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NO. COA01-1083

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Wake County
No. 99-CRS-18803, 99-CRS-35200,
99-CRS-64657

HOWARD HUNICHEN

Appeal by defendant from judgments entered 20 January 2000 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 16 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane Rankin Thompson, for the State.

John T. Hall for defendant-appellant.

MARTIN, Judge.

Defendant was charged in true bills of indictment with felonious assault upon Zachary Fortner (Zachary) with a deadly weapon inflicting serious injury, in violation of G.S. § 14-32(b); felonious child abuse of Zachary Fortner, in violation of G.S. § 14-318.4(a); and felonious assault upon Zachary Fortner inflicting serious bodily injury, in violation of G.S. § 14-32.4, all alleged to have occurred on 23 April 1999. A jury found defendant guilty of misdemeanor assault inflicting serious injury, felonious child abuse, and felonious assault inflicting serious bodily injury.

Judgments were entered upon the verdicts imposing consecutive active terms of imprisonment of a minimum of 31 months and a maximum of 47 months for felonious child abuse, a minimum of 20 months and a maximum of 24 months for felonious assault inflicting serious bodily injury, and 75 days for misdemeanor assault inflicting serious injury. Defendant appeals.

The State's evidence tended to show that in approximately 1993, Kevin Fortner and his wife Lisa met defendant while they were living in Tennessee. At the time, defendant was visiting the associate pastor at the Fortners' church. They had no further contact with defendant until 1995, when they again met defendant in Tennessee and became impressed with his ministry. Thereafter, their contact with defendant became more frequent and they began providing financial support to defendant.

On 15 February 1999, Kevin and Lisa Fortner and their three children, Hope, Tiffany, and Zachary, moved to Raleigh to help defendant with his ministry. They lived with defendant in his one-bedroom apartment until 23 April 1999. After they moved in with him, the relationship between the Fortners and defendant deteriorated; defendant was extremely domineering and critical of the care that Kevin and Lisa provided Zachary, their youngest child, who was seven months old. Defendant characterized Zachary as a lazy, unmotivated child who cried excessively, and said that Lisa was allowing Zachary to become a sissy. Defendant told Kevin and Lisa that he would impose a system of discipline, involving spanking Zachary, so that he would stop crying on command within

two weeks. According to Lisa, defendant took over Zachary's care, not letting her breast feed him or pick him up when he cried. Defendant fed Zachary baby food and cereal. Kevin testified that he allowed defendant to spank Zachary because he trusted defendant as he trusted God. Although Lisa did not share defendant's belief that Zachary's development was delayed and he needed motivation to improve, she did not challenge defendant's methods of motivating Zachary because he quoted Scriptures from the Bible and she trusted his spiritual advice. Defendant eventually began keeping Zachary in his room at night so he could bond with him. At one point, defendant showed Kevin and Lisa Zachary's bruised buttocks and stated that it might look bad but that in the long run it would be good for him. In an effort to motivate Zachary to crawl, defendant would push him from behind with his foot and on one occasion defendant raised his foot and "stomped" on Zachary's buttocks. The evidence tended to show that Kevin and Lisa spanked Zachary a few times with their hands at defendant's insistence.

Defendant also imposed numerous household rules and yelled at Lisa and Kevin when they did something he did not like. He eventually began hitting Kevin and pushing him around; he also hit Lisa periodically. Lisa testified that she and defendant had a sexual relationship which began when defendant forced her to have sex with him. Thereafter, defendant told her that she had wanted to have sex with him and he called her a tease; Lisa then began having sex with him willingly. Soon after, Lisa tried to end the sexual relationship, but defendant continued to force himself on

her. She testified that she was afraid to leave because defendant told her that God would judge her, she would be damned, her daughters would turn out to be sluts like her, and God would give Kevin another wife. She did not tell Kevin about defendant's sexual conduct.

Kevin Fortner testified that in the several weeks prior to 23 April 1999, there was an escalating pattern of control, anger, and violence by defendant toward him and Lisa. For example, on one occasion, defendant threw a baby bottle full of water and hit Kevin in the lip, requiring him to have stitches; on another occasion, defendant struck Kevin in the face.

Lisa Fortner testified that on the morning of 23 April 1999, defendant forced her to have sexual intercourse with him and then preached his sermon over the telephone for his radio program. Subsequently, Lisa was getting her two daughters ready to go to Pullen Park when she heard Zachary cry "real quick" and heard defendant stomping on the floor. Kevin Fortner testified that he was in the living room while Zachary and defendant were in the bedroom. He heard Zachary make an unusual short high-pitched cry, and defendant walked into the living room carrying Zachary by one of his ankles. Defendant put Zachary down for a moment and then picked him back up and carried him back to the bedroom. Kevin heard defendant praying and then defendant told him to call 911. Defendant performed CPR on Zachary until emergency personnel arrived.

