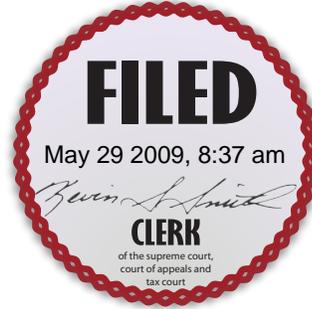


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

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

No. 02A05-0901-CR-21

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0709-FA-69

May 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Misty Lee Jones (“Jones”) appeals her conviction and sentence for Neglect of a Dependant, as a Class A felony.¹ We affirm in part, reverse in part, and remand for resentencing.

Issues

Jones presents two issues for review:

- I. Whether the evidence is sufficient to support her conviction; and
- II. Whether her sentence is inappropriate.

Facts and Procedural History

Jones and Marshawn Wilson (“Wilson”) lived together and had one child, Ariona Wilson (“Ariona”), born May 12, 2007. Jones and Wilson were each employed and alternated child care. On July 27, 2007, Jones arrived home from work, and Wilson informed her that he had accidentally dropped Ariona. Neither parent sought medical attention for Ariona.

During the afternoon of the next day, Jones took Ariona to Wilson’s workplace, a McDonald’s restaurant. Jones left for her workplace at about 4:00 p.m., leaving the baby in Wilson’s care. Wilson ended his shift and took Ariona home. Around 11:00 p.m. that evening, Wilson walked to a bar carrying Ariona, who was not breathing. Bar patrons called 9-1-1 and began to administer CPR, to no avail. After emergency personnel arrived,

¹ Ind. Code § 35-46-1-4.

paramedic Leah Boren attempted life support efforts, but “the baby was very cool,” and Boren formed the opinion that “the baby hasn’t had any respirations or any heart beat for quite a while.” (Tr. 232.)

Ariona was transported to a hospital, but could not be resuscitated. Nurse Ann Hoepfner observed the following injuries to Ariona:

there were multi-stages of bruising on her head, around her eye, on her neck. There was scabbing above her eyes. There was [sic] different marks on her body. The head was swollen in different parts of it, on her body. The fontanelles were bulging.

(Tr. 245.) Dr. Robert Gutekunst performed an autopsy on Ariona’s body and found evidence of “at least three separate event injuries, one of which is a fatal skull fracture[.]” (Tr. 469.) The skull fracture to the back of the head, measuring two and a half inches, was inflicted within two to six hours of Ariona’s death. Dr. Gutekunst opined that Ariona’s death was a homicide.

The State charged both Jones and Wilson with Neglect of a Dependant. Wilson was additionally charged with Battery. At the conclusion of a joint trial, each was convicted as charged. Jones was sentenced to thirty years imprisonment, the advisory sentence for a Class A felony. See Ind. Code § 35-50-2-4. She now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

The State charged that Jones committed neglect of a dependant, as a Class A felony, “between the 27th day of July, 2007 and the 28th day of July, 2007” when Jones “did

knowingly or intentionally place Ariona Wilson, in a situation endangering her life or health, resulting in death, for knowing Ariona Wilson had been injured and failing to seek medical treatment, resulting in her death[.]” (App. 10.)

Jones does not deny that Ariona was her dependent or that Jones failed to seek medical attention for Ariona on the relevant dates. Rather, Jones argues that the evidence does not establish neglect because Ariona did not appear to need medical treatment during the late evening of July 27, 2007, or the daytime hours of July 28, 2007, the last time that Ariona was in Jones’s care. Jones further argues that, in any event, there is insufficient evidence to support the elevation of the offense to a Class A felony based upon Ariona’s death, because Jones was at work and had no opportunity to seek medical attention for Ariona after the fatal blow.

We will affirm a conviction unless no reasonable fact-finder could have found that the evidence and reasonable inferences proved the defendant’s guilt beyond a reasonable doubt. Winn v. State, 748 N.E.2d 352, 357 (Ind. 2001). We view the evidence and the inferences therefrom in the light most favorable to the judgment, and we neither reweigh the evidence nor reassess the credibility of the witnesses. Id. Nevertheless, every criminal conviction must be supported by evidence of each material element of the crime charged. Gibbs v. State, 677 N.E.2d 1106, 1108 (Ind. Ct. App. 1997), trans. denied.

Here, the State presented evidence that Jones came home from work on Friday night, July 27, 2007, and was informed by Wilson that he had accidentally “dropped” Ariona from his standing height when the two-month-old allegedly “rolled out of” his arms. (Tr. 302.)

The infant was visibly bruised and had an abrasion on her forehead.

The next morning, Ariona awoke early and failed to drink a typical amount of formula. Several of Wilson's co-workers and Jones's family members observed Ariona with bruising around her eye and an injury to her forehead. Jones's mother, Nancy Martin, testified that Ariona cried more than usual on Saturday, "didn't drink a lot" and had one arm that "would just fall." (Tr. 303). According to Martin, Ariona's eyes looked "glossy." (Tr. 311.) Wilson's former co-worker, Miriam Thornton, testified that Ariona's bruising was so dramatic that when she saw Ariona on Saturday, she exclaimed to Jones, "what the hell happened to the baby's face?" (Tr. 365.)

When Jones's sister and one of Wilson's co-workers inquired about medical treatment for the infant, Jones insisted that she was fine. However, Jones cautioned Thornton not to wake Ariona because she "had been crying all night because of her fall" and then had been "fussy all day." (Tr. 365, 369.) Martin testified that Jones had been reluctant to obtain medical treatment for Ariona in the past for fear of Wilson's disapproval.

Accordingly, there is sufficient evidence to establish that Jones knew Ariona needed medical treatment and knowingly or intentionally failed to obtain that treatment, thereby placing Ariona in a situation that endangered her life or health. This establishes neglect of a dependant as a Class D felony. See Ind. Code § 35-46-1-4(a)(1). We next turn to the question of whether the evidence established resulting bodily injury,² elevating the offense to

² Pursuant to Indiana Code Section 35-41-1-4, "bodily injury" means "any impairment of physical condition, including physical pain."

a Class C felony, resulting serious bodily injury,³ elevating the offense to a Class B felony, or resulting death, elevating the offense to a Class A felony. See Ind. Code § 35-46-1-4(b).

Dr. Gutekunst observed different injuries in various stages. He characterized the frontal injury (resulting from the Friday night fall) as a “pretty good injury to the forehead.” (Tr. 462.) However, he determined that the injury to the back of the head (the last inflicted injury or “acute injury”) was the “fatal injury.” (Tr. 464.) In Dr. Gutekunst’s opinion, the Friday night fall resulted in “soft tissue swelling” and bruising and some subdural hemorrhage “could have” occurred from the injury across the front of the head. (Tr. 462, 464.) He testified further that, “anytime there is a blunt force trauma to the head, you typically are going to get that [subarachnoid hemorrhage or hemorrhage of the thin membrane covering the brain].” (Tr. 463.)

As such, there is evidence from which the jury could conclude that Jones’s failure to seek medical treatment for Ariona after the Friday night fall resulted in serious bodily injury. Neglect of a dependent as a Class B felony is thus established. However, the evidence also discloses that the fatal injury, fracture of the back of Ariona’s skull, was inflicted via blunt force trauma within a few hours of her death. During those hours, Jones was not present, was not informed of the injury, and did not have the opportunity to obtain medical treatment for Ariona. The State did not establish that Jones’s failure to obtain medical treatment for

³ Pursuant to Indiana Code Section 35-41-1-25, “serious bodily injury” means “bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus.”

Ariona resulted in her death.⁴ As the consequence necessary for conviction of the elevated crime was not proven, we reduce Jones's Class A felony conviction to a Class B felony conviction.

II. Sentence

Jones also challenged her advisory sentence for a Class A felony. Because we have revised her conviction to a Class B felony conviction, we need not address Jones's argument as to Class A felony sentencing. We remand to the trial court for sentencing upon a Class B felony conviction.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and ROBB, J., concur.

⁴ The State alleged only that Jones neglected Ariona by failing to obtain medical treatment and did not allege that Jones placed Ariona in a dangerous situation by returning her to the care of her father.