

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2007-KA-0830**
VERSUS * **COURT OF APPEAL**
GWANA GREEN * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-990, SECTION "J"
HONORABLE DARRYL A. DERBIGNY, JUDGE

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JUDGE MICHAEL E. KIRBY

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(Court composed of Judge James F. McKay III, Judge Michael E. Kirby, Judge Terri F. Love)

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AFFIRMED

STATEMENT OF CASE

On September 27, 2001, the State filed a bill of information charging Gwana Green and her live in boyfriend with second degree cruelty to a juvenile, the boyfriend's son. As to Green it is alleged that on May 1, 2001, she "placed J.S., date of birth November 3, 1996, in water that caused him to suffer second degree burns over sixty-six percent (66%) of his body; Gwana Green also failed to seek medical treatment for J.S. for the injuries received for approximately sixteen (16) hours."¹ (On October 12, 2004, the bill of information was amended to show a birth date in 1994.)

At her arraignment on October 9, 2001, Gwana Green pled not guilty. On January 15, 2002, the trial court found probable cause, denied the motion to suppress the statement and granted the motion to suppress the evidence. Ultimately, the Louisiana Supreme Court reversed the trial court's ruling. *State v.*

¹ There is some discrepancy as to which particular criminal statute Gwana Green was charged with having violated. The obverse side of the bill of information references La. R.S. 14:93.2, which identifies the crime of unlawful tattooing and body piercing of minors. The docket master for the Orleans Parish Criminal District Court references the crimes charged as a violation of La. R.S. 14:93, cruelty to juveniles. From the language quoted from the bill of information, it is clear that the reference on the obverse side of the bill of information to La. R.S. 14:93.2 is a typographical error.

Green, et. al., 2002-1022 (La. 12/04/02), 831 So.2d 962. On January 9, 2004, the trial court granted the State's *Prieur* motion.²

On October 18, 2004, a jury found the defendant guilty of cruelty to juveniles. On January 16, 2007, the defendant was sentenced to five years in the custody of the department of corrections at hard labor.

STATEMENT OF FACTS

Detective Kira Godchaux testified that she was assigned to the Seventh District Task Force on May 2, 2001, when she received a dispatch call at approximately 3:30 p.m. regarding a child that had been burned with hot water. Detective Godchaux proceeded to the Gas Light Apartments at 880 I-10 Service Road where she found that EMS had already arrived at the scene. The detective proceeded to the second floor of the apartment where she observed J.S., a six year old child, lying in the bed with no clothing on.³ Detective Godchaux observed that almost the child's entire body was red and that skin was coming off his legs, feet and stomach.

Detective Godchaux explained that J.S. appeared almost lifeless. He was not moving and he was soft spoken. Detective Godchaux observed bruising or darkness around one eye. Detective Godchaux interviewed the defendant who explained that J.S. had run his bath water the night before and gotten in and burned himself. The defendant also stated that she had called J.S.'s father as well as a pharmacy seeking some remedy for the child. Believing that the case involved possible child abuse, Detective Godchaux notified the Child Abuse Division.

² See *State v. Prieur*, 277 So.2d 126 (La. 1973).

³ Pursuant to LA. SUP CT. RULE XXXII, we refer to the minor child by initials.

Detective Godchaux proceeded to the hospital where she waited until a Child Abuse detective arrived. She advised the detective of her observations at the home. This concluded Detective Godchaux's involvement in the case.

Dr. Bernard Jaffe was the trauma surgeon on call at Charity Hospital when J.S. was admitted to the emergency room after suffering extensive burns over his abdomen and lower extremities. Dr. Jaffe was qualified as an expert in the field of surgery.

Dr. Jaffe testified that when J.S. was admitted he was in a profound state of shock and near death. His pulse was barely palpable and his body temperature was in the mid eighties. Initially, Dr. Jaffe's primary focus was to try to save J.S.'s life. In order to resuscitate him, Dr. Jaffe administered a large amount of intravenous fluid through an IV in two places. Dr. Jaffe explained that J.S. had been so severely burned that his skin had been removed. He explained that when the body loses its protective layer of skin the body weeps and loses an enormous amount of fluid. In J.S.'s case, Dr. Jaffe stated that J.S. had lost many quarts of fluid. Dr. Jaffe believed that the length of time between J.S.'s initial burn and his medical treatment was directly responsible for the seriousness of his condition.

