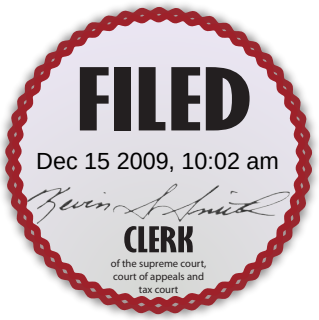

ATTORNEY FOR APPELLANT:

ANTHONY LUBER
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN A. MCKENZIE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0905-CR-215
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0708-FC-246

December 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

John McKenzie appeals his conviction and sentence for Class C felony neglect of a dependent. We affirm.

Issues

McKenzie raises three issues, which we restate as:

I. whether there is sufficient evidence to support his conviction;

II. whether the jury was properly instructed; and

III. whether the trial court properly denied his request to continue the sentencing hearing.

Facts

On November 30, 2006, McKenzie was caring for his three daughters, eight-year-old T.T.,[1] five-year-old Ja.M., and two-year-old Jh.M. Jh.M. had a cold, and McKenzie had taken various measures to relieve her symptoms. He had given her medicine and broth. He had also put his mouth on her mouth and blew threw her mouth to force "the mucus out of her nose." Tr. p. 295. McKenzie also massaged Jh.M.'s stomach "to get the mucus to come up." Id. at 310. At one point, McKenzie told T.T. to go upstairs and get a rag, a bucket, and a bottle of bleach. T.T. brought McKenzie a dry rag, and McKenzie poured bleach on the rag. He held Jh.M. on his lap and told T.T. to hold Jh.M.'s hands behind her back. McKenzie put the rag over Jh.M.'s face, and she started throwing up into the bucket. The bleach caused first and second degree burns around

[1] Although T.T. was not McKenzie's biological daughter, he had cared for her since she was eight months old.

Jh.M.'s nose and mouth. Although Jh.M.'s injuries did not require immediate emergency room treatment, there was a threat of infection.

The next day, Ja.M. told her teacher about Jh.M.'s face, and the teacher reported the incident to the authorities. On December 1, 2006, McKenzie was arrested. The State charged McKenzie with Class C felony neglect of a dependent. A jury trial began on February 11, 2008, and concluded on February 13, 2008. That day, the jury found McKenzie guilty as charged, and the trial court entered a judgment of conviction on the jury's verdict. More than a year later, on April 1, 2009, a sentencing hearing was held. At the hearing, defense counsel asked the trial court to delay sentencing so McKenzie could gather more mental health information from the Department of Correction. The trial court rejected the request and sentenced McKenzie to eight years. McKenzie now appeals.

Analysis

I. Sufficiency of the Evidence

McKenzie argues there is insufficient evidence to support his conviction. Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We respect the jury's exclusive province to weigh conflicting evidence. Id. We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Pursuant to Indiana Code Section 35-46-1-4(b), a person having the care of a dependent who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health and that results in bodily injury commits Class C felony neglect of a dependent.[2] Our supreme court has held that this statute "must be read as applying only to situations that expose a dependent to an 'actual and appreciable' danger to life or health." Gross v. State, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004) (quoting State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985)). The purpose of the neglect statute is to authorize the intervention of the police power to prevent harmful consequences and injury to dependents without having to wait for actual loss of life or limb. Id.

At issue in this case is whether McKenzie acted knowingly. A person engages in conduct knowingly if, when he or she engages in the conduct, he or she is aware of the high probability that he or she is doing so. Ind. Code § 35-41-2-2(b). We have explained that the "knowing" mens rea requires subjective awareness of a high probability that a dependent has been placed in a dangerous situation, not just any probability. Scruggs v. State, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008) (quoting Gross, 817 N.E.2d at 309), trans. denied. Because such a finding requires one to resort to inferential reasoning to ascertain the defendant's mental state, we must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper. Id.

[2] In the charging information, the State alleged that McKenzie, "did knowingly place [Jh.M.], his dependent, in a situation endangering [Jh.M.'s] life or health, to-wit: by causing her to inhale or ingest bleach, resulting in bodily injury, to wit: burns on her face." App. p. 3.

McKenzie argues there is no evidence that he was aware of the high probability that what he did on November 20, 2006 actually and appreciably endangered Jh.M.'s life or health. To the extent he asserts that he simply used home remedies to care for Jh.M. and that one of the doctor's testimony was speculative, he asks us to reweigh the evidence. We cannot do that.

The evidence shows that McKenzie instructed T.T. to get a rag, a bucket, and bleach, that he poured bleach onto a rag, that he restrained Jh.M. and put the rag up to her face. The evidence also shows that when McKenzie placed the rag on Jh.M.'s face, she started throwing up. Further, a pediatrician testified that "it would be hard not to smell" the amount of bleach needed to cause the burns sustained by Jh.M. from two to three feet away. Id. at 267. The pediatrician also testified, "the pattern of injury would appear to be that something was pressed against the face." Id. He said it was unlikely that the injuries were caused by a wiping motion. Although McKenzie testified that he did not know the towel would hurt Jh.M., he also testified that he knew bleach had a child protective cap on it and that they used bleach for cleaning their clothes. From this evidence, the jury could infer that McKenzie knowingly caused Jh.M. to ingest bleach and that his actions knowingly put Jh.M. in a dangerous situation.

II. Jury Instructions

McKenzie also argues that the trial court should have given the jury his tendered Instruction 4.

