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IN THE COURT OF APPEALS OF INDIANA

Chelsea Denise Marksberry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 28, 2022

Court of Appeals Case No. 21A-CR-1959

Appeal from the Vanderburgh Circuit Court

The Honorable Ryan C. Reed, Magistrate Judge

Trial Court Cause No. 82C01-2001-F1-298

Tavitas, Judge.

Case Summary

[1] Chelsea Marksberry appeals her conviction for neglect of a dependent resulting in death, a Level 1 felony. Marksberry left her infant son, K.B., in the care of his father, Jacob Bengert. K.B. had sustained physical injuries while in

Bengert's care in the past. Marksberry knew that Bengert was a drug abuser, had expressed thoughts of harming K.B., and had voiced thoughts of suicide. Nevertheless, Marksberry left K.B. in Bengert's care over the course of approximately seventeen hours and failed to check on K.B. despite her presence in the home. Marksberry subsequently discovered that K.B. was dead. Bengert fled, but he was apprehended and eventually convicted of K.B.'s murder. A jury thereafter convicted Marksberry of neglect of a dependent resulting in K.B.'s death. Marksberry contends that the evidence adduced at trial was insufficient to sustain her conviction. We find her arguments without merit and, accordingly, affirm.

Issues

[2] Marksberry presents two issues for our review:

I. Whether the State presented sufficient evidence to show that Marksberry knowingly placed K.B. in a dangerous situation.

II. Whether the State presented sufficient evidence to show that placing K.B. in a dangerous situation was the reasonably foreseeable cause of K.B.'s death.

Facts

[3] K.B. was born in September 2019. Marksberry lived with Bengert and K.B. in the basement of a home belonging to her best friend, Bengert's sister, Leann. Leann lived upstairs with her children. Marksberry's other child also lived in the house. Bengert also had another child who sometimes stayed at Leann's

house. Marksberry and Bengert were both drug abusers; Marksberry had been using illegal drugs intermittently since she was a teenager and had committed a series of crimes in order to sustain her addiction.

[4] Bengert sometimes cared for K.B. while Marksberry worked. On January 7, 2020, Bengert and Marksberry had the day off from work, and the two stayed up all night. Marksberry admitted to using heroin,[1] despite the fact that she and Bengert were babysitting several small children, including K.B. Marksberry speculated that Bengert had also ingested heroin.[2] At approximately 2:00 p.m. the following day, Marksberry laid down for a nap upstairs after consuming Xanax while Bengert and K.B. remained in the basement. Marksberry went to work as a restaurant server at 4:30 p.m.; her shift ended at 8:40 p.m. In the interim, Leann spoke with Bengert in the basement of the house and noticed K.B. in his bouncy seat, covered in a blanket and with a propped-up bottle. Leann did not find this out of the ordinary. Leann then picked up Marksberry from work and related a conversation that Leann had with Shay, the mother of Bengert's other child, about Bengert's heroin use, of which Leann had been unaware. Leann also informed Marksberry that, prior to picking up

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[1] Marksberry admitted that "she had taken the Heroin, Oxycodone, and the Xanax and then I think later on in the interview she had brought up that the Heroin that she took might have been mixed with Methamphetamine." Tr. Vol. III p. 98. The precise timing of which drugs were consumed at which points, however, is not clear from the record.

[2] Marksberry claimed during a police interview that she had never known Bengert to consume drugs; her claim is belied, however, by repeated drug references in her Facebook messenger conversations with Bengert, which were admitted at trial. *See* State's Ex. 49.

Marksberry, Leann had spoken with Bengert, and Bengert was crying and upset. [3]

[5] Marksberry returned home briefly, but she did not check on—or otherwise interact with—K.B. She did speak with Bengert, who appeared sad and had been crying. Marksberry went to a local tanning facility and then purchased and ingested heroin, before returning home for the night at approximately 10:00 p.m. Marksberry went downstairs to go to sleep but, again, did not check on K.B., who was also downstairs next to the bed.

