

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

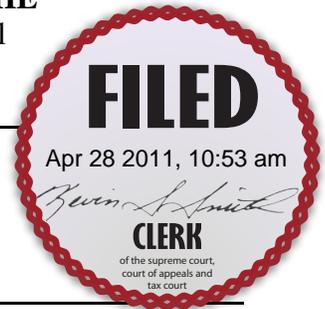
JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

CYNTHIA L. PLOUGHE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



AVONTE YARBROUGH,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

)
)
)
)
)
)
)
)
)
)

No. 49A02-1010-CR-1088

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0901-FB-9055

April 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a jury trial, Avonte Yarbrough appeals his conviction for battery, a Class B felony. On appeal he raises the sole issue of whether sufficient evidence was presented to support his conviction. Concluding that sufficient evidence was presented to support his conviction, we affirm.

Facts and Procedural History

In January 2009, Yarbrough was staying at an apartment in Indianapolis with J.J., his girlfriend, and A.B., her ten-month-old daughter. A.B. had not been acting “herself” for two or three weeks, and had been sick with what Yarbrough and J.J. thought to be a cold. Transcript at 407. A.B. had been sleeping more than usual and was often drowsy when awake, she was coughing and sneezing, her skin was sometimes hot to the touch and sometimes cold to the touch, she was not eating, was “grumpy,” and appeared to be getting worse. *Id.* at 23. As treatment, J.J. gave A.B. Tylenol and Motrin, eventually an entire bottle of each,¹ and applied Vicks vapor rub to her skin.

On January 9, 2009, while J.J. was bathing A.B. in a bathtub, A.B. fell from a sitting position and hit her head on the wall. A.B. screamed and cried out, and J.J. picked her up and calmed her down.

On January 11, 2009, J.J. brought A.B. into the bedroom with Yarbrough when A.B. awoke in the early afternoon. Around 2:00 p.m., J.J. left A.B. laughing and playing in Yarbrough’s care while she went to work. According to Yarbrough, soon after J.J. left he gave A.B. a potato chip, which she nibbled on before falling asleep while laying next to him on the bed. Yarbrough was watching television and eventually fell asleep too. At

¹ The size of the bottle and strength of the medicine are unclear from the record.

some point the two woke up, and at around 5:30 or 6:00 p.m. Yarbrough used his cellular phone to take a photograph of A.B. who had fallen back asleep while sitting up, and sent the photograph to J.J.’s cellular phone. Yarbrough then laid A.B. down on the bed and the two slept again laying next to each other. Yarbrough later awoke to A.B. touching his face. He then changed her diaper and rubbed vapor rub on her chest and near her nose, laid her down in her playpen in another room, and returned to watching television in the bedroom.

At about 8:45 p.m., Yarbrough left the bedroom to feed and check on A.B. and discovered her “gasping for air.” Id. at 418. He picked her up and “[s]he was kind of like limped over.” Id. Yarbrough panicked, called 911, and, although never trained in administering cardiopulmonary resuscitation (“CPR”), Yarbrough attempted to perform CPR by “breath[ing] in her mouth while . . . pushing down on her . . . chest.”² Id. at 421. Firefighters and an ambulance soon arrived at the apartment and took A.B. and Yarbrough to the hospital, where J.J. met them soon after.

Dr. David Zipes, a pediatric hospitalist, met and spoke briefly with Yarbrough at the hospital, and later testified that Yarbrough asked if he or anyone else was “going to jail that night.” Id. at 107.

A.B. was severely injured. When paramedics arrived, A.B. appeared lifeless, did not respond to stimuli, was not crying at all, and was breathing alarmingly slowly. Dr. James Callahan, a neurosurgeon, performed brain surgery on her for a life-threatening and near-fatal brain injury. A.B.’s blood pressure was unstable, and she had extensive

² It is unclear from the record if the 911 operator directed Yarbrough to or instructed him on how to perform CPR on A.B.

swelling in her brain and subdural hematomas on both sides of her brain; due to swelling, the upper portion of her brain had dissected from the lower portion. Dr. Gavin Roberts, a pediatric ophthalmologist, later testified that A.B. had innumerable areas of extensive bleeding in the retinas of both eyes, and layers of both retinas began to split as well. A.B. also had bruises on the upper portion of both of her thighs.

“Acute blood” in A.B.’s brain that appeared on a computer tomography (CT) scan signaled to Dr. Callahan that her injury occurred within the last twenty-four hours. Id. at 133; cf. id. at 155 (Dr. Callahan testifying on cross-examination that the CT scan coloration indicating acute blood could be as accurate as twenty-four to seventy-two hours). Further, he testified the injury was consistent with abusive head trauma from an outside force and ruled out an aneurism, brain tumor, and her January 9 fall in the bathtub as possible causes. Dr. Cortney Demetris, a pediatric hospitalist, generally echoed Dr. Callahan’s opinions, in particular that the January 9 bathtub incident could not have caused her injuries and that her injuries were most consistent with abusive head trauma, which is another term for “inflicted injury on a child that involves the head.” Id. at 343. Dr. Demetris opined that significant force caused A.B.’s injuries, there was no evidence of accidental trauma, and the team of physicians “eliminated all possible medical causes.” Id. at 349. Dr. Roberts opined that A.B.’s eye injuries were caused by abusive head trauma, and a prolonged violent motion for at least several seconds. Dr. Roberts further testified that the bathtub incident could not have caused A.B.’s injuries.

By the time of trial, doctors considered her condition to be left hemiplegic cerebral palsy. As a result of the events of January 11, A.B. had developmental problems and was significantly delayed for her age; as a twelve-month old she was mentally and physically

behaving similar to a two- or three-month old. She also had extreme difficulty controlling the left side of her body.