While examining a photograph of J.S., Dr Jaffe explained the progression of J.S.'s burns:

The black line is the area of the skin that remains which is beginning to peel off. All this area which is red and beefy looking is areas that have been denuded of skin. The skin has been so badly burned that it has been removed. If you saw this initially, immediately after the burn, you would see blisters. But by this time the – since a long time had transpired, the blisters and the skin had actually sluffed off and what you're looking at is the tissue below the skin where the skin is missing.

In treating J.S., Dr. Jaffe also ordered a CAT scan because he observed that J.S. had a black eye and he was concerned whether the child had suffered any significant head trauma. The CAT scan was normal.

Dr. Jaffe described J.S. as having an immersion burn which appeared to have been caused by being immersed in something hot. The burn was circumferential around J.S.'s abdomen and lower extremities. Dr. Jaffe estimated that a significant amount of J.S.'s burns were third degree burns; however his primary concern lay with saving the child's life. Dr. Jaffe knew that J.S. would need to be treated at a facility which specialized in treating burn victims. To that end, Dr. Jaffe contacted Dr. David Herndon at the Shriners Burn Hospital for Children in Galveston, Texas where J.S. was transported by air ambulance.

Dr. David Herndon, who is the Chief of Staff at the Shriners Hospital, was admitted as an expert in the field of treating burns. Dr. Herndon explained that when J.S. arrived at the hospital on May 2, 2001, his temperature and blood pressure had returned to normal range but his heart beat was still very fast. They started new intravenous tubes, rewashed the wounds, and put swaddling bandages on him. Tubes were also placed into J.S.'s nose for feeding purposes and for draining the stomach to prevent vomiting, all of which prepared him for operative intervention the next day.

Upon admission, J.S.'s wounds were photographed. Dr. Herndon viewed the photographs and explained their significance to the jury as follows as follows:

This particular picture shows the distribution of the burn with a straight line demarcation at the lower part of the back, the scapula, the upper part of the mid-back. It shows deep red – deep second and third degree wounds with characteristic purple patches in the red wound that indicate the extension of the injury because of inadequate blood flow to the burn wound.

He explained further:

There is a straight line where the burn has not extended further and there are no splash marks above that. That has particular significance to burn doctors, burns that are of a straight line are generally not accidental. Accidental injuries usually have splash marks because of struggling of individuals in hot water.

Dr. Herndon also noted “areas of purple mottling” on J.S.’s body which indicated a lack of blood flow to the wound. He believed this was consistent with the burn having occurred a good while before adequate fluid resuscitation could be achieved.

Another photograph depicted:

[T]he straight line distribution of the burn coming about that far below the nipples across the child’s chest. It also shows a characteristic sparing at the top of his leg, below his abdomen that occurs because the child had his legs flexed up protecting that area. Also, a very small tip of both knees were protected because they were undoubtedly above the level of the water. But the straight line distribution, without splash marks above, are characteristic of a forced immersion.

Dr. Herndon explained further that:

Patients burned in this fashion have an immense superficial pain response, but when blood flow decreases to the intestines because of fluid leaking out of a burn moon and blood pressure gets to a critically low level, a different kind of pain than the overwhelming pain of a traumatic burn occurs; that’s the pain in the intestines, being deprived of oxygen is a very severe abdominal pain of a different nature.

On cross examination, Dr. Herndon explained that straight line distribution injuries indicate injuries induced by force. Generally, he explained, when accidental injuries occur, the victim struggles, leaving splash marks. Dr. Herndon reported J.S.’s injuries to Child Protective Services.

Michelle Sallean, a licensed social worker, testified that on May 2, 2001, she was on duty at Charity Hospital. She spoke to J.S. and noticed that he was alert, that the adjustment to his injuries was fair, that he was very quiet when he came in, and that he was very lethargic.

Part of Ms. Sallean's responsibilities included evaluating cases for evidence of abuse or neglect. Accordingly, Ms. Sallean interviewed the defendant, whom she described as J.S.'s stepmother. She informed Ms. Sallean that J.S. had run his own bath water and then got in for approximately three minutes without complaining of the temperature. At that point, he complained about it being too hot. When the defendant attempted to help J.S. out of the tub, he slipped out of her hand and got cuts and bruising to his face.

Ms. Sallean also spoke to the physicians who were treating J.S. and learned that Ms. Green's statement was inconsistent with J.S.'s injuries. Accordingly, Ms. Sallean referred the case to Child Protective Services.

