

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

PETER D. HANSEN,

Appellant.

Appeal from the Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable J. Dan Conklin, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

This is an appeal from a Greene County Circuit Court judgment convicting Peter D. Hansen (Defendant) of two counts of felony child abuse, for which he was given a suspended three-year sentence.

Defendant was charged in Greene County Circuit Court with four counts of felony child abuse and two counts of first-degree endangering the welfare of a child pertaining to his treatment of his 13-year-old son N.H. (Son) and his 10-year-old daughter S.H. (Daughter). (L.F. 14-16). In Count I, Defendant was charged with felony child abuse of Son occurring between November 3, 2008, until November 25, 2009, for “restricting him to a cold bathroom without a light, which was too small for [Son] to stretch out for hours at a time.” (L.F. 14). Count II charged Defendant during the same time period with felony child abuse of Son for “restricting food from” him. (L.F. 14). Count III charged Defendant with endangering the welfare of a child for “failing to provide adequate nutrition and sustenance to” him.” (L.F. 15). Counts IV, V, and VI mirrored the charges in Counts I through III, except that in those counts the alleged victim was Daughter. (L.F. 15–16).

Defendant’s case was tried before a jury on November 7-10, 2011, with the Honorable J. Dan Conklin presiding. (L.F. 4). The jury found Defendant guilty on the two child-abuse counts involving Son (Counts I and II),

acquitted Defendant on Counts III, IV, and VI, and was unable to reach a verdict on Count IV, which was the child-abuse count alleging that Defendant had restricted Daughter to a bathroom and small room for hours at a time. (L.F. 4, 67–71; Tr. 1356–58). The trial court later gave Defendant concurrent three-year sentences on Counts I and II, suspended execution of those sentences, and placed Defendant on five years of probation, including 100 days of shock incarceration. (Tr. 1387; L.F. 2, 76–77).

Defendant challenges the sufficiency of the evidence to support his convictions. The evidence presented at trial, viewed in the light most favorable to the verdict, showed the following:¹

In November 2009, two Springfield police officers and a Children’s Division investigator investigating a child-abuse hotline call went to Defendant’s residence. (Tr. 320–24, 343, 419–22, 575, 579–80). Defendant and his family, members of the Seventh Day Adventist Church, were living in a pair of church buildings on air mattresses in “rooms” created with partitions. (Tr. 456, 332, 338, 672). The officers were allowed into the buildings by Defendant’s wife, who said that Defendant and his 14-year-old

¹ Since Defendant was acquitted, or the jury hung, on the charges pertaining to Daughter, much of the evidence concerning Defendant’s specific treatment of her has been omitted.

son (Son) were away.² (Tr. 327, 330-31, 409-10, 686). Son was quickly discovered, “shivering and trembling,” inside the bathroom of an adjacent, locked building. (Tr. 347, 352, 596). The boy was wearing pajama pants and a long-sleeved t-shirt. (Tr. 355).

Defendant had been disciplining his son, who was home schooled, by solitarily confining him to a bathroom for long periods of time.³ (Tr. 672–78, 1224-25). Specifically, Son, who referred to the punishment as “the hole,” was required to remain inside that bathroom “pretty much all day and night” for various periods of time. (Tr. 458, 682). While in confinement, he was allowed outside only for “15 to 30 minutes” to play, and while inside the bathroom, the door was closed, except when he was doing homework. (Tr. 683–84). The temperature in the building was kept between 50 and 30 degrees. (Tr. 347, 424-26, 686, 688). The bathroom, which was only four or five feet square and not big enough for Son to stretch out completely on the floor, was purposefully kept dark. (Tr. 358-89, 365, 425, 429, 595, 679, 681–82, 690, 1265). While inside the bathroom (which was equipped only with a toilet and

² Son turned 14 in November 2009 just before this investigation began. (Tr. 668).

³ While Son generally testified about “the bathroom,” he was actually kept in two bathrooms, which were “about the same size.” (Tr. 677–79, 685).

sink), Son was allowed only a sleeping bag, a foam pad or an air mattress, a Bible, a notebook, eating utensils, a water bottle, and a few clothes. (Tr. 357–58; State’s Exhibits 12–18). Son had been in “the hole” five or six times, with each episode lasting as long as two weeks. (Tr. 628, 678, 688–89). In total, Son spent approximately 28 days in “the hole.” (Tr. 753). When asked how he felt while confined, Son said he would sit in the dark and feel “worried and angry.” (Tr. 680, 689-90, 694).

