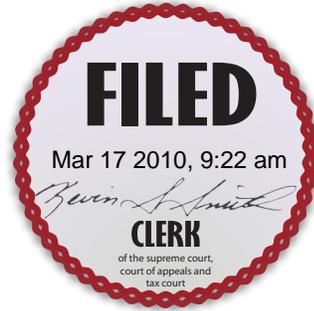


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DELORES BAILS,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0907-CR-665
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kimberly J. Brown, Judge
Cause No. 49G16-0810-FD-238667

March 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Delores Bails appeals her conviction for Battery on a Child, as a Class D felony.

She presents the following issues for our review:

1. Whether the evidence was sufficient to support her conviction.
2. Whether the trial court erred by not sua sponte conducting a competency hearing for the child victim.
3. Whether her sentence is inappropriate in light of the nature of the offense and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On or about October 15, 2008, nine-year old W.B. got into trouble at school for disobeying a school rule during her lunch period. When a school employee notified Bails, W.B.'s mother, of the incident, Bails became angry. And when W.B. came home from school that day, Bails began yelling at W.B. Bails questioned W.B. about the incident, and W.B. lied about what had occurred. In response to W.B.'s dishonest explanation, Bails hit W.B. repeatedly with a belt. W.B. sustained bruising to her face, back, arms, and legs.

The next morning at school, W.B.'s principal noticed the bruises and asked W.B. about them. W.B., scared that she would get Bails in trouble if she told the truth, lied and told the principal that she had been hit by a baseball. Child Protection Services and law enforcement were notified, and photographs were taken of W.B.'s bruises.

On October 21, 2008, the State charged Bails with battery on a child, as a Class D felony, under Indiana Code Section 35-42-2-1. The trial court found Bails guilty as

charged, and entered judgment accordingly. The trial court sentenced Bails to 545 days, with 541 days suspended to probation.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Bails first contends that the State did not present sufficient evidence to rebut her claim of parental privilege as a defense to the charge of battery. The State was required to prove that Bails knowingly or intentionally touched W.B., a person less than fourteen years of age, in a rude, insolent, or angry manner. Ind. Code § 35-42-2-1. And Bails raised the parental privilege defense at trial. As our Supreme Court has observed:

A parent has a fundamental liberty interest in maintaining a familial relationship with his or her child. This fundamental interest includes the right of parents ‘to direct the upbringing and education of children,’ including the use of reasonable or moderate physical force to control behavior. However, the potential for child abuse cannot be taken lightly. Consequently, the State has a powerful interest in preventing and deterring the mistreatment of children. The difficult task of prosecutors and the courts is to determine when parental use of physical force in disciplining children turns an otherwise law-abiding citizen into a criminal.

Willis v. State, 888 N.E.2d 177, 180 (Ind. 2008).

Indiana Code Section 35-41-3-1 provides that “a person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.” A parental privilege to use moderate or reasonable physical force, without criminal liability, was recognized at common law. Willis, 888 N.E.2d at 180. Although Indiana has not yet codified the parental privilege, our courts have construed Indiana Code Section 35-41-3-1 as including reasonable parental discipline that would otherwise constitute battery. Id. at 181; see also Cooper v. State, 831 N.E.2d 1247, 1252 (Ind. Ct. App. 2005).

Our courts are guided by the factors set out in the Restatement of the Law (Second) Torts § 147(1), which provides, “[a] parent is privileged to apply such reasonable force or to impose such reasonable confinement upon [her] child as [she] reasonably believes to be necessary for its proper control, training, or education.” Willis, 888 N.E.2d at 182. Our Supreme Court has set out the factors to determine whether a parent’s use of force was reasonable, including:

- (a) whether the actor is a parent;
- (b) the age, sex, and physical and mental condition of the child;
- (c) the nature of his offense and his apparent motive;
- (d) the influence of his example upon other children of the same family or group;
- (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
- (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

Id. This is not an exhaustive list. Id. There may be other factors unique to a particular case that should be taken into consideration. Id.

A claim of parental privilege is a complete defense. In order to negate a claim of parental privilege to a charge of battery, the State must disprove at least one element of the defense beyond a reasonable doubt. Id. The State must show either (1) that the force the parent used was unreasonable or (2) the parent’s belief that such force was necessary to control her child and prevent misconduct was unreasonable. Id. The State may refute a claim of the defense of parental privilege by direct rebuttal or by relying upon the sufficiency of the evidence in its case-in-chief. Id. at 182.

