IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-202

No. COA20-641

Filed 4 May 2021

Caldwell County, No. 16CRS824

STATE OF NORTH CAROLINA

v.

DUSTIN ALLEN LEWIS

Appeal by defendant from order entered 13 December 2019 by Judge Daniel A. Kuehnert in Caldwell County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah G. Zambon, for the State-Appellee.

William D. Spence for Defendant-Appellant.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 Baby Z is the biological child of Cierra Coffey ("Coffey"). Defendant Dustin Allen Lewis ("Defendant") was Coffey's live-in boyfriend. The couple shared an

apartment with Baby Z and Coffey's non-biological mother, Garnett Paige ("Paige"). On a typical weekday, Defendant spent a few hours caring for Baby Z in the apartment alone. The State presented evidence Defendant was "frustrated" by Baby Z; Defendant thought Baby Z "cried too much," but she should not have a pacifier and Coffey should let Baby Z cry. The State also presented evidence Defendant thought Baby Z "had no discipline" and was "spoiled" by Coffey. A co-worker of Defendant testified Defendant "had a temper."

¶ 2 On 7 December 2014, Coffey took Baby Z to the hospital because Baby Z was "extremely upset" and "wasn't acting herself." On 8 December 2014, Baby Z was in the sole care of Defendant while Coffey was on a smoke break for thirty to forty-five minutes. While watching Baby Z, Defendant texted a female friend to tell the friend he was arguing with Coffey and said, "Nobody knows what I go through. Everything gets flipped on me." That night, the baby would not eat or sleep, and started shaking with seizures. Coffey took Baby Z to the hospital alone. Baby Z had a fractured tibia, broken ribs, and "bleeding on her brain." Coffey texted Defendant to ask if Baby Z ever fell or if he ever shook Baby Z and Defendant responded, "I mess with her about crying, but that's as far as it goes," and "That shouldn't even cross your mind, me doing that. Now you're going to have people saying things about me."

¶ 3 Defendant came to the hospital on 9 December. While in the waiting room, Defendant told co-workers who came to check on the baby that Baby Z cried too much,

and Coffey spoiled her. Defendant said to the co-workers, "Well, they're finding out everything's wrong with her. Next, they're going to say that her leg is broken." During the ride home with the co-workers, one co-worker asked Defendant if he hurt Baby Z and Defendant did not answer.

¶ 4 Baby Z was hospitalized for a month. Baby Z had a subdural hemorrhage or hematoma. Baby Z had new posterior rib fractures on the 4, 5, and 6 ribs on the right side that were about a day old when Baby Z was admitted to the hospital. Baby Z had older, healing lateral fractures on the same ribs and these fractures were about 10 to 14 days old. Baby Z also had a corner fracture on the left tibia. Baby Z also suffered from a swollen optic disc.

¶ 5 Dr. Patricia Morgan was Baby Z's treating physician at Levine Hospital and was tendered and accepted as an expert in pediatrics and child abuse. Dr. Morgan reviewed Baby Z's injuries and records and determined Baby Z was a victim of abusive head trauma and of physical abuse. Dr. Morgan testified Baby Z's injuries were consistent with child abuse because of the type of fractures, retinal hemorrhages, and multiple areas of new blood. Dr. Morgan opined a squeezing force caused Baby Z's new and old rib fractures, and the corner fractures on Baby Z's tibia occurred either from shaking the baby or from a pulling or yanking motion.

¶ 6 Defendant never visited the hospital again after 9 December. When co-workers asked about Coffey and Baby Z, Defendant told them he did not want to get involved.

While Baby Z was in the hospital, co-workers testified Defendant was withdrawn and quiet. A co-worker testified Defendant had no emotion about Baby Z being hospitalized and did not check on Coffey or Baby Z. Paige left the Defendant a note telling him to move out of the home.

¶ 7 Upon questioning by investigators, Defendant admitted that four to five weeks prior to the baby's hospitalization, Baby Z hit her head in the bath when he was bathing her. Defendant also told the investigators there were two times where Defendant threw Baby Z in the air, and one of those times the baby hit the floor. Defendant said at least one of the times he threw Baby Z in the air was around when Baby Z started going to the doctor. Defendant never told Coffey about the incident involving Baby Z being thrown in the air and dropped and did not tell Coffey about the incident involving the bathtub until "weeks" later.

