

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Bricia Chavez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 9, 2022
Court of Appeals Case No.
22A-CR-270
Appeal from the
Marion Superior Court
The Honorable
Mark D. Stoner, Judge
Trial Court Cause No.
49D32-1912-F5-46945

Pyle, Judge.

Statement of the Case

[1] Bricia Chavez (“Chavez”) appeals, after a bench trial, her conviction for neglect of a dependent resulting in bodily injury as a Level 5 felony.¹ Chavez argues that there was insufficient evidence presented to support her conviction. Concluding that sufficient evidence was presented to support Chavez’s Level 5 felony neglect of a dependent conviction, we affirm her conviction.

[2] We affirm.

Issue

[3] Whether there was sufficient evidence to support Chavez’s conviction.

Facts

[4] Chavez and Keijuan Ramey (“Ramey”) are the parents to two children, and the youngest is O.A.R., who was born on November 6, 2018. At the time of his birth, O.A.R. weighed approximately six pounds and six ounces.

[5] On August 19, 2019, when O.A.R. was nine months old, Chavez took O.A.R. to a well-child doctor’s visit, which was his first since his birth. Dr. Diana Summanwar (“Dr. Summanwar”) was the supervising attending physician that assessed O.A.R. In taking O.A.R.’s history, it was discovered that O.A.R. had

¹ Ind. Code § 35-46-1-4(a)(1), (b)(1)(A).

not received any vaccinations or medical care since his birth. At the appointment, O.A.R. was given all of the vaccines that he should have received during his first nine months of age. During the examination, Dr. Summanwar weighed O.A.R. and measured his length and head circumference. O.A.R. weighed approximately ten pounds. By comparing O.A.R.'s measurements with standard growth charts, Dr. Summanwar determined that O.A.R.'s size was abnormal, his measurements were very low, and he was underweight. The doctor diagnosed O.A.R. with failure to thrive. A very low weight is enough to consider a failure to thrive diagnosis, but "when it persists for a long period of time, then it will affect height and head circumference." (Tr. Vol. II at 82). Failure to thrive is "not an end diagnosis," and the cause of the failure to thrive needed to be identified immediately. (Tr. Vol. II at 99). Because O.A.R. had no prior medical care or immunizations, he was at "high risk of complications." (Tr. Vol. II at 99–100, 102).

[6] Dr. Summanwar spoke to Chavez about the concerns and possible complications of having the failure to thrive diagnosis and instructed her to seek additional medical treatment and assessment of O.A.R. directly at Riley Children's Hospital's emergency department to find the cause of the failure to thrive. Because failure to thrive "is not an end diagnosis," the causes for it need to be identified immediately and further "work up" needs to be done to "maintain this child's safety or keep[] his wellbeing." (Tr. Vol. II at 99). After Dr. Summanwar informed Chavez of this, Chavez agreed to take O.A.R. to

Riley. The doctor's office contacted Riley's emergency department to let them know that O.A.R. would be coming and to expect the family.

[7] Chavez did not take O.A.R. to Riley, however, so the Department of Child Services was notified. Family case manager Christi Carvajal ("Carvajal") received the report alleging "suspicions of medical neglect" regarding a failure to thrive for a child under the age of eighteen. (Tr. Vol. II at 139–40). Carvajal went to the family's home with law enforcement, but the family was not home. She and law enforcement went back the following day, on August 20, 2019, and spoke to Chavez and Ramey. When asked to provide a feeding schedule for O.A.R., Chavez was unable to provide anything concrete regarding amounts and timing. After Carvajal spoke with the parents, O.A.R. was removed from his parents' care because of concerns of O.A.R.'s failure to thrive and Chavez's failure to take him to Riley. Carvajal immediately took O.A.R. to Riley to be evaluated, and he was admitted.

