Circuit Court for Cecil County
Case No. C-07-CR-19-000094

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2473

September Term, 2019

MICHELE JESSEE & MARK JESSEE

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: February 9, 2021

A jury in the Circuit Court for Cecil County convicted Michele and Mark Jessee, the appellants, of two counts each of neglect of a minor and rendering a child in need of assistance for their treatment of two of their adopted children, D, who was 12 years old at the time of the relevant events, and H, who was ten.[1] The Jessees contend that the evidence at trial was insufficient to permit a reasonable jury to conclude that they placed the children at substantial risk of harm and that their convictions must therefore be reversed. We conclude that the evidence was sufficient to sustain their convictions. Accordingly, we will affirm.

BACKGROUND

Facts[2]

D first came to the attention of the authorities after a passerby found him walking alone on a highway, shoeless and wet from rain, near midnight on February 21, 2018. The next morning, two police officers and two Child Protective Services assessors from the Department of Social Services (the "Department") went to the Jessees' house and inquired about D without first explaining that they had found him. Ms. Jessee told them that D "should still be asleep" and left to go wake him. She returned, still "nonchalant," and said that he was not in his room. When one officer told Ms. Jessee that they had D and described how they had found him, she said that it was not the first time he "had gotten out." While

[1] To preserve the anonymity of the minor victims, we will refer to them by a single initial. *See State v. Johnson*, 440 Md. 228, 232 n.1 (2014).

[2] Our recitation of the facts takes into account that, in a review for sufficiency of the evidence, we "view[] the evidence in the light most favorable to the prosecution[.]" *State v. Morrison*, 470 Md. 86, 105 (2020) (quoting *Smith v. State*, 415 Md. 174, 184 (2010)).

the assessors checked the home and questioned the Jessees, the officers found two infant children with toys in the living room, and H standing behind the front door, which Ms. Jessee described as "punish[ment] for something." Within two days, the Department removed all the children from the home and placed them in shelter care.

Although five children were living in the Jessees' home, the charges and evidence at trial concerned the treatment of only D and H, and the State's case focused on three aspects of the Jessees' care: sleeping arrangements, discipline, and diet.

Sleeping Arrangements. According to one Department assessor, Christie Clouser, D's bed was a plywood box with a "heavy cardboard" door attached by Velcro and duct tape, with a small, plastic-covered mattress and blanket inside. The box had a pegboard roof that was ventilated by only a few holes, with no light or fan, and "lots of belongings" on top that blocked the holes. D described sleeping in the box as hot, dark, and like being "trapped," and said that he "couldn't breath[e] that well in there." He testified that when he told the Jessees that he was having trouble breathing, they said he had "to keep it like that." D described the Jessees closing the door at night with Velcro and zip ties and said that he snuck a pair of scissors into the bed to cut his way free when he wanted to get out.

H's bed was in the master bedroom closet, along with some of the Jessees' clothing. The closet had a light that was controlled from the outside and a door with an alarm that was triggered when she tried to leave. Both children's bedrooms had cameras by which the Jessees could observe them.

Discipline. Both children testified that the Jessees disciplined them physically and by forcing them to remain isolated for long periods in closed, dark, uncomfortable spaces.

D testified that Mr. Jessee would beat him routinely with his fists or sticks, including on the February night that he ran away, and that he ran away because the Jessees "were abusing [him]." He also said that the Jessees would regularly lock him in a windowless, unlit bathroom. He testified that he was held in the bathroom for long periods, sometimes into and even through the night, during which he would try to claw his way out. The State showed the jury pictures of the bathroom on which D identified scratches on the walls as "the places I was trying to escape from."

H testified that the Jessees had also beaten her, and that they had frequently confined her in the bathroom or her unlit bedroom closet for hours at a time. She testified that the Jessees would remove the light bulbs in her bedroom closet so that she could not turn the lights on and that there was a camera installed in the bathroom so that the Jessees could monitor her.

Diet. The Jessees' regular feeding method for D was to force him to consume a high-calorie smoothie. If he vomited the drink, which he did regularly, the Jessees would often make him drink a second shake in the bathtub to avoid having to clean up "a mess in another part of the house[.]" According to D, sometimes the Jessees would keep him in the tub well into the night. Another technique that the Jessees used with D, which they described as a "game," was to have him pick strips of paper from a Tupperware container that would become his plan for consuming the shake each day. These included: "stand with smoothie"; "[s]moothie 6 ounces every one and a half hours"; and "tied down at table until done; [3] high calorie yogurt and [1 1/2] granola." D said that the alleged beating on

the night that he ran away was administered because he had refused to drink any more of a smoothie.

The Jessees sometimes made H eat a breakfast bar for every meal and also had her drink a liquid "formula," which H called "really gross." She said that the Jessees severely limited her diet because, they told her, she was "allergic to everything." H also testified that she liked to eat "[e]verything," and identified favorite foods, including hot dogs, pizza, and ice cream.

