IN THE COURT OF APPEALS OF IOWA

No. 8-275 / 97-0929

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TRACEY GROVER,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICKY GROVER,

Defendant-Appellant.

Appeal from the Iowa District Court for Clay County, Frank B. Nelson, Judge.

Defendants appeal their convictions for felonious child endangerment. **AFFIRMED.**

Thomas M. Magee, Emmetsburg, for appellant Tracey Grover.

John D. Brown, Emmetsburg, for appellant Ricky Grover.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Michael L. Zenor, County Attorney, and Michael Houchins, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Tracey and Ricky Grover ("the Grovers") appeal their convictions for child endangerment. The Grovers contend: (1) the trial court incorrectly applied the law of aiding and abetting; (2) the trial court erred when it failed to grant their motion for judgment of acquittal and motion for new trial; and (3) Iowa Code section 726.6 is unconstitutionally vague. We affirm.

The Grovers are the parents of three children: Melissa, Christopher, and Matthew. The Grovers were charged with endangering Christopher due to his serious injuries and the Grovers' failure to seek treatment for Christopher.

Christopher and Matthew are twins. On February 6, 1996, between 10:45 and 11:00 a.m. Matthew and Christopher had an appointment to get their second set of immunization shots. Christopher and Matthew were five months old at this time. The nurse who gave the immunization shots, Sharon Klein, testified she held Christopher and he was alert and responding to her touch. Klein also testified she educates parents about the shots and their side effects.

> I tell them -- told them that the child -- the common reactions they could expect would be redness, a swelling at the site, a small bruise possibly and a knot that would develop under there that would last three to four weeks. They could also expect a temperature in the child and they can expect the child might be fussy, might need more care, tender, loving care, might require moving the child around a lot using hot compresses on the leg and giving the child Tylenol.

On the morning of February 7, Tracey called Doctor Creswell, the Grovers' family physician. Tracey reported Christopher was not feeling well, he had been

fussy and irritable and might be having a reaction to his shots. A 2:00 p.m. appointment was set up. Dr. Julie Hamann was on call for Creswell when the Grovers arrived. According to Hamann, when the Grovers arrived:

> My nurse called me right away because she said the baby looked very bad. And the mother brought the baby into my exam room and placed the baby on the table. At that time the baby was definitely compromised. He would not follow with his eyes. His eyes were dilated and fixed to the right. He -- he had some problems with being very rigid and definitely had some neurologic problems I believed.

Tracey told Hamann that Melissa, Christopher's three-year-old sister, had pushed him off the couch.

> She said the baby cried right away but then later it was kind of gasping for air and would not follow her with his eyes like he usually did, and the eyes looked dilated to her. Baby had not ate since 6:00 p.m. the day prior when the accident happened.
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> . . . .
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> I specifically asked her why she didn't bring him immediately to the emergency room, and she told me she thought he would get better over time. And so that's why she didn't bring him in immediately.

Tracey also told Hamann she thought some of the problems might be related to the immunization shots. According to Hamann, Christopher had some bruising on his right leg on top of the area where the shot had been given and over his skull. Hamann testified she saw a hand print in the bruising pattern on Christopher's leg.

> And I specifically asked the mother in front of Dr. Hunziker whether this baby could have been shook at all, and the mother stated that that possibly could have happened. I said well, by whom? And she said well, maybe the three-year-old before it was pushed off the couch.

Hamann took the baby to the emergency room and performed a CAT scan. The results of the CAT scan showed a subdural hematoma (bleeding in the brain).

Christopher was then flown to Sioux Falls, South Dakota, where Dr. Brent Willman observed him. According to Willman, Christopher was "very depressed as far as level of consciousness and obtunded." Willman defined obtunded as a less than normal response to stimuli or the environment.

Back in Spencer, Lieutenant Mark Lawson of the Spencer police department interviewed the Grovers at the hospital.

