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**IN THE
COURT OF APPEALS OF INDIANA**

TIFFANY L. OTTEN,)
)
Appellant-Defendant,)
)
vs.) No. 02A03-1009-CR-538
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-1001-FB-7

May 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Tiffany L. Otten appeals her conviction for neglect of a dependent, as a Class B felony, following a jury trial. Otten presents the following issues for review:

1. Whether the trial court abused its discretion when it admitted evidence of her bad character contrary to Evidence Rule 404(b); and
2. Whether the evidence is sufficient to support Otten's conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 10, 2009, Otten took her seven-month-old son, B.O., to the emergency room at Parkview Hospital in Fort Wayne. Otten had noticed that B.O.'s right eye was swollen shut, and she claimed that she had suspected the cause to be pinkeye. B.O. had also vomited earlier that day. Thomas Edwards, a physician assistant in the emergency room, examined B.O. After Otten pointed out that B.O.'s head was swollen, Edwards suspected a traumatic head injury and ordered a CAT scan of B.O.'s head. While B.O. was at the hospital, the swelling also spread to his left eye. When Edwards asked Otten how the injury had occurred, "[s]he said he could have fallen, but she did not have a direct answer of how it could have occurred." Transcript at 204. A subsequent CAT scan revealed that the child had sustained both depressed and non-depressed skull fractures and had a brain bleed.

Due to the nature of B.O.'s condition as a traumatic injury, he was moved to a different area of the emergency room. There, emergency room nurse Elizabeth Wolfe asked Otten when B.O. had been injured. Otten initially answered that she had noticed the child's condition the previous day, but her boyfriend Joshua Johnson, who was in the

room with her, corrected her. At that point, Otten was “agitated” and altered her answer to say that she had first noticed the condition a few days earlier. Id. at 163. When Wolfe asked how B.O. had been injured, Otten replied that she was not sure but he had fallen off the bed a few days earlier. She also said that he might have been hurt after he had fallen and she had fallen on top of him. Wolfe doubted that a fall from the bed could have resulted in the type of injury B.O. had sustained.

Following protocol, hospital personnel notified Social Services and Child Protective Services of suspected abuse or neglect of B.O. As a result, Claire Roney, a hospital social worker, interviewed Otten. When Roney asked Otten what could have caused B.O.’s injury, Otten said she did not know. Following an interruption in the interview, Roney again asked Otten what might have caused B.O.’s injury, and Otten replied that he had fallen off a bed three or four days earlier.

Detective Lorna Russell of the Fort Wayne Police Department was dispatched to the hospital and asked Otten and Johnson if they would agree to go to the police station to give statements. Otten and Johnson agreed, and Detective Russell advised them of their rights. During the interview, the detective asked Otten how B.O. had been injured, and Otten replied that B.O. had been injured the previous week when his three-year-old brother threw a ball that hit B.O. in the head. When Detective Russell observed to Otten that that story was inconsistent with what Otten had told the medical personnel, Otten’s demeanor changed. She became “disoriented, she couldn’t keep her train of thought, she would lose track of what she was talking about.” Id. at 543. This behavior was inconsistent with Otten’s behavior at the hospital. Based on her sixteen years of

experience as a police officer, thirteen years as a detective, Detective Russell believe that Otten was under the influence of drugs during the interview at the police department.

On the same day as B.O.'s admission to the hospital, police executed a search warrant on Otten's apartment. They found the apartment to be "unke[m]pt and dirty" with "piles of clothes, quite a few alcoholic beverage containers, and broken mirror glass, so some of it was an unsafe condition for kids." Id. at 480. A crime scene technician at the apartment measured the height of the couch seat cushion to the floor to be seventeen and one-half inches from the floor. The technician measured the mattress, including a feather cushion, in the child's bedroom to be twenty-six inches from the floor and twenty-one inches from the mattress to the floor without the feather cushion. And the master bedroom mattress top was eighteen inches from the floor. Officers also found a hemostat and what later tested to be marijuana at the apartment.

The State charged Otten with neglect of a dependent, as a Class B felony. On July 8, 2010, the State filed a notice of its intent to use Evidence Rule 404(b) evidence. On July 23, the trial court held a hearing on that notice and then ruled that the evidence at issue would be admissible at trial. The two-day trial commenced on August 10. Otten objected to the admission of certain evidence that she argued was irrelevant character evidence. The trial court admitted that evidence over her objection. Following deliberations after the close of evidence, the jury returned a verdict finding Otten guilty as charged. On September 13, the trial court sentenced Otten to twelve years at the Department of Correction with credit for time served. Otten now appeals.

