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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-805

Filed 05 September 2023

Pitt County, No. 19 CRS 055325

STATE OF NORTH CAROLINA

v.

ELTON JOSHUA PRITCHETT, III, Defendant.

Appeal by Defendant from judgments entered 3 December 2021 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 25 April 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Zach Padgett, for the State.*

*Joseph P. Lattimore for Defendant.*

GRIFFIN, Judge.

Defendant Elton Joshua Pritchett, III, appeals from judgment entered upon a jury's verdict finding him guilty of felonious child abuse inflicting serious physical injury and assault by strangulation. Defendant contends that the trial court erred in denying his motion to dismiss, violating the "unless covered" provision by entering judgment for assault by strangulation when the more serious assault conviction

covered the same conduct and provided greater punishment, and allowing witness testimony about Facebook messages she received from Defendant. We find no error.

### **I. Factual and Procedural History**

This case arises out of the assault and strangulation of J.D.<sup>1</sup> by Defendant. Evidence presented during Defendant's trial tended to show as follows:

J.D., who was born on 25 October 2017, is the son of Amber Dixon and Jerry Dixon, II. Jerry Dixon, II, passed away on 14 October 2018. Following his father's death, J.D. began to spend a significant amount of time living with his grandparents, who were the parents of Jerry Dixon, II, Jackie, and Jerry Dixon, I. Jackie owned the house and allowed Amber and J.D. to live there. In March of 2019, Jackie called the Department of Social Services to report the poor condition of the home of Amber and J.D. Following this incident, Amber did not allow J.D.'s grandparents to see him for two months. J.D. resumed spending most nights with his grandparents in May and June of 2019. The grandparents received custody of J.D. in July 2019.

In May 2019, Amber began a romantic relationship with Defendant, and by June, Amber was spending most nights at his house. Amber picked J.D. up from his grandparents' house on 1 July 2019. Despite Jackie's expectation that J.D. would return by July 4th, Amber didn't bring him back until July 7th. Jackie tried to call and text Amber but received no response. When J.D. returned to his grandparents'

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<sup>1</sup> Pseudonyms are used to protect the identity of minors pursuant to N.C. R. App. P. 42(b).

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house on July 7th, his body was covered in bruises, his eyes were almost swollen shut, and there appeared to be a cigarette burn on his body. When questioned about J.D.'s injuries, Amber told Jackie that J.D. had fallen on two separate occasions. Amber implored Jackie not to report J.D.'s injuries to the authorities and offered a "fifty/fifty custody" arrangement in exchange for her silence. After Amber left, Jackie took pictures of J.D.'s injuries and called her daughter, Susan Dixon. Jackie called Susan instead of DSS because DSS "didn't do anything" the last time she reported an incident, and it resulted in Amber keeping J.D. from her for nearly two months. Jackie showed J.D.'s injuries to Susan via video.

Subsequently, Susan contacted the police, who arrived within thirty minutes. Deputy Sharpe, from the Edgecombe County Sheriff's Office, responded to the call on 7 July 2019. At trial, Deputy Sharpe testified that his mouth dropped when he saw the injuries to J.D. Deputy Sharpe observed bruises on J.D.'s back, butt, hips, neck, both legs, near J.D.'s penis, as well as bruising and a "big knot" on his head. Shortly after, J.D. was rushed to the hospital.

Upon J.D.'s arrival at the hospital, Dr. Tonya West was one of the medical professionals who examined him. Dr. West provided a diagnosis of the following injuries: "bilateral subconjunctival hemorrhages in his eyes," "abrasions to his forehead," "bruises on his cheeks and under his eyes," "abrasions to his left jaw, upper lip, nose, and the front of his neck," as well as "bruising to his temple, chest, back, buttocks, right thigh, left shoulder, pelvic area, and legs." Dr. West explained that

“bilateral subconjunctival hemorrhages” refer to bleeding in the white parts of his eyes, which is caused by, among other things, strangulation and choking. Jackie and Jerry Dixon, I, were given custody of J.D. after these incidents. When J.D. was brought home from the hospital, he faced difficulties eating due to the injury to his chin. Throughout the night, J.D. also began “screaming at the top of his lungs . . . kicking and throwing punches . . . holler[ing], ‘stop, stop.’” J.D. was twenty-one months old at the time he suffered these injuries.

