IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1003

Filed: 5 September 2017

Washington County, No. 15 CRS 51080

STATE OF NORTH CAROLINA

v.

BRIAN JONATHAN ST. CLAIR, Defendant.

Appeal by Defendant from judgment entered 28 January 2016 by Judge J. Carlton Cole in Washington County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant.

INMAN, Judge.

Brian Jonathan St. Clair ("Defendant") appeals from a jury verdict finding him guilty of felony intentional child abuse inflicting serious physical injury. On appeal, Defendant argues that the trial court erred by denying his request for an instruction on the lesser-included offense of misdemeanor child abuse and, alternatively, that a

new sentencing hearing is required because the trial judge impermissibly considered Defendant's decision to exercise his right to trial by jury in imposing its sentence. After careful review, we conclude Defendant has failed to demonstrate error.

I. Procedural and Factual History

The evidence introduced at trial tended to show the following:

In March of 2015, Defendant and his wife, Kenyatta St. Clair ("Mrs. St. Clair"), resided in Roper, North Carolina with five children. Among the five children was eight-year-old C.W.[1] One weekend evening, Mrs. St. Clair returned home from a store to find a shirtless C.W. trying to flee the home as he was being whipped along his bare torso by Defendant with an extension cord. Mrs. St. Clair stepped between C.W. and Defendant in an effort to stop the whipping, which Defendant concluded with a final strike of the extension cord across C.W.'s face. In a written statement to the Washington County Sheriff's Office (the "Sheriff's Office"), Defendant stated he "lost control" and hit C.W. "at least four times" with the extension cord after he saw C.W. cutting a countertop with a knife.

Following the whipping, Mrs. St. Clair wanted to take C.W. to the hospital for treatment, but she did not drive and was too afraid of how Defendant would react to suggest it.[2] She instead began to treat C.W.'s "pretty deep . . . [and] open" wounds

[1] The minor victim is referred to throughout this opinion by a pseudonym.

[2] Mrs. St. Clair did not have a driver's license, and was therefore dependent on Defendant's relatives for transportation.

with ointment and cotton balls. She observed that C.W. "was scared. He was angry. He was very emotional. . . . He was in a lot of pain." After caring for C.W.'s injuries, Mrs. St. Clair asked Defendant if C.W. would go to school the next day. Defendant replied, "[n]o. He's not going to school."

C.W. missed several days of school the following week; upon his return, one of his friends at school saw the injuries and reported them to a teacher. An investigator with Child Protective Services of the Washington County Department of Social Services (the "Investigator") was notified, who immediately visited C.W. at school. C.W. gave the Investigator permission to examine him and photograph his injuries. The Investigator observed wounds that "looked like slave days . . . [with] looped scarring . . . [where] you c[ould] tell that the skin had been broken" on the child's back, bruising elsewhere on his body, and looped scarring with "some scabbing" on his arm. The photographs taken by the Investigator showed "looped [abrasions], scarring, [and] open wounds that were healing, pinkish in color . . . [and] multiple scars, bruising, cuts, [and] lacerations . . . [to] multiple areas of the body." C.W. confirmed to the Investigator that all of these injuries were the result of Defendant's whipping with the extension cord.

Upon concluding her examination of C.W., the Investigator visited the St. Clair's home with deputies from the Sheriff's Office and informed Defendant and Mrs. St. Clair that none of their children could be housed with Defendant. The St. Clairs

agreed to place all five minors with paternal relatives living nearby. On 18 March 2015, Defendant signed two voluntary written statements to the Sheriff's Office admitting he whipped C.W. with an extension cord on his back and arms and acknowledging that he may have struck C.W. across the face.

A pediatric nurse practitioner with a nearby children's advocacy center (the "Nurse") examined C.W. on 23 March 2015. The Nurse observed "straight line marks . . . [and] multiple marks, U-shaped loop marks" on C.W.'s back, as well as "U-shaped" and "straight" marks on his arms. While some of these marks appeared to be older, a number of abrasions were "pink," including at least one with "a little peely skin around the edges . . . [which was] likely deeper to begin with . . . and . . . likely newer, more recent." The Nurse testified at trial that "the injuries at the time would have been very painful, and at least some of them would have bled . . . . [H]e may have ended up with blood on clothing, blood on bedding, blood on bandages . . . ." She further remarked that "I would have expected this to hurt immediately and to hurt for at least several hours if not several days afterwards until those raw open areas started to cover . . . [and] I would have expected him to be very uncomfortable." When asked by the State whether she "considered these injuries to be serious or severe enough to warrant immediate medical attention[,]" she replied, "[g]iven the number of them that I saw in the photographs and that the skin was broken I think medical attention would have been reasonable. Yes."

