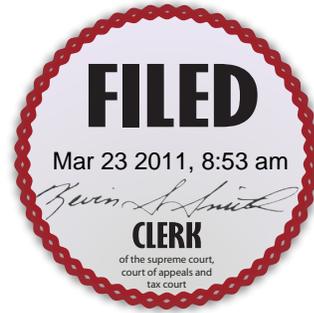


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CORTEZ LEE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 02A03-1008-CR-413

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0912-FB-220

March 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Cortez Lee appeals his conviction and sentence for Neglect of a Dependent,¹ a class B felony. Specifically, Lee argues that the evidence was insufficient to support his conviction and that his twelve-year sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). Finding the evidence sufficient and concluding that the sentence is not inappropriate, we affirm the judgment of the trial court.

FACTS

Lee is the father of twin boys, C.Lt. and C.Lr., who were born on December 5, 2008. Lee and the children's mother, Chavon Harris, lived together in Fort Wayne and Lee cared for the twins during the day while Harris attended school.

At approximately 7:00 a.m. on January 22, 2009, while Harris was at school, Lee noticed that there was something wrong with C.Lt.'s leg. The baby's leg was swollen and "just kind of dangling" and the baby "started screaming once he touched his leg or tried to change his diaper." Tr. p. 278.

Lee knew that the baby needed medical attention, but he did not take him to the hospital because Harris had the insurance card. Lee called Harris at school around noon to tell her that the baby needed to go to the hospital, but she was unable to leave school at that time. Harris returned home from school in the afternoon; however, they waited until later that evening so that Lee's mother could take them to Parkview Memorial Hospital.

¹ Ind. Code §§ 35-46-1-4(a)(1), -4(b)(2).

When C.Lt. was examined, it was discovered that he had an “obliquely oriented displaced fracture of the femur which is the large leg bone that’s in the thigh area.” Tr. p. 51. Upon further examination, doctors discovered that the six-week-old baby also had a skull fracture, fractured ribs, a fractured wrist, a fractured finger, and a fractured foot. There was bleeding from the skull fracture that had caused swelling to the brain. C.Lr. was also examined, but he had no injuries.

The doctors determined that C.Lt.’s injuries had occurred at different times. More particularly, the fractured femur and skull fracture both occurred around the same time and within one or two days of the baby’s admission to the hospital, possibly within ten to twelve hours of his admission. By contrast, the fractured wrist was around “ten to fourteen days or it may be even older.” Id. at 66. Similarly, the infant’s fractured foot was “older than ten days.” Id. The fractured finger was described as an “old healed injury.” Id. at 85.

The doctors who either examined C.Lt. or reviewed his hospital records agreed that his injuries were not accidental and required considerable force. The femur fracture, in particular, could have only occurred upon application of significant force consistent with child abuse.

The doctors who treated C.Lt. also opined that the baby’s injuries would have caused him great pain that would have been noticeable to a caregiver during ordinary daily interactions such as dressing and changing him. The infant’s reaction to the fractured femur in particular would have been noticeable to any caregiver.

Neither Lee nor Harris could explain how their son received his numerous injuries. Lee attempted to explain the fractured femur by stating that Harris had rolled over on the baby's leg the night before they took him to the hospital. Likewise, Lee attempted to explain the fractured skull by stating that he had accidentally struck the baby's head with his elbow while playing video games. The doctors agreed that Lee's explanations were not consistent with the infant's injuries.

The Department of Child Services (DCS) was notified and the twins were placed in foster care. C.Lt. did not incur additional injuries while in foster care.

On December 15, 2009, the State charged Lee with class B felony neglect of a dependent. Lee's jury trial commenced on June 9, 2010, with the jury finding him guilty as charged on June 10, 2010.

The trial court held a sentencing hearing on July 13, 2010. The trial court determined that Lee's lack of criminal history was a "significant mitigating circumstance." Sentencing Tr. p. 18. Additionally, the trial court considered Lee's learning disability to be a "minor mitigating circumstance," observing that "everybody's a little fuzzy on why it is that you are classified as learning disabled." Id. at 19.

The trial court declined to give any mitigating weight to the fact that Lee was only nineteen years old at the time he committed the offense, stating that he was "clearly old enough . . . to know better." Id. at 18-19. Likewise, the trial court did not consider the fact that Lee is the father of three children to be a mitigating factor, pointing out that he is "not involved with these children's lives, in fact, these children have been removed from

your custody and from the custody of the mother of the children and are placed in licensed foster care which candidly Mr. Lee, is probably the best thing for these kids.” Id. at 19.

