Cite as 2019 Ark. App. 312

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-18-948

K.F. APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered May 29, 2019 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23JV-18-189] HONORABLE TROY B. BRASWELL, JR., JUDGE REVERSED AND DISMISSED

PHILLIP T. WHITEAKER, Judge

The Faulkner County Circuit Court adjudicated appellant K.F. delinquent after finding that she had committed the offense of endangering the welfare of a minor in the first degree as an accomplice. On appeal, K.F. argues that the circuit court erred in premising her criminal culpability on her status as an accomplice, raising two subpoints: (1) she was not in the class of persons who could statutorily commit the offense of endangering the welfare of a minor in the first degree; and (2) she did not solicit, advise, encourage, or coerce another person to commit the offense of endangerment, nor did she aid, agree to aid, or attempt to aid another person in planning or committing the offense of endangerment. Additionally, K.F. contends that there was insufficient evidence to support the delinquency adjudication. We find merit in her first argument on appeal, and we reverse and dismiss.

I. *Background Facts*

Alysia Watkins is the mother of one-year-old K.W. Watkins hired K.F.'s sister, MaKayla Brewster, to babysit K.W. in Watkins's home. Despite the original plan, Watkins agreed that MaKayla would provide the babysitting duties in MaKayla's home. K.F. and another friend, T.M., were at MaKayla's house while MaKayla was in charge of the child. While MaKayla was supervising K.W., T.M. posted a video to her Snapchat account depicting two scenes. In the first scene, K.F. is activating a taser or stun-gun device near K.W. while the baby is lying on a bed. Although the video never actually shows the device touching the baby, the audio portion reflects that K.W. is crying. MaKayla is not seen in this scene until the very end when she approaches K.W., who is still lying on the bed. In the second scene, MaKayla is depicted slapping K.W. on the head. K.F. is not present in the second scene, although T.M. could be heard laughing and saying, "do it again." The Conway Police Department investigated the incident, and they obtained as evidence a "Cheetah Cyclone" stun gun from K.F.'s mother.

K.F. was subsequently charged with endangering the welfare of a minor in the first degree. Ark. Code Ann. § 5-27-205(a)(1) (Repl. 2013). The juvenile division of the Faulkner County Circuit Court held an adjudication hearing. After hearing testimony and viewing the Snapchat video, the court adjudicated K.F. delinquent as an accomplice to the offense. K.F. timely appealed.

II. *Standard of Review*

On appeal, K.F. contends that she was not liable as an accomplice. She frames the issue as "whether, under the language of the controlling criminal statutes, K.F. could be liable as an accomplice when she was not within the class of persons who could commit the underlying offense of endangering the welfare of a minor in the first degree and she was the person who committed the act alleged to have endangered the minor." Our analysis therefore requires us to construe the language of both Arkansas Code Annotated section 5-27-205—the endangerment statute—and Arkansas Code Annotated section 5-2-403 (Repl. 2013)—the statute providing for accomplice liability.

In considering the meaning and effect of a statute, we first construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Magness v. State*, 2012 Ark. 16, 386 S.W.3d 390. When the language is plain and unambiguous, we will not resort to rules of statutory construction, and the analysis need go no further. *Id.* We review issues of statutory interpretation de novo because it is for this court to decide what a statute means. *Id.* When dealing with a penal statute, this court strictly construes the statute in favor of the party sought to be penalized. *Holcomb v. State*, 2014 Ark. 141, 432 S.W.3d 600.

III. *Analysis*

A. Endangering the Welfare of a Minor

We begin our statutory analysis by examining the plain language of the endangerment statute. A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or

a person charged with supervision of a minor, he or she purposely engages in conduct creating a substantial risk of death or serious physical injury to a minor. Ark. Code Ann. § 5-27-205(a)(1). First-degree endangering the welfare of a minor is a Class D felony. Ark. Code Ann. § 5-27-205(b).

The State must prove beyond a reasonable doubt every element of a charged offense; this is axiomatic. *Starling v. State*, 2015 Ark. App. 429, at 4, 468 S.W.3d 294, 295 (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994)). In a case of endangering the welfare of a minor, the State must prove the existence of two distinct elements. First, the person committing the offense must be a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor. Second, he or she must purposely engage in conduct creating a substantial risk of death or serious physical injury to a minor.

K.F.'s first argument on appeal focuses on the first of these two elements, i.e., that she was not among the class of persons who can commit the offense of first-degree endangerment of a minor. She notes that the State conceded below that she was not in this class of persons when the prosecutor stated, "As far as the statute, 5-27-205, indicating that a person charged with—must be charged with supervision of a minor, in this case, Your Honor, MaKayla Brewster was." The court also specifically asked the prosecuting attorney "who [the baby's mother testified] was responsible, who was the one that was babysitting?" The State replied, "[O]n this night, her particular answer was MaKayla."

