IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-324

Filed: 19 September 2017

Wake County, No. 13 CRS 219242

STATE OF NORTH CAROLINA

v.

AMIA SMITH ERVIN

Appeal by defendant from judgments entered 7 December 2016 by Judge Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Mary McCullers Reece for defendant-appellant.

TYSON, Judge.

Amia Smith Ervin ("Defendant") appeals from judgments entered upon a jury's verdict finding her guilty of misdemeanor child abuse and contributing to the abuse, neglect, or delinquency of a minor. We reverse in part, find no error in part, and remand.

I. Background

In 2012 and 2013, Defendant lived with her three children: A.E., a son; L.E., A.E.'s older half-brother; and B.E., a daughter. During the 2012-2013 school year, A.E. was a seventh-grader in middle school.

One evening in April 2013, A.E. took a shower without tucking the shower curtain in and got the bath mat wet. His mother, Defendant, asked him about the wet bathroom mat the next morning, A.E. denied knowing anything about how the mat became wet. Eventually, A.E. acknowledged that he had made the bathroom mat wet. Defendant punished A.E. for his dishonesty by spanking him with a belt. A.E. was hit in the head and back with the belt, which left marks upon his back.

Later that day, A.E. reported to in-school suspension for a prior disciplinary infraction. The school counselor noticed A.E. was crying and questioned him about what was upsetting him. A.E. told the school counselor Defendant had whipped him with a belt. A.E. showed the counselor and an assistant principal the marks on his back, which the counselor and assistant principal took pictures of. The counselor notified Wake County Human Services of the incident.

After A.E. returned home from school that day, a social worker came to the apartment where A.E. and his family lived. A.E. showed the social worker the marks on his back from the belt. A.E. told the social worker he had gone without meals or ate only peanut butter and jelly sandwiches at times, because Defendant required her children to ask for food, and he did not like to ask her. The social worker wrote a safety plan, which purportedly required Defendant not to physically discipline A.E..

After leaving Defendant's apartment, the social worker interviewed A.E again when he was at school. During the interview, A.E. told the social worker that Defendant had made him sleep in the closet to prevent him from stealing and breaking his siblings' toys. A.E. also told the social worker that his older brother, L.E., would also put him inside the closet. L.E. latched the door and A.E. would have to ask to use the bathroom. A.E. stated Defendant and L.E. would not unlock the door at times to let him out to use the bathroom and he relieved himself in the closet.

Following the home visit and interview at school, the social worker filed a petition with Child Protective Services ("CPS") to have A.E. removed from Defendant's home. CPS removed A.E. from Defendant's home on 27 April 2013 and placed him with his step-father.

The social worker reported Defendant's actions to law enforcement. A grand jury indicted her on 31 August 2015 with felony child abuse, misdemeanor child abuse, and two counts of contributing to the abuse, neglect, or delinquency of a minor. At trial, Defendant moved to dismiss all charges at the close of the State's evidence and renewed the motion at the close of all evidence. The trial court denied both motions.

The jury found Defendant guilty of one count of contributing to the abuse, neglect, or delinquency of a minor for "forcing her child to sleep in a closet overnight without being able to leave the closet" and of misdemeanor child abuse for "whipping with a belt on [A.E.'s] back causing marks." The jury acquitted Defendant of the

felony child abuse count and one count of contributing to the abuse, neglect, or delinquency of a minor. The Defendant gave notice of appeal in open court.

II. Statement of Jurisdiction

This Court has jurisdiction over Defendant's appeal from the final judgments of a superior court entered following jury verdicts finding Defendant to be guilty pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Defendant argues the trial court erred by: (1) denying her motion to dismiss the misdemeanor child abuse charge; and (2) denying her motion to dismiss the contributing to the abuse, neglect, or delinquency of a minor charge.

IV. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "[T]he question for the Court 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 defendant's being the perpetrator of such offense." *State v. Marley*, 227 N.C. App. 613, 614, 742 S.E.2d 634, 635-36 (2013) (citation omitted). Substantial evidence exists if there is "relevant evidence that [a] reasonable mind might accept as adequate to support a conclusion." *Id.* at 615, 742 S.E.2d at 636 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State,

giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

V. Analysis

A. Misdemeanor Child Abuse

Defendant argues the trial court erred by denying her motion to dismiss the misdemeanor child abuse charge for insufficient evidence. We agree.

The misdemeanor child abuse charge challenged by Defendant arose from Defendant striking A.E. "with a belt on his back causing marks." A parent commits misdemeanor child abuse when the parent intentionally inflicts any "physical injury" on their child who is under 16 years of age. N.C. Gen. Stat. § 14-318.2 (2015).

