

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-2661**
VERSUS * **COURT OF APPEAL**
MARIA C. MORRIS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
*
*
*
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 409-201, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * *
Judge Terri F. Love
* * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Terri F. Love)

Harry F. Connick, District Attorney
Scott Peebles, Assistant District Attorney
619 South White Street
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

Pamela S. Moran
LOUISIANA APPELLATE PROJECT
P.O. Box 840030
New Orleans, LA 701840030

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

STATEMENT OF CASE

On August 19, 1999, the defendant, Maria C. Morris, was charged by bill of information with cruelty to a juvenile in violation of La. R.S. 14:93. The defendant pled not guilty at her arraignment on August 24, 1999. A preliminary and suppression hearing was held on September 24, 1999. The trial court found probable cause and denied defendant's motion to suppress evidence. After a jury trial on October 25, 1999, the defendant was found guilty as charged. The State subsequently filed a multiple bill of information. On November 12, 1999, the defendant was adjudicated a second felony offender and sentenced to seven years at hard labor. The trial

court denied defendant's pro se motion for reduction of sentence.

Defendant's pro se motion for an out of time appeal was granted.

STATEMENT OF FACT

At approximately 4:00 p.m. on May 1, 1999, Officer Mark Mulla responded to a call of cruelty to a juvenile by the defendant's sister, J.M. After being apprised of the situation by the officers already on the scene, Officer Mulla then observed a four-year old boy sitting in an ambulance. The officer testified that the child had fresh and previously inflicted wounds on his face and the body. The officer then spoke to J.M..

J.M. testified at trial that the defendant had been chastising the child on the day in question when she felt it necessary to intervene. After the police were called and investigated at the scene, J.M. accompanied the child to the emergency room.

Dr. Mehrdad Asadifar treated the victim when he arrived at LSU Medical Center on May 1, 1999. Dr. Asadifar stated that the child had visible bruising on his body and appeared disheveled. Once the victim felt comfortable, Dr. Asadifar began questioning the victim regarding his injuries. The doctor testified that the victim stated that Maria hit him in the face with an extension cord. J.M. identified "Maria" as the victim's mother. Dr. Asadifar further testified that the lacerations on the child's face were

consistent with an extension cord. The victim also told the doctor that Maria had bitten him on the left side of his face. Dr. Asadifar testified that these marks were consistent with bite marks. Additionally, the doctor described at trial the fresh wounds discovered on the child's back and left shoulder. The child also suffered from several minor infections, including ringworm on the scalp. Photographs entered at trial depicted the condition of the child both at the scene and in the emergency room.

Detective Pat Young of Child Abuse Unit, after visiting the victim in the ER, made several unsuccessful attempts to contact the defendant and obtain a statement of the events. When the defendant failed to cooperate voluntarily, the detective obtained an arrest warrant and the defendant was arrested.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

The defendant contends that the trial court erred when it denied defendant's motion for post verdict judgment of acquittal because the State did not present sufficient evidence of all of the elements of the crime to support the defendant's conviction. Specifically, the defendant argues that

the State did not prove beyond a reasonable doubt that she was over the age of seventeen or that she committed cruelty to a juvenile.

When assessing the sufficiency of evidence to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This statutory provision is not a separate test from Jackson, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d at 820.

La. R.S. 14:93 defines cruelty to juveniles as "the intentional or

criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen, whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense." Thus, the State was required to prove that: the defendant was over the age of seventeen; the victim was under the age of seventeen; the victim was caused unjustifiable pain or suffering; and the defendant intentionally mistreated or neglected the victim, or the defendant was criminally negligent in her mistreatment or neglect of the child. State v. Berkley, 482 So.2d 140 (La. App. 4 Cir. 1986).

The record reveals that no direct evidence was presented at trial establishing that the defendant was over the age of seventeen. However, we conclude that the jury saw the defendant at trial and was able to ascertain from the circumstances that she was over the age of seventeen. The child's date of birth, September 25, 1993, was introduced into evidence during Dr. Asadifar's testimony. The jury could have concluded that the defendant was over the age of seventeen based on the child's age at the time of the incident and on her appearance at trial two years later.

This circuit has used such an analysis to determine if the age elements of an offense were proven by the State. In State v. Rousselle, 514 So.2d 577 (La. App. 4 Cir. 1987), this Court concluded that testimony established that

defendant, who was convicted of cruelty to a juvenile, was employed by the Belle Chasse Fire Department. The Court noted that although the evidence was circumstantial, it allowed for the reasonable inference that the defendant had to be over the age of seventeen to qualify to hold such a job.

