



Appellant-defendant Ryan Rogers appeals his conviction for Neglect of a Dependent,<sup>1</sup> a class B felony. Specifically, Rogers argues that the trial court abused its discretion by granting the State's motion for a mistrial, so that the subsequent trial violated the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution. Additionally, Rogers contends that there was insufficient evidence to support his conviction. Concluding that the trial court did not abuse its discretion by granting the State's motion for a mistrial and finding the evidence sufficient, we affirm the judgment of the trial court.

#### FACTS<sup>2</sup>

At around 1:00 a.m. on June 5, 2008, Rogers and Careena Kelly took their three-week-old daughter, H.R., to the emergency room of Home Hospital in Lafayette. Dr. Michael Routsong examined H.R. and ordered a C.T. scan. Dr. Routsong noticed bruising on H.R.'s face and under her eyes, and the diagnostic test revealed that she had hemorrhaging around her brain. Rogers told Dr. Routsong that while he was holding H.R., she had kicked and fallen from his arm and that when he had reached down to try and grab her, she struck her head on the vacuum cleaner. Dr. Routsong concluded that H.R. should be airlifted to Riley Hospital for Children (Riley Hospital) in Indianapolis.

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<sup>1</sup> Ind. Code §§ 35-46-1-4(a)(1), -4(b)(2).

<sup>2</sup> We heard oral argument on November 30, 2010, in the courtroom of the Indiana Supreme Court. We would like to thank counsel for the presentations and the Indiana University School of Law—Indianapolis students who attended the argument for their presence and respectful demeanor. Additionally, we want to express our appreciation to the administration, technology support, and staff of the Indiana Supreme Court for their assistance.

Dr. Ralph Andrew Hicks was the first physician to treat H.R. at Riley Hospital, and he noted that H.R. had bruising under both eyelids, on both sides of her neck, and on both shoulders. Additional testing revealed hemorrhaging on both sides and the front of H.R.'s brain. Dr. Hicks ultimately reached the conclusion that H.R.'s injuries were not accidental.

Dr. Tara Harris, a child abuse pediatrician at Riley Hospital, also treated H.R. during her hospital stay. Dr. Harris observed that H.R. had sustained devastating brain injuries and subdural hematomas and concluded that H.R.'s injuries were not accidental and not consistent with the parents' version of how H.R. sustained her injuries. More particularly, Dr. Harris testified that H.R.'s injuries indicated that her "head was propelled through space and stopped suddenly," which is referred to as "acceleration/deceleration." Tr. p. 91. Dr. Harris opined that this type of injury is not caused by "[r]outine handling," but rather is inflicted by a "forceful" and "violent action." Id. Moreover, there were no visible injuries on H.R.'s head and no evidence that H.R. had made contact with a vacuum cleaner.

On September 9, 2008, the State charged Rogers with class B felony neglect of a dependent. Rogers's jury trial commenced on September 29, 2009, and the case against Kelly in 79D02-0809-FB-43 proceeded simultaneously.

On October 1, 2009, the third day of trial, Dr. Routsong testified for the defense as follows:

Q The results of that ophthalmological examination confirmed for you that this was not a case of shaken baby syndrome?

A If I was a member of this jury I would be very concerned about convicting these two based on –

Supp. Tr. p. 144. The State objected and moved to strike, and the trial court sustained the objection and instructed the jury to disregard the comment. Outside the presence of the jury, the State moved for a mistrial, arguing it was a blatant violation of the motion in limine “to sponsor a witness who’s coming into court to tell the jury what they should or should not do.” Id. The State stressed that a mistrial was necessary because Dr. Routsong was the last witness that the jury would hear. After hearing the arguments from both sides, the trial granted the State’s motion for a mistrial, reasoning, in part, that:

Counsel may make the arguments about why any particular evidence is believable or not but the witness, even the most expert of witnesses can only give answers within their expertise and not about what they would do if they were jurors. I don’t think that this is a comment that [can] be erased from the jury’s mind.

Id. at 162.

Rogers’s second trial commenced on February 23, 2010, and after a three-day trial, the jury found Rogers guilty as charged.<sup>3</sup> The trial court conducted a sentencing hearing on April 20, 2010, and Rogers was sentenced to ten years in the Indiana Department of Correction with six years executed and four years suspended to probation. Rogers now appeals.