After police officers arrived at the scene, Raleigh Police

Officer Pressley notified his supervisor, Sergeant W.E. Jordan, concerning the situation. While he was speaking with Sergeant Jordan, defendant insisted on speaking with Officer Pressley's supervisor. Sergeant Jordan testified that defendant was crying and stated, "[i]t's my fault." Defendant further explained that Zachary was on the sofa bed and he slipped. Defendant tried to grab the baby, but he hit his head on the floor and went lifeless. Defendant then took Zachary into another room and attempted to perform CPR.

Raleigh Police Officer John Lynch also responded to the apartment. When Officer Lynch arrived, defendant and two children, Tiffany (17 months old) and Hope (three years old) were present in the apartment; Kevin and Lisa had gone to the hospital. Defendant told Officer Lynch that the Fortners were getting ready to go to Pullen Park for the afternoon. As they were about to leave, defendant noticed that Zachary had a dirty diaper. Defendant told Officer Lynch that he put Zachary on the edge of the bed and reached for a diaper in the bassinet; as he did so, Zachary slipped off the bed. Defendant said that he grabbed Zachary's leg and jerked him back up, but as he did so, Zachary's head hit the floor. Defendant then gave Zachary to Kevin, realized that he was not breathing, and told Kevin to call 911. Defendant performed CPR while being instructed by the 911 operator. When asked if the baby was a squirmy baby, defendant responded that the baby was "lazy and never moved and never did anything but eat and lay there."

Defendant was taken to the police station and interviewed

further. Later the same evening, Detective D.K. Murphy obtained a search warrant for defendant's apartment and defendant was requested to return to his apartment with the police for a search. Defendant rode to the apartment with his brother and then informed the officers that he was going to a nearby drive-in restaurant for supper and would return shortly. Defendant did not return to the apartment that night and was located and arrested in Florida several weeks later. In his search pursuant to the search warrant, Detective Murphy seized a camcorder with tapes and a carrying case located on top of the dresser in the bedroom where Zachary was injured. A parenting magazine with an age-by-age guide to discipline of children was also seized from defendant's bedroom after a second search pursuant to a search warrant on 29 April 1999.

On the day following Zachary's admission to the hospital, defendant contacted Kevin Fortner. Defendant told Kevin and Lisa Fortner that he was not under arrest so he was leaving. He told them that if none of them said anything, "they can't do nothing to anybody."

Initially, Kevin and Lisa Fortner did not tell police officers about the manner in which defendant had dealt with Zachary because they were scared and ashamed. On 26 April 1999, Lisa was interviewed by Detective Murphy and told him that she had been concerned about defendant's discipline of Zachary, that defendant was too rough with him sometimes, and that she had noticed bruises on Zachary.

Louanne Sheppard testified that she and her husband had met defendant in 1997. They attended Bible studies and church services at his apartment. According to Mrs. Sheppard, defendant's personality changed in the fall of 1998, and he became extremely argumentative. Mrs. Sheppard recalled one particular occasion when defendant shouted in her face that she had a spirit of witchcraft and her husband was not keeping her under control. Mr. and Mrs. Sheppard attended an Easter service at defendant's apartment with the Fortners and another family. While they were there, defendant preached for his radio show and became irritated with the children of the other family because they were not sitting quietly. After spending Easter with defendant, the Sheppards became uncomfortable around defendant and decided to have less contact with him. The Sheppards did not hear from defendant until the day after Zachary was injured and defendant asked them to go visit the Fortners in the hospital. Mr. and Mrs. Sheppard ate dinner with defendant and the Fortners and defendant stated that he was sorry and that if anything happened to Zachary, he was going to Mexico. Defendant also stated that the police were going to find the films made in Pullen Park and they would see him push Zachary with his foot and think that he hurt Zachary.

Dr. Michael Cinnamon, a pediatrician specializing in pediatric critical care, assisted in the care of Zachary in the emergency department on 23 April 1999. According to Dr. Cinnamon, Zachary was in cardiac arrest due to a brain injury. Zachary also had a skull fracture, rib fractures, multiple bruises on his buttocks and

across his abdomen and blood in his abdomen. Zachary lost a significant amount of blood according to Dr. Cinnamon, more than likely due to his abdominal injury. Additionally, Dr. Cinnamon testified that Zachary's injuries were life-threatening.

Almost two weeks after he was admitted to the hospital, Zachary was moved from the intensive care unit to the pediatric ward. Although Zachary's condition had improved some, he was still in an essentially vegetative state, unable to interact with his environment due to a brain injury. According to Dr. Cinnamon, Zachary suffered from shaken baby syndrome, also called shaken brain injury and shaken impact syndrome. Shaken baby syndrome is caused by severe shaking or trauma to the head, manifested in subdural hematomas, skull fracture, and retinal hemorrhages. Dr. Cinnamon testified that Zachary's injuries, especially the retinal hemorrhages, would not occur from a fall off a bed. Zachary was transferred to the University of North Carolina hospital to have a permanent feeding tube inserted. In addition to the injuries discovered on admission, Zachary was found to have a pelvic fracture, a fracture of one of the bones in his foot, and fractures of both his upper legs. These fractures were expected to heal normally.

