Circuit Court for Prince George's County
Case No. JA-18-0469

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 876

September Term, 2019

IN RE: J.B.

Kehoe,
Leahy,
Wells,
JJ.

Opinion by Wells, J.

Filed: May 5, 2020

Jerome B., appellant, ("Father") was charged in the Circuit Court for Prince George's County, sitting as a juvenile court, with violating Md. Code (2018 Repl. Vol.), § 7-301 of the Education Article ("ED"), which, subject to certain exceptions, makes it a crime, for a parent to fail to ensure that a school age child regularly attends school.[1] After

[1] Section 7-301 of the Education Article provides, in relevant part, as follows:

> (a-1)(1) Except as otherwise provided in this section, each child who resides in this State and is 5 years old or older and under 18 shall attend a public school regularly during the entire school year.
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> * * *
>
> (c) Each person who has legal custody or care and control of a child who is 5 years old or older and under 16 shall see that the child attends school or receives instruction as required by this section.
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> * * *
>
> (e)(1) Any person who induces or attempts to induce a child to be absent unlawfully from school or employs or harbors any child who is absent unlawfully from school while school is in session is guilty of a misdemeanor and on conviction is subject to a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.
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> (2) Any person who has legal custody or care and control of a child who is 5 years old or older and under 16 who fails to see that the child attends school or receives instruction under this section is guilty of a misdemeanor and:
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> (i) For a first conviction is subject to a fine not to exceed $50 per day of unlawful absence or imprisonment not to exceed 3 days, or both; and
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> (ii) For a second or subsequent conviction is subject to a fine not to exceed $100 per day of unlawful absence or imprisonment not to exceed 5 days, or both.
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> (3) In addition to the penalties provided under paragraph (2) of this subsection, the court may order a person convicted under paragraph (2) of this subsection to perform community service.
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> (4)(i) For a person with legal custody or care and control of a child at the time of an alleged violation of this section, it is an affirmative defense to a charge under this section that the person made reasonable substantial efforts

an adjudicatory hearing, Father was found involved. He was sentenced to 5 days, all of which were suspended, and placed on supervised probation for one year. This timely appeal followed.

ISSUES PRESENTED

Father presents the following two issues for our consideration:

> I. Whether the evidence was legally sufficient to prove that appellant failed to see that his minor son W.B. attended school; and,
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> II. Whether the juvenile court imposed an illegal sentence.

For the reasons set forth below, we shall hold that the evidence was legally sufficient to prove that Father failed to see that W.B. attended school, but that the sentence imposed was illegal.

FACTS AND LEGAL PROCEEDINGS

Father was charged in an adult truancy petition with failing to see that his minor son, W.B., born December 15, 2003, attended school or received instruction in violation of ED § 7-301. At a hearing on June 12, 2019, Diane Arnold, a people personnel worker with the Prince George's County Public School System, testified that in 2017 she was assigned

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> to see that the child attended school as required by law but was unable to cause the child to attend school.
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> (ii) If the court finds the affirmative defense is valid, the court shall dismiss the charge under this section against the defendant.
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> (5)(i) As to any sentence imposed under this section, the court may suspend the fine or the prison sentence and establish terms and conditions that would promote the child's attendance.
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> (ii) The suspension authority provided for under subparagraph (i) of this paragraph is in addition to and not in limitation of the suspension authority under § 6-221 of the Criminal Procedure Article.

to monitor truancy within certain schools, including the William Hall Academy, where W.B. was a student. From the first day of school in September 2017 through mid-November 2017, W.B. missed 7 days of school, but from mid-November through December 2017, he did not attend school. On December 5, 2017, in response to an email from the school's vice principal, Ms. Arnold called Father to discuss W.B.'s failure to attend school. Father told Ms. Arnold that he "was concerned that his son was getting into cars with older men in their twenties, thirties and forties," that "he didn't know where his son was about 80 percent of the time," and that "the police had returned his son to the home." Father said he had called the superintendent of the school system asking for assistance with W.B.'s school attendance. Ms. Arnold suggested that Father contact District Heights Youth and Family Services, an organization that provides family and individual counseling, but he said that he did not want a referral to an agency because he had worked with many agencies in the past with regard to his daughter. Ms. Arnold also referred Father to the Child in Need of Supervision ("CINS") program and suggested that he call the police to let them know about W.B.'s interactions with the older men.

