2015 IL App (3d) 130507-U

Order filed May 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0507 Circuit No. 12-CF-187
MARINA M. ENGLAND,	)	Honorable Paul L. Mangieri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved beyond a reasonable doubt that defendant knowingly caused bodily harm where evidence of defendant violently shaking the infant-victim sustained an inference that defendant was practically certain bodily harm would result. (2) Defendant's convictions for battery and endangering the life or health of a child are vacated pursuant to one-act, one-crime doctrine.

¶ 2 The State charged defendant, Marina M. England, by indictment with aggravated battery of a child (720 ILCS 5/12-3.05(b)(2) (West 2012)), battery (720 ILCS 5/12-3(a)(2) (West 2012)), and endangering the life or health of a child (720 ILCS 5/12-21.6 (West 2012) (renumbered as

5/12C-5 by Public Act 97-1109, effective Jan. 1, 2013)). Following a bench trial, the trial court found defendant guilty of each charged offense and sentenced defendant to a 30-month term of probation and 90 days in jail. Defendant appeals, arguing that the State failed to prove beyond a reasonable doubt that she knowingly caused bodily harm to the victim. Alternatively, defendant argues that her lesser convictions of battery and endangering the life or health of a child should be vacated on one-act, one-crime principles. We affirm in part and vacate in part.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with, *inter alia*, aggravated battery of a child (720 ILCS 5/12-3.05(b)(2) (West 2012)), battery (720 ILCS 5/12-3.2(a)(2) (West 2012)), and endangering the life or health of a child (720 ILCS 5/12-21.6 (West 2012)). As to the aggravated battery count, the indictment alleged that defendant "knowingly and without legal justification caused bodily harm to M.S. *** in that [defendant] shook M.S., resulting in [M.S.] having a concussion." The battery and endangering the life or health of a child counts also alleged simply that defendant shook M.S. The case proceeded to a bench trial on March 28, 2013.

¶ 5 At trial, Kriston E. testified that she was the mother of M.S., the victim in the case. Kriston was also the mother of H.E. Kriston explained that defendant was the victim's aunt on M.S.'s father's side and estimated that defendant was 22 or 23 years old. Defendant babysat Kriston's children at Kriston's house while she was at work. Kriston worked as a certified nursing assistant (CNA).

¶ 6 Kriston testified that defendant was babysitting the children on the afternoon of April 17, 2012. Kriston returned home that evening at approximately 10:30 or 10:40 p.m. When she entered her apartment, Kriston heard defendant "scream bloody murder[:] 'You fucking baby,

take this fucking bottle.' " Kriston proceeded frantically up an interior stairwell to the living room. Kriston described what she witnessed upon reaching the living room:

> "She's shaking her like this (indicating) three or four times hard; and my whole—my baby that has no, you know, structure to her body to stand up or move or defend herself is going like this (indicating). I see [M.S.] like a chicken, like just doing this (indicating)."

¶ 7 After eliciting this testimony, the prosecutor attempted to verbalize Kriston's physical indications:

> "Q: When you said, 'She was shaking her like this,' you held your hands kind of in fists in front of your chest and moved them back and forth very forcefully.
>
> Is that to indicate that [defendant] was holding [M.S.] in front of her body like—
>
> A: Yes.
>
> Q: —with her hands?
>
> A: That is the way she shook her.
>
> Q: And where were [defendant's] hands on [M.S.]?
>
> A: On her rib cage like you would hold a baby in the air, going like this (indicating). And [M.S.]'s body was going like this (indicating).
>
> Q: So by doing that, [M.S.]'s body was snapping back and forth?
>
> A: Yes.
>
> Q: Was her head snapping back and forth?
>
> A: Her whole body, yes, like just flimsy like rubber."

Kriston testified that M.S. was two days shy of three months old at the time of the incident. When Kriston took M.S. from defendant, she noticed that M.S. was trembling and shaking uncontrollably. She noticed that M.S.'s breathing was abnormal, and checked on her constantly throughout the night. M.S. did eventually fall asleep.

¶ 8 Kriston testified that she found another baby-sitter and went to work the next day. Once at work, however, a police officer approached her and told her to take M.S. to the emergency room (ER).[1] Kriston complied, taking M.S. to the ER at Cottage Hospital. She told staff there that she did not bring M.S. in earlier because she did not realize a baby could die from being shaken like that.

¶ 9 H.E. was seven years old at the time of trial and six years old on the date of the events in question. H.E. testified that she saw defendant shake M.S. "too hard." Defendant shook M.S. approximately six times; although H.E. told defendant to stop, she did not. H.E. only saw defendant shake M.S. on one occasion, and it was not during the April 17 incident. H.E. never saw defendant shake M.S. while Kriston was present.

¶ 10 Doctor Channing Petrak testified that she was the medical director of the pediatric resource center in Peoria. Petrak testified that she examined M.S. on the afternoon of April 19, 2012. She first took a medical history from Kriston. Kriston told Petrak that M.S. was not acting normal immediately after being shaken. M.S. was limp at first, then had jolting spasms in her arms and hands. M.S. was unusually irritable and fussy, but seemed fine the next morning. Petrak also reviewed the report from M.S.'s visit to Cottage Hospital, which found no signs of

[1] As the State points out, there was no testimony at trial explaining how the police officer knew to do this, but the fact was not disputed.

injury or trauma. After performing an MRI, a CT scan, and a skeletal survey, Petrak concluded that M.S. had sustained a concussion, or "mild traumatic brain injury."

¶ 11 Detective Kevin Legate of the Galesburg police department testified that he questioned defendant after the incident. Defendant admitted to Legate that she shook M.S., but insisted she "did not shake [M.S.] hard." Defendant claimed that she blacked out while shaking M.S. When she came to and realized what she was doing, she stopped shaking M.S. Legate testified that defendant was over 18 years of age at the time of the incident.