[8] Judy Busch ("Busch"), a registered dietitian, assisted with O.A.R.'s treatment at Riley to determine if his failure to thrive was due to an environmental or medical reason. She observed that O.A.R. was about the size of a two-month-old child and that his weight was "far below the growth chart," his length and head circumference were below the growth chart. (Tr. Vol. II at 110, 113). Busch was "very concerned" because O.A.R.'s scores put him at severe risk of malnutrition. (Tr. Vol. II at 110–12). Busch determined that, based on O.A.R.'s size, his treatment plan should follow the feeding schedule of a two-month-old rather than a nine-month-old.

[9] During the first twenty-four hours on the feeding plan, O.A.R. drank his full bottles easily, acted hungry, and did not show any issues or vomiting. He began to gain weight in the first twenty-four hours, and his feeding plan was expanded the next day to allow for more formula and table food. During the forty-eight hours that O.A.R. was at Riley, he gained weight and thrived. After he was discharged, he continued to eat properly and gained three pounds in just four days.

[10] While O.A.R. was at Riley, the medical team performed labs and tests to determine if O.A.R. had a medical condition that caused his failure to thrive, but the doctors were unable to find a medical condition that O.A.R. suffered from that would cause his failure to thrive. Because a medical condition was ruled out, it was determined that O.A.R.'s failure to thrive was a "social failure," which means that a child is not being fed properly. (Tr. Vol. II at 109, 147). It is consistent with a social failure to thrive when a patient is put on a feeding plan, takes feedings appropriately, and gains weight. If failure to thrive and a lack of nutrition persists and a child continues to not gain weight appropriately, it can impact their learning, developmental milestones, including when they crawl and walk, and ultimately, it can even cause death.

[11] Sergeant Nicolle Flynn ("Sergeant Flynn") began to investigate the medical neglect case against Chavez in September 2019, and after reviewing O.A.R.'s medical records, she made contact with Chavez. Chavez refused to be interviewed in person but did speak with Sergeant Flynn on the telephone. Chavez told Sergeant Flynn that she fed O.A.R. ten ounces of formula every

two hours and that he slept fourteen hours overnight and had slept through the night since he was a newborn. The fact that O.A.R. was sleeping fourteen hours straight was “extremely concerning” to Sergeant Flynn because a child at that age, even at a normal weight, does not sleep for that length of time unless he is ill. (Tr. Vol. II at 172). Sergeant Flynn also learned that the family received formula from the Women, Infant, and Child Program (“WIC”), and the parents confirmed that O.A.R. had not received medical treatment until he was nine months old. Although Chavez told Sergeant Flynn that she received assistance from WIC, the officer was unable to check with the WIC office because Chavez was unable to provide her with an address for the office that they visited. Chavez expressed to Sergeant Flynn that they were told to take O.A.R. to the emergency room right away because Dr. Summanwar was concerned, but Chavez did not do so because she and Ramey “felt like it was not a big deal” and that the situation was being “blow[n] out of proportion.” (Tr. Vol. II at 176). Chavez also told Sergeant Flynn that the WIC office had expressed concern about O.A.R.’s weight in July 2019, and Chavez acknowledged that Dr. Summanwar explained that she needed to take O.A.R. to Riley.

- [12] The State charged Chavez with two counts of Level 5 felony neglect of a dependent resulting in bodily injury. A bench trial was held, and, at the conclusion, the trial court took the matter under advisement. At a later hearing, the trial court found Chavez not guilty of Count I, but guilty of Count II, which

specifically charged that, between November 6, 2018 and August 19, 2019, Chavez

having the care of [O.A.R.], a dependent, did knowingly place said dependent in a situation that endangered the dependent's life or health, to-wit: [Chavez] failed to seek medical attention for [O.A.R.'s] failure to thrive; and that said act resulted in bodily injury to said dependent, to-wit: starvation and/or failure to thrive.

(Appellant's App. Vol. II at 29). The trial court sentenced Chavez to two years, all suspended to probation. Chavez now appeals.

Decision

[13] Chavez argues that there was insufficient evidence to support her Level 5 felony neglect of a dependent resulting in bodily injury conviction. When there is a challenge to the sufficiency of the evidence, “[w]e neither reweigh evidence nor judge witness credibility.” *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016), *cert. denied*, 137 S. Ct. 1082 (2016). Instead, “we consider only that evidence most favorable to the judgment together with all reasonable inferences drawn therefrom.” *Id.* (quotations omitted). “We will affirm the judgment if it is supported by substantial evidence of probative value even if there is some conflict in that evidence.” *Id.* (quotations omitted). Further, “[w]e will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017).

