

After a jury trial, Amanda Johnson appeals her convictions for aggravated battery¹ as a Class B felony and neglect of a dependant² as a Class B felony. Johnson raises two issues on appeal, which we restate as:

- I. Whether there was sufficient evidence to support her conviction for aggravated battery.
- II. Whether there was sufficient evidence to support her conviction for neglect of a dependent.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Johnson's seven-week-old daughter, M.J., was admitted to the hospital with a swollen left leg. An x-ray revealed M.J. suffered a broken left femur. Subsequent x-rays revealed that M.J. had also suffered a few broken ribs that had already begun to heal. It was estimated that the broken femur was between one to five days old, and the broken ribs were one to six weeks old. Suspicious of the injuries, the emergency room physician reported them to Child Protective Services ("CPS").

CPS workers investigated and interviewed those that had control of M.J. for the days prior to M.J.'s admission to the hospital including: Johnson; Johnson's husband; Johnson's brother; Johnson's sister-in-law; Johnson's father; and Johnson's mother. Trooper Makowsky of the Indiana State Police also interviewed Johnson. Everyone denied knowing how M.J. was injured. Johnson admitted that she was M.J.'s primary caregiver, but that M.J.

¹ See IC 35-42-2-1.5.

² See IC 35-46-1-4.

had been in the care of others during the prior few mornings and during the two prior weekends. *Tr.* at 122. Johnson's mother-in-law (M.J.'s paternal grandmother) was originally a suspect, but she did not respond to investigative phone calls and was never interviewed by either CPS or the police.

In explaining the injuries, Johnson stated that someone may have dropped M.J., or M.J. may have gotten her leg caught in her crib, or Johnson may have rolled over on M.J. while sleeping. *Id.* at 124. Johnson described an incident, two days prior to M.J.'s hospital arrival, where she bathed M.J. and almost dropped her while lifting the infant out of the tub. Johnson stated that she caught M.J. by the leg, but when she later demonstrated the fall with a doll, she caught the baby by the opposite leg. Johnson initially denied that M.J. showed any signs of pain. *Id.* at 125. Johnson later admitted that after the bathing incident, M.J. was up during the night in pain for several hours whimpered every few minutes through the evening. *Id.* Johnson also said she fell asleep that evening with M.J. sleeping on her chest. Johnson confessed that, on reflection, it was not a safe way for M.J. to sleep.

Johnson noticed M.J. appeared to be in discomfort during the prior days, but she thought it was a stomachache since she had been feeding the child cereal. *Id.* at 118. Johnson observed M.J.'s leg was swollen a day before she took her to the hospital but did not think it was serious. *Id.* at 127. Johnson stated that she did not take M.J. to the hospital until the next day when the leg had swollen even more and was hard to the touch. *Id.* at 118. The CPS caseworker that was called to the hospital testified that she observed M.J. "squirmy and crying . . . whimpering," while Johnson stood there and was not responsive. *Id.* at 203. The caseworker thought Johnson's behavior was a little disturbing. *Id.* Following the initial

investigation, M.J. was taken into protective custody, to which Johnson responded without emotion that, “she expected that.” *Id.* at 141, 208.

The treating physician, Dr. Merritt-Jenny, testified that a broken femur is usually the result of a fall from a great height, a car accident, a fall down the stairs, or being thrown from a horse. Dr. Merritt-Jenny testified that the break would have caused M.J. severe pain, especially during diaper changes. A subsequent treating pediatric emergency physician issued M.J. morphine, because every time M.J. was moved, she was in pain.

The State charged Johnson with aggravated battery and neglect of a dependent, each as Class B felonies. The jury found Johnson guilty as charged. Later, the trial court sentenced Johnson to two concurrent seven-year terms in the Department of Correction. She now appeals.

DISCUSSION AND DECISION

In reviewing sufficiency of the evidence claims, courts of appeal do not reweigh the evidence or judge the credibility of witnesses. *Rohr v. State*, 866 N.E.2d 242, 248 (Ind. 2007). This court views the evidence most favorable to the verdict and all reasonable inferences that may be drawn therefrom and will affirm the conviction if there is substantial evidence of probative value from which a jury could find the defendant guilty beyond a reasonable doubt. *Id.* A verdict may be sustained on circumstantial evidence alone, if that evidence supports guilt. *Maul v. State*, 731 N.E.2d 438, 439 (Ind. 2000).

I. Aggravated Battery

Johnson claims that the State introduced insufficient evidence to prove her guilty of aggravated battery. To prove Johnson’s guilt, the State was required to demonstrate: 1) that

Johnson; 2) knowingly or intentionally; 3) inflicted injury on M.J.; 4) that created a substantial risk of death or caused a protracted impairment of the function of a bodily member; specifically, Johnson impaired the function of the left leg of M.J. by breaking her femur. IC 35-42-2-1.5.

Johnson asserts that while the State may have put forth sufficient evidence to prove that someone injured M.J., it did not prove beyond a reasonable doubt that she was the one who did so. Specifically, Johnson contends that the evidence demonstrated that five people cared for M.J. in the days and weeks prior to her hospital admission, and that, in light of this nonexclusive control of M.J., all the State could show was that Johnson may have been present during M.J.'s injury.

A person's nonexclusive control is alone insufficient proof of guilt. *Jones v. State*, 807 N.E.2d 58, 65 (Ind. Ct. App. 2004). Usually, issues of nonexclusive control in criminal cases arise in drug and gun-related charges relating to constructive possession. *Cf. Ables v. State*, 848 N.E.2d 293, 297 (Ind. Ct. App. 2006); *State v. Hill*, 688 N.E.2d 1280, 1282-83 (Ind. Ct App. 1997). In those cases, the State usually charges all persons within proximity to the gun or contraband in order to ferret out who was actually the controlling agent, and if it cannot be determined, all may be convicted. *But cf. Cole v. State*, 588 N.E.2d 1316, 1319 (Ind. Ct. App. 1992) (proximity may be so wanting as to obviate guilt, i.e., passenger not liable for firearm in driver's side backseat floorboard). In either case, there must be circumstantial evidence from which the jury can infer the defendant's guilt. *Hill*, 688 N.E.2d at 1283.