DISCUSSION AND DECISION

Issue One: Admission of Rule 404(b) Evidence

Otten first contends that the trial court abused its discretion when it admitted certain evidence contrary to Indiana Evidence Rule 404(b). Our standard of review of a trial court's findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Indiana Evidence Rule 404(b) limits the admission of prior bad acts into evidence and reads in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ind. Evidence Rule 404(b). Evidence is excluded under Rule 404(b) only when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. Pavey v. State, 764 N.E.2d 692, 704 (Ind. Ct. App. 2002) (citing Sanders v. State, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000)), trans. denied.

In assessing the admissibility of 404(b) evidence, the trial court must: (1) determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect. McClendon v. State, 910 N.E.2d 826, 832 (Ind. Ct. App. 2009), trans. denied. "Although relevant, evidence may be excluded if its probative value

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Evid. R. 403.

Otten contends that certain testimony was irrelevant and prejudicial and, therefore, should not have been admitted by the trial court. Specifically, she cites the testimony of various witnesses on the following subjects: Otten’s parenting skills, Otten’s failure to wake due to a “presumed methadone induced stupor[,]” and evidence of Otten’s drug use and misuse. Appellant’s Brief at 12. Otten argues that the statements at issue “go[] to a[n] inference for propensity [to commit the offense] and nothing more.” *Id.* We cannot agree.

The State charged Otten with neglect of a dependent, as a Class B felony. A person “having the care of a dependent, whether assumed voluntarily or because of legal obligation, who knowingly or intentionally . . . places the dependent in a situation endangering the dependent’s life or health” commits the offense of neglect of a dependent. Ind. Code § 35-46-1-4(a)(1). The offense is a Class B felony if the neglect results in bodily injury. Ind. Code § 35-46-1-4(b)(2). Both action and inaction can place a child in an undesirable position by inadequate performance of affirmative duty of reasonable care. McMichael v. State, 471 N.E.2d 726, 732 n.5 (Ind. Ct. App. 1984).

To show that Otten intentionally or knowingly neglected B.O., the State presented the testimony of several witnesses regarding Otten’s parenting skills. The mother of Otten’s boyfriend, Margaret Chance, testified that she had occasionally visited with Otten and the child and observed that Otten “did not know how to take care of the baby that

well.” Transcript at 397. Chance had observed Otten “drowse out” on Methadone¹ while holding B.O., and sometimes Otten “had cigarettes with the baby and did that.” Id. at 399. On one visit to Otten’s apartment, Chance had heard the child crying as she climbed the steps to the apartment. There, she found Otten asleep with the baby “on top of her, and he was wet, and he had snot all over where he had been crying a lot.” Id. at 397-98. Trying to wake Otten, Chance “shook her and shook her and hollered at her but she wouldn’t wake up.” Id. at 398. Chance believed Otten’s failure to wake might have been caused by taking “too much medicine or something.” Id.

Another time, neither Otten nor Johnson woke to answer the door despite Chance’s “pounding” on the apartment door and yelling for twenty minutes. Id. at 401-02. When Chance found an open window, she heard B.O. crying, and he “kept crying and crying.” Id. Through the window Chance saw that B.O. “was in his play pen but there was [sic] a bunch of covers there on him.” Id. at 402. Chance entered through the window and “pulled back the covers” to retrieve B.O. from the play pen. Id. He was “drenched in sweat, even his hair. And when [she] pulled him up he went (sigh sound) and took a deep breath, so [she] knew it was close.” Id. Chance then found Otten and Johnson asleep in the bedroom.

The State also presented the testimony of Cindy Hiatt, the stepgrandmother of Otten’s children. Hiatt testified that B.O. was “very dirty” and his “hair would be matted” most of the time when Otten came to visit. Id. at 458. Otten’s older son had been living with Hiatt since early November of 2008. Otten had “come to [Hiatt] in her

¹ Otten had legal prescriptions for Methadone.

[Otten's] worse [sic] time saying that she couldn't handle" the older child. Id. Hiatt testified that Otten had also said that "she felt that Josh [Johnson] was being mean to [the older child], locking him in his room, wasn't treating him correctly." Id. at 458-59. Hiatt had also once observed B.O. to have what appeared to be a cigarette burn on his leg.

In addition to that testimony, there was also evidence that officers had found marijuana at Otten's house when executing the search warrant. Officers had also found empty prescription containers for Methadone and Hydrocodone which, according to the prescription labels, should have had doses remaining. Further, Otten had admitted in a CHINS proceeding regarding B.O. that the injury he had suffered could not have occurred but for the act or omission of a parent, guardian, or custodian.

The evidence described above is all relevant to Otten's culpability.² A person knowingly commits neglect of a child when he is subjectively aware of a high probability that he placed the child in a dangerous situation. Sanders v. State, 734 N.E.2d 646, 651 (Ind. Ct. App. 2000), trans. denied. Here, the testimony showing that Otten had poor parenting skills, placed her older child with a relative because she couldn't handle him, had been extremely difficult to wake on more than one occasion while seven-month B.O. was in her care and in distress, and had allowed the presence of illegal drugs (marijuana) in the home would have made a reasonable person aware of a high probability that she had placed B.O. in a dangerous situation. See id. Thus, the testimony that Otten contends should not have been admitted is relevant to the determination of her culpability.