> I asked what happened several times, and both seemed to be very hesitant, would look at each other before answering any of the questions. I asked if it was an accident, how this could have happened. And I would ask Tracey, Tracey would look at Rick, Rick would look at Tracey and would never get a direct answer for the first several times I asked this question.

Tracey told Lawson she needed to use the phone, so Lawson and Ricky left the room.

> Well while we were talking he stated he was in the back bedroom with the other twin, with the other baby, and he heard a thud and came out into the other room. And Tracey was walking over to the other baby, to Christopher, who was laying on the floor by the couch.
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> . . . .
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> He stated that I would have to ask Tracey, that she was in the room with him alone, that he wasn't, and he made the comment several times.

The Grovers eventually told Lawson about going to the doctor and the shots, and the symptoms Christopher displayed prior to calling the doctor's office.

> They stated that at approximately 9:00 p.m. that evening, Christopher's eyes became fixed where they would not move or follow an object in front of his face. They thought about calling the hospital but they both

> stated he seemed to come out of it and did not call any medical resources at that time.
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> . . . .
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> They started -- they stated they thought he might have had trouble breathing at that time also, at the same time. But again came out of it and called nobody.

The State also presented a videotape of Ricky. In the videotape, Ricky stated Christopher seemed fine when he woke up, but at around 8:00 or 9:00 a.m. Christopher's pupils were dilated and his eyes were fixed on the ceiling. According to Ricky, Christopher was limp, had an abnormal white color, and would not do anything but sleep. According to Ricky, he thought about calling the hospital during both instances, but did not.

The Grovers waived a jury trial. The trial court found the Grovers guilty of child endangerment. In its ruling the trial court stated:

> Based on the investigation conducted by both Lt. Lawson and Chuck Illg, ***both parents were aware of Christopher's condition. They had to know he had been seriously injured. By not obtaining medical treatment for him when they became aware of his condition, they knowingly created a risk to Christopher's physical and mental health and safety.*** They also clearly used unreasonable force resulting in physical, serious injury. Whether direct perpetrator or aider and abetter, they are equally guilty.

(Emphasis added.)

I. INSUFFICIENCY OF THE EVIDENCE. The Grovers contend the trial court erred in overruling their motions for judgments of acquittal and for new trials. According to the Grovers, there is insufficient evidence to sustain their convictions.

We review challenges to the sufficiency of evidence for errors at law. Iowa R. App. P. 4; *State v. Kraklio*, 560 N.W.2d 16, 17 (Iowa 1997). In evaluating such a claim, we view the evidence in a light most favorable to upholding the jury's verdict. *Kraklio*, 560 N.W.2d at 17. We give the State all reasonable inferences and presumptions the evidence will bear. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The verdict is binding on us unless the record contains no substantial evidence to support it. *Kraklio*, 560 N.W.2d at 17. Evidence is substantial if it could convince a rational trier of fact that the accused is guilty beyond a reasonable doubt. *Id.* Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *Liggins*, 557 N.W.2d at 269. Additionally, discrepancies in testimony, in and of themselves, do not preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *State v. Forsyth*, 547 N.W.2d 833, 836 (Iowa App. 1996) (jury's function to determine credibility and resolve conflicts in evidence). A jury's assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory that it may be deemed a nullity. *See State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993). These standards apply to both jury trials and trials to the court. *See State v. Gay*, 526 N.W.2d 294 (Iowa 1995).

The State charged the Grovers with child endangerment under Iowa Code section 726.6(1)(a), (b), and (c). The Iowa Code provides:

> A person who is the parent, guardian, or person having custody or control over a child or a mentally or physically handicapped minor under the age of eighteen, commits child endangerment when the person does any of the following:
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> (a) Knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.
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> (b) By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty that results in physical injury, or that is intended to cause serious injury, or that is intended to cause serious injury.
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> . . . .
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> (e) Knowingly permits the continuing physical or sexual abuse of a child or minor. However, it is an affirmative defense to this subsection if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person of the child or minor.