The Second Circuit addressed the issue of sufficient proof of age in State v. Shelton, 545 So.2d 1285 (La. App. 2 Cir.1989). In Shelton, the defendant appealed his conviction of molestation of a juvenile on the ground that the prosecution failed to prove that he was over the age of seventeen at the time of the offense. Although there was no direct proof of the defendant's age, the court held that there was sufficient proof of the defendant's age because the evidence showed the defendant was married to the victim's mother and the defendant was being tried as an adult. Additionally, the defendant's physical appearance was before the trier of fact.

The Third Circuit in State v. Fontenot, 616 So.2d 1353 (La. App. 3 Cir. 1993), likewise concluded that the circumstantial evidence was sufficient to show that the defendant was over the age of seventeen at the time of the offense. The State introduced testimony from the treating physician concerning the victim's indication of the defendant's age. The defendant's minor daughter also testified as to her age, supporting the

inference that the defendant was over the age of seventeen. In addition, the Court noted that “the sufficiency of the State's evidence as to the defendant's age is bolstered by the fact that the defendant was tried as an adult and that his physical appearance was placed before the court when [the victim] identified him as the man who beat her.” Fontenot, 616 So.2d at 1358.

In the instant case, the State produced sufficient evidence to prove that the defendant committed cruelty to a juvenile by hitting the child with an extension cord. Several police officers and Dr. Asadifar testified concerning the victim’s injuries. The officers and Dr. Asadifar noted the lacerations on the child’s face. Dr. Asadifar further stated that an extension cord could have caused such injuries. Further, the defendant’s sister, J.M., testified that defendant was whipping the child when she entered the defendant’s bedroom. J.M. was so concerned for the child’s safety that she grabbed her sister and pulled her away from the child. Such testimony was sufficient for the jury to conclude that the defendant had injured the child with an extension cord.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant also argues that the trial court erred when it denied defendant’s request for a mistrial based upon the admission of hearsay

testimony by Dr. Asadifar. Prior to trial, the defendant sought to limit the testimony of Dr. Asadifar. However, the trial court denied the defendant's request to limit the physician's testimony. The defendant claims that trial counsel sought a mistrial as a result of Dr. Asadifar's testimony concerning the history given to the physician by the child at the hospital. However, a review of the record indicates that the defendant did not seek a mistrial as to the admission of Dr. Asadifar's testimony at trial. Therefore, the defendant is prohibited from seeking review of that issue. Instead, the defendant sought a mistrial during the State's opening argument when the State summarized Dr. Asadifar's testimony. The trial court correctly denied the request for a mistrial as the State was within the scope of opening statement when it summarized the testimony it intended to produce during the trial. See La. C.Cr. P. article 766. The only other time the defendant sought a mistrial was when Dr. Asadifar stated that the defendant's sister informed him that "Maria" was the victim's mother. The trial court again denied the request for a mistrial. However, the defendant has not sought review on appeal of that ruling by the trial court.

The defendant further suggests that by allowing Dr. Asadifar to testify regarding the victim's statements, the defendant was prevented from confronting her accuser, namely, the victim. However, the defendant had the

right to call the victim to testify and failed to do so. Therefore, the defendant cannot claim that she was denied her right to confront her accuser.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

The defendant further contends that the trial court imposed an unconstitutionally excessive sentence. She was sentenced under La. R.S. 14:93 and La. R.S. 15:529.1 which provide for a sentencing range of five to twenty years. As a second offender, she was sentenced to seven years at hard labor.

A review of the sentencing transcript reveals that defendant did not orally object to the sentence at the hearing or file a motion to reconsider sentence. La. C.Cr.P. article 881.1 provides that “failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.” While the defendant filed a pro se motion for reduction for sentence the defendant did not file the motion until April 28, 2000, more than thirty days following the imposition of sentence. As defendant’s motion was untimely, this issue has not been preserved for appeal. La.

C.Cr.P. article 881.1.

ASSIGNMENT OF ERROR NUMBER 4 AND ERRORS PATENT

Finally, the defendant argues that the trial court's failure to advise the defendant of post conviction relief is an error patent. However, a review of the record reveals no errors patent. La. C.Cr.P. art. 930.8C provides that the trial court shall advise the defendant at sentencing of the prescriptive period for seeking post conviction relief. La. C.Cr.P. article 930.8C is supplicatory language and does not bestow an enforceable right upon an individual defendant. State ex rel. Glover v. State, 93-2330 (La. 9/5/95), 660 So.2d 1189.

CONCLUSION

We find that the State produced sufficient direct and circumstantial evidence to prove that the defendant was over the age of seventeen at the time of the offense. The defendant's conviction and sentence are, therefore, affirmed.