Lynette Smith, a Child Protection Investigator, testified that in January 2003, her office received a report that J.S. had been abused. The allegations consisted of an eye injury and marks and bruises. Ms. Smith investigated the case, and her report indicated that J.S.'s father was the suspected perpetrator.

Detective Mathew Riles of the Child Abuse Division testified that he was assigned to investigate the case involving J.S. He arrived at Charity Hospital after J.S. had arrived. Detective Riles spoke with the medical staff and the EMS technician. Detective Riles spoke with Gwana Green and then relocated to the Child Abuse Office where he took a taped statement from Gwana Green.

Subsequently, Detective Riles obtained a search warrant for the apartment. The majority of the evidence was collected from J.S.'s bedroom. The items

collected included bed linens, towels, and medical supplies, such as bandaids, gauze pads and burn ointments. Also, they collected skin from a garbage can.

Additionally, Detective Riles tested the temperature of the water coming out of the faucet which was approximately one hundred and fifty-six degrees. A number of photographs were taken of the scene. Gwana Green's video taped statement was then played for the jury. In her statement, the defendant explained how the injury occurred as follows:

When he got in the tub, this is the tub. When he got in the tub he put his foot in the tub. So he didn't say that the water was hot at all, he just clowning around and then he specifically then he sat down, SWEEW! You know, I heard the water. So I am thinking okay he didn't say anything you know. So after, after I heard the water he's washing himself he was saying Ms. G-G, its hot! I went into the bathroom and I didn't put my arm in it, I just my hand in there and I grabbed him out of the water. What I shouldn't have done was I shouldn't have screamed at him. Because when I took him out the water and then he slipped back into the water and then I picked him up and you know, I put him outside of the other bathroom.

After the video was played the court took a brief recess.⁴ Trial resumed the following day, at which time the trial court instructed the jury that it was to disregard Detective Riles' testimony.

⁴ During the recess, Detective Riles was observed partaking in a brief conversation with the prosecutor and the minute clerk. The trial court questioned all three parties concerning the incident. The minute clerk, Hunter Harris, reported that he had commented to the prosecutor that he found it strange that the child had not been in more pain. In reply, the prosecutor noted portions of Dr. Herndon's testimony concerning how blood flow away from the intestines and creates a great deal of pain. Apparently, Detective Riles who was standing behind the two and overheard the conversation. He interjected that with second and third degree burns nerve endings are damaged and one does not feel pain.

Initially, defense counsel requested a mistrial and then withdrew the motion requesting only that the court utilize curative measures. Nevertheless, the trial court declared a mistrial, but granted defense counsel twenty-four hours to seek review. When trial resumed the following day, the trial court instructed the jury that it was to disregard Detective Riles' testimony. Apparently the trial court rescinded granting a mistrial as there is no record of a writ being filed with this court.

J.S.'s grandmother testified that at approximately 11:30 p.m. on May 1, 2001, she received a telephone call from her son, J.S.'s father. She spoke to the defendant who asked her if Neosporin should be used to treat a burn. The grandmother responded that it depended on the burn and told the defendant to take J.S. to a doctor.

J.S. testified on direct examination as follows:

Q. Would you be kind enough to explain it to these ladies and gentleman or to me, if you feel comfortable, how that [being burned] happened?

A. She had run the water, but I put my hand in it and I kept telling her it was too hot. She put her hand in it, but took it out and said it wasn't hot, so I said, yes, it is. And so she told me to get in, I got in and jumped out.

Q. When you say you got in and jumped out, how did you get in?

A. I put my foot in first, then I put my other foot in, then before I completely sat down, I jumped up and got out.

Q. And then what happened?

A. I told her it was hot again and she said it wasn't hot again. And then after that I told her it was hot, but then she came and picked me up and sat me in the water and held me down.