Defendant was charged with felony intentional child abuse inflicting serious physical injury, pleaded not guilty, and the case proceeded to trial beginning on 26 January 2016. Defense counsel requested a jury instruction on misdemeanor child abuse, which the trial court denied. The jury on 28 January 2016 found Defendant guilty of committing the felony offense. The trial court sentenced Defendant to a minimum of 84 months and a maximum of 113 months imprisonment. Defendant gave oral notice of appeal.

II. Analysis

A. Standards of Review

We review a criminal defendant's challenges to the trial court's jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). We apply this same standard to arguments claiming the trial court based its sentencing on improper considerations. *State v. Pinkerton*, 205 N.C. App. 490, 498, 697 S.E.2d 1, 6 (2010), *rev'd on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

B. Lesser-Included Offense Instruction

It is settled law that a trial court "must instruct the jury upon a lesser[-] included offense when there is evidence to support it." *State v. Brown*, 112 N.C. App.

390, 397, 436 S.E.2d 163, 168 (1993) (citing *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)). That is not so, "[h]owever, when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser[-]included offense, [as] it is not error for the trial judge to refuse to instruct [the jury] on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980) (citation omitted).

Jury instruction on a lesser-included offense is therefore appropriate only where " 'the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. U.S.*, 412 U.S. 205, 208, 36 L.Ed.2d 844, 847 (1973)). When reviewing whether conflicts in the evidence warrant instruction on a lesser-included offense, "courts must consider the evidence in the light most favorable to [the] defendant." *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (2011) (internal quotation marks and citations omitted), *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399, 400 (2011).

A defendant is guilty of felony child abuse inflicting serious physical injury under N.C. Gen. Stat. § 14-318.4(a) (2015) where: "(1) th[e] defendant is the parent or caretaker of a child under the age of 16, (2) th[e] defendant 'intentionally inflict[ed] . . . serious physical injury upon or to the child or . . . intentionally commit[ted] an assault upon the child,' and (3) . . . the assault or infliction of injury resulted in

'serious physical injury.' " *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 621 (2002) (quoting N.C. Gen. Stat. § 14-318.4(a)). Misdemeanor child abuse pursuant to N.C. Gen. Stat. § 14-318.2(a) (2015), by contrast, requires only infliction of "physical injury."

"Serious physical injury, within the meaning of [N.C. Gen. Stat.] § 14-318.4 [felony child abuse], is injury that causes 'great pain and suffering.' " *Williams*, 154 N.C. App. at 179, 571 S.E.2d at 621 (quoting *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303, *cert. denied*, 501 U.S. 1208 (1991)). "The term includes serious mental injury." N.C. Gen. Stat. § 14-318.4(d)(2).

"In determining whether an injury is serious, pertinent factors to consider include, but are not limited to: hospitalization, pain, loss of blood, and time lost from work." *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (citation omitted). That said, this Court has rejected the notion that a "serious physical injury" under N.C. Gen. Stat. § 14-318.4 is one requiring hospitalization or even immediate medical attention. *Id.* at 172, 595 S.E.2d at 211; *see also Williams*, 154 N.C. App. at 180, 571 S.E.2d at 622 (refusing to hold as a matter of law that a lack of hospitalization precluded a conclusion that an injury was a "serious physical injury" under N.C. Gen. Stat. § 14-318.4). Nor is there a requirement that a child be unable to attend school or be able to engage in play. *Williams*, 154 N.C. App. at 179-80, 571 S.E.2d at 621-22 (holding that there was sufficient evidence of "serious physical

injury" to support a conviction of felony child abuse under N.C. Gen. Stat. § 14-318.4(a) even where the child attended school and was able to play). The injury suffered need not be permanent to rise to the level of "serious physical injury" under N.C. Gen. Stat. § 14-318.4(a). *Compare* N.C. Gen. Stat. § 14-318.4(d)(2) (defining "serious physical injury" as one that "causes great pain and suffering") *with* N.C. Gen. Stat. § 14-318.4(d)(1) (defining "serious bodily injury" as one that "creates a substantial risk of death or that causes serious permanent disfigurement . . . a permanent or protracted condition . . . or permanent or protracted loss or impairment of the function of any bodily member or organ . . ."); *see also State v. Lowe*, 154 N.C. App. 607, 614-15, 572 S.E.2d 850, 856 (2002) (noting the distinctions in severity of injury between "serious bodily injury" under N.C. Gen. Stat. § 14-318.4(d)(1) for felonious child abuse under N.C. Gen. Stat. § 14-318.4(a3) and "serious physical injury" under N.C. Gen. Stat. § 14-318.4(d)(2) for felony child abuse under N.C. Gen. Stat. § 14-318.4(a)).