The Jessees' Explanations. The Jessees denied many of the children's allegations and offered explanations for others. Regarding the sleeping arrangements, they said that they built D's bed apparatus because he had sensory issues, shared his room with an infant, and would wake up easily if he heard a sound. They informed a social worker that they had modeled the apparatus off plans that they found online. The Jessees denied having locked D inside the bed box and said that they had closed its door with only Velcro so that "it could be easily opened."

As to their disciplinary measures, Mr. Jessee denied beating D or H and stated that, at most, he would "spank them . . . [o]n the tush." Ms. Jessee admitted that she "probably" spanked D "once," but nothing more. In their appellate brief, the Jessees highlighted inconsistencies in the children's testimony regarding the alleged beatings and the absence of any corroborating testimony or evidence about bruises or other injuries. They highlighted testimony from the police officer who picked D up the night he ran away, shortly after D alleged he had been beaten, in which the officer stated that he had seen no visible signs of injury. When asked why they kept D in unlit spaces, Mr. Jessee said that

D was attracted to the lights and would stick his fingers and objects into receptacles. The Jessees also said that H was prone to outbursts or fits, she was unable to deescalate unless they isolated her, and when they did so, it was for only 45 minutes to an hour.

Regarding food, the Jessees claimed that D, who weighed roughly 70 pounds when he was removed from their house, resisted eating and vomited at most meals, and that they had to find foods and techniques to provide him with enough calories to sustain him each day. Beyond D's sensory issues, which left him easily distracted at the table, the Jessees' eldest son testified that D had scoliosis requiring surgical placement of "growing rods" in his back and that the Jessees claimed that D would remain physically undeveloped if not for the high-calorie diet. As for H, the Jessees said that they made her drink a prescribed formula for about a year and a half because she "couldn't digest carbohydrates," and that eventually they began returning her to "everything that everybody else was eating" except for dairy.

Procedural History

The State charged the Jessees each individually with two counts of neglect of a minor and two counts of rendering a child in need of assistance. Additionally, it charged Mr. Jessee with one count of second-degree child abuse and one count of second-degree assault. At the conclusion of all the evidence, the court granted the Jessees' motion for judgment of acquittal on the child abuse charge against Mr. Jessee but denied the motion as to all other counts. The jury acquitted Mr. Jessee of the assault charge but convicted both Jessees of all counts of neglect of a minor and rendering a child in need of assistance. This timely appeal followed.

DISCUSSION

This Court is not a venue to relitigate factual disputes or to weigh the credibility of witness testimony. The standard of review for sufficiency of the evidence is "whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt," viewing "the evidence in the light most favorable to the State." *Williams v. State*, 246 Md. App. 308, 339 (2020) (quoting *Olson v. State*, 208 Md. App. 309, 328 (2012)). "[I]t is not the function of the appellate court to undertake a review of the record that would amount to a retrial of the case," nor is it "to determine the credibility of witnesses or the weight of the evidence." *Handy v. State*, 175 Md. App. 538, 562 (2007). (internal citation and quotation marks omitted). This "standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010). "Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Id.*

I. THE JESSEES ADEQUATELY PRESERVED THEIR ARGUMENTS ON APPEAL.

As an initial matter, the State contends that the Jessees did not preserve their appellate claims because they failed to make their present arguments when they moved for a judgment of acquittal before the trial court. As the State points out, to preserve a claim for appellate review, "a defendant 'must argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence

is deficient.'" *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr v. State*, 405 Md. 293, 303 (2008)).

As to neglect of a minor, the State contends that the Jessees' argument below, that the State had failed to prove that their conduct had harmed D and H, is fundamentally different than their current argument, which is that the State failed to prove that their conduct resulted in a "substantial risk of harm" to the children. In their motion for judgment of acquittal at trial, however, the Jessees argued both that the State had not proven that the children were harmed and that the State had not established that "anything the father did" resulted in the "creat[ion of] a substantial risk to the minor's health . . . or a mental injury." The State also contends that the Jessees did not argue before the circuit court that expert testimony is required to prove a substantial risk of harm in these circumstances but that the Jessees have advanced that argument on appeal. At oral argument, the Jessees clarified that their contention is not that proof of a substantial risk of harm can be established only by expert testimony, but instead that proof of a substantial risk of harm must be established by objective evidence, of which expert testimony is one form, and that the State produced no such evidence at trial.

For the counts of rendering a child in need of assistance, the State contends that the only argument the Jessees made below was about the lack of expert testimony, whereas on appeal, the Jessees' argument is that the State failed to prove neglect, which was a necessary predicate for the convictions for rendering a child in need of assistance. However, during the argument regarding their motion for judgment of acquittal, the Jessees' contentions regarding these counts directly followed their argument that the State

had not presented sufficient evidence to support the charges of neglect, and, moreover, the Jessees then expressly stated that "abusing him or neglecting him . . . . There is no proof of any of that."

