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IN THE
COURT OF APPEALS OF INDIANA

Andre Dunn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 2, 2023

Court of Appeals Case No. 21A-CR-1893

Appeal from the Marion Superior Court

The Honorable Angela Dow Davis, Judge

Trial Court Cause No. 49D27-1812-F3-42910

Opinion by Judge Tavitas

Chief Judge Altice and Judge Brown concur.

Tavitas, Judge.

Case Summary

[1] Andre Dunn appeals his conviction for neglect of a dependent resulting in bodily injury, a Level 5 felony. Dunn argues that: (1) the trial court abused its discretion by excluding certain evidence; and (2) the State failed to present sufficient evidence to support his conviction. Finding that the trial court did not abuse its discretion and that the State presented sufficient evidence, we affirm.

Issues

[2] Dunn raises two issues on appeal, which we reorder and restate as:

I. Whether the trial court abused its discretion in excluding certain evidence.

II. Whether the State presented sufficient evidence to support Dunn's conviction.

Facts

[3] K.W. was born on August 17, 2018, to Shanea White. On October 13, 2018, K.W.'s paternal grandmother, Jama Childress, picked up K.W. from White's home to watch him for the weekend. At the time, Childress was living with Dunn, her boyfriend.

[4] Around noon the following day, Childress left K.W. with Dunn for approximately forty-five minutes while she ran errands. When Childress returned, K.W. "was screaming bloody murder." Tr. Vol. II p. 126. Dunn asked Childress if K.W.'s "head look[ed] off from what it should normally look

like" and stated that K.W.'s head "felt crunchy." *Id*. at 127. Dunn also observed that K.W.'s head looked "swollen." Tr. Vol. III p. 15. Childress, a LPN for dialysis, believed that K.W.'s head "was slightly misshaped" but concluded that the misshapen head was "regular" for a newborn.[1] Tr. Vol. II p. 147.

[5] That evening, Dunn and Childress returned K.W. to White. Dunn and Childress did not report any concerns about K.W.'s head to White, and White did not immediately notice anything wrong with K.W.'s head. K.W. was crying when Childress and Dunn dropped him off, but he fell asleep in his car seat after White carried him inside. White let K.W. sleep for approximately forty-five minutes. White then attempted to take K.W.'s snowsuit off, and K.W. started "screaming . . . like he was in pain." *Id*. at 63. White removed K.W.'s hood and observed that K.W. could not hold his head up and that "the side of his head was swollen and the back of his head was completely flat." *Id*. She further observed that K.W. could not "follow you with his eyes. His eyes would not move from the left." *Id*. at 65.

[6] White took K.W. to the hospital, where he was diagnosed with "bilateral skull fractures," "subgaleal hemorrhage," bruising on the rim of the ear, and bruising

[1] At trial, Dunn testified that he also pointed out that K.W.'s head "looked strange" the previous day, October 13, 2018, and that Childress "explain[ed] how babies have soft spots and how babies' heads are not fully developed[.]" Tr. Vol. III p. 18.

across the shin. *Id*. at 168, 170. The bilateral skull fractures "started at the back of [K.W.'s] head and wrapped around the sides of his head." *Id*. at 172.

[7] On December 7, 2018, the State charged Dunn with three counts: Count I, battery resulting in serious bodily injury to a person less than fourteen years old, a Level 3 felony; Count II, neglect of a dependent resulting in serious bodily injury, a Level 3 felony; and Count III, neglect of a dependent resulting in bodily injury, a Level 5 felony. Regarding Count III, the State alleged that Dunn "did knowingly place [K.W.] in a situation that endangered [K.W.'s] life or health" by "fail[ing] to seek medical treatment for [K.W.] after [K.W.] suffered an injury to his head." Appellant's App. Vol. II pp. 30.