[6] Marksberry called 911 early on the morning of January 9, 2020, after discovering K.B., dead, downstairs. Bengert apologized and tried to justify K.B.'s death[4] but fled after Marksberry called 911. Marksberry carried K.B. upstairs in his bouncy chair while she waited for police. Investigators arrived at the scene to discover K.B., deceased and covered in a blanket. Police then questioned Marksberry, who related a previous incident during which Bengert lost his temper and kicked a Christmas tree, as well as her speculation that he was using painkillers at the time. Marksberry explained that, when Bengert "comes off of the painkillers or Heroin, he would get agitated, confrontational, argumentative, angry." Tr. Vol. III p. 101. Marksberry believed that Bengert

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[3] The record is unclear as to when, precisely, Leann was explaining that Bengert was upset. The implication appears to be that Bengert was upset at the time that Leann picked Marksberry up for work, or immediately beforehand. *See* Tr. Vol. III pp. 167-69.

[4] It is not clear from the record at which point Bengert actually killed K.B. A medical expert testified that no time of death could be established.

may have been suicidal; and Facebook conversations between Marksberry and Bengert include multiple expressions of Bengert's suicidal thoughts.

[7] Marksberry tested positive for amphetamine, methamphetamine, and morphine. A toxicologist testified that "[m]orphine is an [o]piate that is used to mediate pain or to decrease pain. It can also be a metabolite of [h]eroin and it will cause sedation and a decreased since [sic] of pain." Tr. Vol. II p. 199.

[8] Bengert was apprehended on January 9, 2020. Laboratory analysis revealed the presence of THC—the active ingredient in marijuana—amphetamine, and methamphetamine in his system. The results confirm that the presence of the THC was a result of "recent usage." *Id.* at 193. Bengert was charged and convicted of K.B.'s murder.[5] On January 13, 2020, the State charged Marksberry with neglect of a dependent resulting in death, a Level 1 felony. Additionally, the State alleged that Marksberry was an habitual offender. Marksberry's jury trial took place from June 7-9, 2020.

[9] At trial, the State introduced a recording of a phone call between Marksberry and her brother,[6] wherein Marksberry stated:

> I might take a plea because what they charged me with I'm guilty of. I mean I didn't know he used the day that I went to work on

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[5] The CCS reveals that the finding of guilty was entered on November 11, 2020.

[6] There was some confusion as to whether the other participant in the conversation was Marksberry's brother or cousin. Marksberry testified, however, that it was her brother. Tr. Vol. III p. 176.

> Wednesday and I knew other days that he used and I had used in taking care of him and that's what they charged me with.

Tr. Vol. III p. 120. The State also introduced Facebook messages sent by Marksberry and Bengert. State's Ex. 49, 50. One message, sent by Marksberry to an acquaintance, reads: "Yeah we should but my baby doesn't feel good and his dad is worthless so [I] can't leave him w[ith] him I'd just worry the whole time [I'm] away from him." *Id*. Some of Bengert's messages expressed a desire to be violent towards babies, including a reference to strangling K.B., and a reference to punching another baby in the face. In one exchange, Bengert describes an injury that K.B. sustained, apparently from Bengert dropping a bottle on K.B.'s head. At trial, Marksberry described another injury sustained by K.B. while in Bengert's care: "[K.B.] had a bump on his head, when I came home from work [Bengert] said that he had rolled off the bed." Tr. Vol. III p. 156. Bengert also dropped K.B. while on the stairs, resulting in a black eye for the child.

[10] The jury convicted Marksberry of neglect of a dependent, and Marksberry admitted to being an habitual offender. The trial court sentenced Marksberry to thirty years, with twenty years executed in the Department of Correction and the remaining ten years to be served on community corrections. On August 5, 2021, Marksberry moved to set aside the verdict on the grounds that the State failed to prove that Marksberry "knowingly" placed K.B. in a situation that endangered K.B. The trial court denied the motion. Marksberry now appeals.

Analysis

[11] Marksberry argues that the evidence adduced at trial was insufficient to sustain her conviction for neglect of a dependent resulting in death. Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id*. (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018)). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id*. We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)), *trans. denied*.

[12] In the specific context of the crime of neglect of a dependent, the applicable statute provides, in pertinent part:

> (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 . . . commits neglect of a dependent . . . .
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> * * * * *
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> (b) [ ] the offense is . . . (3) a Level 1 felony if it is committed under subsection (a)(1), (a)(2), or (a)(3) by a person at least eighteen (18) years of age and results in the death or catastrophic injury of a dependent who is less than fourteen (14) years of age or in the death or catastrophic injury of a dependent of any age who has a mental or physical disability . . . .

I.C. § 35-46-1-4.