In addition to bathroom confinement, Son was also punished with a “restriction diet.” (Tr. 698-99, 1215). The restriction-punishment diet consisted of two meals per day, each “about a cup of food.” (Tr. 698–99, 782). The breakfast meal consisted of raw or cooked grains, while dinner was rice and vegetables. (Tr. 699). The restriction periods lasted from two days to two weeks, and on five or six occasions, Defendant withheld the second meal entirely. (Tr. 700). This differed from the family’s normal, two- or three-meals-per-day, low-calorie vegetarian diet, although Son was not ever allowed to eat as much as he wished. (Tr. 694–98). When the restriction diet and confinement punishments overlapped, Son was not allowed to have an air mattress in “the hole.” (Tr. 700, 705-06).

Approximately three hours after the officers and Children’s Division investigator first arrived, Defendant returned. (Tr. 583, 598–99). Upon being

confronted, Defendant told the officers that Son and Daughter “were bad children, had bad attitudes, and were liars, thieves, and cheats....” (Tr. 598). When one officer commented that the conditions “were worse than...a prison-type environment,” Defendant replied, “It’s like a hole for a 14-year-old, and I’m okay with that.” (Tr. 363, 1258). Both parents were arrested, and Son and Daughter were taken into protective custody. (Tr. 363).

The children were fed, briefly taken to a Children’s Division office, and then to a hospital’s emergency room for a “Well-Child” exam. (Tr. 600–01, 791–93). A nurse noted that Son was small, thin, had not yet entered puberty, and that his ribs and shoulder blades were visibly prominent. (Tr. 634; State’s Exhibits 35–41). Son, who was 4 feet 11½ inches tall, weighed 83 pounds, 12 ounces.⁴ (Tr. 842, 895). The nurse discharged Son, as he did not present with an emergent medical condition, but did refer him to a pediatrician to address the chronic malnourishment. (Tr. 644–45).

⁴ Son’s height was incorrectly noted in the E.R. records as being over six feet. (Tr. 635–36). Five days later, Son’s accurate height of just under five feet was recorded by a nurse at a Child Advocacy Center. (Tr. 833–42). That nurse calculated Son’s Body Mass Index with his weight of 87 pounds, as between zero and five percent. (Tr. 842–43).

For the following year, Son was treated by a board-certified pediatrician with specialized training in child abuse and neglect. (Tr. 898–90, 892). The doctor noted that Son had gained 12 pounds in 25 days after being put in foster care, which was indicative of a “failure to thrive.” (Tr. 702, 905–08). This pediatrician opined that “based on the history, his physical exam, and the growth charts, I feel that [Son] was provided inadequate calories for appropriate weight gain and growth.”⁵ (Tr. 918).

During trial, the State presented testimony from Son, Daughter, three police officers, two nurses, Son’s pediatrician, and Children’s Division personnel. (Tr. i-iii). Photographs of the victim and “the hole” were admitted into evidence. (State’s Exhibits 12–17, 35-41; Tr. 353, 366). Defendant, a convicted felon, called seven character witnesses plus an expert witness and took the stand himself in his own defense. (Tr. iii-iv, 1212, 1166–1279).

Defendant testified that he had deliberately restricted Son’s food intake and confined him to the bathroom. (Tr. 1215, 1224). He also testified that he used these disciplinary methods to punish Son for lying, being rude, fighting with his sister, and cheating on home-school work. (Tr. 1223–24, 1228). Defendant confirmed that while he was incarcerated for felony stealing, he

⁵ Additional evidence specifically pertaining to Defendant’s sufficiency claims is described in the Argument section of this brief.

was provided three meals per day and that the prison was temperature-controlled. (Tr. 1271, 1273).

The Court of Appeals, Southern District, affirmed Defendant's child-abuse conviction on Count I for confining him to the bathroom because the record contained sufficient evidence to support it. But it reversed Defendant's child-abuse conviction and discharged him on Count II for insufficient evidence. The Court of Appeals opinion began the sufficiency analysis by noting that Defendant had been acquitted of child endangerment premised on his failure "to provide adequate nutrition and sustenance to the child." Slip op. at 4. The court's opinion then focused on the *family's* dietary habits, but failed to mention the restriction diet imposed on Son, which consisted of two cups or less of food each day, as punishment. Slip op. 5. The opinion also noted that no intelligence or blood testing was performed on Son before or after he was placed in foster care. Slip Op. at 5. The opinion then concluded that "[t]his is an unusual and troubling case, but it would be the first time that a conviction was obtained based on the sincere and religiously held diet choice of the parents" and that "[t]hese food choices and the *slight deprivation* alone cannot stand as the basis for a claim that the son was the victim of severe, cruel, or *unusual* punishment." Slip Op. at 5 (emphasis added).