[8] The trial court held a jury trial in May 2021. Dunn testified in his own defense and admitted he did not have "a whole lot" of experience with caring for babies. Tr. Vol. III p. 4. He testified that he did not seek medical treatment for K.W. because, based on Childress "being a mother, a grandmother and a nurse," he "had no reason to question anything." Tr. Vol. III p. 11. Dunn denied stating that K.W.'s head felt crunchy but rather testified that he stated K.W.'s head "looked" crunchy "because [K.W.'s] head looked like a golf ball in a sense because he had potholes in a sense all over his head." Tr. Vol. III p. 15. Childress, Dunn, and White all denied injuring K.W.

[9] Dr. Tara Holloran, a physician with Riley Children's Hospital who specializes in child abuse pediatrics and who personally examined K.W., testified regarding K.W.'s injuries. Dr. Holloran attributed K.W.'s injuries to "non-accidental trauma" based on the combination of "bilateral skull fractures and

bruising on other place[s] of the child" and the fact that "the caretakers have not offered any history that explains [the injuries] or any history of an accident that would have caused them." Tr. Vol. II p. 183; Tr. Vol. III p. 22. She further testified that a newborn's cries of pain are distinct from other newborn cries and that she "would expect the caretaker to recognize that [K.W.] was in pain" based on K.W.'s screaming. Tr. Vol. II. 177. Dr. Andre Lloyd, a forensic bio-mechanic engineer who investigates the causes of injuries, testified that K.W.'s "head injuries were likely caused by a single impact and [K.W.] experienced a[n] impact that would be force equivalent to a two (2) to three (3) feet fall." Tr. Vol. II p. 222.

[10] Dunn sought to introduce evidence of prior neglect of K.W. by White. The trial court found the evidence irrelevant and inadmissible, and Dunn made an offer of proof.

[11] The jury found Dunn not guilty on Counts I and II and guilty on Count III. The trial court entered judgment of conviction on Count III and sentenced Dunn to three years, all suspended to probation. Dunn now appeals.

Discussion and Decision

[12] Dunn argues that the trial court abused its discretion by excluding alleged instances of prior neglect by White and that the State presented insufficient evidence to support his conviction for neglect of a dependent. We disagree.

I. Exclusion of Evidence

[13] We review challenges to the exclusion of evidence for an abuse of the trial court's discretion. *Clark v. State*, 994 N.E.2d 252, 259-60 (Ind. 2013). In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id*. "The effect of an error on a party's substantial rights turns on the probable impact of the impermissible evidence upon the jury in light of all the other evidence at trial." *Gonzales v. State*, 929 N.E.2d 699, 702 (Ind. 2010).

[14] We look to Evidence Rules 402 and 401 to determine whether the trial court erred in excluding evidence of prior neglect of K.W. by White. Evidence Rule 402 provides, "[i]rrelevant evidence is not admissible." Evidence Rule 401 defines relevant evidence as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Here, Dunn was convicted of neglecting K.W. by failing to seek medical treatment for K.W. after Dunn became concerned that K.W.'s "head look[ed] off from what it should normally look like," "felt crunchy," and appeared "swollen." Tr. Vol. II p. 127; Tr. Vol. III p. 15. White was not with K.W. at the time, and, moreover, White took K.W. to the hospital when she discovered his injuries later that evening.

Accordingly, White's alleged history of neglect was not relevant and would not have substantially impacted Dunn's rights.[2]

II. Sufficiency of the Evidence

[15] Dunn next argues that the State failed to present sufficient evidence to support his conviction for neglect of a dependent. We disagree.

[16] 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)). Our deferential standard of review makes clear that "a criminal trial is 'the main event' at which a defendant's rights are to be determined." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022) (quoting *McFarland v. Scott*, 512 U.S.

