MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brandon L. Abbott,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 9, 2022

Court of Appeals Case No. 21A-CR-2193

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-1411-FA-16

Altice, Judge.

Case Summary

[1] Following a jury trial, Brandon Abbott appeals his convictions for two counts of Level 1 felony neglect of a dependent resulting in death. Abbott presents two issues for our review:

1. Is the evidence sufficient to support his convictions?

2. Do his convictions violate principles of double jeopardy?

[2] We affirm.

Facts & Procedural History

[3] During the late afternoon/early evening on April 4, 2014, Abbott picked up Nicole Thomas from her house and drove her to his house. The plan was to "hang out" and possibly use drugs. *Transcript Vol. 5* at 180. Also at Abbott's house were Abbott's three-year-old twin boys, L.C.A. and L.T.A. (the Children), and three other individuals. As the evening progressed, Abbott, Thomas, and the others smoked DAB pens[1] and took ecstasy in the living room while the Children ran around and played. At some point, the Children fell asleep in what Abbott referred to as the "black light" room, which was on the first floor next to the living room. *Id.* at 208. After two of Abbott's other guests

[1] DAB is a liquid form of marijuana that can be smoked with "something like" an "e-cigarette." *Id.* at 181.

left late that night/early the next morning, Abbott and Thomas went upstairs to his bedroom, had sex, and fell asleep.

[4] Around 11:00 a.m. on April 5, Abbott and Thomas woke up to the sound of a smoke detector going off, and Abbott went to investigate. As he reached the top of the stairs, he could see smoke coming from the room where the Children were sleeping the night before. Abbott ran down the stairs and saw that the couch in the room was on fire, but the Children were not there. He then tried to smother the fire with a blanket and when that did not work, he tried to pull the couch out of the room but was unable to do so as the upholstery melted off onto his hands. At that point, Abbott went to the kitchen and grabbed a bowl of water to douse the flames, but to no avail.

[5] When he realized he could not put the fire out, Abbott decided to get everyone out of the house. He ran around the house yelling for the Children but eventually had to run outside because he could not breathe. Abbott took a few breaths of air before heading back into the house. Abbott yelled for the Children using their nicknames but received no response. At some point, Thomas, who had been waiting in the upstairs bedroom, tried to get out of the house and ended up falling down the stairs, hitting Abbott. They both went outside, and Thomas asked about the twins. Abbott told her that "they were still in there." *Id.* at 183. Abbott then got in his car and tried to drive through the garage door to gain access to the house. When that did not work, Abbott "started rolling around in the gravel yelling" about "his babies." *Id*. at 184.

[6] Two of Abbott's neighbors came to help but they too were unsuccessful in locating the Children as the house was "engulfed in flames" and smoke was pouring out from everywhere. *Transcript Vol. 4* at 52. Shortly thereafter, deputies with the Tippecanoe County Sheriff's Department (TCSD) arrived. The officers managed to locate the Children and pulled them out through a window. Both children were unresponsive. They were transported to the hospital where they were declared dead. Subsequent autopsies revealed that the Children had gone into respiratory arrest due to asphyxia cause by "inhalation of soot, super-heated air, and carbon monoxide." *Transcript Vol. 5* at 206, 207.

[7] Abbott and Thomas were also transported to the hospital for treatment. Blood samples obtained from Abbott and Thomas were sent to the Indiana State Department of Toxicology. The results showed that Abbott's blood sample contained THC-COH, an inactive metabolite of THC,[2] hydrocodone, and ecstasy. Thomas had THC-COH, amphetamines, hydrocodone, fentanyl, and ecstasy in her blood.

[8] The following day, TCSD deputies searched the remains of Abbott's residence. As they searched through the rubble, they found drugs and paraphernalia. Specifically, they located marijuana, marijuana pipes, marijuana "roaches,"[3] marijuana grinders, rolling papers, digital scales, hydrocodone, clonazepam,

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[2] The inactive metabolite of THC does not cause impairment but is an indicator of marijuana use.

