MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Richard Osowski,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 8, 2023

Court of Appeals Case No. 23A-CR-1118

Appeal from the Hendricks Circuit Court

The Honorable Daniel F. Zielinski, Judge

Trial Court Cause No. 32C01-2103-F1-1

Memorandum Decision by Judge Riley.
Judges Crone and Mathias concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Richard Osowski (Osowski), appeals his conviction for neglect of a dependent resulting in death, a Level 1 felony, Ind. Code § 35-46-1-4(a)(3), (b)(3).

[2] We reverse and remand with instructions to enter judgment for the offense as a Level 6 felony and for resentencing.

ISSUE

[3] Osowski presents this court with one issue: Whether the State proved beyond a reasonable doubt that he committed the offense of neglect of a dependent resulting in death.

FACTS AND PROCEDURAL HISTORY

[4] S.O. was born on September 15, 2019, to Osowski and Alyssa Loomis (Loomis). S.O. was born prematurely, weighing one pound, eight ounces at birth, and spent the first three months of her life in the NICU ward. On December 22, 2019, S.O. was discharged from the hospital and was taken by Osowski and Loomis to their home in Danville, Indiana, where Loomis' three-year-old daughter from a prior relationship, G.L., also resided. By the time of S.O.'s discharge from the hospital, she had gained a significant amount of weight, but she still had to receive her nutrition through a feeding tube, a time-consuming process that had to be repeated every three hours. S.O. also experienced an on-going issue with her eyes that had been diagnosed as a

blocked tear duct. As a result of this condition, S.O. often had redness, puffiness, and crustiness around her eyes.

[5] On January 10, 2020, Loomis' mother and sister, who lived less than a two-minute drive away, came to Osowski's and Loomis' home to care for S.O. from approximately 5:00 p.m. to 8:00 p.m. while Osowski and Loomis went grocery shopping. When S.O. was in the care of Loomis' mother and sister, neither observed that S.O. had any marks, bruises, or injuries, and the child appeared to be acting normally. S.O. slept most of the time her parents were away. S.O. had fluid running from her eye and puss on the inside of one of her eyes. Loomis' mother and sister stayed until around 9:00 p.m. and then went home.

[6] On Saturday, January 11, 2020, Loomis awoke around 3:00 a.m. to feed S.O. and to prepare to leave for her work at a Brownsburg, Indiana, gas station. S.O.'s feeding went normally, and Loomis went to work, leaving S.O. and G.L. in Osowski's care. Loomis left for work at approximately 4:45 a.m. and arrived at work by 5:20 a.m. Loomis texted Osowski throughout the day to inquire about the girls. Osowski did not report that anything unusual had occurred, although he commented around 10:30 a.m. that S.O. was "a pain in [his] ass lol[.]" (Exh. Vol. p. 26). Loomis got off work at 2:00 p.m. and went to do some planned errands. At 2:23 p.m. Osowski texted Loomis inquiring about her whereabouts, and the two texted about details related to the errands Loomis was running. According to Osowski's later accounts, sometime between noon and 3:00 p.m., Osowski heard S.O. make a "gasp[ing] breathing noise" that "didn't sound normal[.]" (Transcript Vol. III, pp. 11, 19). Osowski also later

related that he had fed S.O. in the normal manner around 3:00 p.m. and that around 3:40 p.m. he noticed that S.O. had red dots and purple areas across both of her eyes. At 3:26 p.m. Osowski texted Loomis to inquire where she was. Loomis called Osowski back and spoke to him until she was almost home. Osowski did not mention anything unusual about S.O. in these communications.

[7] Loomis arrived home around 3:45 p.m. After Loomis arrived, she used the restroom and then went outside with Osowski to smoke, which was their normal routine upon her return from work. After they had finished smoking, Osowski suggested that Loomis check on S.O.'s eye because it "looked a little puffy" and "had the usual stuff in it[.]" (Tr. Vol. II, p. 174). Loomis checked on S.O., who was swaddled, and was concerned about her wellbeing. At 3:56 p.m., Loomis did a search on her cellphone for "infant eye bruising". (Tr. Vol. II, p. 186; Exh. Vol. p. 43). Osowski told Loomis that he thought they did not need to seek medical assistance for S.O. Loomis then called her sister, who worked in the medical field and who Loomis always called if she thought something was wrong with her children. At her sister's request, at 3:59 p.m. Loomis sent her sister an image of S.O.'s face in which S.O.'s right eye appears to be puffy, and a dark spot is visible at the inside corner of her right eye. Loomis unswaddled S.O., and the child made a gasping sound. Loomis' sister advised that S.O. should be taken to the hospital immediately.