[14] In order to convict Chavez of Level 5 felony neglect of a dependent resulting in bodily injury, the State was required to prove beyond a reasonable doubt that Chavez knowingly placed O.A.R. in a situation that endangered O.A.R.'s life or health, and it resulted in bodily injury to O.A.R. Ind. Code § 35-46-1-4(a)(1), (b)(1)(A); Appellant's App. Vol. II at 29. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind Code § 35-41-2-2(b). "The *mens rea* is the defendant's 'subjective[] aware[ness] of a high probability that he placed the dependent in a dangerous situation.'" *Perryman v. State*, 80 N.E.3d 234, 250 (Ind. Ct. App. 2017) (quoting *Gross v. State*, 817 N.E.2d 306, 308 (Ind. Ct. App. 2004)). The danger to the dependent must be "actual and appreciable." *Id.* Here, the State charged that Chavez endangered O.A.R. by failing to seek medical attention for O.A.R.'s failure to thrive, which resulted in bodily injury. (Appellant's App. Vol. II at 29).

[15] Chavez argues that the State failed to prove she had a subjective awareness of high probability that a slight delay in taking O.A.R. to the Riley emergency department placed him in a dangerous situation. However, Chavez was not charged solely for her action of not taking O.A.R. to the emergency department after the appointment on August 19, 2019. Nor did the evidence presented at her bench trial deal solely with this inaction.²

² Chavez focuses her argument regarding the sufficiency of the evidence on the fact that the trial court made a statement in announcing its judgment that it was basing its decision on the facts that once Chavez was

[16] The evidence most favorable to the trial court’s judgment presented at trial showed that the State alleged that Chavez’s neglect of O.A.R. occurred between November 6, 2018, the date of his birth, and August 19, 2019. During that time, Chavez was O.A.R.’s primary caretaker and there were no other individuals, other than Ramey, who cared for O.A.R. Although O.A.R. should have had at least six well-child visits at the age of nine months, Chavez did not take O.A.R. to see a doctor for any of these visits or to receive any of his required vaccinations from birth until he was nine months old. O.A.R. was Chavez’s second child, and her first child, who was one year older than O.A.R., had received all of her vaccinations on the recommended time schedule. In July 2019, the WIC office informed Chavez that O.A.R. was underweight and expressed concern about his size. In August 2019, Chavez finally took O.A.R. to visit a doctor, and, at that appointment, O.A.R. received all the vaccinations that Chavez failed to provide since he was born. Dr. Summanwar also informed Chavez that O.A.R. was diagnosed with failure to thrive and needed to be immediately taken to the emergency department at Riley to be evaluated.

“advised of the situation [of the failure to thrive diagnosis],” it was no longer a hypothetical concern “about failing to bring in your child just from lack of knowledge.” Tr. Vol. III at 6. A trial court in a criminal bench trial is not required to make either findings of fact or conclusions thereon. *Wolf v. State*, 76 N.E.3d 911, 917 (Ind. Ct. App. 2017) (quoting *Dozier v. State*, 709 N.E.2d 27, 30 (Ind. Ct. App. 1999)). In reviewing the sufficiency of the evidence following a bench trial, “the focus of our inquiry is not upon the remarks the trial court makes in a bench trial after having reached the conclusion that a defendant is guilty.” *Id.* Instead, we focus solely upon “whether the evidence presented to the trial court as fact-finder was sufficient to sustain the conviction.” *Id.* In her reply brief, Chavez cites to two cases in her assertion that a trial court’s statements when rendering a verdict in a bench trial cannot be disregarded, *Bennett v. State*, 119 N.E.3d 1057, 1059 (Ind. 2019) and *Kribs v. State*, 917 N.E.2d 1249, 1251 (Ind. Ct. App. 2009). However, both of those cases dealt with statements by a trial court at sentencing that later contradicted its finding of guilt by negating an element of the conviction. We, therefore, do not find those cases to change our analysis.