In *Lush v. State*, 783 N.E.2d 1191, 1195 (Ind. Ct. App. 2003), the defendant was

charged and convicted of aggravated battery and child neglect. There, prior to the child's admission to the hospital, the defendant had exclusive control of the baby while mother was at work, and the child suffered life-threatening injuries. *Id.* at 1196. At the hospital, it was learned that the child had sustained several injuries, including permanent brain damage, which resulted from blunt force trauma occurring within hours prior to the child's arrival at the hospital. Ultimately, the court relied on the defendant's exclusive control of the child, together with the circumstantial evidence, to find sufficient evidence to support the defendant's guilt. *Id.*

In *Hughes v. State*, 508 N.E.2d 1289, 1295 (Ind. Ct. App. 1987), this court held that there was sufficient evidence to support defendant's convictions for neglect of a dependent and manslaughter. This court relied on solely circumstantial evidence and recognized that the defendant did not challenge her exclusive control of the child during the time the child endured the fatal injuries. We cited *Phelps v. State*, 453 N.E.2d 350, 353 (Ind. Ct. App. 1983), where it was held, "that sole or exclusive opportunity, when coupled with other circumstances, may be sufficient to support a finding of guilt, and even the means and manner of death may be inferred from the proven circumstances." *Hughes*, 508 N.E.2d at 1295.

In *Phelps*, this court found sufficient evidence to support the defendant's convictions for aggravated battery and child neglect. 453 N.E.2d at 353. We stated that circumstantial evidence is alone sufficient, and there only need be "an inference reasonably tending to support a finding of guilt." *Id.* There, a fourteenth-month old had suffered blunt force trauma to the head and bruises all over the body that had been inflicted in the hours prior to

his arrival at the hospital. This court noted that opportunity to commit a crime is not enough to convict. *Id.* However, opportunity coupled with other evidence inferring guilt may support a conviction. *Id.*

Here, we find the State's evidence wanting. The State's burden was to prove beyond a reasonable doubt that Johnson knowingly or intentionally inflicted an injury upon M.J. The only proof of that act was found by inference through Johnson's inconsistent explanations of the possible causes of the injury, the doctor's testimony calling Johnson's explanation into question, and Johnson's indifference to M.J.'s care and CPS custody in the hours and days following M.J.'s hospital admission. Johnson did not have exclusive control of the child; the child's injuries were not shown to have occurred in the few hours prior to her hospital admission; and Johnson was not shown to have any particular malice or motive to injure her newborn. Finally, the State failed to exclude the other persons having the care and custody of M.J. as the cause of her broken femur. There was no testimony of how M.J. broke her femur or how Johnson committed such an act. Moreover, there were four other people who cared for M.J. during the time period that doctors testified that M.J. was injured. One person, M.J.'s paternal grandmother, was not even interviewed. While there is evidence that Johnson had the opportunity to commit the crime and Johnson's explanations of possible causes for the injury raise suspicion, opportunity and suspicion do not constitute proof beyond a reasonable doubt that Johnson battered her child. Accordingly, we find the evidence insufficient to support Johnson's aggravated battery conviction.

II. Neglect of a Dependant

Johnson contends that the State failed to prove her guilty of child neglect. To prove Johnson guilty of neglect of a dependant, the State was required to put forth evidence that Johnson: 1) had the care of M.J., a dependent; and 2) knowingly or intentionally; 3) placed M.J.'s life or health in danger; and 4) that this act resulted in serious bodily injury to M.J.; specifically, Johnson, failed to seek prompt medical attention for M.J. after she suffered an extremely painful broken femur and broken ribs. IC 35-46-1-4(b)(2); *Appellant's App.* at 31-32.

“A ‘knowing’ mens rea under this statute is met if the accused ‘must have been subjectively aware of a high probability that [s]he placed the dependent in a dangerous situation.’” *Gross v. State*, 817 N.E.2d 306, 308 (Ind. Ct. App. 2004) (quoting *Armour v. State*, 479 N.E.2d 1294, 1297 (Ind. 1985)). Our Supreme Court has cautioned that the statute must be read as “applying only to situations that expose a dependent to ‘an actual and appreciable’ danger to life or health.” *Id.* at 309 (quoting *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985)).

In *Lush*, this court held that a fifteen-minute delay, when the defendant went to get the child's mother prior to seeking medical attention, was sufficient to establish neglect of a dependent. 783 N.E.2d at 1196.

Here, there was sufficient evidence to support Johnson's conviction for neglect of a dependent. Johnson testified that she was aware M.J. was in severe pain the night before she took her to the hospital, that she saw the child's leg was swollen a day before and knew the child was in pain, and that the child had suffered a broken femur and broken ribs, injuries that

Dr. Merritt-Jenny testified would cause an infant severe pain that no caregiver could ignore. Therefore, the evidence established Johnson knew that M.J. was in severe pain and failed to seek prompt medical attention. This evidence was sufficient to support Johnson's neglect of a dependant conviction. Because Johnson was sentenced to two concurrent seven-year executed terms in the Department of Correction, we remand only to vacate Johnson's aggravated battery conviction.

Affirmed in part, reversed in part, and remanded with instructions.

FRIEDLANDER, J., and BAILEY, J., concur.