[8] Loomis drove G.L. to her grandmother's and aunt's house nearby while Osowski remained with S.O. at home. Minutes later, Loomis returned, picked

up Osowski and S.O., and drove to Hendricks Regional Health Hospital (Hendricks), which was less than a five-minute drive away. The receiving emergency room personnel were so concerned for S.O.'s wellbeing that they requested immediate physician care for S.O. Dr. Elaina Diorio (Dr. Diorio) attended to S.O. Because S.O. was non-verbal, Dr. Diorio initially relied on the history taken from Loomis and Osowski to guide her treatment of S.O. When speaking to Dr. Diorio or to other Hendricks treating personnel, Osowski did not report that anything traumatic or unusual had happened to S.O. A physical examination of S.O. revealed that the child had bruising on her right leg in the pattern of the spaces between a gripped hand, which was concerning to Dr. Diorio because a nonmobile infant like S.O. could not have moved enough to injure herself in that manner. S.O. was lethargic and had purple spots around her eyes. In addition, the soft spot at the top of the head that infants normally have was full rather than flat, indicating that S.O. had increased pressure on her brain. During S.O.'s time at Hendricks, bruising and swelling developed on her abdomen which Dr. Diorio believed required more force than S.O. could have mustered to inflict upon herself. The bruising around S.O.'s eyes also continued to develop. Although she could not formulate a precise timeline, due to the appearance and development of S.O.'s injuries, it was Dr. Diorio's opinion that S.O. had been injured "within a few hours" of being brought to the hospital. (Tr. Vol. II, p. 93).

[9] S.O. underwent a CT scan and began to seizure. S.O.'s heart rate fell. S.O. was intubated to receive oxygen, was provided with anti-seizure medication,

and was placed under sedation in preparation to be transported to Riley Hospital in Indianapolis for further care. Prior to S.O.'s departure for Riley Hospital, Dr. Diorio informed Osowski and Loomis that S.O. was bleeding in her brain and that her chances of survival were poor. Loomis became upset and ran away from the doctor. Osowski asked Dr. Diorio what causes injuries like S.O.'s, and Dr. Diorio informed him that it was caused by trauma. Osowski again asked what caused it, whereupon Dr. Diorio responded, "tell me." (Tr. Vol. II, p. 97). Osowski said nothing and walked away. Dr. Diorio felt that S.O.'s prognosis at that point was very poor and that it was uncertain that S.O. would survive long enough to receive further treatment.

[10] Upon her arrival at Riley Hospital, blood was drained from S.O.'s head. Dr. Shannon Thompson (Dr. Thompson), a child-abuse specialist, diagnosed S.O. with traumatic brain and spine injuries, damage to her retina, and bruising to the exterior of her eyes, all of which was consistent with S.O. having been violently shaken. Because of the tremendous amount of force required to produce such injuries and the fact that S.O. was pre-mobile, Dr. Thompson concluded that S.O.'s injuries were the result of abuse.

[11] During the evening of January 11, 2020, while S.O. was receiving emergency care at Riley Hospital, Osowski was interviewed by a detective with the Danville Police Department. Osowski confirmed that he was the only adult at home all day with S.O. while Loomis was at work. When confronted with the grip-like bruises on S.O.'s right leg, Osowski stated that they were incurred during a diaper change. S.O.'s condition did not improve, and by January 15,

2020, S.O. was brain dead. On January 18, 2020, S.O. died after being removed from life support. S.O.'s autopsy confirmed that she had sustained multiple blunt-force impacts to her head and spine and that she had died due to the swelling in her brain that trauma had caused.

