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NO. COA01-323

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 99 CRS 062855

ROBERT BRADFORD PLEMMONS

Appeal by defendant from judgment entered 8 June 2000 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 23 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lisa K. Bradley, for the State.

Elmore, Elmore & Williams, P.A., by Bruce A. Elmore, Jr., for defendant.

BIGGS, Judge.

Robert Bradford Plemmons (defendant) appeals his conviction of felony child abuse. For the reasons herein, we find no error.

The evidence at trial tended to show the following: Defendant and Cindy Branson (Cindy) are the parents of a minor child, born on 8 February 1999. On 8 September 1999, Lois Branson, the child's maternal grandmother, called the Tot Line and explained that she noticed "bruises on [the child]'s bottom" while he was in her care. She contacted her daughter, Cindy, and requested that she come over to the Branson's home alone.

Renee Gossett (Gossett), of the Buncombe County Department of

Social Services (DSS), upon receiving a Child Protective Services report of an "infant with bruising", made a trip to the Bransons' residence to investigate. When she arrived, the grandparents, Cindy and The victim were present. She initially explained DSS' procedures, took pictures of the child's injuries, and then interviewed the family members. Gossett described the child's bruises as "more blueish in color. . . [s]till had some reddening." She questioned Cindy about her whereabouts on the day the child's injuries were discovered. Cindy explained that she was at work and that defendant "had been caring for the child on that day and the day before. . . ."

Later that afternoon, Gossett interviewed defendant, who explained to her that he had been keeping the minor child for a couple of days. When questioned about discipline, defendant told Gossett that he had "spanked [the child] before and that this was on his hand." He said that he did not think he had ever "popped him on the bottom or anything like that."

Following the DSS investigation, defendant was charged with and convicted of felony child abuse inflicting serious injury in violation of N.C.G.S. § 14-318.4(a). From this conviction, defendant appeals.

Defendant first contends that the trial court erred in denying his motions to dismiss the charge of felony child abuse, in that there was insufficient evidence upon which a reasonable jury could have found him guilty of that charge. Specifically, defendant

argues that there was insufficient evidence that he intentionally inflicted any serious physical injury upon the minor child. We disagree.

In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must consider "all the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997) (citation omitted). Further, there must be substantial evidence of every element of the crime charged, and substantial evidence that the defendant was the perpetrator of that crime. *State v. Elliott,* 344 N.C. 242, 475 S.E.2d 202 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). In addition, this Court has held that:

> When the motion [to dismiss] calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty.

State v. Mapp, 45 N.C. App. 574, 581, 264 S.E.2d 348, 353 (1980) (quoting *State v. Cook*, 273 N.C. 377, 383, 160 S.E.2d 49, 53 (1968)) (citation omitted). Moreover, "'[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.'" *State v. Fritsch,* 351 N.C. 373, 379, 526 S.E.2d 451, 455, *cert. denied,* 531 U.S. 890, 148 L. Ed.2d 150 (2000) (quoting

State v. Stone, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

To establish felonious child abuse under N.C.G.S. § 14-318.4 (1999), the State must produce evidence tending to show the following: (1) that defendant is a parent, or other person providing care or supervision to, (2) a child less than 16 years of age, (3) who intentionally inflicts any serious physical injury upon the child, (4) or who intentionally commits an assault upon the child, which (5) results in any serious injury to the child. N.C.G.S. § 14-318.4(a) (1999); *see also State v. Pierce*, 346 N.C. at 492-493, 488 S.E.2d at 588; *State v. Elliott*, 344 N.C. at 278, 475 S.E.2d at 218-219.

In the case *sub judice*, defendant challenges the sufficiency of the evidence regarding elements three, four and five in that the State failed to offer sufficient evidence that he intentionally inflicted serious physical injury upon the minor child or that he intentionally committed an assault upon the child which resulted in serious injury.

The State presented the following testimony at trial: Mary Jo Schumacher (Schumacher), a social worker with DSS, testified that during an interview with defendant, he admitted to spanking the child on the bottom the night before the bruises were discovered. Further, Schumacher testified that, although defendant denied at trial that he ever hit the child, he later admitted that he had popped him on the hand several times before.