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<sup>3</sup> Kelly was again tried simultaneously and was also found guilty of class B felony neglect of a dependent.

## DISCUSSION AND DECISION

### I. Double Jeopardy

Rogers argues that the trial court erred by granting the State's motion for a mistrial, so that the subsequent trial violated the prohibition against double jeopardy. Specifically, Rogers argues that although Dr. Routsong chose an inappropriate method of expressing his opinion, a curative admonishment would have resolved the error.

The Fifth Amendment to the United States Constitution prohibits the State from placing a defendant in jeopardy twice for the same offense. Brown v. State, 703 N.E.2d 1010, 1015 (Ind. 1998). Jeopardy attaches when a jury has been selected and sworn. Id. at 1014. And “[o]nce jeopardy has attached, the trial court may not grant a mistrial over a defendant’s objection unless ‘manifest necessity’ for the mistrial is found.” Id. at 1015 (quoting Arizona v. Washington, 434 U.S. 497, 505 (1978)). Absent this finding, a mistrial operates as an acquittal to bar further prosecution. Id.

Nevertheless, our Supreme Court recently explained that manifest necessity does not mean that a mistrial was necessary in “‘a strict, literal sense.’” Jackson v. State, 925 N.E.2d 369, 373 (Ind. 2010) (quoting Washington, 434 U.S. at 511). To be sure, the trial court does not have to make an explicit finding of manifest necessity or state that it considered alternative solutions but found them inadequate. Id. Instead, “‘only a ‘high degree’ of necessity is required to conclude that a mistrial is appropriate.” Id. (quoting Washington, 434 U.S. at 506). Moreover, “‘the reviewing court must ‘accord the highest degree of respect to the trial judge’s evaluation of the likelihood that the impartiality of

one or more jurors may have been affected by the improper comment.” Id. (quoting Washington, 434 U.S. at 511). Indeed, the decision whether to grant a motion for mistrial rests within the sound discretion of the trial court. Pavey v. State, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002).

A variety of factors may bear on the need for a mistrial. Jackson, 925 N.E.2d at 373. One significant factor is the extent to which the need for the mistrial is attributable to the State. Id. If the reason is attributable to the State, it must demonstrate a “much higher” degree of necessity for the mistrial. Id.

Another factor is the necessity of the mistrial in light of the steps taken by the trial court to avoid the mistrial. Id. at 374. This factor encompasses considerations such as whether the trial court provided counsel the opportunity to be heard, considered alternatives, and made its decision after adequate reflection. Id.

A third factor to consider is the burden imposed by a mistrial. Id. This factor captures “the values underlying the protection against double jeopardy – the burden on the accused, the associated stigmatization as one accused, and the increased risk of wrongful conviction.” Id. These values should be weighed against allowing the State “one complete opportunity for a conviction.” Id. (quoting Brown, 703 N.E.2d at 1016). Moreover, the values underlying double jeopardy protection “are not as great when the trial is terminated shortly after jeopardy has attached as opposed to at a later stage in the trial.” Id. (quoting Brown, 703 N.E.2d at 1016).

In the instant case, Dr. Routsong was an expert witness who Rogers readily admits was “vital to the defense,” appellant’s br. p. 13, and whose curriculum vitae was admitted into evidence. Notwithstanding Dr. Routsong’s expert status, he was questioned in an abbreviated manner using leading questions on direct examination. Even more compelling, the trial court had granted a motion in limine prohibiting the parties from presenting opinion testimony on the ultimate issue—whether Rogers was guilty of neglect of a dependent. And defense counsel had a responsibility to advise witnesses regarding relevant motions in limine and rules of evidence. In short, the need for the mistrial was certainly not attributable to the State.

As for the steps the trial court took to avoid a mistrial, the record indicates that the trial court provided counsel ample opportunity to be heard. Additionally, the trial court replayed the relevant portion of Dr. Routsong’s testimony twice and heard additional argument from counsel after each time. Under these circumstances, we cannot say that the trial court took inadequate steps to avoid a mistrial.

