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OPINION OF SEPTEMBER 4, 2009, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000607-MR

TABITHA STONE APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 07-CR-00422

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: The appellant, Tabitha Stone, appeals her conviction for third-degree criminal abuse for the abuse of her infant son, J.A. Her allegations of error include insufficiency of the evidence and a Kentucky Rule of Evidence (KRE) 404(b) violation. Both alleged errors were preserved for review. For the reasons discussed below, we reverse the decision of the Christian Circuit Court.

Relevant Facts

On February 5, 2007, Tabitha Stone ("Stone") was at home with her two-year-old son, J.A. Stone and her son lived with her boyfriend, Jaime Allison ("Allison"). On the morning in question, Allison agreed to babysit his nephew while his sister, Ashley Ann Allison Morris ("Morris"), was at school.[1] After Morris dropped her son off at Allison's residence, Allison went to work, leaving the nephew and J.A. in Stone's care. Stone was allegedly unhappy with this arrangement because she did not want to watch Morris's son. The following events of that morning and the next day are in dispute.

Morris testified at trial that when she went to pick up her son that afternoon, Stone was lying on the couch and Morris's son was on the floor playing with toys. Morris indicated that J.A. was in the bedroom with Allison when she arrived. She further testified that Stone claimed she had been "busting [J.A.'s] ass all morning" and that she had called Allison to return home from work and "whoop him." Morris testified that she saw her brother emerge from the bedroom with a broken paint stick in his hand.

Allison, who had reached a plea agreement with the Commonwealth, also testified at trial. He testified that Stone had called him several times at work that morning to come home and "whoop [J.A.'s] ass." He stated that, when he returned home, he took J.A. by the hand and took him into the bedroom to spank him. He claimed that Stone did not try to stop him from spanking J.A. Further,

[1] Apparently, both Morris and Stone were students in the nursing program at a local community college.

Allison testified that he did not spank J.A. hard enough to make him cry and that he was not crying when he emerged from the bedroom. Stone also testified that J.A. was not crying when he emerged from the bedroom.

Kim McNeeley ("McNeeley"), Stone's former mother-in-law (and J.A.'s paternal grandmother), also testified at trial. She testified that Stone called her the day after the "spanking" and asked whether she wanted to see J.A. McNeeley responded that she wanted to see J.A. Stone agreed that she would drop him off for McNeeley to babysit while she was at school. McNeeley testified that Stone confided in her that J.A. had been "bad" and she had "whooped" him with a hair brush until the hair brush broke. Stone allegedly told McNeeley not to "freak out" when she saw J.A. because his bottom was bruised. However, at trial, Stone testified that she did not "whoop" J.A. with a hairbrush. She further testified that she did not see J.A.'s bottom until the following morning, and that she had not known Allison had beaten him so badly.

It is undisputed that when Stone arrived at McNeeley's home, McNeeley immediately pulled down J.A.'s diaper and examined his bottom. McNeeley testified that the injuries did not appear to be the result of a normal spanking, noting that someone had "beat that baby," stating "you don't spank a two-year-old baby like that –clear up in the butt hole." After Stone left for school, McNeeley called the police. Once police arrived and examined J.A., they advised McNeeley to take him to the emergency room.[2] Two employees of social services

[2] Stone testified that she knew McNeeley was going to take the child to the emergency room to be examined, and that she wanted McNeeley to do so.

and a police officer were present for J.A.'s examination. Thereafter, J.A. was taken to the Christian County Sherriff's office where more photographs were taken. McNeeley took J.A. to Children's Advocacy the following day. McNeeley testified that upon asking J.A. how he got the marks on his bottom, the child replied that Jaime Allison had done it with "a stick."

In an unfortunate turn of events, no social services investigation was undertaken and no report was prepared by the Cabinet before trial. The prosecutor noted that she had spoken with someone from the Cabinet who said J.A.'s case must have been lost in the shuffle. As such, J.A.'s placement with his mother was never questioned or subject to any order of the court or removal by the Cabinet. Rather, J.A. was sent home to reside with Stone at her mother's house, where they resided until Stone obtained her own residence sometime thereafter. J.A. still resided with Stone at the commencement of this action.

Although the Cabinet failed to conduct any formal investigation into the abuse, the Christian County police did conduct an investigation in which it interviewed various people, including Allison, Stone, McNeeley, and Morris. Deputy Mark Reed testified that charges were brought against Allison and Stone after the investigation. He commented that, based upon the nature of the injuries he observed, *both* Allison and Stone should have been charged.

Stone was tried before a jury and convicted of criminal abuse in the third degree. She was sentenced to 30 days' imprisonment and given a $500.00 fine. She now appeals that conviction.