[12] On March 8, 2021, the State filed an Information, charging Osowski with Level 1 felony aggravated battery resulting in death, Level 1 felony neglect of a dependent resulting in death, and Level 5 felony battery resulting in bodily injury to a person less than fourteen years of age. On February 28, 2023, the trial court convened Osowski's two-day jury trial. Dr. Thompson and the pathologist who performed S.O.'s autopsy both testified that an infant with S.O.'s injuries would almost immediately not have acted normally. The pathologist opined that a layperson who looked at S.O. after she had sustained her injuries would have known that she was not acting normally and that the amount of force required to inflict S.O.'s injuries was not consistent with someone accidentally dropping S.O. Loomis testified that prior to January 11, 2023, S.O.'s eye condition had settled into one of her eyes. Osowski testified at trial and denied injuring S.O. Osowski told the jury that after giving S.O. her 3:00 p.m. feeding, he saw red and purple discoloration around S.O.'s eyes and that, while he had previously seen purple around her eyes, "the red dots were new." (Tr. Vol. III, p. 21). Osowski insisted that S.O. had sustained the bruising on her leg because she was a "strong kicker" and that she had taken her 3:00 p.m. feeding in the normal manner. (Tr. Vol. III, p. 32). Osowski

explained that he told Loomis that they did not need to seek treatment for S.O. because her eye condition was something that they already knew about.

[13] At the conclusion of the evidence, the jury found Osowski guilty as charged. On March 23, 2023, the trial court held Osowski's sentencing hearing. The trial court sentenced Osowski to thirty years for his aggravated battery conviction, to thirty years for his neglect of a dependent conviction, and to three years for his battery resulting in bodily injury conviction, all to be served concurrently.

[14] Osowski now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[15] Osowski only challenges the evidence supporting his conviction for Level 1 felony neglect of a dependent resulting in death. Pursuant to our well-settled and deferential standard of review, we neither reweigh the evidence nor judge the credibility of witnesses, and we consider only the probative evidence and reasonable inferences that support the jury's verdict. *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007).

[16] A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally deprives the dependent of necessary support commits Level 6 felony neglect of a dependent. I.C. § 35-46-1-4(a)(3). The offense is a Level 1 felony if it is committed by a person at least eighteen years of age and results in the death of a dependent who

is less than fourteen years of age. I.C. § 35-46-1-4(b)(3). The State charged Osowski with Level 1 felony neglect of a dependent as follows:

> On or about January 11, 2020, . . . Osowski, being at least 18 years of age and having the care of [S.O.], a dependent less than 14 years of age, did knowingly deprive the dependent of necessary support, to wit: needed medical care, and which resulted in the death of [S.O.]

(Appellant's App. Vol. II, p. 23).

[17] Osowski first contends that the State failed to prove that he knew S.O. required necessary medical treatment and that he deprived her of that treatment. For purposes of the neglect statute, "necessary support" is the "food, clothing, shelter, and medical care without which the dependent's life or health is at risk or endangered." *Ricketts v. State*, 598 N.E.2d 597, *trans. denied*. Where the neglect alleged is a failure to provide necessary medical care, the State is required to prove that the defendant acted with awareness of a high probability that he was engaging in the proscribed conduct. *See Taylor v. State*, 28 N.E.3d 304, 306 (Ind. Ct. App. 2015) (citing I.C. § 35-41-2-2(b)), *trans. denied*. The need for medical care must be actual and apparent, and the defendant must be actually and subjectively aware of that need. *Id*. The State may prove a defendant's actual knowledge of the need for medical care through circumstantial evidence. *Sample v. State*, 601 N.E.2d 457, 459 (Ind. Ct. App. 1992). In cases where neglect is alleged as a result of a failure to procure medical care, "[w]hen there are symptoms from which the average layperson would have detected a serious problem necessitating medical attention, it is

reasonable for the jury to infer that the defendant knowingly neglected the dependent." *Mitchell v. State*, 726 N.E.2d 1228, 1240 (Ind. 2000), *abrogated on other grounds*.