[3] A "roach" is a burned marijuana cigarette. *Id.*

alprazolam, amphetamines, and ecstasy. *Transcript Vol. 4* at 173. They also located multiple lighters in various places throughout the house, a small propane tank in one of the bedrooms, and a "torch type lighter' in the kitchen. *Id*. at 174.

[9] Dennis Randle, working on behalf of the Indiana State Fire Marshal, did an investigation into the cause of the fire. He determined that the room with the most damage was the room where the fire started and that it started between the sofa and the wall. This was the room where the Children had been sleeping the night before the fire. In going through the rubble, he found an exploded LP tank in that room. As part of his investigation, Randle ruled out electrical issues, gas line issues, natural causes such as a lightning strike, and problems with the furnace and free-standing fireplace as causes of the fire. He also did not find any sign that the fire was intentionally set with an accelerant like gasoline. Ultimately, Randle concluded that the cause of the fire was "undetermined." *Id*. at 241.

[10] A few days after the fire, Abbott visited Thomas in the hospital and asked her not to tell the police that they had been smoking with DAB pens the night before the fire. He also took steps to avoid speaking with detectives because he "assumed [he] was going to be getting arrested for drugs." *Transcript Vol. 5* at 248. He also "thought . . . they were going to blame [him] for killing [his] kids." *Id*. Although he did not believe he was responsible for their deaths, Abbott admitted that he "[p]robably" neglected them. *Id*. at 249.

[11] On November 3, 2014, the State charged Abbott with two counts of Class A felony neglect of a dependent resulting in death, Class B felony dealing in a schedule I controlled substance, two counts of Class D felony possession of a schedule I controlled substance, Class C felony possession of a narcotic drug, Class D felony possession of a schedule II controlled substance, Class D felony possession of a schedule IV controlled substance, Class D felony dealing in marijuana, Class D felony possession of marijuana, Class D felony maintaining a common nuisance, Class A misdemeanor possession of paraphernalia, and Class A misdemeanor contributing to the delinquency of a minor. On March 17, 2015, Abbott pled guilty to both counts of neglect of a dependent resulting in death. On April 9, 2015, the trial court sentenced Abbott to consecutive thirty-five-year terms for a total sentence of seventy years. The court ordered sixty-six years to be executed in the Indiana Department of Correction (DOC) and suspended four years to probation.

[12] On January 4, 2016, Abbott filed a petition for permission to file a belated notice of appeal, which the trial court denied. Abbott subsequently filed a petition for post-conviction relief, which was granted. In so doing, the post-conviction court vacated his guilty plea, judgments of conviction, and sentence.

[13] Abbott was retried on the original thirteen counts. A four-day jury trial commenced on June 7, 2021, at the conclusion of which the jury found Abbott guilty as charged. The trial court held a sentencing hearing on September 13, 2021. The court imposed consecutive twenty-six-year sentences for Abbott's

convictions for neglect of a dependent, for a total of fifty-two years.[4] The court ordered forty-six years to be executed at the DOC and suspended six years to probation. Abbott now appeals. Additional facts will be presented as necessary.

Discussion & Decision

1. Sufficiency

[14] When addressing sufficiency of the evidence claims, our standard of review is well settled: we do not reweigh the evidence or judge the credibility of the witnesses. *McCallister v. State*, 91 N.E.3d 554, 558 (Ind. 2018). Rather, we consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Purvis v. State*, 87 N.E.3d 1119, 1124 (Ind. Ct. App. 2017). We will affirm a defendant's conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

[15] In April 2014, Ind. Code § 35-46-1-4 defined the offense of neglect of a dependent resulting in death as follows:

[4] The court merged some of the convictions and ordered the sentences on the remaining convictions to be served concurrently with the sentence imposed on the two counts of neglect of a dependent.

> (a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
>
> > (1) places the dependent in a situation that endangers the dependent's life or health;
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> commits neglect of a dependent, a Class D felony.
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> (b) However, the offense is:
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> > (3) a Class A felony if it is committed under subsection (a)(1) . . . by a person at least eighteen (18) years of age and results in the death of a dependent who is less than fourteen (14) years of age.