Notwithstanding the opinion's implication that Defendant's religious beliefs may have played a part in reversing his conviction, the record shows that Defendant never challenged his prosecution on First Amendment grounds, and he has not raised such a claim in this appeal.⁶

⁶ The only constitutional challenge Defendant raised in the trial court was that the child-abuse and child-endangerment statutes were unconstitutionally vague. (L.F. 21–28). Defendant testified at trial that a vegetarian diet is “certainly not” required of Seventh Day Adventists, but merely “recommended.” (Tr. 1172). Defendant never suggested that his disciplinary methods were religiously motivated, and in closing argument, defense counsel explained that “the freedom of religion does not exclude people from conduct that would be in violation of the law. (Tr. 1308).

ARGUMENT

I (Sufficiency—withholding food).

The record contains sufficient evidence to support Defendant’s conviction under Count II for abuse of a child under § 568.060, RSMo 2000, because the State presented sufficient evidence to show that Defendant’s practice of withholding food to punish Son constituted “cruel and inhuman punishment.”

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court’s review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. banc 2011); *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). “This is not an assessment of whether the [appellate court] believes that the evidence at trial established guilt beyond a reasonable doubt but [is] rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder ‘could have found the essential elements of the crime beyond a reasonable doubt.’” *Nash*, 339 S.W.3d at 509 (quoting *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010)). “In reviewing the sufficiency of the evidence, all evidence favorable to the State is accepted as true, including all favorable inferences drawn from

the evidence.” *Nash*, 339 S.W.3d at 509. “All evidence and inferences to the contrary are disregarded.” *Id.* See also *State v. O’Brien*, 857 S.W.2d 212, 215–16 (Mo. banc 1993) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses’ credibility, courts employ “a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.”)).

“An appellate court ‘faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.’” *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); see also *Freeman*, 269 S.W.3d at 425 (holding that an appellate court should “not weigh the evidence anew since ‘the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case’”) (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)); see also *Nash*, 339 S.W.3d at 509; *State v. Sumowski*, 794 S.W.2d 643, 645–46 (Mo. banc 1990) (affirming child abuse conviction, in part, because victim’s prior statement that his bruises were not inflicted by his father was disregarded as being contrary to the verdict).

Appellate courts do not act as a “super juror with veto powers”; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52; *Nash*, 339 S.W.3d at 509; *Freeman*, 269 S.W.3d at 425. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact’s province to believe all, some, or none of the witnesses’ testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989).

B. The record regarding this claim.

Defendant was charged in Count II with “felony abuse of a child” when he “knowingly inflicted cruel and inhuman punishment upon [Son]..., a child less than seventeen years old, by restricting food from” him. (L.F. 14).

At trial, Son testified that he was born in November 1995, that he had lived with Defendant in the church buildings, and that he was home-schooled. (Tr. 668–672). He explained that Defendant “directed” the discipline in the household. (Tr. 674). Son also described the food restrictions imposed on him when he was being punished:

Q: You had indicated that you weren’t [normally] allowed the sweets like dried fruit or the extras like chips. Did your food portion change when you were on restriction?

A: Yes.

Q: How did they change?

A: They got smaller.

Q: Approximately how much food did you get for each meal while on restriction?

A: About a cup.

Q: When you were on restriction what did you usually eat for breakfast?

A: Raw grains or cooked grains.

Q: And how was that different from when you weren't on restriction?

A: When we weren't on restriction, we were allowed to have dried fruits.

Q: And when you were in restriction what did you usually eat for supper?

A: Rice, vegetables, and stuff like that.

Q: How was that different from when you were not on restriction?

A: We were allowed to have cheese and other like chips and salsa.

Q: How often—was your dinner ever withheld while you were on restriction?

A: Yes.

Q: And how often do you think your dinner was withheld from you while on restriction?

A: Probably five or six times.

Q: And usually how long did your restriction last?

A: It ranged from two days to about two weeks.

* * * *

Q: But the amount of food that you ate, did that change when you were on restriction?

