IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-472

Filed: 15 October 2019

Durham County, No. 15CRS058505

STATE OF NORTH CAROLINA

v.

WILLIE LEE MARTIN, III, Defendant.

Appeal by defendant from judgment entered 24 April 2017 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals on 30 January 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.

Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover, for defendant-appellant.

BERGER, Judge.

On April 26, 2017, Willie Lee Martin, III ("Defendant") was found guilty of felony child abuse resulting in serious physical injury. The jury also found as an aggravating factor that the victim was very young. Defendant was sentenced to 92 to 123 months in prison. On appeal, Defendant argues that the trial court erred by

(1) denying Defendant's motion to dismiss for sufficiency of the evidence, and (2) declining to instruct the jury on misdemeanor child abuse as a lesser-included offense. We disagree.

Factual and Procedural Background

Defendant and co-defendant Jessica Naomi Watkins ("Watkins") lived together in Durham, North Carolina. Defendant and Watkins are the parents of the victim, "John."[1] On September 8, 2015, Watkins took John, who was then two months old, to Dr. Keyona Gullett Oni ("Dr. Gullett") for a scheduled check-up. Dr. Gullett observed that John had several visible injuries, including bleeding in the whites of both eyes, and bruises on his tongue, ears, and chin. Watkins told Dr. Gullett that she believed Defendant inflicted the injuries.

Watkins noted that Defendant would often repeatedly flick John on the chin to keep him awake during feedings and that she believed the flicking was responsible for the bruising. According to Watkins, Defendant's actions caused John to cry and prevented him from feeding until Watkins was able to console him. Defendant would continue flicking John's chin despite Watkins' protests and Watkins' warnings that their neighbors may call the police because of John's crying.

Based on John's young age and the nature of his injuries, Dr. Gullett suspected abuse, and John was sent to the emergency department for additional evaluation.

[1] We refer to the victim by a pseudonym because he was under the age of eighteen at the time of the offense.

Dr. Gullett also attempted to contact the Department of Social Services ("DSS") caseworker who was working with Watkins concerning prior abuse allegations. Unable to reach Watkins' caseworker, Dr. Gullett contacted the DSS emergency line to report her concerns.

At the emergency department, a team of child maltreatment specialists evaluated John. Holly Warner ("Warner"), a nurse practitioner and member of the child maltreatment team, identified the injuries previously discovered by Dr. Gullett. While consulting with Warner, Watkins disclosed additional instances during which she observed Defendant "injur[ing] the child in the home." Based on her evaluation of John, Warner ordered a skeletal survey of the infant. The survey revealed healing fractures to John's posterior second and third ribs, as well as healing fractures in John's right tibia and fibula. A later x-ray also uncovered healing fractures to John's tenth and eleventh ribs.

At trial, Watkins testified that she observed Defendant punch John in the stomach and squeeze John in order to make the infant go to the bathroom. As a result of the punching and squeezing, John cried "a lot." Watkins further testified that she witnessed Defendant pick John up from his bassinet by the ankles and dangle the infant over Defendant's back. The dangling also caused John to cry. Watkins also testified that on August 25, 2015 she accidentally dropped John onto the floor while she fed him.

Both Warner and Dr. Molly Berkoff ("Dr. Berkoff"), a pediatrician and medical director of the child maltreatment team, testified at trial that John's injuries were non-accidental and consistent with an ongoing pattern of abuse based on John's young age at the time of the injuries, as well as the number, nature, and differing ages of his injuries. According to Warner, absent a bone disorder or a high-speed automobile collision, rib fractures in infants are typically a result of child abuse. Dr. Berkoff testified that a punch to the abdomen of an infant or a hard squeeze of an infant are both mechanisms capable of fracturing an infant's ribs. Additionally, Dr. Berkoff testified that, based on her medical knowledge and experience, a simple fall from a caregiver's arms would not result in rib fractures in a healthy infant. However, Dr. Berkoff testified that the cause of the injuries to John's lower right leg could not be determined because the injuries were in an advanced stage of healing when they were discovered.

The jury found Defendant guilty of felony child abuse resulting in serious physical injury, and he was sentenced to 92 to 123 months in prison. Defendant timely appeals arguing that the trial court erred by (1) denying Defendant's motion to dismiss for sufficiency of the evidence, and (2) declining to instruct the jury on misdemeanor child abuse as a lesser-included offense.

Standard of Review

A trial court's denial of a motion to dismiss is reviewed *de novo*. *State v. Williams,* 255 N.C. App. 168, 177, 804 S.E.2d 570, 576 (2017). On review, the question is whether there exists substantial evidence of (1) each essential element of the charged offense, and (2) the defendant's identity as the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In ruling on a motion to dismiss, the trial court must view all 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. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Substantial evidence can be either direct or circumstantial. *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826 (2015). "If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. The trial court's role is not to weigh the evidence, consider evidence unfavorable to the State, or determine the credibility of the State's witnesses. *State v. Parker,* 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001). Rather, "[o]nce the court determines that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts,

taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

A trial court's denial of a requested jury instruction on a lesser-included offense is also reviewed *de novo*. *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015). When considering whether to submit an instruction on a lesser-included offense to the jury, the trial court must first determine whether "the lesser offense is, as a matter of law, an included offense for the crime which the defendant is indicted." *State v. Smith*, 186 N.C. App. 57, 65, 650 S.E.2d 29, 35 (2007) (citation and quotation marks omitted). If so, then an instruction on the lesser-included offense must be given if the evidence would permit a rational juror "to find [the] defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

Analysis

Defendant first argues that the trial court erred when it denied his motion to dismiss because the State failed to present sufficient evidence that he caused serious physical injury to John. We disagree.