[13] Marksberry challenges the sufficiency of the evidence on two fronts: (1) her *mens rea*, meaning whether the State proved that she *knowingly* placed K.B. in harm's way; and (2) causation, meaning whether Marksberry's actions—or lack thereof—were the reasonably foreseeable cause of K.B.'s death. We address each in turn.

A. Mens Rea

[14] Marksberry first contends that the State presented insufficient evidence to prove beyond a reasonable doubt that she knowingly put K.B. in danger. In order to prove a crime, the State generally must prove that a criminal defendant acted with a certain state of mind. In the hierarchy of possible criminal states of mind—known as the *mens rea* element of a crime—"knowingly" is defined as follows: "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); *see also, e.g., McMillan v. State,* 95 N.E.3d 161, 168 (Ind. Ct. App. 2018)*, trans. denied*. Indeed, the jury in this very case was instructed as to precisely this definition of the term. *See* Appellant's App. Vol. II p. 223.

[15] We have interpreted the *mens rea* requirement of the neglect statute to require proof that a defendant possessed "a subjective awareness of a 'high probability' that a dependent had been placed in a dangerous situation." *Shultz v. State*, 115 N.E.3d 1280, 1286 (Ind. Ct. App. 2018) (quoting *Pierson v. State*, 73 N.E.3d 737, 741 (Ind. Ct. App. 2017)); *see also McMillan*, 95 N.E.3d at 161. We further note that "[b]ecause, in most cases, such a finding requires the factfinder to infer the defendant's mental state, this Court must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper." *Id*. "The danger to the dependent must be 'actual and appreciable.'" *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)).

[16] Marksberry argues that there is "a complete lack of evidence" with respect to whether she knowingly placed K.B. in a situation that endangered K.B.'s life or health. Appellant's Br. p. 14. Marksberry points us to *Caldwell v. State*, 497 N.E.2d 610 (Ind. Ct. App. 1986), and contends that "the *Caldwell* opinion demonstrates precisely why this case constitutes a manifest injustice and is unprecedented." *Id*. We do not agree.

[17] Marksberry overstates the evidence in *Caldwell* and understates the evidence in her own case. In *Caldwell*, Caldwell dropped her child off with child's

grandmother for Thanksgiving. A witness testified that violence between the grandmother and child had previously occurred in Caldwell's presence on more than one occasion. *Caldwell*, 497 N.E.2d at 612. Caldwell apparently had independent knowledge of the grandmother's propensity toward violence. After Caldwell dropped the child off, the grandmother repeatedly struck the child "both with her hands and with a broomstick. During the last of these incidents, [child] fell and hit her head on the table. [Child] died that night in her sleep." *Id*. at 611. The sum total of our analysis with respect to the sufficiency issue in *Caldwell* was as follows: "The State presented ample evidence, as recited above, that Caldwell knew of [grandmother]'s propensity for violence to young children. Viewed most favorably to the trial court's judgment, the evidence supports the trial court's judgment." *Id*. at 612.

[18] Marksberry's argument with respect to *Caldwell* is based on the fallacious notion that, in order for Bengert to "pose [ ] a threat to children prior to the time that he killed K.B.," there must necessarily have been evidence that Bengert had been *violent* in the past. Appellant's Br. p. 16. Notwithstanding that there *was* evidence presented of Bengert's violent temper, not all danger is posed by a threat of violence, and subjective knowledge of a risk of danger, not violence, is what our statute requires. *See 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); *Johnson v. State*, 555 N.E.2d 1362 (Ind. Ct. App. 1990) (failing to secure medical treatment for

eight hours after an infant was burned subjected the infant to risk of severe infection, even though infant did not actually become infected).

[19] We agree with Marksberry's assessment that the evidence at trial with respect to Bengert's parenting and relationships with children was positive at times. Our role, however, is to examine *all* of the evidence and determine whether "an inference may reasonably be drawn from it to support the verdict." *Sutton*, 167 N.E.3d at 801 (quoting *Drane*, 867 N.E.2d at 146-47). In the specific context of drug abuse, our Supreme Court has held that: "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).

