appeal, Defendant acknowledges the State's evidence that, while driving with the children in his vehicle, he "exceeded the speed limit for approximately one minute" before "sometimes crossing the center line to pass pulled-over vehicles" with Deputy Rae in pursuit with his blue lights flashing. Defendant attempts to minimize the gravity of his conduct by arguing that the duration of this incident was shorter than the incidents described in *Watkins* or in *State v. Reed*, in which the defendant-mother left her child alone by the side of a concrete pool "for approximately five to ten minutes[.]" 249 N.C. App. 116, 126, 789 S.E.2d 703, 710 (2016), *rev'd per curiam based on dissent*, 371 N.C. 106, 813 S.E.2d 215 (2018).

¶ 17 Nevertheless, a reasonable juror could find that Defendant created a substantial risk of physical injury to the children in his vehicle by speeding and repeatedly crossing the center line, without regard to how long Defendant did either. While a longer duration increases the potential risk of physical injury, a shorter duration certainly does not negate that risk altogether. We therefore conclude that "a reasonable juror could have found that Defendant created a substantial risk of

physical injury to [his children] by other than accidental means." *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178 (citation and internal quotation marks omitted).

¶ 18 As in *Watkins*,

> the only question before us in an appeal from the denial of a motion to dismiss is whether a reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury.

Id. "Because we are satisfied that the State's evidence was adequate to submit the case to the jury, the trial court properly denied Defendant's motions to dismiss. Accordingly, Defendant's argument is overruled." *Id.*

Conclusion

¶ 19 For the foregoing reasons, the trial court did not err in denying Defendant's motions to dismiss the charges of misdemeanor child abuse. Defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and GRIFFIN concur.

Report per Rule 30(e).