This statute provides for three separate and independent offenses. *State v. Fredell*, 283 N.C. 242, 247, 195 S.E.2d 300, 303 (1973). The State is required to prove only one of the three distinct acts set forth in N.C. Gen. Stat. §14-318.2(a). *State v. Armstead*, 54 N.C. App. 358, 360, 283 S.E.2d 162, 164 (1981). "[T]he State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury." *State v. Watkins,* __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016).

"[O]ur Supreme Court has recognized that, as a general rule, a parent [. . .] is not criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment." *State v. Varner,* __ N.C. App. __, __, 796 S.E.2d 834, 836 (2017) (citing *State v. Alford*, 68 N.C. 322, 323 (1873)).

> This general rule regarding a parent's right to administer corporal punishment does *not* apply: (1) where the parent administers punishment "which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other *permanent* injury[,]" *Alford*, 68 N.C. at 323; (2) where the parent does not administer the punishment "honestly" but rather "to gratify his own evil passions[,]" irrespective of the degree of the physical injury inflicted, *State v. Thornton*, 136 N.C. 610, 615, 48 S.E. 602, 604 (1904); or (3) where the parent uses "cruel or grossly inappropriate procedures . . . [or] devices to modify" a child's behavior, N.C. Gen. Stat. § 7B-101(1)(c) (2013).

Id. at __, 796 S.E.2d at 836 (emphasis in original).

A parent is not criminally liable for inflicting "moderate punishment" on a child. *State v. Pendergrass*, 19 N.C. 365, 365-66 (1837). "Moderate punishment" includes any punishment which does not produce "permanent" injury, including any punishment that "may seriously endanger life, limbs or health, or shall disfigure the child[.]" *Id.* at 366.

Defendant argues the evidence, when viewed in the light most favorable to the state, is insufficient to allow a reasonable juror to find Defendant inflicted "permanent" injury on A.E. when she hit him with a belt on 23 April 2013. We agree.

Defendant was specifically charged with having "created or allowed to be created a substantial risk of physical injury to that child other than by accident to wit: whipping him with a belt on his back causing marks."

No evidence was presented at trial tending to show Defendant intended, by striking A.E. on 23 April 2013 with a belt, to cause permanent injury, caused permanent injury, or created a substantial risk of permanent injury. It is undisputed A.E. had marks on his back the morning he attended school and following Defendant's punishing of him with the belt. These marks were photographed by the school guidance counselor and an assistant principal.

One of the State's expert witnesses, Dr. Elizabeth Witman, testified that based on her examination of the photographs of A.E.'s back taken by the guidance counselor and assistant principal, the marks on A.E.'s back were "acute." Dr. Witman defined "acute" as follows: "That means recent. Say the type where you'll see redness or swelling or maybe bruising, but over a period of days or weeks or months sometimes all of that evidence may resolve."

When the prosecutor asked A.E. whether he had any lasting injuries from Defendant striking him, A.E. responded that he had a scar from a prior incident when Defendant hit him with an extension cord. There was no evidence that A.E. had scars or "permanent injuries" related to Defendant punishing him with a belt on 23 April 2013.

The State argues that Defendant's striking A.E. with a belt "created or allowed to be a created a substantial risk of physical injury," under the third offense specified in N.C. Gen. Stat. § 14-318.2(a). In making this argument, the State asserts *State v. Watkins* is analogous to the present case. We disagree.

In *Watkins*, the State's evidence indicated the defendant-parent had left her two-year-old child alone inside a vehicle with a window rolled down in 18-degree weather while it was sleeting, snowy, and windy. *Watkins* at __, 785 S.E.2d at 178. The Court held that "[g]iven the harsh weather conditions, [the child's] young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant 'created a substantial risk of physical injury' to him . . . ." *Id.*

The facts in *Watkins* are distinguishable from the case at bar. Here, the State presented no evidence of a "substantial risk of physical injury" created by Defendant's striking of A.E. on the back with a belt on 23 April 2013. Leaving a very young child in a car with a window rolled down in dangerously cold weather clearly had the potential to create a "substantial risk of physical injury" to a two-year-old child, whereas the completed striking of a seventh-grader with a belt to a degree consistent with non-permanent injuries does not appear to create a "substantial risk of physical injury." *See id.* The State's argument is overruled.

The State further argues the jury could have found the evidence sufficient to find misdemeanor child abuse based on additional incidents separate from the 23 April 2013 striking with the belt. Defendant was only indicted for striking A.E. with a belt on 23 April 2013 in the misdemeanor child abuse charge. "It is well established that '[a] defendant must be convicted, if at all, of the particular offense charged in the indictment' and that '[t]he State's proof must conform to the specific allegations contained' therein." *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014) (alterations in original) (quoting *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985)). The State's argument relying upon separate purported incidents, which are not alleged in the offense charged, are overruled.

