MEMORANDUM DECISION

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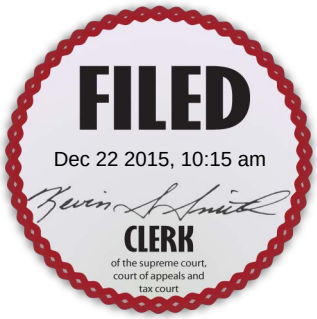

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IN THE
COURT OF APPEALS OF INDIANA

Charlene Tabb,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 22, 2015

Court of Appeals Case No. 18A05-1407-CR-357

Appeal from the Delaware Circuit Court.
The Honorable Thomas A. Cannon, Jr., Judge.
Cause No. 18C05-1308-MR-1

Shepard, Senior Judge

[1] Charlene Tabb was convicted on multiple counts arising from abuse of her three younger siblings and the death of her four-year-old cousin. Tabb raises several evidentiary issues and contends that the trial court abused its discretion in sentencing. We affirm. It will be tough to read.

Issues

[2] Tabb presents several issues for our review, which we restate as follows:

I. Whether the trial court abused its discretion by barring additional testimony from Tabb's siblings;

II. Whether the court abused its discretion by excluding evidence of prior bad acts or reports opining on the credibility of her siblings;

III. Whether the evidence adequately supported the convictions; and

IV. Whether the trial court abused its discretion in sentencing.

Facts and Procedural History

[3] Tabb and her parents, who lived in Florida, decided it would be better for Tabb's siblings and a young cousin to live with her and her husband Marcus Marcellus Tabb, in Muncie. In July 2012, Tabb and Marcus drove to Florida and brought all four children to Indiana, a place the children had never visited. J.G. was fifteen years old, R.G. was thirteen, Jr.G. was ten, and M.P. was four.

[4] After arriving in Indiana, Tabb's siblings lived alone in a house on North Brady Street, while Tabb, Marcus, and M.P. lived on 6th Street. Marcus installed cameras throughout the Brady Street house so that he and Tabb could monitor and record the children's behavior. They gave the children strict rules, and the consequences for any perceived misbehavior were extreme. They were not allowed to speak to each other or have telephone conversations with their parents without Marcus or Tabb being present, which was roughly once every

three days when they brought food to the house. Otherwise, the children's contact with Tabb and Marcus consisted of stern lectures, many of which were videotaped, and whippings, also videotaped, when the children broke a house rule—like leaving food spatter in the microwave, tracking in a small amount of dirt on the tile floor, and leaving hair in the sink. In addition to corporal punishment, which Tabb dispensed, the consequences for violations included kneeling on the hard floor for hours, eating only ramen noodles for meals, or writing out the violated rule 500 times.

[5] In late November 2012, R.G. told a school counselor that the three older children were living by themselves and that their behavior was being monitored by cameras. After the counselor notified D.C.S., an investigator arranged to meet with the entire family at Brady Street. Beforehand, Marcus instructed the older children to say that he and Tabb lived with them on Brady Street and not to mention M.P. Although the record is unclear whether Tabb was present, the investigator met with the three older children and Marcus, who did most of the talking. Since M.P. was kept at the house on 6th Street, the investigator was unaware of her existence. R.G. was later punished for having spoken to the school counselor. M.P. and Tabb moved to Brady Street, while Marcus visited and continued to monitor things by camera.

[6] M.P. had no apparent health problems in Florida, but that changed. Her health devolved to the point that she was vomiting daily. Neither Marcus nor Tabb took M.P. for medical treatment. They perceived her behavior to be intentional tantrums rather than health issues, and punished her. The older children were

not allowed to speak to M.P. and she was forbidden from talking to them. If Tabb was not present, the older children were instructed to punish M.P. for vomiting, the Tabb way—corporal punishment.

[7] Eventually, Tabb urged the older children to be more creative with punishing M.P. She and they escalated from whippings with belts or cords, to the use of a hammer, pliers, and a screwdriver. M.P. was weak, had trouble standing, complained that she was dizzy and did not feel well. Though M.P.'s health was getting worse by the day, and R.G. had urged Tabb to take M.P. to the hospital for treatment of a serious wound he had inflicted, neither Marcus nor Tabb did so. On June 21, 2013, by contrast, Marcus took J.G., R.G., and Jr.G. to the doctor because they had strep throat, and purchased medicine for them.