[2] Dunn also argues that his "constitutional right to present a defense under the Sixth Amendment to the United States Constitution or Article 1, Section 13 of the Indiana Constitution" was impeded by the trial court's exclusion of the evidence. Appellant's Br. p. 13. We find this argument is waived. Indiana Appellate Rule 46(A)(8)(a) requires the appellant to support his argument with "cogent reasoning" and "citations to the authorities." "While failure to comply with the Indiana Rules of Appellate Procedure does not necessarily result in waiver of a claim, waiver is appropriate when . . . the violation of those rules substantially impedes our review of the issues alleged." *Martin v. Hunt*, 130 N.E.3d 135, 137-38 (Ind. Ct. App. 2019) (citing *In re Moeder*, 27 N.E.3d 1089, 1097 n.4 (Ind. Ct. App. 2015), *trans. denied*.). Here, Dunn's argument is bereft of any meaningful engagement with the law on which his argument relies. Dunn does not provide any statements of the relevant constitutional law, and Dunn's argument relies on cases that do not discuss or rely on the right to present a defense under either the Sixth Amendment to the United States Constitution or Article 1, Section 13 of the Indiana Constitution. We are unable to ascertain from Dunn's limited and inapposite reasoning how Dunn's right to present a defense was impeded. Dunn, thus, fails to offer a cogent argument supported with citation to the relevant authorities, and his argument, therefore, is waived.

849, 859, 114 S. Ct. 2568, 2574 (1994)). "When there are conflicts in the evidence, the jury must resolve them." *Id*.

[17] "To preserve the jury's primacy in determining whether the State has met this burden, appellate courts 'consider only the evidence most favorable to the State together with all reasonable and logical inferences which may be drawn therefrom.'" *Id*. (quoting *Lyles v. State*, 970 N.E.2d 140, 142 (Ind. 2012)). "A conviction must be affirmed unless 'no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.'" *Id*. (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)). "Hence, 'the task for us, as an appellate tribunal, is to decide whether the facts favorable to the verdict represent substantial evidence probative of the elements of the offenses.'" *Id*. (quoting *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007)).

[18] The State charged Dunn with neglect of a dependent pursuant to Indiana Code Section 35-46-1-4(a), which provides, in relevant part:

> 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, a Level 6 felony.

Subsection (b) makes the offense a Level 5 felony if it "results in bodily injury."

[19] '"Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable [caregiver] would take, such as are usually taken in the ordinary experience of mankind."' *Lush v. State*, 783 N.E.2d 1191, 1197 (Ind. Ct. App. 2003) (quoting *White v. State*, 547 N.E.2d 831, 836 (Ind. 1989)). "When the allegation of neglect is the failure to provide medical care, the State must show that the need for medical care was actual and apparent and the accused was actually and subjectively aware of that need." *C.T. v. State*, 28 N.E.3d 304, 307 (Ind. Ct. App. 2015) (citing *Fout v. State*, 619 N.E.2d 311, 313 (Ind. Ct. App. 1993)), *trans. denied*. '"When 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."' *Patel v. State*, 60 N.E.3d 1041, 1051-52 (Ind. Ct. App. 2016) (quoting *Mitchell v. State*, 726 N.E.2d 1228, 1240 (Ind. 2000), *abrogated on other grounds by Beattie v. State*, 924 N.E.2d 643 (Ind. 2010)).

[20] Here, the State presented sufficient evidence that Dunn was aware that K.W. needed medical treatment and failed to provide that treatment. Dunn reported his concerns that K.W.'s "head look[ed] off," "felt crunchy," and looked "swollen" to Childress. Tr. Vol. II p. 127; Tr. Vol. III p. 15. In addition, K.W. "was screaming bloody murder," and Dr. Holloran testified that she "would expect the caretaker to recognize that [K.W.] was in pain" based on K.W.'s screaming. Tr. Vol. II. pp. 126, 177. Based on K.W.'s screaming and the apparent injuries to his head, the jury could have reasonably concluded that Dunn recognized that K.W. needed immediate medical treatment. *See Sample v. State*, 601 N.E.2d 457, 459 (Ind. Ct. App. 1992) (the State may prove

defendant's knowledge of the need to seek medical treatment through circumstantial evidence) (citing *Hill v. State*, 535 N.E.2d 153, 154 (Ind Ct. App. 1989)). Dunn, however, not only failed to seek medical treatment but also failed to inform White of his concerns regarding K.W.'s head.