We conclude that the Jessees' arguments below provided the circuit court with sufficient information about their contentions to allow it to weigh the same issues that they now present on appeal. *See Jordan v. State*, 246 Md. App. 561, 587, *cert. denied*, 471 Md. 120 (2020) (stating that the purpose of requiring preservation "is first, last, and always an insistence that the trial court [be] given the opportunity to correct its own error"). Accordingly, the arguments were preserved, and we will proceed to address the merits.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JESSEES' CONVICTIONS.

The Jessees contend that the State failed to meet its evidentiary burden to sustain their convictions for both neglect and rendering a child in need of assistance because the "jurors were provided no objective evidence or testimony regarding an objective substantial risk of harm to D and H, but rather were presented with acts by the parents that arguably fell outside the normative modalities of parenting and were then left to their own devices to extrapolate from those acts whatever possible harm they could imagine." We disagree. The evidence presented at trial, viewed in the light most favorable to the State, was sufficient to permit a reasonable juror to conclude beyond a reasonable doubt that the Jessees' conduct had created a substantial risk of harm to D and H.

A. The Jessees' Conduct Must Be Measured by a Standard of Objective Reasonableness.

Neglect of a child means "the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor." Md. Code Ann., Crim. Law § 3-602.1(a)(5)(i) (2012 Repl.; 2020 Supp.). The focus of the Jessees' argument on appeal is the requirement that their conduct had "create[d] a substantial risk of harm" to D's and H's physical health or "a substantial risk of mental injury." *Id*. Based on their reading of *Hall v. State*, 448 Md. 318 (2016), the Jessees contend that the State was required to identify a particular "objective substantial risk of harm" to D and H as a result of their conduct, and that the State failed to do so.

We do not read *Hall* the way the Jessees do. In *Hall*, a jury had convicted the defendant of neglect of her three-year-old son by leaving him in the care of his 14-year-old sister when the mother was out of the house overnight and unreachable by cell phone. *Id.* at 324-25. When the sister was asleep, the boy left the house and was eventually located on a busy highway by a motorist who had nearly hit him. *Id*. The State presented evidence that the three-year-old was known to be "very, very difficult to control," and that a social worker had recommended that he not be left in the care of his older sister. *Id.* at 323. The jury convicted the mother of neglect. *Id.* at 326.

The Court of Appeals reversed. The Court observed that "the pivotal statutory phrase" defining the crime of neglect is "[i]ntentional failure to provide necessary assistance and resources for the physical needs . . . of a minor *that* creates a substantial risk

of harm[.]" *Id.* at 328 (quoting Crim. Law § 3-602.1(a)(5)(i)) (emphasis added in *Hall*). Analogizing the conduct criminalized by the statute to that sufficient to constitute reckless endangerment, the Court held that the "evaluation of the defendant's conduct and the creation of risk . . . must be made objectively." *Hall*, 448 Md. at 331. The standard to be used in making that evaluation "is whether the parent intentionally failed to provide necessary assistance and resources for the physical needs of the child by acting in a manner that created a substantial risk of harm to the child, measured by that which a reasonable person would have done in the circumstances." *Id.* The Court identified "[t]he importance of relying on an objective standard to evaluate parental inaction or neglect" as the "avoidance of '20/20 hindsight' by a jury that can engage in risk distortion." *Id.* The Court was concerned that "[s]uch second-guessing" would raise the possibility that "any risk of harm that could be envisioned, aided by 20/20 hindsight, would satisfy criminal culpability in the mind of a jury[.]" *Id.* at 332.

Applying the objective standard to the facts before it, the Court held that the relevant question was whether the defendant's "conduct—leaving her three-year-old son, A., in the care of his fourteen year-old sister—created a 'substantial risk of harm' to A.'s physical health . . . such that a reasonable parent under the circumstances would not have engaged in" it. *Id.* at 336. The Court held that it was not. *Id.* Indeed, noting that Maryland law expressly permits children under the age of eight to be left alone with "a reliable person at least 13 years old," the Court found that the mother's conduct was objectively reasonable. *Id.* (quoting Md. Code Ann., Fam. Law § 5-801(a)). That the mother's conduct had actually resulted in a situation posing a substantial risk of harm to the child—him walking

alone on a highway in the middle of the night—was beside the point because the focus was on the objective reasonableness of the mother's conduct when it occurred, not the result. *See Hall*, 448 Md. at 331.