[18] Here, contrary to Osowski's assertions, the evidence most favorable to the jury's verdict established that Osowski was subjectively aware of S.O.'s need for medical care. On January 11, 2020, between the hours of 4:45 a.m. and approximately 3:45 p.m., Osowski was the only adult present in the home. Sometime during that time period, S.O. sustained multiple impacts to her head and spine consistent with being violently shaken. The pathologist who performed S.O.'s autopsy characterized the force necessary to impart S.O.'s injuries as being equivalent to a motor vehicle accident or a fall from a great height, and Dr. Thompson testified that S.O.'s injuries were the result of abuse. This court has acknowledged that, where the record supports a reasonable inference that the defendant himself inflicted the victim's injuries that required care, the factfinder may reasonably infer that the defendant was subjectively aware of the need for care. *Sanders v. State*, 734 N.E.2d 646, 650-51 (Ind. Ct. App. 2000), *trans. denied*. We conclude that the jury could have reasonably concluded from the evidence that Osowski inflicted S.O.'s injuries, a conclusion Osowski does not dispute on appeal, and, therefore, that he was subjectively aware of S.O.'s need for medical care. *See id.*

[19] In addition, S.O.'s injuries were inflicted "within a few hours" of being brought to the hospital. (Tr. Vol. II, p. 93). The State established at trial that S.O. would not have been acting normally almost immediately after sustaining her

injuries and that a layperson could have looked at S.O. and known she was not acting normally. According to Osowski's own testimony, sometime between noon and approximately 3:00 p.m., he heard S.O. make an unusual gasping sound. We conclude that an average layperson who heard an infant child who had been born premature and had just recently been released from the hospital make a gasping noise was exhibiting distress and was in need of medical attention. *Mitchell*, 726 N.E.2d at 1240. However, Osowski did nothing. Also according to his own testimony, by 3:40 p.m., Osowski noticed that both of S.O.'s eyes had new, red dots around them, a circumstance from which the jury could have additionally concluded that Osowski knew of S.O.'s need for medical treatment despite evidence of a pre-existing condition, as Loomis testified that by January 11, 2020, the blocked tear duct issue had settled into only one eye. Despite this additional evidence of his knowledge of S.O.'s need for care, Osowski and Loomis smoked a cigarette before Osowski suggested that Loomis might want to check on S.O. In light of Osowski's infliction of S.O.'s injuries, the unusual gasping sound Osowski heard S.O. make, and the development of new, red dots around both eyes where there had previously only been a different appearing condition in one eye, we conclude that S.O.'s need for medical care was actual and apparent and that Osowski was actually and subjectively aware of S.O.'s need. *Taylor*, 28 N.E.3d at 306.

[20] Neither can we credit Osowski's assertion that the State failed to prove that he deprived S.O. of care. It was not disputed that Osowski did not seek any assistance for S.O. before Loomis returned home just before 4:00 p.m. on

January 11, 2020. After Osowski suggested that Loomis check on S.O., Loomis immediately became concerned for S.O.'s wellbeing. Even though he had inflicted serious injury on S.O., Osowski attempted to dissuade Loomis from taking S.O. to the hospital by telling her he thought they did not need to seek treatment, which further delayed S.O.'s care as Loomis checked with her sister and was finally persuaded to take S.O. to the hospital. Osowski's challenge on this point is that the delay was too short to constitute neglect, citing cases where convictions for neglect were sustained where treatment was delayed for multiple hours or even days. However, the evidence and inferences most favorable to the jury's verdict are that S.O. made an unusual gasping sound as early as noon on January 11, 2020, which would have been approximately four hours before Loomis decided to take S.O. to the hospital. This court has affirmed convictions for neglect entailing substantially shorter delays than four hours. *See Lindhorst v. State,* 90 N.E.3d 695, 792 (Ind. Ct. App. 2017) (finding sufficient evidence of neglect where Lindhorst delayed seeking care for a child's life-threatening injuries for up to two hours); *see also Lush v. State*, 783 N.E.2d 1191, 1197-98 (Ind. Ct. App. 2003) (finding sufficient evidence of neglect through deprivation of medical care where Lush inflicted the victim's injuries and care was delayed by fifteen minutes as Lush went to the victim's mother's workplace prior to taking the victim to the hospital).