[8] At about 6 p.m. the next day, Marcus took medicine to the children and left. Later that evening, R.G. heard M.P. making choking or gagging sounds. When he got up to investigate, M.P. remained still when he kicked her. Panicked, he awakened his sister J.G., screaming that M.P. was dead, and then called Marcus. After he told Marcus that M.P. was not breathing, Marcus yelled at R.G., saying the responsibility for M.P.'s condition was R.G.'s, since he was the man of the house. Marcus drove to Tabb's workplace, picked her up, and drove to the Brady Street house. They *then* called 911.

[9] Medics and responding officers found M.P. on the floor, already dead. Rigor mortis had set in. There were extensive visible injuries. Tests later revealed at least eighty separate injury marks on her body, in various stages of healing, the

majority of which were over twenty-four hours old. The swelling of M.P.'s body was caused by vascular dehydration which would have taken days or weeks to progress to that point. M.P.'s cause of death was pulmonary embolus related to her dehydration and injuries, including lack of movement and infection.

[10] The State initially charged Tabb in multiple counts. A jury found Tabb guilty of aiding murder,[1] Class A felony neglect of a dependent,[2] five counts of Class C felony battery,[3] and three counts of Class D felony neglect[4] as lesser-included offenses. The trial court merged the Class A felony neglect conviction with the aiding murder conviction. It imposed an aggregate sentence of eighty-seven years.[5]

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[1] Ind. Code § 35-42-1-1 (2007) (murder); Ind. Code § 35-41-2-4 (1977) (aiding).

[2] Ind. Code § 35-46-1-4 ((b)(3) (2012).

[3] Ind. Code § 35-42-2-1(a)(3) (2012).

[4] Ind. Code § 35-46-1-4(a) (2012).

[5] The trial court imposed a sixty-five year sentence on the aiding murder conviction, a sentence of three years and four months on three of the Class C felony battery convictions, four years each for two of the convictions of Class C felony battery, and a sixteen-month sentence on the all three of the Class D felony neglect convictions to be served consecutively. The trial court limited the aggregate sentences for several convictions because the offenses constituted a single episode of criminal conduct.

Discussion and Decision

I. Excluding Additional Testimony

[11] Tabb claims that the trial court abused its discretion by refusing to allow Tabb to call her three younger siblings as witnesses in her case-in-chief.

[12] Evidence Rule 611 directs trial courts to exercise reasonable control over the mode and order of examining witnesses and presenting evidence. The goal is to make the interrogation effective for determining the truth, avoid wasting time, and protect witnesses from harassment or undue embarrassment. Evid. Rule 611(a); *Isaacs v. State*, 659 N.E.2d 1036, 1042 (Ind. 1995). In terms of cross-examination, the rule guides courts to limit questioning to matters discussed on direct examination and matters affecting witness credibility but permits the court to allow questioning about other matters as if it were direct examination. Evid. Rule 611(b).

[13] A trial court's decision whether to allow a witness to be recalled is left to the court's sound discretion. *Simpson v. State*, 915 N.E.2d 511, 517 (Ind. Ct. App. 2009), *trans. denied.* The decision is found to be an abuse of discretion only if it is against the logic and effect of the facts and circumstances before the court. *Id.*

[14] Tabb was unable to articulate for the trial court exactly what testimony she hoped to elicit from the children if she were permitted to recall them as witnesses in her case-in-chief. She complains on appeal that she was unable to put on a proper defense because she was not allowed to ask her younger siblings

questions about their initial untruthfulness immediately after M.P.'s death. The record belies this claim.

[15] The parties had taken videotaped depositions of all three younger siblings, during which Tabb had the opportunity to cross-examine. R.G.'s and Jr.G.'s depositions were each over two hours long, while J.G.'s lasted three hours. Those depositions were played for the jury, and the children were made available for further questioning via closed-circuit television. After Jr.G.'s deposition was played, Tabb conducted additional cross-examination of her that lasted for over three hours. J.G. gave additional testimony during a cross-examination lasting over three hours. R.G. was cross-examined for over four hours after his deposition was shown to the jury.