Q. Then what happened?

A. Well, I stayed down for a little while, but then I jumped up and that's how I got burnt.

Q. After you got out of the tub, what happened then?

A. She took me down for a cold cup of water before Noel got home.

Q. And when Noel got home what happened?

A. He started hitting me in the head.

Q. Was your skin okay after being in that hot water?

A. (Witness shakes head from side to side in a negative way.)

Q. What was wrong with it?

A. It was all hanging off of me.

Q. Did it hurt?

A. Yes.

Q. Did you say that it hurt?

A. Yes. But after a little while it started feeling better.

Q. When did you go to the hospital?

A. Seventeen hours - - I was at the house for seventeen hours.

During cross-examination, J.S. testified that he did not remember giving a statement to the police. Defense counsel played portions of J.S.'s taped statement, and J.S. identified his voice on the tape. The entire taped statement was then played for the jury. In the statement, J.S. stated that he ran the bath water too hot. He stated that he jumped out of the water after getting in and told the defendant that the water was too hot. The defendant came in and put him in the bath and held him down. When he got up he was burned and his skin was coming off. During the course of the night he told his father that his stomach hurt. He said that his legs and feet hurt. When he got up the next day he ate breakfast and watched television.

The following day the defense called three witnesses, including the defendant herself.⁵

ERRORS PATENT

Review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER

Defendant contends that the evidence was insufficient to support her conviction. When assessing the sufficiency of evidence to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jacobs*, 504 So.2d 817 (La.1987).

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro*, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. § 15:438. This statutory provision is not a separate test from *Jackson*, but

⁵ The record indicates that a transcript of the testimony from October 18, 2004, is unavailable. Appellate counsel, who was also trial counsel, does not contend that the defendant has been deprived of her constitutional right of appeal as a result of the missing transcripts of the defense witnesses. See *State v. Boatner*, 2003-0485 (La. 12/3/03), 861 So.2d 149

The fact that appellate counsel was also trial counsel would likely militate against finding that the defendant's right to an appeal is compromised by the missing transcript if the issue were assigned as error. In light of the fact that no assignment of error on the issue of the missing transcripts has been raised, we mention it only in passing.

rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. *State v. Jacobs*, 504 So.2d at 820.

La. R.S. 14:93 A provides:

Cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.

La. R.S. 14:10(2) provides:

General criminal intent is present whenever there is specific intent and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

La. R.S. 14:12 provides:

Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

Initially, defendant argues that any rational juror would have discounted J.S.'s trial testimony that the defendant ran his bath water too hot and forced him to sit in the hot water because his earlier statement contradicted his trial testimony. Defendant suggests that J.S.'s statement to the police completely exonerated the defendant of any crimes and that he changed his testimony at trial.

Review of J.S.'s statement fails to reflect that he exonerated the defendant. Indeed, in several instances, J.S. stated that the defendant held him down in the water. While J.S.'s statement differed from his trial testimony in that he stated that he, not the defendant, ran the water, this discrepancy is not significant enough to cause a rational juror to find that the state failed to prove its case beyond a reasonable doubt. Furthermore, the straight line burns indicating a forced immersion and the absence of any splash marks refutes the defendant's statement that she heard J.S. washing himself.

Defendant also argues that the evidence supporting her failure to take J.S. to the hospital or to seek medical treatment until the afternoon following the injury failed to establish criminally negligent mistreatment or neglect. Defendant notes that in his initial statement J.S. stated that his burns were not hurting him before he went to sleep and that he ate breakfast and had no pain in his legs. Defendant also notes that Michele Sallean testified that J.S. was alert when he arrived at the hospital.

However Dr. David Herndon, Chief of Staff of the Shriners Burn Hospital for Children testified:

Patients burned in this way have an immense superficial pain response but when blood flow decreases to the intestines because of fluid leaking out of the burn moon and blood pressure gets to a critically low level, a different kind of pain than the overwhelming pain of the traumatic burn occurs; that's the pain in the intestines, being deprived of oxygen is a very severe abdominal pain of a different nature.

Also, when Detective Godchaux arrived at the apartment she observed that almost all of J.S.'s body was red and that skin was coming off his legs, feet and stomach. Dr. Jaffe testified that when J.S. arrived at Charity Hospital he was in a

profound state of shock and near death. J.S.'s pulse was barely palpable and his body temperature was in the mid eighties. Additionally, J.S. had lost several quarts of fluid from his wounds. That the defendant had allowed J.S.'s condition to deteriorate to this point before seeking medical attention demonstrates a complete disregard for the health and well being of J.S. and a gross deviation below the standard of care expected to be maintained by a reasonably careful person. Indeed, Dr. Jaffe testified that the failure to seek appropriate medical treatment following J.S.'s initial burn was directly responsible for the seriousness of his condition.

Viewing the evidence in the light most favorable to the state, the find that the state proved its case beyond a reasonable doubt.

CONCLUSION

For the reasons above we affirm the defendant's conviction and sentence.

AFFIRMED.