[21] Dunn argues that he "had no reason to seek medical attention once the nurse [Childress] explained away Dunn's concerns." Appellant's Br. p. 8. But Childress, a LPN for dialysis, did not specialize or practice in infant care, and she was also, like Dunn, a caregiver to K.W. at the time. Children would not be adequately protected if a neglectful caregiver could rely on the medical opinion of a fellow-caregiver, the latter of whom may have an interest in disguising, trivializing, or explaining away the child's injuries and/or needs. The jury, thus, could have concluded that a reasonable caregiver in Dunn's position would have taken K.W. to the hospital to be evaluated by a neutral medical professional.

[22] Dunn also appears to argue that K.W. is not his legal dependent and that Childress "had primary care of K.W. that weekend." Appellant's Br. p. 8. Dunn, however, was still a caregiver with a duty to seek medical treatment for K.W. Indiana Code Section 35-46-1-4(a) applies to "[a] person having the care of a dependent, whether assumed voluntarily or because of a legal obligation." "[T]he statutory language . . . makes it clear that assuming care of a dependent voluntarily, even if that dependent is not the defendant's child, is sufficient to prove care of a dependent under Indiana Code § 35-46-1-4." *Kellogg v. State*, 636 N.E.2d 1262, 1264 (Ind. Ct. App. 1994). Here, Dunn agreed to watch

K.W. with Childress over the weekend and agreed to watch K.W. by himself while Childress ran errands. The jury, thus, could reasonably find that Dunn was a person who had "the care of" K.W. during the relevant time period. *See* Ind. Code § 35-46-1-4(a).

[23] Dunn next relies on *Smith v. State*, 718 N.E.2d 794 (Ind. Ct. App. 1999), *trans. denied*. In that case, we held that the State presented sufficient evidence to support defendant-Smith's conviction for neglect of her infant daughter when the evidence established that: 1) the child had multiple injuries that predated her death; 2) Smith left the child alone with her boyfriend despite knowledge that the boyfriend physically abused the child; and 3) Smith "did not take [the child] to the doctor despite her concern about the apparent injuries for fear the doctor would take [the child] away from [Smith]." *Id*. at 806. Dunn argues that, unlike *Smith*, Dunn did not avoid seeking medical treatment for K.W. "to avoid the authorities." Appellant's Br. p. 9. Indiana Code Section 35-46-1-4(a), however, does not require a caregiver to avoid seeking medical treatment with the specific purpose of avoiding law enforcement, and, thus, Dunn's argument is inapposite.

[24] Dunn also relies on *Sample*, 601 N.E.2d 457. In that case, we held that the State presented sufficient evidence to support defendant-Sample's conviction for neglect of her infant child when the evidence established that she delayed taking the child to the hospital for two days despite obvious swelling to a bump the child developed after hitting her head. *Id*. at 459-60. Dunn argues that, unlike *Sample*, "this was not a case of a progressive injury" and that Dunn and

Childress returned K.W. to White soon after Dunn raised concerns about K.W.'s head. Appellant's Br. p. 9. Indiana Code Section 35-46-1-4(a), however, does not require the dependent's injury to be progressive, and returning K.W. to White did not discharge Dunn of his duty to provide medical treatment. Accordingly, we are not persuaded by Dunn's argument. [3]

[25] It is the role of the jury to weigh the evidence and determine whether the defendant is guilty. *Young*, 198 N.E.3d at 1176. Here, the State presented sufficient evidence for the jury to find beyond a reasonable doubt that Dunn neglected K.W. by failing to provide medical treatment after discovering K.W.'s injuries. Dunn essentially asks us to reweigh the evidence, but that we cannot do.

Conclusion

[26] The trial court did not abuse its discretion by excluding alleged instances of prior neglect by White, and the State presented sufficient evidence to support Dunn's conviction. Accordingly, we affirm.

[27] Affirmed.

Altice, C.J., and Brown, J., concur.

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[3] Dunn points out in his Reply Brief that Indiana Code Section 35-46-1-4(c) provides a defense to neglect of a dependent. "'[A]n argument raised for the first time in a reply brief is waived.'" *Kirchgessner v. Kirchgessner*, 103 N.E.3d 676, 682 (Ind. Ct. App. 2018) (quoting *U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 797 n.5 (Ind. 2000)), *trans. denied*. Accordingly, we do not address this argument.