When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the

reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. “Appellate courts affirm [a] conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Matthew v. State, 892 N.E.2d 695, 697 (Ind. Ct. App. 2008).

Bails likens her discipline of W.B. to that which our Supreme Court found to be permissible in Willis, but we find the facts and circumstances of that case to be distinguishable. In Willis, the mother used progressive forms of discipline to punish her eleven-year-old son, who frequently got into trouble. 888 N.E.2d at 183. According to the defendant in Willis, she had previously grounded the child after he had been caught stealing, but that punishment had not been effective. Accordingly, she decided that a harsher punishment, namely, swatting him with a belt, would be more effective in response to a subsequent incident where the child had stolen several items of clothing. Id. As the defendant explained, “I thought about it over the entire weekend and I even tried to talk to him again. And he continued to lie. . . . I didn’t know what else to do.” Id. The court noted that the defendant had inflicted five to seven swats on the child’s buttocks, arm, and thigh for what many parents might reasonably consider a serious offense. Id.

Here, Bails contends that the State’s evidence was insufficient to refute the claim of parental privilege because the force she used to discipline W.B. was reasonable. We cannot agree. Bails’ argument that “[t]he analysis as to whether a parent’s disciplining of

a child goes too far is a highly subjective one,” Appellant’s Brief at 7, ignores our standard of review and merely requests for this court to reweigh the evidence, which we will not do. See Willis, 888 N.E.2d at 183.

The State presented sufficient evidence to refute her claim of parental privilege. While Bails’ discipline did not cause W.B. permanent physical damage, the photographs and W.B.’s testimony support the trial court’s finding that the discipline was unreasonable because it was disproportionate to W.B.’s misconduct. While the exact number of times W.B. was struck with the belt may be unclear, the photographs verify that W.B. received blows to both sides of her face, both sides of her upper back, her chest, her arm, and her inner leg. The trial court noted, “you look at these pictures, and you consider the wrongdoing, . . . I don’t believe [the] discipline was reasonable. . . . [I]f you count these bruises which are not just light bruises, you got . . . [six] different areas that were bruised, heavily bruised.” Transcript at 82. The evidence does not show that the punishment was “controlled” as Bails would like this court to believe. Bails testified that she did not recall how many times she in fact “whooped” the child. Transcript at 57. And the photographs do not corroborate Bails’ testimony that she was aiming for the child’s buttocks. Rather, the photographs clearly demonstrate that W.B.’s buttocks had no bruising.

A parent “is not privileged to use a means to compel obedience if a less severe method appears to be likely to be equally effective.” Willis, 888 N.E.2d at 183. Contrary to Bails’ claim that this incident was a controlled progression of discipline, the evidence shows that Bails struck W.B. several times in anger, having not taken time to first reflect

on what an appropriate punishment would be. Unlike the mother in Willis, who reflected over the course of a weekend to determine what type of discipline to impose, Bails became angry upon learning of the incident at school and was angry when W.B. came home. And Bails proceeded to “whoop” W.B. almost immediately after the child lied about the incident. Transcript at 59.

In sum, we hold that the facts and circumstances of this case are distinguishable from those in Willis. Most significant is the fact that Bails did not take time to reflect upon an appropriate punishment, as the mother did in Willis. Instead, Bails acted in the heat of her anger with W.B. The mother in Willis inflicted controlled swats aimed at the child’s buttocks. Here, the numerous bruises that W.B. sustained on the various parts of her body, including her face, are inconsistent with Bails’ testimony that she attempted to swat W.B. on her buttocks. We hold that the State disproved Bails’ parental privilege defense beyond a reasonable doubt. The evidence supports Bails’ conviction.

Issue Two: Competency of Witness

Bails next contends that the trial court had an affirmative duty to establish W.B.’s competency prior to her testimony. Timely objection should be made to any improprieties that may occur during the course of a trial so that the trial judge may be informed and may take effective action to remedy the error or grievance complained of. Haycraft v. State, 760 N.E.2d 203, 209 (Ind. Ct. App. 2001). A defendant’s failure to object to a child’s testimony acts as a waiver of any question of the competency of the child as a witness. Id. Here, Bails did not offer a timely objection to W.B.’s testimony, and the issue is waived. See id.