[16] To accommodate additional questioning of the children, closed-circuit equipment was set up in the courtroom and at the Child Advocacy Center. Attorneys and guardians ad litem were present at the Center, with a defense attorney and prosecutor present in the courtroom and at the Center. Replicating this for yet more questioning of the children most assuredly would have caused substantial delay, and the court rightly decided against doing so in the absence of solid reasons.

[17] Although Tabb argues that she wanted to question the children about new information from the Center incident reports, testimony from Dr. Krause, and their parents' testimony, such additional testimony from the children was unnecessary. Tabb had already attacked the credibility of the children,

including asking them about inconsistencies in their statements, prior statements that were given to police officers and to Dr. Krause, and had emphasized their own abuse of M.P. Sergeant Gibson testified at trial about the children's untruthfulness in some respects during initial statements to police. The children's parents testified at trial that they spoke with the children frequently on the telephone sometimes when Tabb and Marcus were not present. The trial court also allowed Tabb to recall Dr. Krause as a witness after the children's testimony.

[18] Rule 611 explicitly allows courts to protect witnesses from harassment or undue embarrassment. These children had already recounted at length their own abuse at the hands of Tabb, in addition to admitting their own involvement in M.P.'s abuse. We find no abuse of discretion in the trial court's decision not to subject Tabb's younger siblings to additional questioning.

II. Exclusion of Evidence

[19] Next, Tabb claims that the trial court abused its discretion by excluding reports on psychological testing of Tabb's younger siblings performed by doctors at the Youth Opportunity Center. Claims about exclusion of evidence are reviewed for an abuse of discretion. *Brown v. State*, 770 N.E.2d 275, 280 (Ind. 2002).

[20] Tabb argues that by excluding the evidence the trial court prevented her from arguing her defense of parental privilege. Parental privilege is a complete defense, i.e., a legal justification for an otherwise criminal act. Ind. Code § 35-41-3-1 (1977); *Willis v. State*, 888 N.E.2d 177, 182 (Ind. 2008) (adopting the

Restatement of the Law (Second) Torts, § 147(a)). To negate the claim and support a conviction for battery, the State must prove beyond a reasonable doubt either that the force used by the parent was unreasonable, or the parent's belief that the force was necessary to control the child and prevent misconduct was unreasonable. *Willis*, 888 N.E.2d at 182. Many factors suggested by the Restatement—including the age, sex, physical and mental condition of the child, and whether the force is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm—assist in determining the reasonableness of the punishment. *Id.*

[21] The State argued against admitting the reports, saying they contained privileged doctor-patient matters, hearsay, and evidence of prior bad acts. Evidence Rule 404(b)(1) prohibits the use of evidence of a crime, wrong, or other act to prove a person's character to show that on a particular occasion the person acted in accordance with that character. Tabb offered no argument in support of one of the permitted uses described in Rule 404(b)(2). Instead, she sought to introduce evidence that since her younger siblings had gotten in trouble in Florida, she was justified in punishing them for misbehavior in Indiana.

[22] Similarly, Evidence Rule 608 prohibits the admission of extrinsic evidence to prove specific instances of a witness's conduct for the purpose of attacking or supporting a witness's character for truthfulness. Tabb sought to admit the reports for just that purpose. Evidence Rule 704(b) prohibits witnesses from offering their opinions about whether a witness has testified truthfully. The trial court acknowledged that the reports contained privileged information and

prohibited Tabb from eliciting doctors' opinions about the children's truthfulness or about any prior bad acts that were disclosed during the testing.

[23] The trial court's decision to exclude the reports was not an abuse of discretion.

[24] In any event, the corporal punishment Tabb inflicted on M.P. and her younger siblings was entirely disproportionate to the behavior she sought to correct, *viz.* leaving crumbs in the toaster, tracking in dirt on the kitchen floor, asking for permission to have a boyfriend, or for suffering from extreme nausea. We find no error, let alone reversible error.