A: Yes, ma'am.

Q: And how did that change?

A: I was allowed to only have a cup, about a cup of food.

A: So it wasn't just taking away dessert, it was taking away the amount of food that you ate too?

A: Yes, ma'am.

(Tr. 699–700, 782). Three or four times while Son was on the restricted or punishment diet, Defendant would not allow Son to eat anything at all. (Tr. 776). This led Son to hyperventilate on one occasion. (Tr. 777).

Son testified that Defendant restricted the amount of food he could eat even when he was not being punished; Defendant and his wife consumed bigger portions. (Tr. 696–97). When Son tried to obtain more food than he

was allowed, Defendant broke a plastic spoon over his head. (Tr. 695–96). Son also said that Defendant ate ice cream he had purchased at an ice cream store; Son was never given ice cream. (Tr. 697). If Son did not drink the one gallon or more of water as Defendant required, Defendant would withhold supper from him. (Tr. 697–98, 766).

Defendant testified that he had “implemented the food restriction” in response to Son’s misbehavior. (Tr. 1215). He also testified that “...what really hit [Son] was his stomach...he really loved anything food.” (Tr. 1223). Defendant explained that the family “had pretty unlimited food,” and he confirmed that there was plenty of food in the church. (Tr. 1243, 1268).

The record showed that when he was removed from Defendant’s care, Son was thin, his bones protruded, and he had not yet begun puberty even though he was 14 years old. (Tr. 634). A pediatrician opined that Son had been provided inadequate calories for appropriate weight gain and growth. (Tr. 918).

C. The jury could reasonably find that punishing a child by withholding food constituted “cruel and inhuman punishment.”

During the charged time period (November 3, 2008 to November 25, 2009), Missouri law provided that “a person commits the crime of abuse of a child if such person: (1) knowingly inflicts cruel and inhuman punishment upon a

child less than seventeen years old.” Section 568.060.1(1), RSMo 2000.⁷ Given Defendant’s admission that he purposely restricted Son’s food intake, (Tr. 1215), the issue is whether there was sufficient evidence from which a reasonable fact finder could conclude that this treatment constituted cruel and inhuman punishment. (Tr. 1215). The record readily supports such a finding.

This Court has explained that the words “cruel and inhuman punishment...have a settled common law meaning and are words of general and common usage about which there is no great dispute as to meaning.” *State v. Brown*, 660 S.W.2d 694, 698 (Mo. banc 1983) (holding that the child-abuse statute is not unconstitutionally vague). But those words do not require that the punishment rise to the level of physical injury. *See State v. Horton*,

⁷ In 2012, the General Assembly rewrote § 568.060 and removed the phrase “cruel and inhuman punishment.” As rewritten, the statute now provides: “A person commits the offense of abuse or neglect of a child if such person knowingly causes a child who is less than eighteen years of age: (1) To suffer physical or mental injury as a result of abuse or neglect; or (2) To be placed in a situation in which the child may suffer physical or mental injury as the result of abuse or neglect.” Section 568.060.1, RSMo Cum. Supp. 2012.

325 S.W.3d 474, 480 (Mo. App. E.D. 2010) (“although the majority of child abuse cases involve some sort of injury...it is not required to be proven by provision of the statute.”). Unlike laws pertaining to child endangerment, Missouri’s child-abuse statute “is intended to prevent abusive and punitive conduct which causes serious emotional injury to a child.” *State v. Dunson*, 979 S.W.2d 237, 243 (Mo. App. W.D. 1998) (holding that § 568.060 “is not just a subset, or specific instance, of endangering the welfare of a child; it is an independent crime that prohibits cruel and inhuman punishment even if it does not create a substantial risk to the life, body or health of a child.”). See also *Bass v. State*, 950 S.W.2d 940, 946 (Mo. App. W.D. 1997) (noting that child abuse does not require physical injury). “As used in § 568.060, ‘punishment’ includes ‘severe, rough, or disastrous treatment.’” *State v. Breedlove*, 348 S.W.3d 810, 814 (Mo. App. S.D. 2011) (quoting *State v. Silvey*, 980 S.W.2d 103, 108 (Mo. App. S.D. 1998)).