A.E. testified that when Defendant whipped him with a belt on 23 April 2013, she hit him on his head as well as his back. The State presented no evidence as to any injuries A.E. may have sustained to his head from being hit by the belt, or how being hit in the head created a "substantial risk of physical injury" to A.E. The misdemeanor child abuse charge in the indictment only charges Defendant for "whipping [A.E.] with a belt on his back causing marks." A.E. being hit on the head is not pertinent to the allegation that Defendant "whipped [A.E.] with a belt on his back causing marks[]" created an injury or risk of injury. *See id.* at 322, 765 S.E.2d at 102 (stating the State's proof must conform to the specific allegations in the indictment).

Viewing the evidence in the light most favorable to the State, evidence of Defendant's striking A.E. with a belt does not show her actions "created or allowed to be a created a substantial risk of physical injury[.]" *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223. The evidence was insufficient as a matter of law to submit to the jury the issue of Defendant's committing misdemeanor child abuse. We hold the trial court erred in denying Defendant's motion to dismiss. Defendant's conviction for misdemeanor child abuse and judgment entered thereon is reversed.

B. Contributing to the Abuse, Neglect, or Delinquency of a Minor

Defendant argues the trial court erred by denying her motion to dismiss the charge of contributing to the abuse, neglect, or delinquency of a minor for insufficient evidence. We disagree.

Defendant was charged with contributing to the abuse, neglect, or delinquency of a minor for "forcing [A.E.] to sleep in the closet overnight without being able to leave the closet."

The offense of contributing to the abuse, neglect, or delinquency of a minor is defined as follows:

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-316.1 (2015). N.C. Gen. Stat. § 7B-101 defines a neglected juvenile, in relevant part, as one who:

> [D]oes not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2015). N.C. Gen. Stat. § 7B-101 defines an abused juvenile, in relevant part, as:

> (1) Abused juveniles. — Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> . . . .
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
>
> c. Uses or *allows to be used upon* the juvenile *cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior*;
>
> . . . .
>
> e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others[.]

N.C. Gen. Stat. § 7B-101(1) (2015) (emphasis supplied).

> [The offense of contributing to the abuse, neglect, or dependency of a minor] requires two different standards of proof. First, the State must show, beyond a reasonable

> doubt, that Defendant knowingly or willfully caused, encouraged, or aided the juvenile to be in a place or condition whereby the juvenile could be adjudicated neglected. Second, adjudication of neglect requires the State to show, by clear and convincing evidence, that a juvenile is neglected.

State v. Stevens, 228 N.C. App. 352, 356, 745 S.E.2d 64, 67, *writ denied, review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013).

This Court has required "there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 672 (1997) (citation, internal quotation marks, and emphasis omitted).

Defendant argues there was insufficient evidence of any "physical injury or potential injury to [A.E.] from sleeping in the closet such that he could be adjudicated neglected or abused." Additionally, Defendant argues insufficient evidence was presented to show A.E. had "severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others[,]" in order to be adjudicated abused. N.C. Gen. Stat. § 7B-101(1)(e).

When viewed in the light most favorable to the State, substantial evidence tended to show Defendant punished and allowed L.E. to punish A.E. by requiring him to sleep in the locked closet without being allowed access to a bathroom on a regular basis for up to two years. *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223. Substantial

evidence showed A.E. had to knock on the closet door and ask his mother and brother to unlock the door and for permission to use the bathroom. On times after his brother would not unlock the door, Defendant relieved himself in the closet. In addition, A.E. was diagnosed with post-traumatic stress disorder, caused, at least in part, by psychological abuse.

Considering all of the evidence in the light most favorable to the State, and giving them the benefit of inferences thereon, this showing constitutes sufficient evidence that Defendant put the juvenile in a place or condition, or committed an act the juvenile could be adjudicated abused to survive Defendant's motions to dismiss. *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223. A reasonable juror might find the evidence presented as adequate to support the conclusion Defendant "use[d] or allow[ed] to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify behavior[,]" whereby A.E. could be adjudicated abused. N.C. Gen. Stat. § 7B-101(1); *see Marley,* 227 N.C. App. 614, 742 S.E.2d at 635.

The trial court properly denied Defendant's motion to dismiss the charge of contributing to the abuse or neglect of a juvenile. Defendant's arguments are overruled.

VI. Conclusion

We reverse the trial court's denial of Defendant's motion to dismiss with respect to the charge of misdemeanor child abuse. Because the trial court should

have granted Defendant's motion to dismiss with respect to the charge of misdemeanor child abuse, we reverse Defendant's conviction on this charge.

We find no error in the trial court's denial of Defendant's motion to dismiss the charge of contributing to the abuse, neglect, or delinquency of a minor by "forcing her child to sleep in a closet overnight without being able to leave the closet." We remand to the trial court for resentencing in accordance with this opinion. *It is so ordered*.

REVERSED IN PART, NO ERROR IN PART, and REMANDED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).