Dr. Leslie Boyce, a pediatric neurologist, consulted on Zachary's case while he was a patient at Wake Medical Center. Dr. Boyce opined that Zachary was the victim of shaken baby syndrome based on the nature of the injuries and the multiple aged injuries. According to Dr. Boyce, the constellation of Zachary's injuries

could have only been caused by child abuse, a severe motor vehicle accident, or falling from a major height. Dr. Boyce testified that Zachary suffered from cerebral atrophy or shrinking of the brain which is probably the result of his impact injury and low blood flow to the brain. Dr. Boyce further stated that Zachary had a very poor prognosis for any future improvement.

Dr. David Merton, an expert in the field of pediatric radiology, provided a description of shaken baby syndrome. Dr. Merton explained that the infant is generally grasped by the chest and shaken back and forth, which shears the small blood vessels between the skull and the brain. This shaking action also frequently causes fractures in the infant's ribs. Additionally, if the infant's head strikes a hard surface, a skull fracture can result. Dr. Merton's review of Zachary's x-rays revealed that Zachary had twelve separate fractures: a fracture of his skull, five fractures of his ribs, a fracture of his pelvis, a fracture of his right wrist, a fracture of his right knee area, a fracture of his left knee, and several fractures of his left ankle. Zachary's rib fractures were new fractures with no evidence of healing. The pelvic fracture also had occurred recently with no evidence of healing and according to Dr. Merton, could have only been caused by a motor vehicle accident, a fall from a great height, or a direct blow with an extreme amount of force. The oldest fracture had occurred between two to four weeks previously.

Lorie Stahl, a pediatric occupational therapist, testified that she worked with Zachary at Hilltop Home, which is a

residential center for severely and profoundly disabled infants, toddlers, and young children. She had worked with Zachary for approximately seven months. At the time of trial, Zachary was primarily being fed through a feeding tube because of swallowing problems, he could not grasp objects, and according to Ms. Stahl, he will never stand or walk.

Defendant did not testify, but offered the testimony of eight character witnesses. Defendant's motion to dismiss at the close of all the evidence was denied.

I.

Defendant first contends that the trial court erred by allowing into evidence testimony regarding sexual conduct between he and Lisa Fortner. He contends the evidence was not relevant, was not admissible under G.S. § 8C-1, Rule 404(b) and, even if it was relevant, any probative value was outweighed by the prejudicial effect so that the evidence should have been excluded pursuant to Rule 403.

Defendant has failed to properly preserve this question for appellate review by raising a timely objection. *See* N.C.R. App. P. 10(b)(1) (2002). Moreover, he has failed to assert, in his assignments of error, that the admission of the evidence was plain error, thereby waiving plain error review. *See* N.C.R. App. P. 10(c)(4) (2002). Consequently, the assignment of error is not properly before us and we decline to consider it.

II.

Defendant next argues that the trial court erred in computing his prior record level for purposes of sentencing him for misdemeanor assault inflicting serious injury. At trial the State submitted a worksheet showing that defendant had been convicted in 1993 for reckless driving in Guilford County. Defendant objected because the State had not provided defendant with a copy of defendant's prior criminal history pursuant to his discovery request. The trial court overruled defendant's objection. On appeal, defendant now asserts that the trial court erred by considering the prior reckless driving conviction because the State failed to present a certified copy of that conviction.

For purposes of determining the prior conviction level for misdemeanor sentencing, G.S. § 15A-1340.21(c) provides:

> A prior conviction shall be proved by any of the following methods:
> (1) Stipulation of the parties.
> (2) An original or copy of the court record of the prior conviction.
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
> (4) *Any other method found by the court to be reliable* (emphasis added).

We conclude the information provided by the State, which included the county, date, and file number of the prior conviction, none of which defendant disputed, was sufficient for the trial court to find the conviction had been proved by a reliable method in accordance with G.S. § 15A-1340.21(c)(4). Defendant's assignment of error is overruled.

III.

Next, defendant asserts the trial court erred in overruling his motion for appropriate relief, by which he contended that the trial court used evidence necessary to prove an element of the offense of felonious child abuse, i.e., the age of the victim, to aggravate defendant's sentence for that offense, in violation of G.S. § 15A-1340.16(d). We disagree.