III. Sufficiency of the Evidence

[25] Tabb asserts that her convictions for aiding murder and Class C felony neglect are "not backed up by any evidence." Appellant's Br. at 11. She claims that due to the paucity of evidence, she was entitled to a directed verdict as to those counts. When reviewing the evidence to support a criminal conviction, we affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

[26] Tabb and Marcus drove to Florida where they voluntarily assumed the care of the four children and supervised them in Muncie. Tabb and Marcus participated in the meeting at which the family rules were discussed with the children.

[27] When the children violated a rule, Marcus would inform Tabb, and she would go to the house to lecture and whip the children with cords or belts. Marcus recorded many of those beatings. The children would scream and cry in pain, flinching and trying to protect themselves from the blows that struck different parts of their bodies. The whippings resulted in swelling, bleeding, or other injuries. In the recordings, Tabb could be heard asking Marcus if she had forgotten anything. He would respond by correcting her, agreeing with her, or keeping count of the lashes she dispensed when she lost track.

[28] Initially, when M.P. began to occasionally vomit, Tabb gave her some over-the-counter medicine. When M.P. began to vomit on a daily basis, Tabb and Marcus became convinced that M.P. was just throwing a tantrum. They could be heard discussing this on videotape. When the weather was warm, M.P. was required to eat her food outside so she would not make the house messy. At one point when M.P. threw up, Marcus gave her something else to eat. Tabb objected, claiming that M.P. was wasting money. After that, Tabb forced M.P. to eat her own vomit.

[29] On one occasion, Tabb instructed her three siblings to hit their cousin M.P. on the feet and toes with a hammer as she watched, telling the children that they were giving M.P. what M.P. wanted. On other occasions they struck her on the buttocks with the hammer. Eventually, the children then began to use pliers on M.P.'s fingers, toes, and nipples. They used a screwdriver to stab M.P. in the buttocks and on her feet. Sadly, the record contains even more.

[30] Besides the death of M.P., the beatings and other corporal punishment on the surviving children have produced long-lasting damage, such as post-traumatic stress disorder, conduct disorder, and anti-social personality disorder. M.P.'s physical injuries were profound, readily observable, and well beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child.

[31] Tabb was aware of and saw the most severe wound R.G. had inflicted on M.P. She refused to take M.P. for medical care because M.P. might overstate her level of pain. When the D.C.S. investigator came to Brady Street to meet with the family, the children were not allowed to mention M.P.

[32] This hardly constitutes "no evidence at all." The evidence was sufficient.

IV. Sentencing Error

[33] Tabb challenges her aggregate eighty-seven-year sentence, contending that there is insufficient evidence to support the aggravating factors found by the trial court. A court may abuse its discretion by entering a sentencing statement finding aggravating factors unsupported by the record. *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Here, Tabb claims that the sentencing statement is deficient because it contained only the trial court's personal opinions and general conclusions, but no facts or circumstances. We disagree.

[34] The court's sentencing statement is thorough and detailed. The court examined both the mitigating factors, to which it assigned little weight, and the

aggravating factors, which include: 1) the harm to M.P. was much greater than necessary to establish the elements of the offense; 2) M.P. was only five years old and was particularly vulnerable; 3) the harm caused to Tabb's siblings by making them participate in M.P.'s abuse; 4) the degree of planning required in committing the offenses, including installing security cameras, hiding M.P.'s existence from D.C.S., and refusing to seek medical treatment for M.P.; and 5) Tabb's lack of remorse and failure to accept responsibility for M.P.'s death.

[35] Suffering more than eighty injuries in varying stages of healing, M.P.'s death was not swift. The pain she was forced to endure prior to her death was more than any person should have to bear. Further, the mental scars Tabb's siblings will have to overcome are significant. Their own physical wounds suffered through the corporal punishment they endured by way of Tabb's vicious whippings goes beyond the label battery. The trial court's quote from *Brown v. State*, 770 N.E.2d 275 (Ind. 2002) is particularly apropos: "This tale of maternal neglect is so shocking that the customary words of legal analysis seem inadequate to the task." *Id.* at 281. The trial court did not abuse its discretion in sentencing Tabb.

Conclusion

[36] In light of the foregoing, we affirm the decision of the trial court.

[37] Affirmed.

Baker, J., and Bailey, J., concur.