Rogers highlights the fact that his trial was terminated on the third day and that, consequently, the values underlying double jeopardy are significant. While the values underlying double jeopardy are not as great when the trial is terminated earlier in the proceedings, the facts and circumstances in this case actually favored a mistrial. As the State points out, “the evidence of criminal activity in the present was based almost entirely on expert testimony.” Appellee’s Br. p. 7. Additionally, Dr. Routsong testified two days after Dr. Harris and Dr. Hicks, who testified for the State, and was the last

witness that the jury would hear before deliberating. Consequently, there was significant danger that Dr. Routsong's improper testimony would influence the jury. Similarly, the improper testimony occurred after the State's case in chief, leaving the jury with a statement from a doctor telling them not to convict, which, as previously stated, directly violated a motion in limine.

In sum, the need for the mistrial was attributable to the defense, the trial court ordered a mistrial after adequate reflection, and the balance between double jeopardy values and society's interest in allowing the State one complete opportunity for a conviction all favored a mistrial under these facts and circumstances. Accordingly, the trial court did not abuse its discretion by ordering a mistrial, and this argument fails.

## II. Insufficient Evidence

Rogers also argues that there was insufficient evidence to convict him of class B felony neglect of a dependent. When considering a challenge to the sufficiency of the evidence, this Court neither reweighs the evidence nor judges witness credibility. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will consider only the evidence most favorable to the verdict and all reasonable inferences. Taylor v. State, 879 N.E.2d 1198, 1202 (Ind. Ct. App. 2008). Additionally, this Court will affirm if there is probative evidence from which a jury could have found the defendant guilty beyond a reasonable doubt. Gray v. State, 871 N.E.2d 408, 416 (Ind. Ct. App. 2007).

To prove that Rogers was guilty beyond a reasonable doubt, the State was required to show that while having the care of H.R., a dependent, Rogers knowingly or



intentionally placed H.R. in a situation that endangered H.R.'s life or health, resulting in serious bodily injury to H.R. I.C. §§ 35-46-1-4(a)(1), -4(b)(2).

While Rogers does not dispute that H.R. sustained serious bodily injury and that H.R. was a dependent in his care, he points to final jury instruction number 7.09, which detailed to the jury the essential elements that the State had to prove, including that Rogers “placed [H.R.] in a situation that actually and appreciably endangered [H.R.’s] life or health.” Appellant’s App. p. 87. Rogers argues that there is no evidence to support this element. More particularly, Rogers points out that the State’s entire case centered on proving that striking a vacuum cleaner did not cause H.R.’s traumatic brain injuries. Rogers acknowledges that while the jury was free to believe this, there was absolutely no evidence regarding the actual cause of H.R.’s injuries. Furthermore, Rogers highlights the fact that other people had access to H.R. and could have caused her injuries.

Here, both Rogers and Kelly testified that around 11:00 p.m. on June 4, 2008, they were sitting on the couch watching television when H.R. began to cry, and Rogers went to the kitchen to prepare her bottle. As Rogers held H.R. face up in one arm while holding her bottle with his other hand, she “kind of jerk[ed] and – and she started to fall.” Id. at 239. Rogers caught H.R. “underneath her arms with . . . [his] hands wrapped around her arms. . . .” Id. at 299-300. According to Rogers, when he caught H.R., “she cracked the vacuum cleaner.” Id. at 300.

Conversely, as stated above, Dr. Hicks concluded that H.R.'s injuries were not accidental. Likewise, Dr. Harris testified that H.R.'s injuries indicated that her "head was propelled through space and stopped suddenly," which is referred to as "acceleration/deceleration." Id. at 91. Dr. Harris opined that this type of injury is not caused by "[r]outine handling," but rather is inflicted by a "forceful" and "violent action." Id. Moreover, there were no visible injuries on H.R.'s head and no evidence that H.R. had made contact with a vacuum cleaner.

This Court has recognized that it is within "the province of the jury to determine credibility and accept or reject evidence as it sees fit." Gantt v. State, 825 N.E.2d 874, 878 (Ind. Ct. App. 2005). In other words, the jury in this case was free to believe portions of the parents' testimony and disbelieve the rest while accepting the testimony of other witnesses. Specifically, the jury was free to accept the parents' testimony that H.R.'s injury occurred while she was in their care and disbelieve their version of how H.R. incurred the injury. And the jury could accept the testimony of Dr. Hicks and Dr. Harris that H.R.'s injury was not accidental and not consistent with the parents' version of events. In short, we decline Rogers's invitation to reweigh the evidence and judge witness credibility, and we affirm the decision of the trial court.

The decision of the trial court is affirmed.

NAJAM, J., and VAIDIK, J., concur.