In aggravation, the trial court noted the nature and circumstances of the crime, namely, the various ages of the injuries that the baby had suffered, the severity of those injuries, the violation of the position of trust that Lee was in as caregiver, and the fact that the baby was only six weeks old. After concluding that the aggravating circumstances significantly outweighed the mitigating circumstances, the trial court sentenced Lee to twelve years imprisonment. Lee now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Lee argues that the evidence is insufficient to support his conviction for class B felony neglect of a dependent. More particularly, “Lee contends the evidence is insufficient to show that he knowingly placed [C.Lt.] in a dangerous situation.” Appellant’s Br. p. 5.

When considering a challenge to the sufficiency of the evidence, this Court neither reweighs the evidence nor judges witness credibility. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will consider only the evidence most favorable to the verdict along with all reasonable inferences. Taylor v. State, 879 N.E.2d 1198, 1202 (Ind. Ct. App. 2008). Additionally, this Court will affirm if there is probative evidence from which a

jury could have found the defendant guilty beyond a reasonable doubt. Gray v. State, 871 N.E.2d 408, 416 (Ind. Ct. App. 2007).

To prove that Lee was guilty beyond a reasonable doubt, the State was required to show that while having the care of C.Lt., a dependent, Lee knowingly or intentionally placed C.Lt. in a situation that endangered C.Lt.'s health, resulting in serious bodily injury to C.Lt. I.C. §§ 35-46-1-4(a)(1), -4(b)(2). Indiana Code section 35-41-2-2(b) provides that “[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.” In the context of the child neglect statute, our Supreme Court has explained that “knowing behavior is that level where the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation.” Armour v. State, 479 N.E.2d 1294, 1297 (Ind. 1985).

In this case, the doctors who either examined C.Lt. or reviewed his hospital records agreed that his injuries were not accidental and required considerable force. The femur fracture, in particular, could have only occurred upon application of significant force consistent with child abuse. Moreover, neither Lee nor Harris gave a plausible explanation of how their son received his numerous injuries, and Lee was C.Lt.'s primary caregiver, especially when Harris was at school.

The doctors also determined that C.Lt.'s injuries occurred at different times. Specifically, the fractured femur and skull fracture both occurred around the same time and within one or two days of the infant's admission to the hospital, possibly within ten

to twelve hours of his admission. By contrast, the fractured wrist was around “ten to fourteen days or it may be even older.” Tr. p. 66. Similarly, the infant’s fractured foot was “older than ten days.” Id. The fractured finger was described as an “old healed injury.” Id. at 85.

Perhaps most compelling, the doctors who treated C.Lt. opined that the baby’s injuries would have caused him great pain that would have been noticeable to a caregiver during ordinary daily interactions such as dressing and changing him. The infant’s reaction to the fractured femur in particular would have been noticeable to any caregiver. From these facts and circumstances, there was more than sufficient evidence from which the jury could reasonably conclude that Lee was subjectively aware of a high probability that he placed his six-week-old son in a dangerous situation that resulted in serious bodily injury to his son. Consequently, this argument fails.

II. Inappropriate Sentence

Lee argues that his twelve-year sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). Lee contends that that he should have been given the advisory sentence of ten years. See Ind. Code § 35-50-2-5 (stating that “[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years”).

When reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the

defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As an initial matter, we note that Lee offers basically no argument on this issue aside from the mere assertion that his sentence is inappropriate and that he should have been sentenced to a ten-year term. Therefore, he has waived the argument. See Casady v. State, 934 N.E.2d 1181, 1191 (Ind. Ct. App. 2010) (concluding that defendant waived argument that sentence was improper for failure to make a cogent argument); see also Ind. Appellate Rule 46(A)(8)(a) (instructing that the argument section of the appellant's brief must "contain the contentions of the appellant" and be "supported by cogent reasoning").

Waiver notwithstanding, the record indicates that Lee was a primary caregiver to his six-week-old son. As such, Lee was in a position of trust, and his infant son was dependent upon him to meet his every need and to protect him. When Lee finally sought medical treatment for his son's seriously injured leg, the doctors discovered that the baby not only had a fractured femur, but also a skull fracture, fractured ribs, a fractured wrist, a fractured finger, and a fractured foot. The doctors determined that C.Lt.'s injuries occurred at different times and were in various stages of the healing process. Additionally, the doctors who either examined the baby or his hospital records agreed that the injuries were not accidental and consistent with child abuse.

As discussed above, the doctors also opined that C.Lt.'s injuries would have caused him great pain that would have been noticeable to a caregiver during ordinary

daily interactions such as dressing and changing him. Put another way, the baby cried, which is what babies do when they are in distress or need something. Nevertheless, Lee ignored these cries for help and failed to seek medical treatment for his infant son in a timely manner. And although we recognize that Lee has no criminal history and a learning disability, in light of the egregious nature of the offense, we cannot say that his twelve-year sentence is inappropriate, and we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.