² Indiana Evidence Rule 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence."

Otten also challenges the admission of testimony by Christina Radu, a neighbor, who had once called police to report possible abuse of B.O. Even assuming error in the admission of that evidence, the error, if any, was harmless because Otten has not shown that the admission of Radu's testimony affected Otten's substantial rights. See Gonzalez v. State, 929 N.E.2d 699, 702 (Ind. 2010). Thus, Otten's argument regarding the admission of Radu's testimony is without merit.

In the second step of our Rule 404(b) analysis, we consider whether the challenged evidence is more probative than it is prejudicial. McClendon, 910 N.E.2d at 832. On this point, Otten's sole argument is that, because the evidence regarding her "litany of uncharged 'wrongs['] was] trotted out before the jury w[as] relevant to no legitimate issue and with no probative value as a consequence, [it was] clearly prejudicial." Appellant's Brief at 13. But, again, we have determined that the testimony of Chance and Hiatt was relevant to Otten's culpability. Otten made no argument and, therefore, has not shown that the probative value of that testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. See Evid. R. 403. Thus, Otten has not shown that the trial court abused its discretion when it admitted that evidence under Evidence Rule 404(b).

Issue Two: Sufficiency of Evidence

Otten next contends that the evidence is insufficient to support her conviction for neglect of a dependent, as a Class B felony. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses.

Rhoton v. State, 938 N.E.2d 1240, 1246 (Ind. Ct. App. 2010), trans. denied. We look only to the probative evidence supporting the verdict 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.

Again, in order to prove neglect of a dependent, the State was required to show beyond a reasonable doubt that Otten, having the care of a B.O., whether assumed voluntarily or because of a legal obligation, knowingly or intentionally placed him in a situation that endangered B.O.'s life or health. See Ind. Code § 35-46-1-4(a)(1). The information charged that Otten's conduct had resulted in serious bodily injury, elevating the offense to a Class B felony. Appellant's App. at 11.

In challenging the sufficiency of evidence, Otten argues only that the State did not meet its burden to prove that she intentionally or knowingly neglected B.O. We cannot agree. "Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind" Lay v. State, 933 N.E.2d 38, 42 (Ind. Ct. App. 2010) (citations omitted), trans. denied. Thus, the State was not required to prove that Otten herself abused B.O.; rather, it only had to prove that she failed to take action that a reasonable parent would take and that such failure endangered B.O.'s life or health and resulted in serious bodily injury. See id.

A person knowingly commits neglect of a child when she is subjectively aware of a high probability that she placed the child in a dangerous situation. Sanders, 734 N.E.2d

at 651. “Because such a finding requires one to resort to inferential reasoning to ascertain the defendant’s mental state, the appellate courts must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper.” Scruggs v. State, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008) (internal quotation marks and citation omitted), trans. denied.

Here, the evidence shows that on at least two occasions Otten had been so soundly asleep that she did not wake to either her baby’s crying, even when he was on top of her, or to twenty minutes of pounding on the apartment door. She also told Hiatt that Johnson was mean to her older child and that she could no longer handle that child when she asked Hiatt to begin caring for him. Despite her concerns about Johnson’s treatment of her older son, Otten kept B.O. in the home.

On January 9, Chance’s husband visited Otten’s apartment and did not observe any injury to B.O. Otten testified that B.O. was in her care from the evening of January 9 until she took him to the hospital on January 10. When the serious injury was then discovered, she changed her responses over time, alternately disclaiming knowledge of how B.O. could have been injured, suggesting that he could have fallen from a bed or when she fell on top of him, or suggesting that he had been hit in the head with a ball days earlier by his three-year-old brother. However, medical personnel testified that a tremendous amount of force would have been required to inflict the type of skull fracture that B.O. had sustained.³ And Dr. Michael Munz opined that B.O. had likely been injured in the twenty-four-hour period preceding his admission to the hospital.

³ Due to his young age, B.O.’s skull was flexible and not yet fully fused. Wolfe testified that the bones in such a skull are soft and would require a “tremendous amount of force to break that bone, and

In light of this evidence, a jury could have reasonably found that Otten intentionally or knowingly placed B.O. in a situation that endangered his life or health. Otten's arguments to the contrary amount to a request that we reweigh the evidence. This we cannot do. Rhoton, 983 N.E.2d at 1246. And Otten does not challenge the sufficiency of evidence as to any element of the offense other than her level of culpability. As such, Otten has not shown that the evidence is insufficient to support her conviction for neglect of a dependent, as a Class B felony.

Affirmed.

ROBB, C.J., and CRONE, J., concur.

that is why a fall from a bed is not what I would consider to be a cause" for the type of injury sustained by B.O. Transcript at 176.