Dr. Summanwar explained that the evaluation was necessary because O.A.R. health was complicated due to the lack of prior medical care and immunizations.

[17] Although Chavez told Dr. Summanwar that she would take O.A.R. to Riley and was made aware of the risk that O.A.R. was in, she failed to do so on August 19. DCS was contacted and attempted to make contact with the family later on August 19, but the family was not home. The next day, DCS arrived at their home and spoke with Chavez, who was unable to provide information regarding O.A.R.'s feeding schedule. DCS removed O.A.R. and took him immediately to Riley. While there, it was determined that O.A.R. only weighed ten pounds and was the size of a two-month-old child. Doctors conducted tests and labs and discovered that O.A.R. had no medical condition that was the cause of the failure to thrive diagnosis, which meant that O.A.R.'s failure to thrive was environmental or a "social failure" caused by not being fed properly. (Tr. Vol. II at 109, 147). When the medical team began feeding O.A.R. regularly, he immediately began gaining weight, which was consistent with a social failure to thrive diagnosis where a patient is put on a feeding plan, takes feedings appropriately, and gains weight.

[18] The evidence presented at trial showed that Chavez was O.A.R.'s primary caretaker and knowingly deprived him of medical care for the first nine months of his life, neglecting to take him to any well-child visits or ensure he had any of the required vaccinations. The evidence revealed that O.A.R. was her second child, and that Chavez's first child had received the proper medical care

required for a newborn. In addition, Chavez was told that O.A.R. was very underweight after a physical exam with the WIC office in July 2019. She was also made aware by Dr. Summanwar of O.A.R.'s failure to thrive diagnosis and given instructions to take him to the Riley emergency room immediately for further testing. However, Chavez still persisted in her failure to seek medical care for O.A.R. O.A.R. did not receive all of the medical care he needed until DCS removed him from his parents' care and took him to Riley. At the time O.A.R. was admitted to Riley, at nine months old, he weighed only ten pounds and was the size of a two-month-old. Although we note that any single inaction of Chavez presented at trial may not have been wholly sufficient to sustain her conviction, looking at the totality of the evidence presented at trial, we find that there was sufficient evidence to support Chavez's conviction and to prove that she had a subjective awareness of a high probability that she placed O.A.R. in a situation that endangered his life or health.

[19] In her contention that the evidence was insufficient, Chavez asserts that the present case is analogous to *Fout v. State* and *Ricketts v. State* and that "reversal is required when the State failed to offer 'proof that a parent subjectively knew of the child's peril.'" (Appellant's Br. at 12–13). In *Fout v. State*, we found that the evidence was insufficient to support a conviction for neglect of a dependent because, although the baby died due to an infection, the record did not show that the doctor informed the defendant of the infection, there was no evidence that defendant was aware of the infection, and there was no evidence presented of the defendant's knowledge of the peril that the child was in. 619 N.E.2d 311,

313 (Ind. Ct. App. 1993). Here, Chavez was aware of O.A.R.'s small size and failure to thrive diagnosis, her failure to take O.A.R. for regular medical care and vaccinations, and the danger that O.A.R. was in. She was aware in July that there was concern about his small size and informed by a doctor to take him to the Riley emergency department, but she still failed to seek medical treatment. In *Ricketts v. State*, this court found "that evidence of malnutrition, in and of itself, does not support the conclusion that the person's health or life is at risk or in danger" without evidence that the children's "health was at risk or lives were endangered." 598 N.E.2d 597, 601 (Ind. Ct. App. 1992), *trans. denied*. In the present case, O.A.R. was diagnosed with failure to thrive and not that he suffered solely from malnutrition. In addition, there was evidence that O.A.R. had not received any medical care or vaccinations in the nine months since his birth, and there was testimony regarding the health risks that O.A.R. was exposed to as a result of not seeking medical care combined with the failure to thrive. Therefore, we do not find *Fout* and *Ricketts* to be controlling.