In addition, Dr. Cindy Brown, a certified child medical examiner and an expert in the field of forensic pediatrics,

testified to the following: that there were "multiple linear bruises on [the child's] buttocks and right thigh that were lineal and formed the impression that suggested a hand print" and that the colors were blue, red and purple"; that if [the type of] bruising [described] did occur by accident, it would result in a single bruise in the area of impact, not multiple bruises that form a pattern similar to those observed on the child; that having seen other children with linear bruises similar to those observed on the minor child, she stated that they were caused by a spanking from the hand, belt, cord, electrical cord, rope, or switch; that these injuries are not consistent with an accidental injury; that even given the number of times children fall during their toddler years, it is still exceedingly rare to see a bruise on the buttocks. Further, on cross examination, Dr. Brown testified to the following:

> Q. So there's variability as to what kind of force could have caused the bruise; correct?
>
> A. No. I believe it would require great force. Many children who have been spanked don't have bruises from spanking. They have a red mark that goes away; not enough force to break the blood vessels under the skin.
>
> Q. So in order to break the blood vessels under the skin, you're saying there has to be some force directly against that particular location?
>
> A. It has to be sufficient force to deform the tissue and break the blood vessels, yes.
>
> Q. And it has to touch the tissue at that particular location and break the blood vessel, doesn't it?
>
> A. Yes.

> Q. And if a child fell and fell on the ground and hit his buttocks on something hard, it could break the tissue and form a bruise, couldn't it?
>
> A. It would be unusual, but yes, it's possible.
>
> Q. And the reason you asked the child to pull up is because if the child fell from a standing position he could break the skin and form a bruise?
>
> A. From the height of a child that age, it would be just exceedingly rare to ever see a bruise from a fall.
>
> Q. But it's possible, isn't it?
>
> A. I have not seen it.

This Court has held that "if a child suffers injuries that are neither accidental nor self-inflicted during a period of time in which the child is in the exclusive custody of an adult, the finder of fact can draw an inference that the adult inflicted the injury." *State v. Qualls,* 130 N.C. App. 1, 502 S.E.2d 31 (1998). Here, Dr. Brown testified that the injury occurred within forty-eight hours prior to 9 September 1999, during which time the child was in the exclusive custody of defendant.

Additionally, this Court has held that past instances of mistreatment are admissible to prove intent. *State v. Krider,* 138 N.C. App. 37, 530 S.E.2d 569 (2000). Here, Cindy testified that she observed defendant hit the child on the hand or leg to discipline him, and that she had previously observed red marks on the child where defendant hit him. We conclude that there is sufficient evidence from which a jury could infer that defendant intentionally inflicted injury upon the minor child, or that he

intentionally committed an assault upon the child which resulted in injury.

Moreover, we disagree with defendant's contention that the injuries inflicted upon the child did not satisfy the statutory requirement that such injuries be serious. Our Supreme Court has held that a serious physical injury is such physical injury as causes great pain and suffering. *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293, *cert. denied,* 501 U.S. 1208, 115 L. Ed.2d 977 (1991). When questioned about whether the injury she observed on the child caused him great pain and suffering, Dr. Brown testified that "the force required to produce bruises such as these on the buttocks would be extreme and painful." We conclude that there is sufficient evidence in the record on each element of the offense of felony child abuse to deny defendant's motion to dismiss, and to submit this charge to the jury.

Finally, we reject defendant's argument that there was insufficient evidence of misdemeanor child abuse, and therefore, it was error for the trial court to charge on that offense. In the present case, the trial court, in addition to submitting the charge of felonious child abuse to the jury, also instructed on non-felonious child abuse. It is well settled that "when a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense [only] when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser." *State v. Wilson,* 128 N.C. App. 688, 692, 497 S.E.2d 416, 419-20 (1998). Where there is

evidence of a defendant's guilt of a lesser-included offense, that defendant is entitled to have the question submitted to the jury, even if there is no request for the instruction. *State v. Summitt*, 301 N.C. 591, 273 S.E.2d 425, *cert. denied*, 451 U.S. 970, 68 L. Ed. 2d 349 (1981). We conclude that the trial court did not err by instructing the jury on the lesser-included offense of misdemeanor child abuse, even though the jury ultimately found defendant guilty of the greater offense.

Accordingly, we overrule defendant's assignments of error, and hold that the trial court committed no error.

No error.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).