¶ 12 Following closing arguments, the trial court found defendant guilty of aggravated battery of a child, battery, and endangering the life or health of a child. With respect to defendant's mental state, the court found that, based upon defendant's age, as well as M.S.'s age and size, it could "draw the inference *** that the Defendant certainly knowingly engaged in acts that would cause bodily harm or be of an insulting or provoking nature by engaging in the shaking of a baby." The court sentenced defendant to a 30-month term of probation, including a 90-day jail term. Defendant appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that she committed aggravated battery of a child. Specifically, defendant contends that the State failed to prove that she acted knowingly as to the result of her conduct. Alternatively, defendant argues that her convictions for battery and endangering the life or health of a child should be vacated based on one-act, one-crime principles. We find the evidence adduced at trial was sufficient to establish that defendant knew that her conduct would cause bodily harm to M.S. and vacate defendant's misdemeanor convictions.

¶ 15 I. Sufficiency of the Evidence

¶ 16 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31. It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). This deference is due, in part, because the trier of fact is in a better position than a reviewing court to observe witnesses and make determinations of credibility. *E.g.*, *People v. Gumila*, 2012 IL App (2d) 110761, ¶ 64.

¶ 17 A person who is at least 18 years of age commits aggravated battery of a child when, in committing a battery,[2] he or she knowingly, by any means, "causes bodily harm or disability or disfigurement to any child under the age of 13 years." 720 ILCS 5/12-3.05(b)(2) (West 2012). An individual acts knowingly as to the result of his conduct when he "is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2012) (defining "knowledge" *mens rea*); see also *People v. Hall*, 273 Ill. App. 3d 838, 842 (1995) (applying statutory knowledge definition to offense of aggravated battery of a child).

¶ 18 The element of knowledge is rarely susceptible of direct proof. *People v. Nwosu*, 289 Ill. App. 3d 487, 494 (1997). Where a defendant denies that she knowingly brought about the

[2] Battery is committed where a person "knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2012). Defendant does not dispute that the evidence proved beyond a reasonable doubt that she committed battery.

proscribed result, the State must prove the defendant's mental state through circumstantial evidence. *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009). "[I]ntent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself." *Id*. In the context of aggravated battery of a child, the degree of an offender's conduct may give rise to the inference that she was practically certain bodily harm would result. See, *e.g.*, *Hall*, 273 Ill. App. 3d at 842-43. For example, the court in *People v. Rader*, 272 Ill. App. 3d 796 (1995), considered the size of the defendant as compared to a 4½-month-old baby, as well as the baby's injuries, in concluding that a rational trier of fact could have found the defendant knowingly caused great bodily harm. *Id*. at 805.

¶ 19 In the present case, Kriston described the violence with which defendant, a fully grown adult, shook three-month-old M.S. She described M.S.'s body as snapping back and forth, "flimsy like rubber." The resulting mild traumatic brain injury, as diagnosed by Petrak, caused M.S. to have spasms and jolts for the rest of the evening. We note that the aggravated battery of a child statute requires only bodily harm as a result when the victim is under 13 years of age, as opposed to the great bodily harm required for the aggravated battery of older children. See 720 ILCS 5/12-3.05(b)(1), (2) (West 2012). Kriston's testimony regarding the severe manner in which defendant shook the infant, supports the reasonable inference that defendant was practically certain that some bodily harm would result.

¶ 20 Defendant contends that some evidence adduced at trial gives rise to the opposite inference, that she was not practically certain that bodily harm would result. She points out that Kriston herself, a CNA who witnessed the shaking, was not practically certain that bodily harm had been done to M.S. Defendant also contends that M.S. suffered no permanent injuries so

grave "that they must have been caused by the kind of extreme violence that anyone would know would be practically certain to cause bodily harm."

¶ 21 The trier of fact, however, is not required to accept any explanation of the evidence that might be consistent with the defendant's innocence. *Campbell*, 146 Ill. 2d at 380. Indeed, defendant's contentions, at best, merely show that the evidence was capable of producing conflicting inferences. " 'Where evidence is presented and such evidence is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution.' " *Saxon*, 374 Ill. App. 3d at 416 (quoting *McDonald*, 168 Ill. 2d at 447). Here the trial court resolved the possible conflict by reasonably inferring that defendant was practically certain that bodily harm would result from her conduct. Accordingly, we find that the State proved the knowledge element of aggravated battery of a child beyond a reasonable doubt.

¶ 22 II. One-Act, One-Crime Doctrine

¶ 23 Where the same physical act is used to support multiple convictions, only the most serious conviction can stand. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Where a defendant's conduct involves what might be considered multiple acts, the State must indicate its intention to treat the conduct as separate offenses by apportioning the conduct among the charged offenses. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001). Where the State fails to treat a defendant's conduct as separate acts in the trial court, it will not be permitted to do so for the first time on appeal. *Id*. at 343. Violation of the one-act, one-crime doctrine constitutes plain error. *E.g.*, *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 24 In the case at hand, the State plainly did not seek to treat defendant's conduct as multiple acts that would support separate convictions. That is, in its indictment, the State did not allege separate incidents of shaking or separate shakes for each count. Indeed, the State on appeal

admits that the charging instrument did not differentiate between shakes, and concedes that defendant's lesser convictions should thus be vacated. We therefore vacate defendant's convictions for battery and endangering the life or health of a child pursuant to the one-act, one-crime doctrine.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Knox County is affirmed in part and vacated in part.

¶ 27 Affirmed in part and vacated in part.