[20] Despite Marksberry's assertion that "there is *no evidence* that [Marksberry] knowingly placed K.B. in a situation that actually and appreciably endangered K.B.'s life or health[,]" Appellant's Br. p. 14 (emphasis added), we conclude that sufficient evidence was presented from which a reasonable trier of fact could reach that conclusion.[7] Marksberry testified that she was aware that Bengert was a heroin abuser and that she had witnessed Bengert care for K.B. during periods when Bengert was using heroin. Marksberry was aware that

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[7] We reject the State's arguments that either Marksberry's drug use or the presence of drugs in K.B.'s system is relevant to our analysis here. Neither were the direct or indirect cause of K.B.'s death. Bengert's acts were the direct cause. The only pertinent question before us is whether Marksberry left K.B. in Bengert's care with the subjective knowledge that doing so placed K.B. in a situation that endangered K.B.'s life.

K.B. had sustained injuries while in Bengert's care on multiple occasions, including an incident during which Bengert dropped K.B. while on the stairs. Bengert's Facebook messages expressed frustration with K.B., and some of those messages implied that Bengert wished to act violently toward infants.

[21] Furthermore, Marksberry was aware that Bengert had expressed thoughts about suicide, believed him to be depressed, and knew that Bengert had been up all night prior to leaving K.B. in Bengert's care. She believed that Bengert was using illegal drugs that night. The State was not required to affirmatively demonstrate that Bengert had been using drugs at or close to the time that Marksberry left K.B. in his care. Leaving a child with a caretaker with a history of significant drug abuse, in whose care the child has been injured on multiple previous occasions, clearly meets the requirement of knowing that there is a high probability that the child is exposed to actual and appreciable danger.

[22] Marksberry's primary argument appears to merely be an alternate conclusion at which the jury could have arrived, based on the idea that Marksberry was of the subjective belief that, even when "drunk, sober, stoned, faded, under the influence, high, ripped, [Bengert] was good with the kids[.]" Tr. Vol. III p. 174. The remainder of Marksberry's arguments on this score are: (1) "It is Absurd to Argue That Jacob's Act of Getting Angry and Kicking a Christmas Tree Presaged Homicidal Behavior Against an Infant."; (2) "Evidence That Jacob Could Get Cranky if Coming Off of Heroin is Equally Insufficient to Presage Homicidal Behavior Against an Infant."; (3) "Evidence That Jacob Used Drugs Did Not Demonstrate That He Was Likely to Kill an Infant." Appellant's Br.

p. 2. These are plainly requests that we reweigh evidence, which we will not do.[8]

[23] Marksberry used drugs around her children. Bengert used drugs around the children, and Marksberry knew of that drug use. We are similarly dismayed at the number of times that Marksberry had the opportunity to attend to K.B., who was silent and covered by a blanket, and failed to do so. This combination of failures and oversights culminated in the tragic death of an infant child. The evidence was sufficient to sustain a conclusion that Marksberry knowingly placed her child in a situation that carried a substantial risk of death.

B. Causation

[24] Marksberry briefly challenges the sufficiency of evidence with respect to the causation element—in other words, whether the State proved that Marksberry's actions, or lack thereof, caused K.B.'s death. Marksberry argues that "[t]he Prosecution presented no evidence that drug use caused [Bengert] to kill K.B." Appellant's Br. p. 21. This is of no moment. The only link in the chain of causality with which we are concerned is Marksberry's placing of K.B. in a dangerous situation. As we have explained, the situation was dangerous because it involved Bengert's condition and no outside supervision. How or

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[8] Even if we were to address these arguments, we note that Marksberry repeatedly decries the arguments made by the State at trial as "absurd and oxymoronic." Appellant's Br. p. 20. We do not entertain arguments that misrepresent an opposing party's position in order to make it easier to knock down. "'Petulant grousing' and 'hyperbolic barbs' do not suffice as cogent argument as required by our appellate rules." *Basic v. Amouri*, 58 N.E.3d 980, 985 (Ind. Ct. App. 2016) (quoting *County Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 291 (Ind. Ct. App. 1999), *trans. denied*).

why Bengert killed K.B., whether drug-related or otherwise, is not pertinent to the analysis. The only question before us is whether a reasonable trier of fact could have concluded that Marksberry's placed K.B. in a situation that endangered K.B.'s life or health, which resulted in K.B.'s death. The evidence of Bengert's history of drug abuse, suicidal ideation, and violent thoughts and actions, as well as Marksberry's repeated failures to attend to her child, support the jury's verdict. Thus, the evidence was sufficient to show that placing K.B. in a dangerous situation was the reasonably foreseeable cause of K.B.'s death.

Conclusion

[25] The evidence is sufficient to sustain Marksberry's conviction. We affirm.

[26] Affirmed.

Bradford, C.J., and Crone, J., concur.