Amber testified at trial about what happened between 1-7 July 2019. She stated that she and J.D. stayed at Defendant’s house, where she slept on the couch and J.D. slept on a loveseat. Eventually, J.D. began sleeping in the bedroom on a toddler bed with Defendant. On 3 July 2019, Amber and her family took J.D. to see fireworks and take pictures. The pictures show that J.D. had bruises on his forehead on 3 July 2019. Defendant attributed these bruises to J.D. falling off the steps earlier that week while they were walking to retrieve the mail. A couple of days later, Amber noticed bruises on J.D.’s groin area and back.

On 5 and 6 July 2019, J.D. woke up in the middle of the night crying for his cup. When Amber attempted to help J.D., Defendant intervened, assuring her that he would fetch the cup for J.D. and instructing her to lay back down on the couch. On July 6, Amber noticed J.D. had additional injuries to his face and, on the morning of July 7, she observed burst blood vessels in his eyes and that the bruises had intensified. J.D. spent the entire night in the bedroom with Defendant both nights.

Members of Amber’s family testified at trial about incidents that occurred between J.D. and Defendant prior to July 2019. Amber’s brother, Scotty Smith, testified about an incident that occurred earlier in 2019 when he, Amber, J.D., and Defendant were in a truck. After Amber got out of the truck, J.D. began to cry which led Defendant to call J.D. a “titty baby and a pussy boy,” take him out of his car seat, and “[flick] him on top of the head.” Defendant also told Mr. Smith that J.D. was “getting on his nerves.” Amber’s mother, Angela Edwards, testified that around June or July 2019, they were at Angela’s house when J.D. started crying and Defendant said “[t]hat little fucker cries too much.” Additionally, Amber’s sister, Taylor Lilley, recounted an incident when Defendant became visibly upset with J.D. and “had his fists balled up by his side.”

On 26 August 2019, Defendant was indicted on charges of felonious child abuse inflicting serious physical injury and assault by strangulation. Trial by jury began on 29 November 2021 in Pitt County Superior Court with Judge J. Carlton Cole presiding. The jury found Defendant guilty on both charges. Defendant timely appeals.

## **II. Analysis**

Defendant argues that the trial court erred by: (1) denying his motion to dismiss; (2) entering judgment for assault by strangulation, when the more serious assault conviction was covered under the same conduct and provided greater punishment; and (3) admitting unauthenticated testimony about Facebook messages.

We disagree.

**A. Motion to Dismiss**

Defendant first argues that the trial court erred in denying his motion to dismiss because there was not substantial evidence that Defendant was a caretaker under N.C. Gen. Stat. § 14-318.4(a).

This Court, in evaluating the trial court's decision to deny Defendant's motion to dismiss, "must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982); *see also State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) ("This Court reviews the trial court's denial of a motion to dismiss de novo."). The question for this Court upon review is "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 of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

"Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists." *McKinnon*, 306 N.C. at 298, 293 S.E.2d at 125. Contradictions and discrepancies are for the jury to resolve and will not result in dismissal of the case. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

N.C. Gen. Stat. § 14-318.4 provides that:

[a] parent or any other person providing care to or supervision 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[.]

N.C. Gen. Stat. § 14-318.4 (2021). Defendant only alleges that there was insufficient evidence to show that he was providing care or supervision to J.D. at the time of the incidents alleged.

This Court, in *State v. Chambers*, first addressed the issue of how a person may qualify as a “person providing care to or supervision of” a child. 278 N.C. App. 474, 479, 861 S.E.2d 367, 371 (2021). In *Chambers*, this Court referenced N.C. Gen. Stat. § 7B-101(3), where “caretaker” is defined as:

Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile’s health and welfare means a stepparent; foster parent; an adult member of the juvenile’s household; an adult entrusted with the juvenile’s care.