Waiver notwithstanding, the trial court has the discretion to determine if a child witness is competent based on the judge's observation of the child's demeanor and responses to questions posed by counsel and the court. Haycraft, 760 N.E.2d at 209. A trial court's determination that a child is competent to testify will only be reversed for abuse of discretion. Casselman v. State, 582 N.E.2d 432, 435 (Ind. Ct. App. 1991). If the record contains evidence from which the trial court could have inferred the child understood the nature and obligation of the oath, the trial court's ruling must be affirmed. Id.

A child under ten years old was formerly presumed to be incompetent to testify, but the statute setting forth the presumption was repealed in 1990. Haycraft at 209. Instead, Indiana Evidence Rule 601 now applies. Id. It states that "[e]very person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly." Id. Before competency of a child witness is established, a "child must still demonstrate to the court she underst[ands] the difference between telling the truth and telling a lie, kn[ows] she [i]s under compulsion to tell the truth, and kn[ows] what a true statement actually [i]s." Casselman, 582 N.E.2d at 435.

The transcript reveals that the trial court did not abuse its discretion in allowing W.B. to testify. In particular, the trial court engaged in the following colloquy with W.B.:

Q: So, [W.B.] you understand all we're asking you to do is one thing, okay? You know what that is?

A: Yes.

Q: It's tell the truth. Okay.

A: Yes.

Q: Just tell the truth.

Transcript at 6. Subsequently, Bails' counsel engaged in the following conversation with

W.B.:

Q: Your mother, [Bails], ever teach you about telling the truth, and telling a lie?

A: Yes.

Q: Okay. What would happen to you if you told a lie?

A: I would get in trouble.

Id. at 33. Counsel further questioned W.B.:

Q: And, you told [your principal] that some boy hit you, or the kids hit you in the mouth with a ball?

A: Yes.

Q: That was a lie wasn't it?

A: Yes.

Q: And, you know telling a lie is wrong, right?

A: Yes.

Q: In fact, . . . your mother taught you a lot about please don't lie. She asked you to always tell the truth; is that right?

A: Yes.

Q: You wouldn't get in trouble for telling the truth[,] would you?

A: No.

Id. at 35.

It is reasonable to infer, based on the record together with the trial court's ability to assess W.B.'s in-court demeanor, that W.B. had demonstrated that she understood the difference between the truth and a lie, knew she was required to tell the truth, and actually knew what a true statement was. Bails has not shown that the trial court abused its discretion on the issue of W.B.'s competency to testify.

Issue Three: Sentence

Bails contends that her 545-day sentence is inappropriate in light of the nature of the offense and her character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that her sentence is inappropriate in light of the nature of her offenses and her character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The range of imprisonment for a Class D felony is six months to three years, with an advisory sentence of one and one-half years. Ind. Code § 35-50-2-7. An advisory sentence is no longer presumptive and a court may impose any sentence within the statutory range. Anglemyer v. State, 868 N.E.2d 482, 488 (Ind. 2007) clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). Here, the trial court imposed the advisory sentence for a Class D felony. The trial court did not identify any aggravators or mitigators at sentencing. But the trial court did note that Bails' sentence was "fashioned" upon the recognition of her responsibilities as a foster mother. Transcript at 90.

Bails contends that her sentence is inappropriate in light of the nature of the offense. In particular she notes that "her daughter was not seriously hurt." Appellant's Brief at 14. But the evidence shows that W.B., a young and physically small child, was "whooped" with a belt several times by her mother, and she sustained serious bruising. Transcript at 59. Further, when W.B. went to school the next day and was asked about the bruises, W.B. felt compelled to make up a story about what had caused the bruises. We are not persuaded that Bails' sentence is inappropriate in light of the nature of the offense.

Bails also contends that her sentence is inappropriate in light of her character. In particular, Bails points out that her service as a foster parent is a noble undertaking. But Bails' history of violent behavior, while minor, does not reflect a good character. In addition to a misdemeanor battery conviction in 1999, at the time of sentencing in this case, there was "another case pending" involving "the same kind of allegation" of

physically abusing her fourteen-year-old stepdaughter. Id. at 83. We cannot say that Bails' advisory sentence is inappropriate in light of her character.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.