In January 2018, Ms. Arnold sent a truancy letter to Father reminding him that W.B. was required to attend school and asking him and W.B. to set up an appointment to meet with her. A meeting was held in early February 2018. Father attended, but W.B. did not. When asked why W.B. was not at the meeting, Father said he "did not want to attend." Father advised Ms. Arnold that he had not met with a counselor from CINS. W.B.'s school attendance did not improve and in March 2018, Ms. Arnold submitted a packet of information about W.B. to the Interagency Council, a group that included, among others,

the supervisor of psychological services, a representative from student services, a representative from the State's Attorney's office, and a police officer. The Interagency Council held a meeting that both Father and W.B. attended. The Council discussed the need for W.B. to attend school and Father expressed again that he needed assistance getting W.B. to school and his concern that W.B. left home and went off in cars with older men. Ultimately, both Father and W.B. agreed that W.B. would attend school the next day.

On that day, however, Father went to the school, but W.B. did not. The principal called the police, but they would not come to the school. Father was upset and said he planned to call a news station. Father suggested that Ms. Arnold should go to his home, get W.B., and bring him to school. The principal suggested that Father speak with Ms. Boyd, a "TNI" worker who had an office at the school, and who had worked with Father and his family in the past.[2] Ms. Boyd, apparently unaware that Father had already been referred to the CINS program, provided him with another referral to that program. Ms. Arnold testified that Father never had a counseling meeting with the social worker at CINS who had been assigned to his case.

W.B. continued to be absent "pretty much for the rest of the school year." By the end of the year had missed 95 and a half days of school.

[2] The initials "TNI" are not defined in the record before us, but might refer to the "Transforming Neighborhood Initiative," a program in Prince George's County designed to, among other things, improve student attendance at school. *See* Ovetta Wiggins, *Prince George's starts academic year with initiative to transform struggling schools*, The Washington Post, August 18, 2013, https://wapo.st/2SCriPl.

Father testified on his own behalf. He stated that W.B. lived with him and that he first became aware that his son had a problem with school attendance in late 2017 and early 2018. W.B. told Father that he did not like school. Father went to the school and asked for help but felt like the school was not responding to him. He also spoke with the superintendent, a councilman, and "a lot of people in Prince George's County," and threatened to go to Channel 5 News.

Father acknowledged that Ms. Arnold referred him to the CINS program. He spoke with a gentleman from the program, whose name he did not know. They set up a meeting, and Father said he would try to get W.B. to attend. On the day of the meeting, Father called the gentleman from the CINS program to let him know that W.B. had not come home the previous night. Father explained:

> You know, because I never personally met him [the gentleman from the CINS program] but I would talk to him on the phone and would tell him, [W.B.'s] not here. Or I haven't seen him in three days or this or that, or whatever. You know, he just would never get up and go. And the only thing I really did was wanted them – somebody to help me with him along the way so we can try to get him to school to make him focus in school so he won't get into any bad trouble out there in the street, end up dead somewhere by somebody else in the street or a policeman because of things that he were (sic) doing.

On cross-examination, Father further explained that he could not get his 14-year-old son to the CINS program:

> I called. What I was supposed to do. And make a call [to CINS]. Then CINS wasn't for them to set down and try to correct me. It was to help my child for me. That's what they was supposed to do. Did – I take him there and I sat in there with him if they want me to set in there with him but that never happened because [W.B.] would run away from home, he'd be gone for weeks at a time or days at a time. When I tell him that we have a meeting tomorrow he wouldn't – next thing I know he wouldn't come home.

Father testified that he never missed a meeting about W.B. or any of his children, but he "could never get [W.B.] to stay home and get in the car and go with me. Father acknowledged that at the Interagency Council meeting, W.B. initially sat in the car and "didn't want to come in," but when asked to get W.B., Father returned to the car and, thereafter, W.B. joined in the meeting.