[21] Given this evidence of Osowski's knowledge of S.O.'s need for medical care and his deprivation of that care, we conclude that the State established that Osowski knowingly deprived S.O. of necessary support. *See* I.C. § 35-46-1-

4(a)(3). However, when a dependent's death is used to elevate the felony level of the neglect offense, the State is also required to prove beyond a reasonable doubt that the dependent's death would not have occurred but for the defendant's failure to provide medical care. *Patel v. State*, 60 N.E.3d 1041, 1052 (Ind. Ct. App. 2016). In *Patel*, the defendant induced her own labor and gave birth to a premature but alive male baby. *Id*. at 1045-46. Patel cut the umbilical cord, placed the baby in a plastic bag, and left the baby in a dumpster before driving herself to the hospital for medical care. *Id*. at 1046. Patel was subsequently convicted of class A felony neglect of a dependent for failing to provide medical care to her baby immediately after his birth, resulting in his death. *Id*. at 1048. While the *Patel* court found sufficient evidence that Patel was subjectively aware that her baby had been born alive and that she had endangered her baby by failing to provide him with care, the court agreed with Patel that there was insufficient evidence that Patel's failure to provide medical care had resulted in the baby's death. *Id*. at 1052. In reaching this conclusion, the *Patel* court cited *Bergmann v. State*, 486 N.E.2d 653, 657 (Ind. Ct. App. 1985), wherein the defendant's conviction for class B felony neglect of a dependent was affirmed in light of testimony from the coroner to the effect that, within the bounds of reasonable medical certainty, the child would have had a good chance of surviving if she had received timely medical treatment, that the child had no chance of survival without medical treatment, and that early treatment in similar cases provided a 90-95% survival rate. *Id*. at 1053. The *Patel* court also relied on *Brown v. State*, 770 N.E.2d 275, 281 (Ind. 2002), a case wherein our highest court affirmed a mother's conviction for neglect resulting in

death, where the State provided testimony from a doctor that the victim's chances of survival would have been good if she had received prompt medical treatment after her father fractured her skull. *Id.* Noting that in Patel's case no witnesses "testified as to how quickly any medical care could have been provided or whether it could have changed the outcome[,]" the court found the evidence on this element insufficient, vacated Patel's conviction for class A felony neglect of a dependent, and remanded for entry of judgment and resentencing for class D felony neglect of a dependent. *Id.* at 1054-55.

[22] We reach the same conclusion here. The State elicited no testimony from the pathologist, Dr. Diorio, or Dr. Thompson regarding how the provision of earlier medical care would have changed the outcome for S.O., nor did it provide any evidence of S.O.'s better chances of survival had she received earlier care. On appeal, the State argues that the members of the jury were allowed to apply their own life experiences when assessing the evidence on this element and that "[c]ommon sense would dictate that earlier medical intervention would have allowed doctors to diagnose S.O.'s condition earlier and begin treatment sooner." (Appellee's Br. p. 12). However, in light of *Bergmann*, *Brown*, and *Patel*, we conclude that the jury must be provided with at least some evidence upon which to exercise its common-sense judgment and that, here, there was none. As such, we vacate Osowski's conviction for Level 1 felony neglect of a dependent and remand for entry of judgment on and resentencing for Level 6 felony neglect of a dependent. *See Patel*, 60 N.E.3d at 1054-55; *see also Keith v. State*, 127 N.E.3d 1221, 1230 (Ind. Ct. App. 2019)

(holding that where there is insufficient evidence to support an element which elevates the felony level of an offense, this court orders the trial court to vacate the conviction and to enter judgment on the highest class of offense supported by the evidence).

CONCLUSION

[23] Based on the foregoing, we conclude that the State failed to prove beyond a reasonable doubt that Osowski's neglect resulted in S.O.'s death but that there is sufficient evidence to sustain his conviction for Level 6 felony neglect for failing to provide necessary support.

[24] Reversed and remanded with instructions to vacate the Level 1 felony conviction, to enter judgment of conviction for Level 6 felony neglect of a dependent, and for resentencing.

Reversed and remanded.

Crone, J. and Mathias, J. concur.