

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS SMITH,

Defendant-Appellant.

UNPUBLISHED

November 24, 1998

No. 203804

Recorder's Court

LC No. 96-008666

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was charged with first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). Following a bench trial, defendant was convicted of the lesser charge of second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3). The court sentenced defendant to eighteen months to four years in prison. Defendant appeals as of right. We affirm.

Defendant lived in his mother's house along with his girlfriend, his one-year-old-son Devonte, and his three siblings. On February 4, 1996, defendant's younger sister discovered that defendant had left Devonte with a bloody nose, a bandage on his arm, bruises on his legs, and scratch marks on his body. When defendant's mother returned home and observed the baby's injuries, she called the police, and Devonte was taken to the hospital. The treating physician determined that the child was suffering from extensive injuries, which included several bruises and abrasions, fractured ribs, fractured vertebrae, and a fractured arm. Some of the injuries appeared to be several days old, while others, including the broken arm, had evidently been more recently inflicted.

Defendant first contends that the evidence was insufficient to support his conviction of second-degree child abuse. When reviewing the sufficiency of evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The elements of an offense may be proven through circumstantial evidence and reasonable inferences arising from the evidence. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995).

In order to establish the crime of second-degree child abuse, the prosecutor must prove that the defendant's omission or reckless act caused serious harm to a child. MCL 750.136b(3); MSA 28.331(2)(3). The child abuse statute does not provide a definition of "reckless"; therefore, this Court is to accord the word its plain and ordinary meaning. *People v Gregg*, 206 Mich App 208, 211-212; 520 NW2d 690 (1994). This Court has previously consulted dictionary definitions to aid in construing the term "reckless" as used in the child abuse statute. *Id.* at 212.

Black's Law Dictionary (6th Ed) defines "reckless" as:

Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.

The Random House College Dictionary, Revised Edition, defines "reckless" as:

1. utterly unconcerned about the consequences of some action; without caution; careless . . . 2. characterized by or proceeding from such carelessness.

In the present case, we believe that the trial court properly determined that the evidence established that defendant's conduct was reckless. First, it would be reasonable to conclude from the evidence that defendant intentionally caused Devonte's injuries, particularly the broken arm. The evidence revealed that defendant had been alone with Devonte immediately before the discovery of his injuries. There was also evidence that defendant had told his sister that he had bandaged Devonte's arm that morning because Devonte had injured his arm on a chair. The physician who treated Devonte testified that his arm could have been fractured within the past twenty-four hours and that the fracture likely was caused by a twisting movement. Defendant's sister testified that she had seen Devonte the previous evening and that he was "fine" at that time.

Moreover, even if defendant did not intentionally inflict the injuries, there was sufficient evidence presented to show that he acted recklessly in permitting them to occur. Defendant's mother testified that she had noticed injuries on Devonte after he had returned from his maternal grandmother's house on previous occasions. These injuries included red marks, scars, breathing problems, and fractured ribs. Furthermore, defendant's mother testified that she told defendant and his girlfriend that she would call the police if she found any more bruises on Devonte. We believe that this evidence shows a pattern of abuse and indicates at the very least that defendant was aware of the abuse and allowed it to continue.

Accordingly, we find that the evidence showed that defendant either intentionally inflicted the injuries on Devonte himself or, alternatively, simply stood by and recklessly permitted them to occur. In either case, the evidence was sufficient to support defendant's conviction of second-degree child abuse.

Defendant next argues that the trial court erred in finding that he was a “person” as defined by the child abuse statute; that is, that he was either the child’s parent or guardian, or that he cared for, had custody of, or had authority over the child. MCL 750.136b(1)(c); MSA 28.331(2)(1)(c). Defendant notes that the only witness who testified that he was Devonte’s father was his sister Phoenicia, a witness who the trial court found had offered perjured testimony. Because the court specifically found that Phoenicia had committed perjury, defendant contends it had no basis for believing her statement that defendant was the child’s father. Therefore, defendant argues that the verdict was inconsistent with the court’s factual findings.

Findings of fact by the trial court will not be set aside unless clearly erroneous; furthermore, this Court must consider the “special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). Although the trial court found that Phoenicia had given perjured testimony, the court did not specify which portions of Phoenicia’s testimony it believed to be false. In any event, it is within the sole province of the trier of fact to resolve all issues of credibility. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Thus, the court was free to believe Phoenicia when she stated that defendant was Devonte’s father, yet disbelieve her with respect to other aspects of her testimony. See *People v Akerley*, 73 Mich App 321, 325; 251 NW2d 309 (1977).

Moreover, the child abuse statute does not require that defendant be the father of the abused child. Rather, it merely requires that defendant “cares for, has custody of, or has authority over the child” for any length of time. MCL 750.136b(1)(c); MSA 28.331(2)(1)(c). In this regard, evidence was presented to show that defendant’s girlfriend was Devonte’s mother and that the two of them shared responsibility for caring for Devonte. When his girlfriend was at work, defendant was left alone with Devonte. Further, defendant had authority to leave Devonte with other babysitters, such as his sister Phoenicia. All of these facts show that defendant, at the very least, had custody of, or authority over, Devonte and, thus, is subject to the statute on this basis alone. Therefore, we find that the trial court did not err in finding that defendant was a “person” within the definition of the child abuse statute.

Defendant finally argues that his sentence violates the principle of proportionality. He contends that the court abused its discretion in disregarding the recommendation of the Michigan Department of Corrections that defendant be sentenced to probation. He further argues that the court improperly made a finding at sentencing that defendant was guilty of the greater offense of first-degree child abuse in order to justify imposing a prison sentence. We disagree.

This Court must determine whether the trial court abused its discretion in imposing the sentence. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). An abuse of discretion occurs when a sentence is not proportionate to the seriousness of the crime and the defendant’s prior record. *Id.* The severity and nature of the crime are permissible factors to be considered. *People v Hunter*, 176 Mich App 319, 320-321; 439 NW2d 334 (1989). Furthermore, where there is support in the record that defendant has committed a greater offense than that for which he was convicted, the court may consider that evidence as constituting an aggravating factor, even if defendant has been acquitted of the greater charge. *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987).

Contrary to defendant's representations, the trial court did not find at sentencing that defendant was guilty of first-degree child abuse. Although the court did note in its findings at trial its belief that defendant had intentionally inflicted the injuries and that he "should be guilty of the greater offense," the record does not support that the court relied upon this belief to justify a greater sentence. Rather, the court simply noted the tender age of the victim, and the extent of the injuries, and commented that it believed that the mother and defendant were both responsible for the abuse. These were permissible factors to consider in sentencing defendant.

There are no sentencing guidelines for child abuse. However, the minimum sentence of eighteen months was well under the maximum four-year prison term permitted for second-degree child abuse. MCL 750.136b(3); MSA 28.331(2)(3). Given the seriousness of the offense, we find that defendant's sentence does not violate the principle of proportionality, and thus, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage