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IN THE
COURT OF APPEALS OF INDIANA

DONALD FULK, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-1007-CR-381
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Special Judge
Cause No. 32D03-0804-FB-5

May 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Donald Fulk, Jr. appeals his conviction for aggravated battery as a class B felony.[1] Fulk raises one issue which we revise and restate as whether the evidence is sufficient to sustain his conviction. We affirm.

The facts most favorable to Fulk's conviction follow. In April 2008, Fulk lived in Brownsburg, Indiana, with his girlfriend, his daughter who was approximately five years old, his son who was approximately three years old, and his girlfriend's son J.G., who was approximately fifteen months old. Sometime between about 4:30 p.m. and 4:40 p.m. on April 2, 2008, Fulk returned home from work and assumed childcare responsibilities for the three children, and at about 4:40 p.m. or 4:45 p.m. Fulk's girlfriend left home to go to work. Later in the evening at approximately 8:00 p.m., Fulk called his girlfriend at work and said that he had to call 911 because he thought J.G. had had a seizure and that she needed to come home quickly. Fulk's girlfriend arrived at home as the ambulance was pulling away and got into Fulk's truck, and Fulk drove to Riley Hospital.

While traveling to the hospital, Fulk told his girlfriend that he had fed the kids dinner and then put J.G. down on the floor to play. He said that while he was studying, he heard J.G. whimper and looked up, but that J.G. was fine and started crawling away and playing with more toys. Fulk said that "about eightish" J.G. started whining, and he took him into the bedroom, changed his diaper, and put him in pajamas. Transcript at 353. Fulk told his girlfriend that he noticed that J.G. "got real stiff," that he knew J.G. had had a seizure, and that he then called 911. Id.

[1] Ind. Code § 35-42-2-1.5 (2004).

When J.G. arrived at Riley Hospital, he was "essentially unresponsive" and had "a Glasgow coma scale score of seven" which was "considered a severe traumatic brain injury." Id. at 750, 756. A CT scan revealed that J.G. had a "large fluid mass in the subdural space in the right side of [his] brain" and "a horrible amount of brain swelling." Id. at 749-750, 752. J.G. underwent emergency surgery to remove subdural fluid and relieve the pressure on his brain. Based upon observations of J.G.'s conditions, J.G.'s surgeon believed J.G. had a substantial risk of dying. J.G. was placed in the intensive care unit following the surgery for at least three weeks and monitored carefully.

On April 18, 2008, the State filed an information charging Fulk with Count I, aggravated battery as a class B felony;[2] and Count II, neglect of a dependent causing serious bodily injury as a class B felony. In November 2009, a jury trial was held and resulted in a mistrial. On May 17, 2010, a second jury trial commenced. At trial, the State presented evidence related to the nature J.G.'s injuries which included testimony from Dr. Donald McIntire, J.G.'s pediatrician prior to April 2, 2008; Dr. Antoinette Laskey, a child abuse pediatrician; and Dr. Jodi Smith, the pediatric neurosurgeon who performed surgery on J.G. On May 19, 2010, the jury found Fulk guilty of aggravated battery as a class B felony under Count I and the lesser-included offense of neglect of a dependent as a class D felony under Count II. On June 24, 2010, the court vacated Fulk's conviction under Count II and sentenced Fulk to six years in the Department of Correction for his conviction under Count I.

[2] The charging information alleged that Fulk "did knowingly or intentionally inflict injury, to wit: acute subdural hematoma with mass effect that is consistent with an intentional injury on J.G., DOB 12/14/2006 that created a substantial risk of death to J.G. . . . ." Appellant's Appendix at 19.

The issue is whether the evidence is sufficient to sustain Fulk's conviction. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of aggravated battery is governed by Ind. Code § 35-42-2-1.5, which provides: "A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death . . . commits aggravated battery, a Class B felony." Thus, to convict Fulk of aggravated battery as a class B felony, the State needed to prove that Fulk knowingly or intentionally inflicted injury on J.G. that created a substantial risk of death.

A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so. Ind. Code § 35-41-2-2(a). 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. Ind. Code § 35-41-2-2(b).

Fulk argues that the evidence is insufficient to show that J.G.'s injury was caused by abusive trauma or that he inflicted J.G.'s injury. Fulk essentially argues that J.G.'s

bleeding could have been caused by reasons other than inflicted trauma, including accidental trauma, rebleeding, congenital malformations, genetic conditions, infection, and chronic use of antibiotics. Fulk specifically argues that "[t]he only evidence presented by the State to establish that a crime had been committed was the testimony of [J.G.'s] neurologist and the neurosurgeon who operated on him" and that "[t]he State also relied on testimony of the neurologist and neurosurgeon in an attempt to establish proof that the injury occurred when [J.G.] was in Fulk's exclusive care." Appellant's Brief at 7. Fulk points to the fact that in the weeks immediately preceding J.G.'s hospitalization and surgery, J.G. had a series of ear and eye infections which had been resistant to antibiotic treatment and that the surgeon stated that the infection could have caused swelling in the brain.

The State argues that sufficient evidence exists that "J.G.'s injuries were caused by abusive trauma and not some benign or accidental force." Appellee's Brief at 6. The State argues that three physicians gave testimony that "explicitly stated that every alternative hypothesis proffered by [Fulk] was not the cause of [J.G.'s] injuries" and that "the timeline firmly establishes that given the extent and nature of the trauma, and J.G.'s otherwise normal behavior, the injury could only have been inflicted while he was under [Fulk's] exclusive care and custody." Appellee's Brief at 4-5.

To the extent Fulk's arguments as to the possible causes of J.G.'s injuries and the time when J.G. may have sustained his injuries ask us to assess the credibility of the witnesses or reweigh the evidence presented to the jury, we note that we cannot do so. See Drane, 867 N.E.2d at 146. In addition, to the extent Fulk asserts that every

reasonable hypotheses of innocence must be excluded, we note that it is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence,'" id. at 147 (citing Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995)), and that the "evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (citation omitted).

The record reveals that Dr. McIntire testified at trial regarding J.G.'s medical history and discussed J.G.'s series of eye and ear infections prior to April 2, 2008, the course of antibiotics that he had prescribed for J.G. in January, February, and March of 2008, and J.G.'s admittance at Riley on March 7, 2008. Dr. McIntire testified that J.G. was at Riley for approximately five days for I.V. antibiotics and that, when J.G. was discharged, he was prescribed an oral antibiotic for seven days. Dr. McIntire indicated that in his opinion "none of [J.G.'s] prior conditions are related to what happened" on April 2, 2008. Transcript at 528. Dr. McIntire also testified that "typically I.V. antibiotics are out of your system within twenty-four to thirty-six hours after you stop the I.V." and that "[o]ral antibiotics are in your system for anywhere from [] twenty-four to forty-eight hours after you've completed them." Id. at 548. The implication of Dr. McIntire's testimony is that the medications J.G. had been previously prescribed could not have caused the bleeding and brain swelling in J.G.'s head.

Dr. Laskey testified regarding her review of the medical records related to J.G. and her assessment of the nature of J.G.'s injuries. Dr. Laskey first observed J.G. in the intensive care unit following the operation. Dr. Laskey testified that J.G.'s mother did not have medical history information regarding J.G.'s biological father and that "the

absence of information about a bleeding disorder doesn't mean we don't look for it, it just means you don't have a family history available." Id. at 638. Dr. Laskey indicated that she performed some tests to determine whether or not J.G. was at an especially high risk for bleeding and that the test results were normal.

In her consult report, which was presented to the jury, Dr. Laskey concluded in part:

> While the initial concern was of an infection, the subsequent information obtained through lab results and the OR is consistent with trauma. The absence of any trauma and the significant nature of the trauma makes [sic] this most consistent with inflicted trauma. Based on the nature of the clot and the symptoms it is most consistent with an injury (ie close in time to presenting symptom—seizure).
>
> To a reasonable degree of medical certainty, the injuries/findings we have described cannot plausibly be explained by accidental injury, preexisting medical illness, reasonable discipline or benign events. Therefore, these injuries should be considered consistent with ***inflicted trauma (e.g. child abuse)***. This child is at high risk of further injury of [sic] death if returned to the hands of the caregiver who inflicted these injuries.

State's Exhibit 23. Dr. Laskey testified that she could not "find a medical reason, meaning hemophilia, [] aneurism, . . . genetic conditions, things that would medically cause [J.G.] to be in this state." Id. at 651.

Dr. Laskey further testified that there were no external signs of trauma to J.G.'s head but that it is "[a]bsolutely" possible for a child to have injuries similar to J.G.'s injuries because there are a number of ways a child could experience an impact and show no evidence of external trauma. Id. at 658. Dr. Laskey explained, for instance, that a child landing on a soft surface such as a bed or couch may not cause bruising or a skull fracture, but would stop the head suddenly and result in an impact. Dr. Laskey indicated

that in her opinion J.G. suffered from "[a]busive [h]ead [t]rauma." Id. at 659. Dr. Laskey also testified that a typical child that does not have an underlying medical condition like hemophilia would not sustain a subdural hematoma from falling off of a toy onto a carpeted surface "because the fall is very short," that children often fall "onto hard surfaces . . . from heights greater than that," that they "see injured children from falls, minor skull fractures, big goose eggs on their head," and that "[w]e don't see devastating, life threatening injuries from . . . a routine, household fall for [a] toddler." Id. at 676.

