

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN R. SHORT,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

)
)
) Not For Publication
)

) No. M-2017-63
)

)
)
) **FILED**
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 25 2018

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Following a jury trial, Appellant was found guilty on December 8, 2016, of Verbal Abuse by a Caretaker in Tulsa County District Case No. CF-2015-3195. Appellant was convicted and sentenced to two weeks imprisonment and fined One Thousand Dollars. Appellant appeals.

In Appellant's sole proposition, he claims there was insufficient evidence presented to support the jury's verdict. He first argues that his duties and relationship with victim as a special education teacher do not meet the definition of "caretaker" as required by the first element of Verbal Abuse by a Caretaker. See Instruction No. 4-147A, OUJI-CR(2d). Appellant maintains that while the school district provides food, shelter, bathroom facilities, nurses, dispenses medication and transportation to and from school his only responsibility was to educate the victim. Appellant next argues that his actions do not meet the definition of "verbal abuse" because his actions were not repeated, the second element of the charged offense. *Id.*

Appellant's arguments regarding his status as the victim's caretaker and whether his actions constituted verbal abuse are factual determinations. He has already made these arguments to the jury and they disagreed by finding him guilty of Verbal Abuse by a Caretaker. According to *Spuehler* this Court is not to decide if we agree with the jury but whether any reasonable jury could have determined Appellant fit the definition of a caretaker or that his actions fit the definition of verbal abuse. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319-320, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

On appeal, this Court reviews claims of sufficiency of the evidence to determine "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Id.* "Pieces of evidence must be viewed not in isolation but in conjunction, and we must affirm the conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt." *Davis v. State*, 2004 OK CR 36, ¶ 22, 103 P.3d 70, 78.

The evidence at trial was that Appellant spent the entire school day with the victim and was in charge of providing him with an exceptional level of assistance. Appellant or his assistants took the victim everywhere he went while at school. They helped the victim with personal hygiene, including blowing his nose and cleaning up after frequent episodes of soiling himself.

Appellant also made sure the victim was taken to the school nurse to receive his daily medications and to lunch. Appellant's responsibility for the victim exceeded merely being responsible for his education.

On the day of this incident, the victim punched another student while outside during lunch. Appellant was not present when this took place. When the students were brought back to the classroom Appellant took the victim aside and into the classroom's annex room, away from the other students and assistants. While Appellant was out of sight with the victim one of the teaching assistants heard a disturbance in the annex. When the assistant got up to see what was happening, he filmed one minute and fourteen seconds of a longer ongoing interaction between Appellant and the victim. On the video Appellant is heard yelling at the victim to "Be a man with me. Come at me like that." Appellant also calls the victim a "punk kid." While making these statements Appellant pushes the victim, pokes the victim and forces the victim's head up with his hand. During this episode Appellant also violently claps his hands in the victim's face. The victim appears to be very upset during this video recording. Appellant's actions arguably appear to be intimidating and meant to provoke the victim.

The cases relied upon by Appellant do not support his position that he could not be found to be a caretaker who committed verbal abuse. Appellant relies on *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775 (10th Cir. 2013) and *Hagen v. Independent School District No. I-004*, 2007 OK 19, 157 P.3d 738. Both are civil cases and neither case addresses the issues in this case.

Appellant cites no authority establishing that this Court should make these factual determinations.

The State cites this Court's opinion in *State v. Thomason*, 2001 OK CR 27, 33 P.3d 930, to refute Appellant's position that this Court should determine that Appellant is not a caretaker. In *Thomason* this Court states "The real question posed by this case is whether sufficient evidence exists to prove caretaker neglect. This record indicates that it is bitterly disputed whether Thomason is a caretaker and if so, whether she had any contact with Roberts. Those are factual issues to be resolved by a jury." *State v. Thomason*, 2001 OK CR 27, ¶ 11, 33 P.3d 930, 933. The State is correct that the issues raised by Appellant were questions for the jury to decide.

After examining Appellant's claims of insufficient evidence, pursuant to the *Spuehler* and *Davis* standards stated above, Appellant has failed to establish that the evidence presented at trial was insufficient to support the jury's conclusion that Appellant was a caretaker and that he verbally abused the victim. Appellant's insufficient evidence claims are without merit.

DECISION

The Judgment and Sentence of the trial court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

HONORABLE WILLIAM MUSSEMAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

JOE E. WHITE, JR.
CHARLES WEDDLE
KATE THOMPSON
WHITE & WEDDLE, P.C.
630 NORTHEAST 63RD STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLANT

KATIE KOLJACK
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY COURTHOUSE
500 SOUTH DENVER AVENUE
SUITE 900
TULSA, OK 74103
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

LINDA H. MCGUIRE
ATTORNEY AT LAW
3847 SOUTH BOULEVARD
SUITE 200
EDMOND, OK 73013
COUNSEL FOR APPELLANT

JOE E. WHITE, JR.
WHITE & WEDDLE, P.C.
630 NORTHEAST 63RD STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
SHERI M. JOHNSON
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.

LEWIS, V.P.J.: Concur
HUDSON, J.: Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur