

IN THE UTAH COURT OF APPEALS

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| State of Utah, |) | MEMORANDUM DECISION |
| |) | (Not For Official Publication) |
| Plaintiff and Appellee, |) | |
| |) | Case No. 20040516-CA |
| v. |) | |
| |) | |
| Joaquin Bello-Catalan, |) | F I L E D |
| |) | (October 6, 2005) |
| |) | |
| Defendant and Appellant. |) | 2005 UT App 422 |

Fourth District, Provo Department, 041401703
The Honorable Samuel McVey

Attorneys: Margaret P. Lindsay, Orem, for Appellant
 Carlyle Kay Bryson, Provo, for Appellee¹

Before Judges Billings, Davis, and Greenwood.

BILLINGS, Presiding Judge:

In a bench trial, Defendant Joaquin Bello-Catalan was convicted of child abuse, pursuant to Utah Code section 76-5-109(3), a class B misdemeanor. See Utah Code Ann. § 76-5-109(3) (Supp. 2005). Defendant contends that there was insufficient evidence to find him guilty beyond a reasonable doubt. We reverse.

Defendant asserts the evidence is insufficient to establish that he recklessly injured his child. We agree. "When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." State v. Larsen, 2000 UT App 106, ¶10, 999 P.2d 1252 (quotations and citation omitted). "[B]efore we can uphold a conviction it must be supported by a quantum of evidence concerning each

¹The State did not file a brief on appeal.

element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt." Id. at ¶10 (alteration in original) (quotations and citation omitted). "Under this less deferential standard, the likelihood that a defendant's conviction will be reversed following a bench trial, as opposed to a jury trial, is increased." State v. Goodman, 763 P.2d 786, 787 (Utah 1988).

When challenging the sufficiency of the evidence, "Defendant 'must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.'" Larsen, 2000 UT App 106 at ¶11 (citation omitted). Defendant has properly marshaled the evidence. The evidence Defendant marshaled is as follows: On April 23, 2004, Defendant's neighbor, Christy Sandoval, agreed to babysit his two children² at her apartment so that Defendant could drink beer without the children present. When Defendant brought the children over to Sandoval's apartment, Sandoval did not observe any injuries or marks on the children.

A few hours later, Sandoval went to Defendant's apartment to retrieve a car seat and observed Defendant asleep on the couch. She also noticed that there were beer cans and a miniature guitar with its back broken off located on the floor of Defendant's apartment.

After Sandoval observed Defendant's wife (Wife) return home, Sandoval heard Wife yelling at Defendant. When Wife retrieved the children from Sandoval's apartment, there were no apparent injuries to either Wife or the children. Sandoval later observed that the miniature guitar had been further broken into several pieces.

Officer Shaun Bell (Officer Bell) testified that when he arrived at Defendant's apartment, he heard a male and female arguing in a heated manner and a child crying. He ordered Defendant out of the apartment and observed that Defendant had been drinking. After handcuffing Defendant, Officer Bell entered the home and noticed that it was in disarray: there were beer cans scattered about, spilled baby formula, and a broken miniature guitar on the floor. Officer Bell testified that he

²The child who was allegedly abused was approximately four months of age.

observed a "large goose egg on [Wife's] head that was swollen and bruised at that time." Officer Bell also testified that the children were crying and that "the youngest baby had a red mark on [her] face" that was "just above the eye and it appeared like it was just a round spot." Officer Bell took pictures of both Wife and the youngest child. While Wife's injury was visible in the pictures, the red spot on the child "didn't show up very well."

Defendant argues that this evidence, viewed in a light most favorable to the trial court's findings, is insufficient to support the conviction. We agree. Utah Code section 76-5-109(3)(b) provides that "[a]ny person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows: . . . if done recklessly, the offense is a class B misdemeanor." Utah Code Ann. § 76-5-109(3)(b). The trial court found that "the child did appear uninjured when she was being baby[-]sat, a very short time later she had a red mark on her. She was upset and crying when the officer investigated. . . . I believe that [the child abuse] charge has been proved beyond a reasonable doubt, so I'll find . . . the [D]efendant guilty of child abuse." The only evidence supporting this finding is the fact that the child did not have a red mark on her face while in the care of Sandoval, but a short time later, and after an argument between Defendant and Wife, the child had a red mark above her eye and she was crying. However, this evidence is insufficient to prove beyond a reasonable doubt that Defendant recklessly³ caused or permitted another to inflict the red mark on the child. See id. Therefore, we hold that the trial court's determination of guilt "is against the clear weight

³Pursuant to Utah Code section 76-2-103,
[a] person engages in conduct . . .
[r]ecklessly, or maliciously, with respect to
circumstances surrounding his conduct or the
result of his conduct when he is aware of but
consciously disregards a substantial and
unjustifiable risk that the circumstances
exist or the result will occur. The risk
must be of such a nature and degree that its
disregard constitutes a gross deviation from
the standard of care that an ordinary person
would exercise under all the circumstances as
viewed from the actor's standpoint.

Utah Code Ann. § 76-2-103 (2003).

of the evidence." State v. Larsen, 2000 UT App 106, ¶10, 999 P.2d 1252. Accordingly, we reverse Defendant's conviction.

Judith M. Billings,
Presiding Judge

WE CONCUR:

James Z. Davis, Judge

Pamela T. Greenwood, Judge