Analysis

Stone argues (1) that she was entitled to a directed verdict because the Commonwealth failed to prove the essential elements of the offense beyond a reasonable doubt, and (2) that she was substantially prejudiced when the Commonwealth asked her if she was a convicted felon. As we reverse on the first issue, we do not address the second.

Stone argues that a directed verdict should have been granted because the Commonwealth failed to prove that J.A. sustained a serious physical injury and failed to prove that she had the requisite *mens rea* for the offense. In considering a motion for a directed verdict, a "trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Moreover, "the trial court must assume that the evidence for the Commonwealth is true . . . [and reserve] to the jury questions as to the credibility and weight to be given to such testimony." *Id*. On appellate review, we ask whether "it would be clearly unreasonable for a jury to find guilt" under the circumstances. *Id.*

Kentucky Revised Statute ("KRS") 508.120 sets forth the elements for third-degree criminal abuse as follows:

> (1) A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person of whom he has actual custody to be abused and thereby;
>
> (a) Causes serious physical injury; or

> (b) Places him in a situation that may cause him serious physical injury; or
>
> (c) Causes torture, cruel confinement or cruel punishment;
>
> to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless. . . .

Stone argues that the Commonwealth failed to prove that serious physical injury resulted to J.A. under KRS 508.120(a). Stone cites to KRS 500.080(15) which defines serious physical injury as an injury "which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." In support of this allegation of error, she notes that no medical records were entered into the record at trial and no hospital staff testified at trial. She further argues that no testimony was presented as to any treatment J.A. required as a result of the "spanking." As such, she argues that "serious physical injury" was not proven by the Commonwealth.

Our decision today is made more complicated by the fact that the jury instruction used for third-degree criminal abuse failed to instruct on subsections (b) and (c) of the statute.[3] The relevant instruction, Jury Instruction No. 7, read as follows:

> THIRD-DEGREE CRIMINAL ABUSE
>
> If you do not find the Defendant Guilty under Instruction No. 6, you will find the Defendant guilty of

[3] However, the jury instructions for first-degree criminal abuse and second-degree criminal abuse properly instructed on all prongs of the relevant statutes.

> Third-Degree Criminal Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about February 5, 2007, and within 12 months before the finding of the Indictment herein, she had actual custody of J.A. and recklessly permitted him to be abused by Jamie Allison;
>
> B. That as a result thereof, J.A. *sustained a serious physical injury*; AND
>
> C. That J.A. was 12 years of age or less, physically helpless and mentally helpless.
>
> If you find the Defendant guilty under this Instruction, you shall fix his (sic) punishment at confinement in the county jail for a period not to exceed 12 months, at a fine not to exceed $500.00, or both confinement and fine, in your discretion.

(Emphasis added.)

We observe, first, that this case may have been differently decided if the jury had been instructed on prong (c) of the statute: "torture, cruel confinement, and cruel punishment." KRS 508.120(c). *See, also, Canler v. Commonwealth*, 870 S.W.2d 219, 222 (Ky. 1994) *(held that "spanking" could be considered a cruel punishment, which was a determination to be made by the jury).* Further, it seems clear to this Court that this case may have also been decided differently had the jury been properly instructed on prong (b) of the statute. Indeed, although there were no medical records introduced at trial, the jury could infer from the testimony at trial and the photos introduced into evidence that serious physical injury *could have* resulted from the beating (or that such a risk existed). KRS 508.120(b).

However, the jury was not given the chance to decide the case under prongs (b) or (c) of the statute, as neither was instructed upon in Jury Instruction No. 7. Rather, under Jury Instruction No. 7, the jury could have *only* found Stone guilty if they had believed that Allison *actually* inflicted serious physical injury upon J.A. There is no evidence in this case that J.A. sustained a serious physical injury. Indeed, there was no evidence in the record that he suffered an injury that could result in death, that he suffered any disfigurement, that he suffered a prolonged impairment of health, or that he suffered the prolonged loss or impairment of any bodily organ. KRS 500.080(15). *See, e.g., Holbrook v. Commonwealth*, 925 S.W.2d 191 (Ky. App. 1995) (no *"serious physical injury" found where victim had bruises on buttocks from a paddle*); *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986), *overruled on other grounds by B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007) (*no serious physical injury found where baby had burns in and around mouth from cigarette or cigarette lighter*); *and Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977) (*no serious physical injury found where police officer was hit by pellets of buckshot and injuries were superficial*). As such, we find that it would be clearly unreasonable for a jury to find guilt under the instructions as they were written.

Conclusion

Accordingly, we reverse the decision of the Christian Circuit Court and remand with instructions to dismiss the case. As we are reversing with instructions to dismiss, we need not address Stone's other arguments on appeal.

ALL CONCUR.

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