¶ 8 Because of the abuse she sustained, Baby Z suffered permanent, life-altering injuries. Baby Z has cerebral palsy. She requires constant assistance and special equipment. She receives physical therapy, occupational therapy, and speech therapy and sees a neurologist, pediatrician, pediatric orthopedist, and a podiatrist. Baby Z now lives with her biological grandmother because the grandmother has experience assisting people with special needs and is financially stable. Baby Z is a "total care patient". She is legally blind. She cannot walk on her own.

¶ 9 On 6 June 2016, Defendant was indicted by a Caldwell County grand jury on

charges of child abuse resulting in serious physical injury and child abuse resulting in serious bodily injury. Defendant was tried on those charges on 2 December 2019. Defendant made a motion to dismiss the charges at the close of the State's evidence and the motion was denied. Defendant presented no evidence. On 16 December 2019, the jury found Defendant guilty on both charges. Defendant orally appealed the convictions in open court at the close of trial.

II. Jurisdiction

¶ 10 Jurisdiction lies in this Court as a matter of right over a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat § 15A-1444(a) (2019).

III. Issues

¶ 11 The issues on appeal are (1) whether the trial court erred in denying Defendant's motion to dismiss the charge of child abuse by inflicting serious bodily injury and (2) whether the trial court erred in denying Defendant's motion to dismiss the charge of child abuse by inflicting physical injury.

IV. Analysis

A. Serious Bodily Injury v. Serious Physical Injury

¶ 12 Defendant was charged under both N.C. Gen. Stat. § 14-318.4(a) (2019) and N.C. Gen. Stat. § 14-318.4(a3) (2019). North Carolina classifies several offenses as felony child abuse under N.C. Gen. Stat. § 14-318.4. Subsection (a) provides:

> [a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class D felony, except as otherwise provided in subsection (a3) of this section.

N.C. Gen. Stat. § 14-318.4(a). "Serious physical injury" is defined in the statute as "[p]hysical injury that causes great pain and suffering." N.C. Gen. Stat. § 14-318.4(d)(2) (2019).

¶ 13 Defendant was also charged under subsection (a3):

> [a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child . . . is guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-318.4(a3). The statute defines "serious bodily injury" as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1) (2019); *see State v. Dixon*, 258 N.C. App. 78, 82, 811 S.E.2d 705, 708 (2018) (comparing serious bodily injury and serious physical injury.)

¶ 14 This Court has iterated "the legislative intent for adding subsection (a3) as 'a Class B2 felony' was to substantially increase punishment for the more egregious

instances of child abuse." *Dixon*, 258 N.C. App. at 85, 811 S.E.2d at 709. The "charge of intentionally inflicting 'serious bodily injury' is reserved for those more egregious cases where a child suffers 'permanent or protracted' injuries or is placed at 'substantial risk of death.'" *Id*. at 85, 811 S.E.2d at 710; *see also* N.C. Gen. Stat. § 14-318.4(d)(1).

B. Motion to Dismiss Charge of Serious Bodily Injury

¶ 15 The Defendant was first charged and convicted of child abuse by intentional infliction of serious bodily injury under N.C. Gen. Stat. § 14-318.4(a3). Defendant contends the State failed to present substantial evidence of his intent to inflict injury on Baby Z.

¶ 16 Under N.C. Gen. Stat. §14-318.4(a), the State does not have to prove intent to cause *serious* injury to a child; the State must only present evidence the defendant had the intent to inflict injury and the injury was serious. *State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 476 (1986).

¶ 17 "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Riggsbee*, 72 N.C. App. 167, 171, 323 S.E.2d 502, 505 (1984) (citing *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974)). In order to determine the presence of intent, "the jury may consider the acts and conduct of the defendant and the general

circumstances existing at the time of the alleged commission of the offense charged." *Riggsbee*, 72 N.C. App. at 171, 323 S.E.2d at 505.