This statute applies to situations that expose a dependent to an actual and appreciable danger to life and health. *Scruggs v. State*, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008) (citing *Gross v. State*, 817 N.E.2d 306, 308 (Ind. Ct. App. 2004)), *trans. denied*. In *Scruggs*, we reiterated:

> [T]hat to be an "actual and appreciable" danger for purposes of the neglect statute when children are concerned, the child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child. This is consistent with a "knowing" mens rea, which requires subjective awareness of a "high probability" that a dependent has been placed in a dangerous situation, not just any probability.

883 N.E.2d at 191 (quoting *Gross*, 817 N.E.2d at 308). "Because such a finding requires one to resort to inferential reasoning to ascertain the defendant's

mental state, the appellate courts must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper." *McMichael v. State*, 471 N.E.2d 726, 731 (Ind. Ct. App. 1984), *trans. denied*.

[16] Here, Abbott does not dispute that he was the Children's father and primary caregiver; that he regularly abused marijuana, hydrocodone, and ecstasy while he was supposed to be taking care of the Children and while in in the presence of the Children; that he did so the night before the Children died; or that as a result of his drug use, there were drugs and paraphernalia, including multiple lighters, strewn about the house where the Children had access to them. Indeed, Abbott acknowledges that our Supreme Court has held that in the specific context of drug abuse, "the knowing exposure of a dependent to an environment of illegal drug use poses an actual and appreciable danger to that dependent and thereby constitutes neglect regarding the endangerment requirement of the offense." *White v. State*, 547 N.E.2d 831, 836 (Ind. 1989). He even admitted that he "[p]robably" neglected the Children. *Transcript Vol. 5* at 249.

[17] On appeal, Abbott's challenge to the sufficiency of the evidence is that the State failed to prove beyond a reasonable doubt that his drug use "resulted in" the Children's deaths. In this vein, he asserts that the Children died as a result of a house fire, the cause for which was undetermined.

[18] In *Patel v. State*, 60 N.E.3d 1041, 1052 (Ind. Ct. App. 2016), this court found that the phrase "results in the death of a dependent" as used in I.C. § 35-46-1-

4(b)(3) implicates proximate causation. Generally, "[a]n act or omission is said to be a proximate cause of an injury if the resulting injury was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of act or omission." *Funston v. Sch. Town of Munster*, 849 N.E.2d 595, 600 (Ind. 2006); *see also Paragon Fam. Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003). Thus, because proximate causation characterizes the injury as "a natural and probable consequence" of the defendant's criminal acts, the injury need not coincide with those criminal acts to establish culpability. *Fix v. State*, 186 N.E.3d 1134, 1142 (Ind. 2022). In the context of the neglect statute, we have stated that the only link in the chain of causality with which we are concerned is the act of placing a dependent in a dangerous situation. *See Marksberry v. State*, 185 N.E.3d 437, 444 (Ind. Ct. App. 2022), *trans. denied*.

[19] Here, the evidence showed that Abbott routinely used marijuana, hydrocodone, and ecstasy. The night before the fire, Abbott and others he invited into his home openly used marijuana and consumed ecstasy and other drugs while the Children ran around the house. Various items associated with drug use, including multiple lighters and a gas torch, were strewn about the house and accessible to the Children. At some point during the night, Abbott and Thomas went to Abbott's upstairs bedroom, leaving the Children unattended until Abbott was awakened by a smoke alarm around 11:00 a.m. Under these circumstances and their natural and probable consequences, a jury could have concluded that Abbott reasonably should have foreseen that his drug use and accessibility of dangerous items left out in the open coupled with lack of

supervision of two three-year-old children could result in their deaths. *See, e.g., Gober v. State*, 163 N.E.3d 347 (Ind. Ct. App. 2021) (leaving children under the age of six alone in an apartment for fifteen hours could foreseeably result in the children starting a fire).

[20] Contrary to Abbott's argument, the State was not required to prove the exact cause of the fire or that Abbott directly caused their deaths. As noted above, the State was required to prove only that Abbott placed the Children in a situation that endangered their lives and that it resulted in their death. The evidence is sufficient to support the jury's determination that Abbott's drug use was the proximate cause, and therefore "resulted in," the Children's deaths. Abbott's convictions for neglect of a dependent resulting in death are affirmed.