At the close of the State's case, Father moved for judgment of acquittal on the ground that there was no evidence that he willfully prevented W.B. from attending school or that W.B. was actually under his control. The juvenile court denied Father's motion. After hearing all the evidence, the juvenile court found that the State met its burden beyond a reasonable doubt in establishing that Father violated ED § 7-301, stating:

> The Court has reviewed the statute, the 7-301, this would be (c). This says each person who has legal custody or care and control of a child who is 5 years old or older and under 16 shall see the child attends school or receives instructions as required by this section. So in this case the Respondent clearly did make an effort, meaning he's just not sitting on his butt and not allowing (inaudible ** 3:08:10) – not taking no action, I guess that's the best way to put it. But the question is would he – is what he – the question is, is what he has done, is that enough, excuse me, to make I would consider reasonable efforts. And there were some facts, to be honest with you, are not clear from his perspective. So he said he was run away days or weeks at a time, but wasn't, I'm not sure, about when, what period of time. There was no testimony that, you know, he called the police, you know, has a missing person report, there was actually a missing person report so if he was – come across the police and they could have brought him home. And I'm just not convinced that a father does not have control over his – at least a portion of the time a 14-year-old child, even this child who obviously has issues. And if that means – because there was testimony about he sees him going out the house and getting in a – adult's car, so he's obviously – (inaudible **3:09:25) obviously he was in the house that morning and so if that's the case then, you know, why didn't he take him to school himself, I – and there was also, I believe it's lacking the efforts made towards the CINS offer. The school itself or the board also didn't just sit on their butt either and not say, oh well,

> your son's not coming to school. They were actively – the – making referrals and it was just not satisfactory. And that is – I mean, they referred him to – I – be honest with you, I'm not sure what your client expected the board to be able to do. The – I mean, they can't send nobody to the house or physically restrain him and drag him to school. I mean, I think a – actually, a parent could do that, but not a – not the board.
>
> So in any event I find that the State has met their burden beyond a reasonable doubt in this case with regards to the statute; that the – it says, shall. That's why I asked to see the statute. Who has legal custody shall see the child attends school. I mean it's – everything has to be within reason but I think reasonable efforts as a whole weren't made. All right.

(Tr. 6/12/19 at 44-46)

DISCUSSION

Father contends that the evidence was insufficient to support his conviction for violating ED § 7-301. We disagree and explain.

When an action has been tried without a jury, we "review the case on both the law and the evidence." Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses." *Id.* "We review any conclusions of law *de novo*, but apply the clearly erroneous standard to findings of fact." *In re: Elrich S.*, 416 Md. 15, 30 (2010) (internal citation omitted). A finding of fact is not "'clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.'" *Brown v. State*, 234 Md. App. 145, 152 (2017) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)).

Appellate review of the sufficiency of the evidence is the same in both a jury trial and a bench trial. *Chisum v. State*, 227 Md. App. 118, 129 (2016). Likewise, the standard

of review of evidentiary sufficiency that applies when reviewing a case from a juvenile court is the same standard that applies to criminal cases. *In re James R.*, 220 Md. App. 132, 137 (2014). Specifically, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*)); *In re: Kevin T.*, 222 Md. App. 671, 676-77 (2015). "[W]e defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Sewell v. State*, 239 Md. App. 571, 607 (2018) (citation and internal quotation marks omitted). We view "not just the facts, but all rational inferences that arise from the evidence, in the light most favorable to the prevailing party." *Smith v. State*, 232 Md. App. 583, 594 (2017) (internal quotations and citation omitted). Circumstantial evidence alone is "'sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.'" *Ware v. State*, 170 Md. App. 1, 29 (2006) (quoting *Painter v. State*, 157 Md. App. 1, 11 (2004)).

DISCUSSION

I.