¶ 18 It does not matter whether the State's evidence is direct, circumstantial, or both, because the sufficiency of evidence test is the same for each type of evidence. *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made. This is the way people often reason in everyday life." *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987). Circumstantial evidence may be used for motive, opportunity, capability and to identify the accused as the one who committed the crime. *State v. Pridgen*, 313 N.C. 80, 94, 326 S.E.2d 618, 627 (1985). When reviewing circumstantial evidence, the trial court determines "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances" and if so, the jury must determine the defendant's guilt beyond a reasonable doubt based on the facts taken separately or together. *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) (citing *State v. Thomas*, 256 N.C. 593, 124 S.E.2d 728 (1962)).

¶ 19 Baby Z had a subdural hemorrhage, three broken ribs, and a fractured tibia. Because of her significant neurological injuries, Baby Z now has cerebral palsy and cannot walk or use the bathroom by herself, even five years after she sustained the injuries. Defendant does not dispute Baby Z's injuries were serious.

¶ 20 The State provided evidence Defendant had the requisite intent to injure Baby Z. Around the time Coffey went out for a smoke break, Defendant was watching Baby Z. During that time Defendant texted a female co-worker saying Coffey was trying to fight with him and: "Nobody knows what I go through. Everything gets flipped on me." These events occurred after Coffey spent the previous day tending to the baby and taking the baby to the hospital. A jury's inference of Defendant's intent to inflict injury on Baby Z, based on evidence presented by the State that Defendant was frustrated with Baby Z, was a reasonable inference. *See Rowland*, 263 N.C. at 358, 139 S.E.2d at 665.

¶ 21 Defendant further contends the State did not present substantial evidence Defendant was the offender. However, the State provided evidence Defendant, at certain relevant times, provided sole care and supervision for Baby Z on various days up to and including 8 December 2014. The timeframe provided by Dr. Morgan for when the neurological injuries occurred was within hours of Baby Z being hospitalized. The only two people who cared for Baby Z relative to such period of time on 8 December 2014 were Defendant and Coffey. Defendant was left alone with Baby Z for approximately thirty to forty-five minutes while Coffey went outside for a smoke break. Immediately after, Baby Z started having seizures for the first time. A jury's inference, concluding Defendant had the opportunity to inflict injury on Baby Z, based

on evidence presented by the State, was reasonable. *See Rowland*, 263 N.C. at 358, 139 S.E.2d at 665.

¶ 22 The State met its burden to provide substantial evidence of each element of N.C. Gen. Stat. § 14-318(a3). Therefore, the trial court correctly denied Defendant's motion to dismiss.

C. Motion to Dismiss Charge of Serious Physical Injury

¶ 23 Defendant was next charged and convicted of child abuse by intentional infliction of serious physical injury under N.C. Gen. Stat. § 14-318.4(a). The trial court charged the jury that to find guilt under Count II, they must find Defendant had, between late November and early December 2014, intentionally inflicted serious physical injury on Baby Z resulting in the "old but healing rib fractures." Defendant contends, as he contended in his Count I argument, the State did not present substantial evidence Defendant intended to inflict injury on Baby Z. For the same reasons stated in part (A) of this analysis, we disagree.

¶ 24 A jury's inference of Defendant's intent to inflict injury on Baby Z, based on evidence presented by the State Defendant was frustrated with Baby Z, was a reasonable inference. *See Rowland*, 263 N.C. at 358, 139 S.E.2d at 665. The State met its burden to provide substantial evidence of each element of N.C. Gen. Stat. § 14-318.4(a). Therefore, the trial court correctly denied Defendant's motion to dismiss.

VI. Conclusion

¶ 25 This Court holds the trial court did not err in denying Defendant's motions to dismiss the charges of child abuse by inflicting serious bodily injury and child abuse by inflicting physical injury. The jury's inferences as to Defendant's intent to inflict injuries on Baby Z were reasonable given the evidence presented by the State regarding Defendant's attitude toward Baby Z. Further, the jury's inferences as to Defendant's opportunity to commit the offenses charged were reasonable given the evidence presented by the State regarding the time Baby Z spent in the sole care of Defendant. Therefore, the State met its burden to provide substantial evidence of each element of N.C. Gen. Stat. § 14-318.4(a) and N.C. Gen. Stat. § 14-318.4(a3), respectively. We affirm the decisions of the trial court.

AFFIRM.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).