Defendant argues on appeal that there were conflicts in the evidence as to whether C.W. suffered "serious physical injury" under N.C. Gen. Stat. § 14-318.4(a) or merely "physical injury" under N.C. Gen. Stat. § 14-318.2. Specifically, he points to the evidence showing that: (1) C.W. was never hospitalized; (2) his skin was broken by the whipping but did not suffer from a "loss of blood;" (3) he was playing outside at some point during the days he was kept home from school and therefore was not

"unable" to go to school; and (4) there are no anticipated long-term physical health issues associated with the injuries. As a result, Defendant contends, the State's evidence was "equivocal" as to the seriousness of the injury such that an instruction on the lesser-included offense of misdemeanor child abuse was necessary. We disagree.

We addressed a similar argument in *State v. Matsoake*, ___ N.C. App. ___, 777 S.E.2d 810 (2015), *disc. rev. denied*, 368 N.C. 685 (2016), when a defendant convicted of first-degree rape argued on appeal that the trial court erred in declining to give a requested lesser-included offense instruction on attempted rape. ___ N.C. App. at ___, 777 S.E.2d at 813. Citing the victim's statements at trial that she thought penetration occurred but could not be certain, the defendant argued that the "evidence regarding [the necessary element of] penetration [for conviction of first-degree rape] was equivocal" such that a lesser-included instruction on attempted rape was necessary. *Id.* at ___, 777 S.E.2d at 815. The victim, however, also testified that defendant's penis had touched her vagina and positively identified the defendant when asked who had "penetrated [her] vagina with his penis." *Id.* at ___, 777 S.E.2d at 815 (alteration in original). The was also "substantial evidence of penetration" presented by the State, including physical evidence and testimony by the victim's medical providers. *Id.* at ___, 777 S.E.2d at 815. We therefore rejected the defendant's argument in the face of "the victim's testimony and other competent

evidence, viewed in the light most favorable to [the d]efendant," as the purportedly equivocal testimony was insufficient to "create a conflict in the evidence to require an instruction on attempted first-degree rape." *Id.* at ___, 777 S.E.2d at 815.

This case is analogous to *Matsoake*. Even if we assume *arguendo* that C.W. was able to attend school based on Mrs. St. Clair's testimony that C.W. played outdoors in the days following the whipping and that she and Defendant asked each other "how is [C.W.] going to school like this[,]" the State was not required to prove that C.W. was unable to attend school, *Williams*, 154 N.C. App. at 179-80, 571 S.E.2d at 621-22, and C.W.'s ability to attend school does not contradict or equivocate the "clear and positive" evidence from Mrs. St. Clair, the Investigator, and the Nurse that C.W. was in significant pain and suffered from bleeding, deep, and open wounds that warranted immediate medical attention. *Hardy*, 299 N.C. at 456, 263 S.E.2d at 718-19. Nor does the fact that C.W. was not taken to the hospital necessitate a lesser-included offense instruction; the State was not required to prove this fact either, *Williams*, 154 N.C. App. at 180, 571 S.E.2d at 622, and whether or not C.W. was actually taken to the hospital has no bearing on whether immediate medical treatment would have been reasonable as testified to by the Nurse. The same is true of the physical impermanency of C.W.'s injuries, as "serious physical injury" may exist irrespective of any permanent injury or disability. N.C. Gen. Stat. § 14-318.4. Thus, the "competent evidence, viewed in the light most favorable to Defendant, did

not create a conflict in the evidence to require a[lesser-included instruction]." *Matsoake*, ___ N.C. App. at ___, 777 S.E.2d at 815.