A defendant may be found guilty of felony child abuse if the State proves beyond a reasonable doubt that (1) the defendant is the parent or other person providing care to or supervision of a child; (2) the child is less than sixteen years of

age; and (3) the defendant intentionally inflicted serious physical injury upon the child or intentionally assaulted the child resulting in serious physical injury. N.C. Gen. Stat. § 14-318.4(a) (2017). A serious physical injury is one that causes "great pain and suffering." N.C. Gen. Stat. § 14-318.4(d). "[B]ecause the nature of an injury is dependent upon the relative facts of each case, whether an injury is 'serious' is generally a question for the jury." *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210-11 (2004). Here, neither party disputes Defendant's relationship to John or John's age. Defendant argues that the State failed to produce substantial evidence that he was responsible for John's serious physical injury.

At trial, the State produced sufficient evidence that John suffered serious physical injury. The State's evidence tended to show that John had healing fractures of his posterior second and third ribs, fresh fractures of his tenth and eleventh ribs, healing fractures of his tibia and fibula in the lower right leg, bleeding in the whites of both of his eyes, and bruises on his tongue, ears, and chin. Warner and Dr. Berkoff both testified that, given the number, location, and differing ages of the injuries on an infant as young as John, the injuries were non-accidental and consistent with a pattern of abuse. Dr. Berkoff further testified that based on her medical knowledge and experience, John's injuries would not result from the fall from Watkins' arms.

This Court has determined that a child victim crying and bruising after being assaulted is sufficient to prove serious physical injury. *Id.* at 173, 595 S.E.2d at 211.

Here, John's injuries included not just bruising, but fractures to his ribs and legs. There was substantial evidence that John suffered serious physical injury.

Additionally, the State presented substantial evidence to permit a reasonable inference that Defendant caused John's serious physical injury. Watkins testified that she witnessed Defendant punch John in the stomach and squeeze John. According to Dr. Berkoff, either a punch to the abdomen or a hard squeeze could cause rib fractures in an infant.

Watkins also testified that she witnessed Defendant repeatedly flick John hard under his chin to keep him awake during feedings and witnessed Defendant lift John by his ankles and dangle the infant over Defendant's back. Even though the State's medical experts were unable to determine the cause of the fractures to John's lower right leg because the injuries were in an advanced stage of healing when discovered, there was sufficient evidence to permit a reasonable inference that Defendant caused these injuries by lifting John by the ankles and dangling him by his legs.

Although the evidence did not eliminate every conceivable theory of Defendant's innocence, when viewed in a light most favorable to the State, there was substantial evidence from which a reasonable juror could infer that John suffered serious physical injury at the hands of Defendant. Accordingly, the trial court did not err when it denied Defendant's motion to dismiss based on sufficiency of the evidence.

Defendant next argues that the trial committed error by denying his request to instruct the jury on misdemeanor child abuse as a lesser-included offense. We disagree.

Ordinarily, where the essential elements of a lesser statutory offense are covered by a greater statutory crime, then it is a lesser-included offense of the greater crime. *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 6 (2002). However, even where the elements of two statutory crimes are virtually identical, "the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended." *State v. Gardner*, 315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986). Thus, if statutory language plainly indicates that a lesser offense should be punishable in addition to a greater crime, then our courts must treat both offenses separately in order to give effect to the clearly intended legislative scheme. *See id.* at 455, 340 S.E.2d at 709.

Here, Defendant was charged and convicted of felony child abuse under Section 14-318.4(a) of the North Carolina General Statutes. At trial, Defendant requested that the court also instruct the jury on misdemeanor child abuse. Although the essential elements of misdemeanor child abuse would appear to be covered by felony child abuse, the plain language of Section 14-318.2(b) states that "[t]he Class A1 misdemeanor of child abuse is an offense *additional to other . . . criminal provisions*

and is not intended to repeal or preclude any other sanctions or remedies." N.C. Gen. Stat. § 14.318.2(b) (2017) (emphasis added).

Interpreting this provision, this Court has previously noted that the General Assembly "did not intend [misdemeanor] child abuse to be a lesser included offense or to merge with any other offense." *State v. Mapp*, 45 N.C. App. 574, 585, 264 S.E.2d 348, 356 (1980); *see also State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 219 (1996) (discussing how similar language found under Section 14-318.4(b) "clearly expressed" the legislature's intent to punish a defendant cumulatively for forms of child abuse and other crimes arising out of the same conduct).

Therefore, pursuant to the plain language of Section 14-318.2(b) and the precedent established by *State v. Mapp* and *State v. Elliott*, the trial court did not err when it denied Defendant's requested instruction on misdemeanor child abuse.

Conclusion

For the reasons set forth herein, the trial court did not err when it denied Defendant's motion to dismiss for sufficiency of the evidence. In addition, the trial court did not err when it denied Defendant's requested jury instruction on misdemeanor child abuse as a lesser-included offense.

NO ERROR.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).