In sentencing defendant for felonious child abuse, the trial court found, as a factor in aggravation of punishment, that the "victim Zachary Alexander Fortner was an infant, 7 months of age." Defendant contends the court erred in so finding because the age of the child victim is an element of the crime of felony child abuse and therefore cannot be used in aggravation of sentencing. While it is true that an element of felonious child abuse under G.S. § 14-318.4 is that the child victim must be less than 16 years old, our Supreme Court has held that the very young age of the child victim may still be considered by the trial court as an aggravating factor in determining a defendant's sentence for the offense. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). In *Ahearn*, the Court stated:

> The age of the victim, while an element of the offense, spans sixteen years, from birth to adolescence. The abused child may be vulnerable due to its tender age, and *vulnerability* is clearly the concern addressed by this factor.

Id. at 603, 300 S.E.2d at 701. As in *Ahearn*, the fact that Zachary was very young, seven months of age, was not an element of the offense and therefore was properly considered by the trial court as a factor in aggravation of punishment.

IV.

Defendant also argues that the entry of judgments sentencing him for both misdemeanor assault inflicting serious injury, in violation of G.S. 14-33(c)(1), and felonious assault inflicting serious bodily injury, in violation of G.S. § 14-32.4, amounts to double jeopardy, violating his constitutional right not to be punished twice for the same criminal offense. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and N.C. Const. art. I, § 19 prohibit the imposition of multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986). "When the same act or transaction constitutes a violation of two criminal statutes, the test to determine whether there are two separate offenses is whether each statute requires proof of a fact which the other does not." *State v. Haynesworth*, 146 N.C. App. 523, 530-31, 553 S.E.2d 103, 109 (2001), (citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932)).

Applying this test to the present case, we conclude defendant's double jeopardy rights have not been violated, because the statutes at issue require proof of different facts. To prove a violation of G.S. § 14-32.4, felonious assault inflicting serious bodily injury, the State must prove that the assault resulted in *serious bodily injury*, which is defined as

> bodily 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. § 14-32.4. On the other hand, to convict a defendant for misdemeanor assault inflicting serious injury in violation of G.S. § 14-33 the State must only prove that "serious injury" was inflicted in the course of the assault. Neither the legislature nor our courts have provided a specific definition of "serious injury," requiring only that "'[t]he injury must be serious but it must fall short of causing death.'" *State v. Ramseur*, 338 N.c. 502, 507, 450 S.E.2d 467, 471 (1994) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). Serious injury can be found based on factors such as "pain, loss of blood, hospitalization, and time lost from work." *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983). In a recent case, this Court concluded that "serious bodily injury" requires proof of more severe injury than "serious injury." *State v. Hannah*, ____ N.C. App. ____, 563 S.E.2d 1 (2002). Because of this, ". . . our courts have found *serious injury* in situations that may not rise to the level of *serious bodily injury* as defined under N.C.G.S. § 14-32.4 . . . ." *Id.* at ____, 563 S.E.2d at 5 (citations omitted). Thus, misdemeanor assault inflicting serious injury in violation of G.S. 14-33(c)(1) and felony assault inflicting serious bodily injury in violation of G.S. § 14-32.4 do not share identical evidence; G.S. § 14-32.4 requires proof of facts not required for conviction of a violation of G.S. § 14-33(c)(1). Therefore, the trial court did not err by entering separate judgments and imposing separate sentences upon defendant's conviction of both felonious assault

inflicting serious bodily injury and misdemeanor assault inflicting serious injury.

V.

Finally, defendant contends the trial court erred by denying his motion to dismiss the charge of felonious child abuse. Defendant specifically argues that there was insufficient evidence that defendant was a parent, provider of care to the child, or supervisor of the child, which is an essential element of felony child abuse under G.S. § 14-318.4.

When considering a motion to dismiss the trial court must determine "whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense." *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). "Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). Further, the trial court must consider the evidence "in the light most favorable to the State and [] the State is entitled to every reasonable inference to be drawn therefrom." *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994).

When considered in the light most favorable to the State, there was substantial evidence that defendant was a person "providing care to or supervision of" Zachary within the meaning of G.S. § 14-318.4(a). The evidence tended to show that soon after

the Fortners arrived at defendant's apartment in February 1999, defendant assumed primary responsibility for Zachary's care in order to impose his system of discipline and motivation upon the child. Defendant acknowledged to police officers that Kevin and Lisa Fortner had permitted him to take over Zachary's primary care. The evidence showed that defendant eventually took Zachary to sleep in his room so they could bond, spent time each day attempting to teach him to crawl, fed him baby food, and prevented the Fortners from having access to him because their presence interfered with his care of Zachary. We hold the evidence was substantial that defendant was a person "providing care to and supervision of" Zachary, and that the trial court properly denied defendant's motion to dismiss the charge of felonious child abuse.

No error.

Judges TIMMONS-GOODSON and CAMPBELL concur.

Report per Rule 30(e).