In short, the evidence is uncontradicted that: (1) C.W. was "in a lot of pain" and the injuries "would have been very painful[;]" (2) Mrs. St. Clair wanted to take C.W. to the hospital but was too afraid to ask Defendant to do so, and the Nurse believed immediate medical attention would have been reasonable; and (3) the wounds were deep, open, and would have bled. Such evidence suffices to prove felony child abuse inflicting serious physical injury within the scope of N.C. Gen. Stat. § 14-318.4(a). *Romero*, 164 N.C. App. at 172, 595 S.E.2d at 210; *see also Williams*, 154 N.C. App. at 180, 571 S.E.2d at 622. The State's evidence is "clear and positive" as to the element of serious physical injury, *Hardy*, 299 N.C. at 456, 263 S.E.2d at 718-19, and the evidence pointed to by the Defendant neither equivocates nor negates the State's evidence such that a lesser-included instruction was necessary. *Matsoake*, ___ N.C. App. at ___, 777 S.E.2d at 815.

C. The Trial Court's Comments During Allocution and Sentencing

Defendant's second argument posits that a new sentencing hearing is required because "it can be reasonably inferred from the trial judge's remarks that he imposed a more severe sentence [based on Defendant's decision to] exercise[] his right to a jury trial . . . ." We disagree.

"A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). The presumption is overcome where "the record discloses that the court considered irrelevant and improper matter [sic] in determining the severity of the sentence . . . ." *Id.* at 712, 239 S.E.2d at 465. This includes cases "[w]here it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury . . . ." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

Just prior to sentencing, Defendant delivered an allocution, which included the following exchange with the trial court:

> DEFENDANT: Yes, . . . I'm sorry for what had happened.
>
> I mean, I didn't even expect it to get this far. . . . It was me, in fact, disciplining my son, and yes. I still say it to this day. It did get out of hand. I mean, I shouldn't have snapped, and I did grab the first thing that I seen [sic] in front of me you know, but that's my boy. I love him.
>
> I mean, I love all my kids with all my heart. . . . I did the best I could as a parent you know . . . . I never imagined it would get this far, Your Honor. I didn't.
>
> You know, I do apologize to the Court. You know, I have been the sole provider for my family. . . . [E]verything has been me always, and I have did [sic] that faithfully, provided for my family the best I can.
>
> THE COURT: Mr. [Assistant District Attorney] Cameron,

> it's just so difficult for me as a parent to -- *I think about this little nine year old sitting here on this stand having to testify against a father who professes to love him, not only the father but the mother. I don't understand how you can do that.*
>
> *I sit in these courts every day, and I've had cases and fought them, child abuse and sex abuse. The majority of them, Mr. [defense counsel] Harrell, say that, "I just didn't want to put my family through this," and the fact that he did tells me that he was more concerned about him, that he never accepted the reality of the situation that he beat the skin off that boy which is inappropriate under any circumstance, and it negates all these other things that you have said.*
>
> Every child deserves an opportunity to grow up in a safe, secure, and loving environment, and as parents we cannot afford to snap.

(emphasis added).

Defendant contends that the emphasized language above supports a reasonable inference that the trial court entered a more severe sentence because of Defendant's decision to exercise his right to trial by jury. Taken in their full context, however, it is clear that the trial judge did not deliver those comments regarding the severity of the sentence, but instead as an expression of disbelief as to Defendant's statements that he was sorry, loved C.W., and placed his family before himself. A "trial court judge d[oes] not err when he comment[s] upon [a] defendant's allocution" where such a "reflexive comment" is "a mere expression of the trial court's reticence to trust the sincerity of [a] defendant's allocution . . . ." *State v. Pinkerton*, 205 N.C. App. 490, 505, 697 S.E.2d 1, 10-11 (2010) (Hunter, J., dissenting) (citing *State v. Tice*,

191 N.C. App. 506, 513-15, 664 S.E.2d 368, 373-74 (2008), and *State v. Person*, 187 N.C. App. 512, 527-28, 653 S.E.2d 560, 570 (2007), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008)), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011) (adopting dissent). Because the trial court's comments were simply an expression of incredulity in response to the statements made by Defendant in his allocution, we reject Defendant's argument.

III. Conclusion

We hold that Defendant was not entitled to a lesser-included instruction on misdemeanor child abuse because the State's substantial competent evidence was unequivocal and positively proved the element of serious injury to support conviction for felony child abuse. We further hold that the trial court's statements prior to sentencing were addressed to the veracity of the Defendant's allocution and do not indicate a sentence imposed based upon consideration of improper matters. As a result, we find no error by the trial court.

NO ERROR.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).