[20] Chavez also contends that the evidence presented at her trial was insufficient to prove causation of any bodily injury because the State offered no evidence that bodily injury resulted from the one-day delay in taking O.A.R. to the emergency room. In order to convict Chavez of Level 5 felony neglect of a dependent, the State was required to prove that the neglect resulted in bodily injury. See Ind. Code § 35-46-1-4(a)(1), (b)(1)(A). "Bodily injury" means any impairment of physical condition, including physical pain. Ind. Code § 35-31.5-2-29. The "results in" language of the neglect statute "implicates

proximate causation.” *Patel v. State*, 60 N.E.3d 1041, 1052 (Ind. Ct. App. 2016). “At a minimum, proximate cause requires that the injury would not have occurred but for the defendant’s conduct.” *Id.* (quoting *Paragon Family Rest. V. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003)). Thus, the State was required to prove beyond a reasonable doubt that O.A.R.’s failure to thrive would not have occurred but for Chavez’s failure to seek medical attention between November 6, 2018 and August 19, 2019.

[21] Contrary to Chavez’s assertion, the time frame for offense was the entire nine months of O.A.R.’s life and not only the one day between when he was taken to the doctor and when he was removed from Chavez’s care. At trial, Dr. Summanwar testified that the warning signs she saw when examining O.A.R. were his severely low weight, height, and head circumference, plus his lack of immunizations and medical care at the age of nine months old. Based on his extremely low measurements, which were well below where they should be for a baby his age, O.A.R. was diagnosed as failure to thrive. Failure to thrive “means lack of adequate expected weight gain based on just receiving appropriate nutrition and lack of any other organic problems that could cause them not to gain weight.” (Tr. Vol. II at 146). A very low weight is enough to consider a failure to thrive diagnosis, but “when it persists for a long period of time, then it will affect height and head circumference.” (Tr. Vol. II at 82). Thus, because O.A.R.’s height and head circumference were both affected, in addition to his extremely low weight, it could be inferred that his failure to thrive had persisted for a long period of time. Failure to thrive is “not an end

diagnosis” and the cause of the failure to thrive needed to be identified immediately. (Tr. Vol. II at 99). Because O.A.R. had no prior medical care or immunizations, he was at a high risk for complications. However, the evidence showed that Chavez did not take O.A.R. for any medical care until he was nine months old. When he was admitted to Riley, the dietician that saw him was very concerned because O.A.R.’s scores put him at severe risk of malnutrition.

[22] The evidence showed that O.A.R. was not Chavez’s first child, and that her first child, who was one year older than O.A.R., had received all of her vaccinations and well-child visits on the recommended time schedule. Therefore, Chavez was aware of the proper medical care required for a newborn and failed to take O.A.R. for any of this medical care appointments for the first nine months of his life. Further, in July 2019, Chavez was told by the WIC office that O.A.R. was underweight. When asked by DCS in August 2019 about O.A.R.’s feeding schedule, Chavez was not able to give any concrete information regarding amounts and timing. When she spoke with the police a month later, Chavez told Sergeant Flynn that she fed O.A.R. ten ounces of formula every two hours and that he slept fourteen hours overnight and had slept through the night since he was a newborn. Sergeant Flynn did not find the feeding schedule information credible based on O.A.R.’s size and found the fact that O.A.R. was sleeping fourteen hours straight “extremely concerning” because a child at that age, even at a normal weight, does not sleep for that length of time unless he is ill. (Tr. Vol. II at 172).

[23] There are many dangers that can occur when failure to thrive, a lack of nutrition, and inadequate weight gain persist. They can include stunted brain growth and mental development; a failure to meet learning and developmental milestones, such as crawling, walking, fine motor skills, and speech; and, ultimately, even death. Therefore, the full extent of O.A.R.'s injuries may not be known until he is older. However, the evidence presented at trial was sufficient to prove that O.A.R.'s failure to thrive would not have occurred but for Chavez's failure to seek medical attention in the nine months of his life.

[24] Affirmed.

Bradford, C.J., and Altice, J., concur.