The Court's focus in *Hall* was thus on the standard by which to evaluate the conduct of the defendant and the requirement that the conduct be assessed by a standard of objective reasonableness. Contrary to the Jessees' contentions here, the Court did not impose any heightened obligation on the State to identify a particular type of objective harm to which their conduct left the minors susceptible. In this case, the State was therefore required to prove that the Jessees "intentionally failed to provide necessary assistance and resources for the physical needs of [D and H] by acting in a manner that created a substantial risk of harm to the child[ren], measured by that which a reasonable person would have done in the circumstances." *See id*. "The conduct itself is the ultimate determinant." *State v. Morrison*, 470 Md. 86, 127 (2020) (describing the holding in *Hall*). That is the guideline we must apply and to which we now turn.

B. The Evidence Was Sufficient to Convict the Jessees for Child Neglect.

At trial, the State provided testimony from the officers who found D the night he ran away, the social workers who interviewed the Jessees and investigated the event, the officers present that first morning, and D and H. Ms. Clouser, the Department assessor who ultimately elected to remove D and H from the household, testified that she did so because she had safety concerns about the children's wellbeing. For D, she noted her concern about his physical safety based on the box-like structure in which he was sleeping,

the unlit room where the Jessees would lock him, and the coercive eating techniques that they employed. As for H, Ms. Clouser expressed concerns about the unlit closet that doubled as her bedroom, her restrictive diet, and the windowless bathroom in which the Jessees would isolate her for hours. D and H also offered testimony about these same elements of the Jessees' conduct.

Viewing this evidence in the light most favorable to the prosecution, *Morrison*, 470 Md. at 105, and based on a standard of objective reasonableness, *id.* at 127, we think that a reasonable jury could conclude beyond a reasonable doubt that the Jessees' conduct was objectively unreasonable and posed a substantial risk of physical or mental harm to the children. For two reasons, we disagree with the Jessees' contention that because the State did not itemize the specific risks of harm to which their conduct exposed D and H, the evidence was insufficient.

First, we think that Ms. Clouser's testimony about the safety concerns that caused her to remove the children from the Jessees' care served that purpose.

Second, a reasonable jury, focusing on the objective reasonableness of the Jessees' conduct, could arrive at that determination based on its own experience, knowledge, and common sense. Where the risk of harm would be obvious to the average juror, the lack of a witness—expert or otherwise—expressly drawing the same conclusion is unnecessary to validate the verdict. *See, e.g.*, *State v. Suddith*, 379 Md. 425, 446 (2004) (noting that "[t]here is nothing mysterious about the use of inferences in the fact-finding process. Jurors routinely apply their common sense, powers of logic, and accumulated experiences in life to arrive at conclusions from demonstrated sets of facts" (quoting *Robinson v. State*, 315

Md. 309, 318 (1989))); *Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 737 (2020) ("Expert testimony is *not* required for matters that would be within the common knowledge of an average person."). The facts presented in this case are a far cry from those at issue in *Hall*. Unlike the objectively reasonable act of leaving a young child with a 14-year-old sibling babysitter, here the jury heard evidence that the Jessees locked D in a box overnight that was hot and had obstructed airflow in which he had difficulty breathing; locked both children in small, dark, unlit spaces for many hours at a time; and force-fed them high-calorie shakes, in D's case by tying him down in a chair or forcing him to remain in a bathtub until he finished something he frequently vomited. No expert testimony was required for a jury to rationally conclude that an objectively reasonable person in the Jessees' position would have realized that such conduct would present a substantial risk of physical and mental harm to the children.

To be sure, the children's testimony contained contradictions and the Jessees presented evidence calling into question many of the allegations against them. But, as we have said, our task in reviewing the sufficiency of the evidence is not to reweigh it or to assess credibility differently from the jury's assessment. *See Grimm v. State*, 447 Md. 482, 505 (2016) ("[T]he fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony[.]" (quoting *Walker v. State*, 432 Md. 587, 614 (2013))). The Jessees offer no basis to cause us to doubt that the jury had before it sufficient evidence to sustain its convictions for neglect. Accordingly, we will affirm those convictions.

C. The Evidence Was Sufficient to Convict the Jessees for Rendering a Child in Need of Assistance.

Section 3-828(a) of the Courts and Judicial Proceedings Article (2020 Repl.) provides that "[a]n adult may not willfully contribute to, encourage, cause or tend to cause any act, omission, or condition that renders a child in need of assistance." Section 3-801(f) of that Article defines a child in need of assistance as "a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs."

The Jessees' challenge to the sufficiency of the evidence supporting their convictions for rendering a child in need of assistance piggybacks on their neglect arguments. They argue that because their convictions for rendering a child in need of assistance required the jury to first find that the child had "been neglected," and on the assumption that we would agree with them that the evidence of neglect was insufficient, then necessarily the evidence was insufficient to sustain the convictions for rendering a child in need of assistance. Based on our holding that the evidence was sufficient to support the neglect convictions, we reject the Jessees' challenge to the rendering a child in need of assistance convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.