Iowa Code § 726.6(1) (1995). Under section 726.6(1)(a), no intent to injure is required. *State v. Heacock*, 521 N.W.2d 707 (Iowa 1994). Thus, section 726.6(1)(a) is not a specific intent crime. *See State v. Farnum*, 554 N.W.2d 716, 721 n. 6 (Iowa App. 1996) (specific intent means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind).

The State contends the proper focus is on section 726.6(1)(a). According to the State, the Grovers knowingly acted in a manner that created a substantial risk to Christopher's health and safety when they failed to seek medical treatment immediately after they became aware of Christopher's condition. The Grovers counter there are many situations where a parent does not have the medical expertise

to know how seriously a child's predicament is. They argue what may start out as a headache may progress to a fever which progressively climbs to dangerous levels. They also contend the State ignores the realities of medical costs and natural caution of parents, and imposes criminal liability on those parents whose decisions, when judged by hindsight, are wrong. Last, the Grovers argue no evidence was introduced regarding their mental capabilities to understand the symptoms displayed by Christopher were "life threatening."

First, the State is not required to prove the Grovers knew the injuries were life threatening. Iowa Code section 726.6(1)(a) only requires the State to prove the Grovers knowingly acted in a manner that created a substantial risk to Christopher's physical, mental, or emotional health or safety.

Second, and more importantly, the defense of diminished responsibility is only available in cases involving specific intent. *State v. McVey*, 376 N.W.2d 585, 587 (Iowa 1985); *State v. Nicholson*, 402 N.W.2d 463, 465 (Iowa App. 1987). Further, if the defense of diminished responsibility is going to be argued, a motion must be filed within forty days of arraignment. Iowa R. Crim. P. 10(11)(b)(1). Even if section 726.6(1)(a) was a crime requiring evidence of specific intent, there is nothing in the record showing the Grovers filed a motion in conformance with Rule 10. Diminished responsibility is not available as a defense in this case.

We find the Grovers' arguments are unpersuasive. Christopher displayed very serious symptoms. These symptoms were nothing like the possible side effects

explained by Klein or what could rationally be expected to result from a short fall off a couch. Further, this does not explain the hand-shaped bruise on Christopher's leg. The Grovers did nothing while their five-month-old son lay seemingly comatose and gasping for air. Further, by morning, he had not eaten for over twelve hours. Ricky thought about calling on two separate occasions, but did nothing. According to their own statements they did not call a doctor because Christopher would improve and go to sleep. Yet, when they did call the doctor, they did not tell the nurse on the phone about any symptoms other than Christopher was fussy and irritable. We find there is substantial evidence to support the trial court's finding both Ricky and Tracey are guilty of child endangerment as principals for knowingly failing to seek medical care and creating a substantial risk to Christopher's physical health.

Because we find the Grovers are guilty as principals, we do not need to address their argument on aiding and abetting. We also find their claim on the constitutionality of section 726.6 is without merit.

For these reasons, we affirm the Grovers' convictions.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., concurs specially.

SACKETT, J. (concurring specially)

I concur specially. I, too, would affirm. The question advanced is whether defendant-parents' failure to call a doctor to seek immediate medical help is substantial evidence to support a finding beyond a reasonable doubt defendant-parents are guilty of the crime of child endangerment.

I agree with defendants parents do not always have the ability to assess whether a medical problem is so serious the child must immediately be taken to a doctor or medical facility. I also agree with defendants' argument to find the parents guilty of child endangerment for failing to seek immediate medical attention requires substantial evidence they were able to understand and diagnose the severity of the problem and, having this knowledge, still did not seek medical help.

There being substantial evidence to support the trial court's finding beyond a reasonable doubt both defendants knew Christopher was seriously injured, and one of them used unreasonable force resulting in the serious injury, convinces me the State has met its required burden.