N.C. Gen. Stat. § 7B-101(3) (2021). In deciding if a person is a caretaker, the trial court “must consider the totality of the circumstances” in determining whether a person is entrusted with the juvenile’s care, “including the duration and frequency of care provided by the adult, the location in which that care is provided, and the decision-making authority granted to the adult.” *Chambers*, 278 N.C. App. at 479, 861 S.E.2d at 371 (quoting *In re R.R.N.*, 368 N.C. 167, 170, 775 S.E.2d 656, 659 (2015)).

This Court addressed a similar issue in *State v. Carrilo*. In *Carrilo*, this Court held that a person can become a caretaker of a child when the child's primary caretaker temporarily leaves the room. *State v. Carrilo*, 149 N.C. App. 543, 549, 562 S.E.2d 47, 51 (2002). In *Carrilo*, the mother and the defendant were lying down when the mother's baby started crying. The mother went to the kitchen and came back to see the defendant shaking the child and "it seemed like the baby's head was hitting the bed." *Id.* at 545, 562 S.E.2d at 48. This Court held this was substantial evidence that the defendant had provided care to or supervised the child when viewed in the light most favorable to the State.

Defendant argues on appeal that *Carrilo* is distinguishable from the present case because, in *Carrilo*, the incident occurred at the child's residence and the child had been living with the defendant for a couple of months. However, this Court, in deciding *Carrilo*, also relied on the fact that the child had previously been left in the care of the defendant for short periods of time. *Id.* at 549, 562 S.E.2d at 51. Additionally, this Court did not hold the defendant must be living with the child for at least two months or that the incident must have occurred at the child's primary residence. As previously stated in *Chambers*, we must consider the totality of the circumstances in deciding these issues. Defendant need not even have plenary parental authority, so long as there is evidence sufficient for a jury to find J.D. depended on Defendant for 'parental-type' care. *Chambers*, 278 N.C. App. at 481, 861 S.E.2d at 372.



In this case, J.D. was repeatedly under Defendant's supervision for extended periods during the night. Defendant assured Amber that he had J.D. under control, prevented her from entering the room, and attended to J.D.'s needs, including providing him with a cup when he cried.

Additionally, although J.D. may not have been living with Defendant for two months, Amber, who had primary custody of J.D. during this time, began staying overnight with Defendant regularly approximately two months before these incidents. Defendant misconstrues the holding in *Chambers* to require such care to occur in the child's primary residential setting. There is no such requirement. Defendant references Jackie's testimony that "J.D. was staying all the time with me" and portrays J.D. as nothing more than a "temporary guest" at Defendant's home. J.D. was residing with Defendant in a residential setting at the time of the incidents and would likely have continued to stay there on various occasions if not for these incidents. We hold this to be sufficient considering J.D. frequently moved between Jackie's different houses and had stayed at Defendant's residence for at least a week.

When viewed in the light most favorable to the State, a reasonable jury could find that Defendant provided care to or was a supervisor of J.D. Therefore, we hold that the trial court did not err in denying Defendant's motion to dismiss.

**B. N.C. Gen. Stat. § 14-32.4(b) "Unless Covered"**

Defendant next contends that the trial court erred in entering judgment and convictions under both N.C. Gen. Stat. § 14-32.4(b) and N.C. Gen. Stat. § 14-32.4(a)

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without substantial evidence that there was a distinct interruption between the assaults and therefore convicted him under both statutes with the same conduct.

Questions of statutory construction are a question of law that we review *de novo*. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014). For criminal defendants to be charged and convicted of two separate assaults, the State must provide substantial evidence that there was “a distinct interruption in the original assault followed by a second assault, so that the subsequent assault may be deemed separate and distinct from the first.” *State v. Dew*, 379 N.C. 64, 71, 864 S.E.2d 268, 274 (2021) (citations omitted). The fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption to justify charging a defendant with multiple counts of assault. *Id.* at 72, 864 S.E.2d at 275.