Because K.F. was not "charged with supervision of a minor" as set forth in the statute, she is not in the class of persons who can commit the offense of first-degree endangerment.[1] As a result, K.F. cannot be principally culpable for committing the offense of first-degree endangerment. The circuit court recognized this point at trial, noting that K.F. was "correct in that the [endangerment statute] requires that somebody be a parent/guardian or otherwise legally charged with [the minor's] well-being." The court, however, accepted the State's argument that it was proceeding against K.F. as an accomplice to MaKayla, who was the person charged with supervision of the minor. We must therefore consider the matter of accomplice liability under Arkansas's statutes.

B. Accomplice Liability

Arkansas Code Annotated section 5-2-403 provides as follows:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:
>
> (1) Solicits, advises, encourages, or coerces *the other person to commit* the offense;

[1]On appeal, the State suggests that the trial testimony supports a conclusion that K.F. was "helping" MaKayla babysit and that she was thus "charged with supervision" of the baby. We cannot agree. Not only did the State essentially concede at trial that K.F. was not charged with supervision of the minor, the evidence showed that she was not so charged. Alysia Watkins testified repeatedly that MaKayla was the one she left in charge of her daughter. "MaKayla was babysitting." "I was paying MaKayla to babysit my baby." "I had an agreement with MaKayla to babysit my daughter that day." "From my perspective the person babysitting my daughter was MaKayla. I never had any conversations with K.F. or T.M. about babysitting my daughter." The State is therefore incorrect when it tries to argue that K.F. was charged with supervision of the minor. We note that the use of the word "charged" here follows the statute and does not refer to a formal charge reflecting criminal culpability.

(2) Aids, agrees to aid, or attempts to aid *the other person in planning or committing* the offense; or

(3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.

(b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:

(1) Solicits, advises, encourages, or coerces *the other person to engage in the conduct* causing the particular result;

(2) Aids, agrees to aid, or attempts to aid *the other person in planning or engaging in the conduct* causing the particular result; or

(3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

(Emphasis added.)

Below, the State argued––and the court found––that K.F. was an accomplice of MaKayla in the commission of the offense of endangering the welfare of a minor. To be culpable as an accomplice to MaKayla, K.F. must have solicited, advised, encouraged, or coerced MaKayla to commit the offense of endangerment, Ark. Code Ann. § 5-2-403(a)(1); must have aided, agreed to aid, or attempted to aid MaKayla in planning or committing the offense of endangerment, Ark. Code Ann. § 5-2-403(a)(2); or, having a legal duty to prevent the commission of the offense of endangerment, K.F. must have failed to make a proper effort to prevent it, Ark. Code Ann. § 5-2-403(a)(3). In short, K.F. must have taken some action to further *MaKayla's commission* of the offense. On the record before us, she did not.

In this case, the State alleged––and the court found––that the act of sparking a stun gun at the baby was conduct that created a substantial risk of death or serious physical injury to a minor. On the record before us, K.F. was the person engaged in that conduct, but as discussed above, she is not in the class of persons who can commit the offense of first-degree endangerment. MaKayla is a person within the class of persons who can commit the offense of first-degree endangerment, but she did not engage in the act of sparking a stun gun at K.W. In other words, on the record before us, MaKayla did not engage in conduct creating a substantial risk of death or serious physical injury to a minor as it relates to the use of a stun gun.[2] Because MaKayla did not engage in such conduct, she did not commit the offense of first-degree endangerment. As a result, K.F. cannot be an accomplice to an offense that was never committed by another person.

As noted above, we construe criminal statutes strictly in favor of the defendant. *Holcomb*, *supra*. Construing the accomplice-liability statute strictly, there must be evidence that the defendant engaged in some course of conduct that assisted "the other person to commit" an offense. "The other person" in this case is MaKayla, and MaKayla did not commit an offense. The circuit court therefore erred in adjudicating K.F. delinquent on the basis of accomplice liability.[3]

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[2]Although the Snapchat video also showed MaKayla slapping the baby on the head, the circuit court expressly found that there was no evidence that K.F. was involved in that offense.

[3]Because we conclude that K.F. could not have been adjudicated delinquent under the statute as charged, it is unnecessary to address her second argument on appeal, wherein

she contends that the evidence was insufficient to support the endangerment finding.

Reversed and dismissed.

KLAPPENBACH and VAUGHT, JJ., agree.

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Leslie Rutledge, Att'y Gen., by: *Brooke Jackson Gasaway*, Ass't Att'y Gen., for appellee.