Defendant’s “restriction diet” falls under the scope of the child-abuse statute that was in effect during the charged time period. The State presented evidence that Defendant deliberately gave his 13-year-old son only two “cups” of food per day for several days in a row, and on five or six occasions he withheld even the second cup of food, limiting Son to only one cup of food per day. (Tr. 698–700, 782, 1215). Son testified that on some

occasions, food was withheld entirely. (Tr. 776–77). From that evidence, the jury could reasonably conclude that Son was forced to endure mental and physical misery as result of that punishment. *See Silvey*, 980 S.W.2d at 107 (affirming child abuse conviction and noting that a reviewing court does not “dispense with common sense or ignore an evident statutory purpose”). Defendant’s punishment was severe, rough, and disastrous in this case, especially since Son was already malnourished. This, coupled with the complete withholding of food on occasion, constituted “cruel and inhuman punishment.”

This is not a case where a child was merely denied enjoyable foods or prohibited from eating an excessive amount. Defendant’s assertion that he did nothing more than deprive Son of “desserts and condiments” is inconsistent with the record. (Deft’s Br. 25). Defendant refused to provide Son with even a minuscule amount of food. This form of punishment is especially cruel and inhuman because of the underlying danger it presents to the victim. *See State v. Todd*, 183 S.W.3d 273, 278 (Mo. App. W.D. 2005) (noting in a child endangerment case the “substantial risks associated with malnourishing a child have been deemed self-evident....”); *See State v. Mahurin*, 799 S.W.2d 840, 842 (Mo. banc 1990) (noting in a homicide-by-

starvation case the self-evident dangers of failing “to provide nutritional care necessary for a child’s well-being”).

Neither Defendant’s brief nor the Court of Appeals opinion cites to any case in which a conviction for child abuse under § 568.060 has been reversed for insufficient evidence. Defendant attacks his conviction by relying on cases in which appellate courts have rejected sufficiency challenges to child-abuse convictions. He then challenges his conviction by arguing that his conduct did not rise to the level described in those cases. This type of analysis is particularly unhelpful in sufficiency cases. Whether the evidence was sufficient to support child-abuse convictions in the cases on which Defendant relies does not provide any basis for concluding that the evidence was insufficient in Defendant’s case.

The law does not permit the withholding of food as punishment even to adults convicted of serious crimes. For example, the federal courts have held that it is unconstitutional to withhold adequate food from prison inmates. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (Eighth Amendment requires that “prison officials must ensure that inmates receive adequate food....”); *Williams v. Coughlin*, 875 F.Supp. 1004, 1014 (W.D.N.Y. 1995) (“the withholding of food for two or more days in response to a minor disciplinary infraction may be sufficiently serious to sustain an Eighth Amendment

claim....”); *Foster v. Runnels*, 554 F.3d 807, 812-13 (9th Cir. 2009) (unconstitutional to feed an inmate only 16 meals over a 23-day period). If severely restricting food to adult prisoners constitutes “cruel and unusual punishment” under the Eighth Amendment, Defendant’s withholding of food to his own child surely qualifies as “cruel and inhuman punishment” under the child-abuse statute.

Even at Missouri juvenile-detention facilities, juveniles are required by law to receive more food than Defendant provided in this case. “[R]estrictive diets” are expressly prohibited from being used to discipline juvenile offenders. *See* Rule 129.⁸ In light of these comparisons to the penal system, it

⁸ The second Appendix A of Supreme Court Rule 129, which concerns Juvenile and Family Courts, is titled “Standards for Operation of a Secure Juvenile Detention Facility.” Section 9 is titled “Rules and Discipline.” Part E of subsection 9.3 provides “a prohibition against the use of restrictive diets as a form of discipline.” Section 15, “Food Services,” subsection 15.5, provides that the “facility shall provide three meals, of which two are hot meals, at regular meal times during each 24 hour period....” These provisions can be located on pages 695 and 700, respectively, of the soft-bound 2014 Westlaw edition of Missouri Court Rules, Volume I – State.

cannot be said that there was insufficient evidence from which the jury could find that Defendant committed child abuse.

Defendant argues that the conduct required “for this sort of charge are instead akin to literal malnutrition or intentional starvation.” (Deft’s Brief 25). While Defendant *did* cause Son to be malnourished, (Tr. 918), the assertion that child abuse is only committed by inflicting physical harm is contrary to purpose of the statute. *See Horton*, 325 S.W.3d. at 480; *Dunson*, 979 S.W.2d. at 243; *Bass*, 950 S.W.2d at 946.