> When a party has challenged a trial court's refusal of a tendered jury instruction, the court on appeal performs a three-part evaluation. First, we ask whether the tendered

> instruction is a correct statement of the law. Second, we examine the record to determine whether there was evidence present to support the tendered instruction. . . . Third, we determine whether the substance of the tendered instruction was covered by another instruction or instructions. This evaluation is performed in the context of determining whether the trial court abused its discretion when it rejected the instruction.

Walden v. State, 895 N.E.2d 1182, 1186 (Ind. 2008) (citation omitted).

McKenzie's Instruction 4 read:

> Knowingly is defined by statute as follows:
>
> A person engages in conduct "knowingly" if when, he engages in this conduct, he is aware of the high probability that he is doing so.
>
> The charge in this case alleges that the accused acted "knowingly". "Knowingly is not the same as "recklessly" or "negligently". A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. "Negligence["] is a failure to do what a reasonably careful and prudent person would have done under the same or like circumstances, or the doing of some thing which a reasonably careful and prudent [sic] would not have done under the same or like circumstances; in other words, negligence is the failure to exercise reasonable and ordinary care.
>
> Proof that the accused acted "recklessly" or "negligently" does not satisfy the State's obligation to prove beyond a reasonable doubt that the accuses [sic] acted "knowingly."

App. p. 70.

Assuming that the tendered instruction is a correct statement of the law and the evidence supported the tendered instruction, the substance of the instruction was covered in large part by other instructions. For example, the trial court repeatedly instructed the jury that the State was required to prove that McKenzie knowingly placed Jh.M. in a

dangerous situation, and the trial court specifically defined knowingly for the jury. Most importantly, during the deliberations, the jury requested further instruction on the definition of knowingly and the required state of mind, and the trial court gave the jury the following instruction:

> In this case the state has alleged that the defendant committed the offense with which he is charged with a "knowingly" state of mind or culpability. As you have been instructed, the State must prove that the defendant knowingly committed each of the elements of the offense and that bodily injury resulted.
>
> In an effort to help you determine what "knowingly" means, there are three possible levels of criminal culpability in Indiana. I.C. 35-41-2-2, in its entirety reads as follows:
>
> I.C. 35-41-2-2. Culpability.
>
> (a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.
>
> (b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of the high probability that he is doing so.
>
> (c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of the harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.
>
> This additional instruction of law must be considered and read in conjunction with all other instructions with which you have been provided.

Exhibit 2 (bold omitted). This instruction covers the reckless component of McKenzie's Instruction 4.

To the extent McKenzie argues that the injury to Jh.M. was an accident, this theory was adequately covered by the following instruction:

> It is a defense that the defendant was reasonably mistaken about a matter of fact if the mistake prevented the defendant from:
>
> Knowingly committing the acts charged.
>
> The State has the burden of proving beyond a reasonable doubt that the defendant was not reasonably mistaken. The State may present additional evidence to counter this defense or may rely on the evidence it presented during its case-in-chief.

App. p. 79. Although this instruction does not specifically define negligence, the jury was clearly informed it could not convict McKenzie for acting with a mens rea other than knowingly. The trial court did not abuse its discretion in instructing the jury.

III. Sentencing Hearing

McKenzie also argues that the trial court should have delayed the sentencing hearing to allow him to obtain psychological evaluations from the Department of Correction prior to sentencing. Regarding McKenzie's mental health, the presentence investigation report provided:

> The defendant reported his mental health is "good." He reported that he was diagnosed as a Paranoid Schizophrenic in 1996 while in the Dixon Psychiatric Facility (part of the Illinois Department of Correction). He reported he has been receiving mental health treatment through Madison Center for the past eight years. He also stated he has also been diagnosed with, "some anger issues."

App. p. 256. McKenzie argues that his request to obtain information from the DOC "was the functional equivalent of requesting an adjournment" as described in Indiana Code Section 35-38-1-2. Appellant's Br. p. 15. Indiana Code Section 35-38-1-2 (b) reads:

> Upon entering a conviction, the court shall set a date for sentencing within thirty (30) days, unless for good cause shown an extension is granted. If a presentence report is not required, the court may sentence the defendant at the time the judgment of conviction is entered. However, the court may not pronounce sentence at that time without:
>
> > (1) inquiring as to whether an adjournment is desired by the defendant; and
> >
> > (2) informing the victim, if present, of a victim's right to make a statement concerning the crime and the sentence.
>
> When an adjournment is requested, the defendant shall state its purpose and the court may allow a reasonable time for adjournment.

The adjournment provision of Indiana Code Section 35-38-1-2 applies only when a presentence investigation report is not required and a defendant is sentenced at the time the trial court enters the judgment of conviction. Here, a presentence investigation report was prepared. Moreover, McKenzie was not sentenced on the same day the trial court entered the judgment of conviction. In fact, the trial court entered the judgment of conviction on February 13, 2008, and McKenzie was not sentenced until almost a year later, on April 1, 2009. McKenzie had ample time to gather his mental health information. Regardless, the trial court recognized "a history of mental health problems" when it imposed McKenzie's sentence. Tr. p. 457. Thus, McKenzie has not established

that the trial court erred in rejecting his request to delay sentencing so he could gather additional mental health information.

Conclusion

There is sufficient evidence to support McKenzie's conviction, the jury was properly instructed, and the trial court did not err in rejecting his request to postpone the sentencing hearing. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.