Father contends that the evidence was insufficient to support his conviction because there was no evidence of willful failure on his part to see that W.B. attended school and there was no evidence that W.B. was actually under his control. He points out that he initiated contact with the school when he noticed W.B. was not attending, he openly

admitted that he needed help and requested assistance from the school, he attended meetings, and maintained contact with school officials. In support of his argument that he did not have control over W.B., Father asserts that the evidence overwhelming supported a finding that "he had absolutely no control over the child." Father maintains that the juvenile court effectively applied a strict liability standard by noting that statute's use of the word "shall." We are not persuaded.

The evidence was sufficient to support the juvenile court's determination that Father did not make "reasonable and substantial efforts" to see that W.B. attended school, as required by ED § 7-301(e), and to support the finding that W.B. was under Father's control. The evidence clearly established that Father failed to follow through on the recommendations of school workers in order to obtain help for W.B. Father was offered a referral to District Heights Youth and Family Services, an agency Ms. Arnold described as "excellent," but he was unwilling to work with that agency because of his past experiences. Father was encouraged to let the police know about the issue of W.B. engaging in activities with older men, but there was no evidence that he did so. In addition, Father was referred to the CINS program by both Ms. Arnold and Ms. Boyd, but he failed to meet with the counsellor assigned to W.B.'s case. Father was asked to bring W.B. to a February appointment at CINS, but he failed to do so because the child did not want to attend. Although both Father and W.B. attended the Interagency Council meeting, the following day W.B. failed to attend school. Father suggested that Ms. Arnold should go to his home and get W.B. to attend school, but he did not personally do the same. Instead, the evidence shows that he passively acquiesced in W.B.'s behavior. From this evidence, the juvenile

court could reasonably conclude that Father was not making reasonable and substantial efforts to see that W.B. attended school. The judge's statement that Father "clearly did make an effort," was simply a recognition that Father took some action, but not "reasonable and substantial" action, with respect to W.B.'s school attendance.

Similarly, there was sufficient evidence from which the juvenile court could find that Father had control over W.B. During the 2017-2018 school year, W.B. was 13 and 14-years-old. He lived with Father in the family's home. Although Father testified that W.B. left home for long periods of time and left home to accompany older men instead of attending school, there was no evidence that Father ever called the police, drove W.B. to school, or took any other steps to end that behavior. He simply allowed W.B.'s behavior to continue. There was also evidence that Father was able to get W.B. out of the car and into the Interagency Council meeting after he was directed to do so. For these reasons, we conclude that the evidence was sufficient to support the juvenile court's findings.

II.

Father was sentenced to incarceration for a period of five days, all of which was suspended, and one year of supervised probation. Father argues, and the State agrees, that the sentence was illegal because the maximum penalty allowed was incarceration for a period of three days. We agree.

Under Maryland Rule 4-345, a "court may correct an illegal sentence at any time." An illegal sentence "must actually inhere in the sentence itself and must not be a procedural illegality or trial error antecedent to the imposition of sentence." *Carlini v. State,* 215 Md. App. 415, 425-26 (2013). A sentence is inherently illegal when "there either has been no

conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed." *Chaney v. State*, 397 Md. 460, 466 (2007).

Here, the sentence was not a permitted one for the conviction upon which it was imposed. Effective July 1, 2018, the maximum penalty for a violation of ED § 7-301(c) was reduced from ten days to three days. As the State recognizes, when a statutory penalty in effect at the time of an offense is amended prior to a defendant's trial and sentencing so as to be more favorable to the defendant, the more favorable penalty authorized by the statute in effect at the time of trial and sentencing applies. *Waker v. State*, 431 Md. 1, 10-13 (2013). There was no evidence that Father had a prior conviction. Accordingly, the juvenile court should have applied the revised statute which provided for a maximum sentence of three days of incarceration. The imposition of a five-day sentence was illegal under Maryland Rule 4-345, and a remand for a new sentencing hearing is required.

SENTENCE IMPOSED BY THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED; CASE REMANDED FOR RESENTENCING; JUDGMENTS AFFIRMED IN ALL OTHER RESPECTS; COSTS TO BE DIVIDED EQUALLY.