When asked whether J.G. would have eaten dinner after he sustained his injury, Dr. Laskey testified that J.G. "was not injured at the time he ate dinner if he ate dinner" because "his injury was such that this wasn't something that was going to be clinically . . . silent" and "the blood in his head and the swelling of his brain was causing him symptoms, his seizure, his blown pupil, they are not compatible with any functioning." Id. at 678-679. She further testified that "[t]his wasn't something that happened slowly and you're eating while your brain is dying." Id. at 679. Dr. Laskey also testified that J.G. had retinal hemorrhages, which is bleeding in the back of the eyes which is often found in children who have subdurals from inflicted trauma.

Dr. Smith testified at length regarding J.G.'s surgery and her care of J.G. at Riley Hospital. Dr. Smith testified that prior to J.G.'s surgery, she shaved J.G.'s head and looked for trauma and "didn't see any bruising at all." Id. at 798. Dr. Smith testified that she opened J.G.'s scalp, took off a very large bone flap, and immediately upon taking off the bone flap noticed that "the dura was pretty blue" which suggested that there may be

bleeding rather than an infection. The dura was "tense" and "rock hard," which meant there was "a lot of fluid underneath it." Id. at 763-764. Upon opening the dura, Dr. Smith noticed "there was active bleeding going on" and that under the bleeding there was a "blood clot on the surface of the brain." Id. at 764. Dr. Smith further testified that she saw no evidence of arterial venous malformation or a tumor, and that "even [her] operating nurses said oh oh, this is not [an] infection, you know, this is an injury." Id. at 767. Dr. Smith also testified that she did "not believe that this was related to an aneurism rupture." Id. at 832. Dr. Smith "removed all the subdural," "irrigated the brain off," and added a "dural patch." Id. at 767-768. Dr. Smith testified J.G. had "venous bleeding" from "the sagittal sinus and avulsed cortical veins," that the bleeding was "coming out pretty fast," and that she "knew that [she] had to do something with it quickly or else he could die from exsanguinations." Id. at 769-770. At one point, the court asked whether the trauma could have occurred before 5:00 p.m. while J.G. was under his mother's care, and Dr. Smith responded in part:

> [A]s I've thought about this whole thing, I have to [] go back to what I saw in the operating room. I think that if [J.G.'s] bleeding had been that intense for several hours, . . . I don't think he would have survived. I think he would have been sicker sooner, and I think he would have had to go to the emergency department sooner. . . . [It was] hyper acute . . . active bleeding, on-going bleeding, and I think that . . . if that had happened to that extent at three p.m., then I think [J.G.] would have presented to the emergency department by four p.m. And that's what I have to believe based on what I saw."

Id. at 830.

Based upon our review of the evidence as set forth in the record and above, we conclude that sufficient evidence exists from which the jury could find Fulk guilty

beyond a reasonable doubt of aggravated battery as a class B felony. See Lush v. State, 783 N.E.2d 1191, 1195-1197 (Ind. Ct. App. 2003) (holding that the evidence was sufficient to sustain the defendant's conviction for aggravated battery as a class B felony where the evidence showed that the victim was in the defendant's exclusive care at the time she sustained a life-threatening injury to her head, that the victim's injuries were only a few hours old and that the victim could not have played normally after the injuries were inflicted, and that due to the severity of the victim's injuries they could not have been inflicted by falling to the ground).[3]

For the foregoing reasons, we affirm Fulk's conviction for aggravated battery as a class B felony.

Affirmed.

ROBB, C.J., and RILEY, J., concur.

[3] In support of his argument, Fulk cites to Howard v. State, 319 N.E.2d 849 (Ind. Ct. App. 1974). In Howard, in reversing the defendant's conviction for cruelty and neglect of a child, the court stated: "The evidence most favorable to the State merely discloses that the injuries to [the victim's] head and abdomen occurred between 12 and 24 hours prior to his hospitalization. During that period, [the victim] was under the control of several persons other than [the defendant]" and that "[a]t most, the evidence shows that [the defendant] among others had an opportunity to inflict the injuries to [the victim's] head and abdomen." 319 N.E.2d at 851-852. In this case, the State presented evidence that J.G. sustained his brain injury after his mother had left for work and that Fulk had exclusive control of J.G. at that time. The evidence presented against the defendant in Howard is distinguishable from the evidence presented in this case, and we do not find Howard instructive.