To be convicted under both statutes, there must be an assault, separate from the strangulation event, which caused “serious physical injury.” N.C. Gen. Stat. § 14-32.4(a). Serious physical injury is defined as “[p]hysical injury that causes great pain and suffering. The term includes serious mental injury.” N.C. Gen. Stat. § 14-318.4(d).

Conduct that stretched over the course of four hours, but occurred in a car and in a trailer, is not a distinct interruption. *Dew*, 379 N.C. at 72, 864 S.E.2d at 276. In *Dew*, our Supreme Court held the time that it took the victim to clean a trailer and get in a car was not sufficient to be considered a distinct interruption. In holding the events were insufficient, the Court provided a non-exhaustive list of distinct

interruptions which included “an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.” *Id.* at 72, 864 S.E. at 275.

In the present case, there is evidence in the record that J.D.’s injuries worsened over the course of 1 July 2019 to 7 July 2019. Pictures of J.D. on July 3rd show bruising to the forehead and pictures from the following days show J.D. with new injuries that were not pictured on July 3rd. We hold that attending a fireworks show with his mother’s family is an intervening event. This provides sufficient evidence of a break between the assault that caused the injuries leading up to July 3rd and the assault that caused the injuries discovered in the following days. Additionally, Dr. Wright testified the different coloring of the bruises on J.D.’s body indicated that the bruises occurred at different times because they were at different stages of healing.

Defendant next contends the State has not provided any evidence of J.D.’s pain and suffering. In determining whether there is evidence of pain or suffering, this Court has previously looked at factors such as: (1) hospitalization, (2) pain, (3) loss of blood, and (4) time lost from school. *State v. Williams*, 184 N.C. App. 351, 355, 646 S.E.2d 613, 616 (2007). The issue of whether there is pain or suffering is typically a question for the jury. *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 211 (2004). The State offered evidence that J.D. was hospitalized, had trouble eating for multiple weeks after the incident, began waking up in the middle of the night

screaming, and had bleeding into the subconjunctival space of both his eyes. We hold this evidence is sufficient to support the element of pain and suffering.

We hold the State produced substantial evidence that there was a distinct interruption between the assault and strangulation, and that the trial court did not err in entering judgments and convictions for both N.C. Gen. Stat. § 14-32.4(b) and N.C. Gen. Stat. § 14-32.4(a).

### **C. Facebook Messages**

Lastly, Defendant contends the trial court erred by allowing the testimony of Amber's sister about messages she received from, who she believed to be, Defendant on Facebook. Defendant argues that the State did not satisfy the authentication requirements Rule 901 of the North Carolina Rules of Evidence. We disagree.

Even assuming that a timely and specific objection was made to preserve the issue for appeal, Defendant's argument is meritless. Defendant cites *State v. Ford* and *State v. Taylor* in support of his argument. *State v. Ford* 245 N.C. App. 510, 521, 782 S.E.2d 98, 106 (2016); *State v. Taylor* 178 N.C. App. 395, 413, 632 S.E.2d 218, 230 (2006). In both *Ford* and *Taylor*, the issue was of authentication of documents that were admitted into evidence, not the testimony of a witness.

In the present case, the State never offered the Facebook messages into evidence as an exhibit. Rule 901 requires that exhibits such as photographs and documents be authenticated or identified before being admitted into evidence. N.C. R. Evid. 901. There is no authentication requirement for testimony; the witness

providing the testimony need only have personal knowledge. Without the Facebook messages having been admitted into evidence, Defendant's argument that the trial court erred in admitting the testimony without authenticating the account itself has no merit. Without any admitted evidence to authenticate, we hold the trial court did not err in allowing the testimony.

### **III. Conclusion**

For the aforementioned reasons, we hold the trial court committed no error.

NO ERROR.

Judges ZACHARY and GORE concur.

Report per Rule 30(e).