2. Double Jeopardy

[21] Abbott argues that his two convictions for neglect of a dependent resulting in death violate double jeopardy principles. Whether convictions violate Indiana's prohibition against double jeopardy is a question of law that we review de novo. *Morales v. State*, 165 N.E.3d 1002, 1009 (Ind. Ct. App. 2021). Substantive claims of double jeopardy can be divided into two categories: "when a defendant's single act or transaction violates multiple statutes with common elements and harms one or more victims" or "when a single criminal act or transgression violates a single statute but harms multiple victims." *Wadle v. State*, 151 N.E.3d 227, 247 (Ind. 2020); *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020).

[22] In determining whether two offenses violate double jeopardy, we first review the text of the neglect statute to see if it contains a distinct unit of prosecution. *Powell*, 151 N.E.3d at 264. "If the statute, whether expressly or by judicial construction, indicates a unit of prosecution, then we follow the legislature's guidance and our analysis is complete." *Id*. If the statute is ambiguous, then we proceed to the second step of the analysis and "determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses." *Id*.

[23] As with all questions of statutory interpretation, we first look to the statute's text, reading its terms in their plain and ordinary meaning. *Id*. at 265. As pertinent here, the neglect statute provides: "A person having the care of *a dependent* . . . who knowingly or intentionally . . . places *the dependent* in a situation that endangers *the dependent's* life or health . . . commits neglect of a dependent." I.C. § 35-46-1-4(a)(1) (emphasis supplied). The offense is elevated if "committed . . . by a person at least eighteen (18) years of age and results in the death of *a dependent* who is less than fourteen (14) years of age." I.C. § 35-46-1-4(b)(3) (emphasis supplied).

[24] In determining whether a single statute permits multiple punishments for multiple victims, there is a distinction between conduct-based offenses and result-based offenses. *See Powell*, 151 N.E.3d at 265. A conduct-based offense is a statute that defines an offense based on certain actions or behaviors and the crime is complete regardless of the result of the offender's conduct. *Id*. at 265-66. A result-based offense is defined by both the defendant's actions and the

results or consequences of his actions. *Id*. at 266. Result-based offenses permit multiple punishments from a single criminal act.

[25] To commit the offense of neglect of a dependent resulting in death, the statute requires conduct on the part of the defendant and a result or consequence of that conduct. That is, the statute looks to whether the defendant knowingly or intentionally placed the dependent in a situation that endangered the dependent's life or health and that such conduct resulted in the dependent's death. *See Skeens v. State*, 151 N.E.3d 1248, 1254 (Ind. Ct. App. 2020) (noting that the State must prove that the defendant's conduct was a proximate cause of the dependent's death). Because the neglect statute is concerned with the defendant's conduct toward the dependent and the result of the defendant's conduct on the dependent, it is a result-based offense.

[26] Moreover, we note that the language in the statute clearly contemplates the offense as against a single dependent. Indeed, to commit the offense of neglect of a dependent, the statute requires conduct on the part of the defendant against "a dependent" and a result or consequence of that conduct to "the dependent's life or health," or more specifically, the death of "a dependent." I.C. § 35-46-1-4(a)(1), (b)(3). Use of the term dependent in the singular suggests that a separate punishment is required for *each* dependent that is neglected. *See id*. at 267 (finding that language in the murder statute referring to a singular victim suggests that each victim calls for a separate punishment) (citing *Brown v. State*, 912 N.E.2d 881, 896 (Ind. Ct. App. 2009)).

[27] In sum, we find the neglect statute is unambiguous, and each dependent whose death results from the defendant's neglect constitutes a separate and independent violation of the statute. Thus, Abbott could be convicted separately for each dependent he endangered, the result of which was the death of the dependent. Abbott's two convictions for neglect of a dependent resulting in death do not violate double jeopardy principles.

[28] Judgment affirmed.

Vaidik, J. and Crone, J., concur.