Dr. John Plunkett, a forensic pathologist and defense expert witness, reviewed A.B.'s medical records and opined that A.B.'s head injury likely occurred about two days earlier and was not from shaking or abuse, but from a "low-velocity impact." Id. at 575. Dr. Plunkett further opined that A.B.'s sleepiness and eye injuries were secondary effects of the low-velocity impact following an increase in pressure inside A.B.'s head.

Yarbrough was charged with aggravated battery and two counts of battery, all Class B felonies. Prior to trial the State moved and the trial court granted its motion to dismiss one of the two battery charges. At trial, the jury heard testimony from J.J., Lisa Williams, who was one of the paramedics responding to Yarbrough's call, Dr. Zipes, Dr. Callahan, Dr. Roberts, Detective Anna Humkey, Dr. Demetris, Dr. Plunkett, and Yarbrough.

The jury found Yarbrough guilty of battery as a Class B felony and not guilty of aggravated battery, and the trial court entered judgment accordingly. Following a sentencing hearing, the trial court sentenced Yarbrough to twelve years, with four years suspended and two years of probation. Yarbrough now appeals his conviction.

Discussion and Decision

I. Standard of Review

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or weigh the evidence, and we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). When confronted with conflicting evidence, we must consider it in a light

most favorable to the conviction. Id. We affirm the conviction “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. . . . The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quotations and citations omitted).

II. Battery

To convict Yarbrough of battery as a Class B felony, the State had to prove beyond a reasonable doubt that Yarbrough “knowingly or intentionally touche[d] another person in a rude, insolent, or angry manner . . . [that] result[ed] in serious bodily injury to a person less than fourteen (14) years of age and [wa]s committed by a person at least eighteen years of age[.]” Ind. Code § 35-42-2-1(a)(4).

Yarbrough first contends the State’s case was based on circumstantial evidence, and that he was convicted only because the tragic nature of the severe injury to a young child invokes a “societal incentive to assign blame or to hold someone responsible.” Brief of Defendant-Appellant at 9 (quoting Martineau v. Angelone, 25 F.3d 734, 742-43 (9th Cir. 1994)). However, a conviction may be based upon circumstantial evidence alone, and the fact that a case is based entirely on circumstantial evidence does not mean that insufficient evidence supports the verdict. Hoover v. State, 918 N.E.2d 724, 731 (Ind. Ct. App. 2009), trans. denied. Further, we need not opine on the validity of Yarbrough’s general characterization of society’s common reaction to tragic injuries of young children. Yarbrough has failed to demonstrate that his conviction is based merely on misplaced blame for A.B.’s tragic injuries. Cf. Dan Cristiani Excavating Co., Inc. v. Money, 941 N.E.2d 1072, 1076 (Ind. Ct. App. 2011) (“While admittedly difficult to muster, without evidence of influence [of hindsight bias] we must presume absence of

such and cannot reverse a trial court decision based on appellate discussion of an abstract non-legal theory.”), trans. pending. Indeed, the record indicates that Yarbrough argued this theory at trial, yet the jury disagreed and decided that Yarbrough was personally knowingly or intentionally responsible for A.B.’s injuries.

Next, Yarbrough refers us to several cases in which there appears to have been far clearer evidence of the defendants’ guilt than the State presented in this case against him. See, e.g., Powers v. State, 696 N.E.2d 865, 867 (Ind. 1998) (describing a defendant’s admission to repeatedly striking and dropping a five-month-old child on the ground); Vega v. State, 656 N.E.2d 497, 505 (Ind. Ct. App. 1995) (noting that the “proximate cause of death [of the child] was easily ascertainable,” with testimony that the defendant beat the child until she bled, immersed her in water for a long period of time, refused to feed her or keep her warm, and refused to seek medical assistance), trans. denied. By highlighting these cases, Yarbrough appears to argue that because the evidence against him does not appear as strong as that in Powers or Vega, evidence in his case is insufficient to support his conviction. We disagree. We do not read Powers or Vega to mean that an overwhelming amount of evidence is required to sustain a conviction. To the contrary, upon appellate review we will affirm the conviction “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. . . . The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Drane, 867 N.E.2d at 146 (quotations and citations omitted).

At trial, several physicians testified regarding their medical opinions of what likely happened to A.B., and in addition Dr. Zipes testified regarding Yarbrough’s unusual question of whether he was headed to jail. Detective Humkey also testified regarding

inconsistencies between her first and second interview of Yarbrough. Yarbrough testified in his own defense, along with Dr. Plunkett. Yarbrough's argument that insufficient evidence was presented regarding whether he knowingly or intentionally caused A.B.'s injuries directly calls for our assessment of credibility, which we will not do. See id.

The jury assessed the credibility of Yarbrough and other witnesses and considered Yarbrough's argument at trial of the possibility that A.B.'s injuries were a result of her ongoing sickness or of the January 9 bathtub incident. The jury found Yarbrough guilty beyond a reasonable doubt, and we refuse to reassess the credibility of witnesses or reweigh the evidence presented. While no direct evidence was presented regarding Yarbrough striking, dropping, or otherwise harmfully touching A.B., he was undisputedly the only one in her presence during the time that he and the physicians agree A.B. was injured. The testimony of numerous physicians, emergency medical personnel, and a police detective as well as accompanying exhibits admitted into evidence is sufficient to support Yarbrough's conviction, and we therefore affirm.

Conclusion

Sufficient evidence supports Yarbrough's conviction for battery as a Class B felony, and we therefore affirm.

Affirmed.

NAJAM, J., and CRONE, J., concur.