Defendant also argues that the restriction diet was not harmful to Son and bases this assertion on the testimony of defense witnesses, who were Defendant’s long-time friends.⁹ (Deft’s Brief 26–27). But the jury, as the finder of fact, was not required to credit their testimony, and this testimony must be ignored by an appellate court considering a sufficiency claim since it is contrary to the verdict. *See State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005) (courts reviewing sufficiency claims disregard “any evidence and inference contrary to the verdict.”); *Sumowski*, 794 S.W.2d at 645–46 (disregarding evidence unfavorable to child-abuse conviction). Defendant’s

⁹ Katheryn York grew up with Defendant, Geoffrey Haefel had known Defendant since 1987, and Jodi Cooper’s family had “known him for years.” (Tr. 1036, 1080-81, 1101).

argument is further flawed in that it invites this Court to reweigh the evidence and substitute its own judgment for that of the jurors. *See Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008) (appellate court shall “not weigh the evidence anew”); *Breedlove*, 348 S.W.3d at 815 (evidence of spanking sufficient for child-abuse conviction, in part, because an appellate court “may not substitute our judgment for that of the trial court and may not reverse even if we believe we would have weighed the evidence differently.”).

Finally, this Court has noted that “the number of reports of child abuse cases appearing in a multitude of publications has reached epidemic proportions....” *State ex rel. D.M. v. Hoester*, 681 S.W.2d 449, 452 (Mo. banc 1984). Contributing to that epidemic are the recurring cases in which parents severely, and sometimes fatally, malnourish their children. *See State v. Jones*, 427 S.W.3d 191, 194 (Mo. banc 2014) (mother ignored warnings from medical personnel about the risk of starving her newborn son); *State v. Bass*, 81 S.W.3d 595, 601 (Mo. App. W.D. 2002) (two children died as a result of starvation and neglect); *In Interest of B.A.*, 931 S.W.2d 926, 928 (Mo. App. W.D. 1996) (parental rights case in which infant was hospitalized for “moderate to severe malnutrition for which there was no medical explanation.”); *In Interest of P.M.*, 801 S.W.2d 773, 774 (Mo. App. W.D. 1991) (parental rights case where one child died from, among other contributing

factors, “severe protein calorie malnutrition” while his 3 siblings were hospitalized for “failure to thrive, malnutrition, and emotional deprivation”). In response, “Missouri joined [the] battle against child abuse by enacting the Child Abuse Reporting Act....” *Bradley v. Ray*, 904 S.W.2d 302, 310 (Mo. App. W.D. 1995); *See also* § 210.155, RSMo 2000 (reporting suspected child abuse is mandatory for police officers, medical providers, school personnel, social workers, day care staff, and ministers). Defendant’s conviction for child abuse under the facts of this case is entirely consistent with this public policy.

As mentioned above, Defendant is not challenging his conviction on First Amendment grounds. In any event, the law does not excuse criminal behavior committed for an ostensibly religious purpose. *See* MO. CONST. art. 1, § 5. (while “all men have a natural and indefeasible right to worship...this section shall not be construed to...justify practices inconsistent with the good order or safety of the state, or with the rights of others.”); *Employment Division v. Smith*, 494 U.S. 874 (1990) (religious beliefs do not excuse compliance with the law). *See also Commonwealth v. Cottam*, 616 A.2d 988, 1000 (Pa. Super. Ct. 1992) (affirming convictions of Seventh Day Adventist parents charged with the death of their son and the severe malnutrition of their daughter on the ground that parents must provide “parental care...and sustenance” to their children “despite their religious beliefs”).

In sum, the State presented sufficient evidence proving that the punishment Defendant inflicted on Son by severely restricting his food intake, and in some cases withholding it entirely, was indeed cruel and inhuman. The severity of the punishment was shown by the fact that Son was malnourished and underdeveloped when he was removed from the home and placed in foster care, where he made significant improvement. The trial court did not err in overruling Defendant's motion for acquittal on Count II.

II (Sufficiency—confinement).

The record contains sufficient evidence to support Defendant’s conviction under Count I for abuse of a child under § 568.060, RSMo 2000, because the State presented sufficient evidence to show that Defendant’s locking Son in a small, dark, and cold bathroom for days at a time was “cruel and inhuman punishment.”

A. Standard of Review.

The standard of review is the same as outlined in Point I.

B. The record regarding this claim.

Defendant was charged in Count I with having committed “felony abuse of a child” when he “knowingly inflicted cruel and inhuman punishment upon [Son]..., a child less than seventeen years old, by restricting him to a cold bathroom, without light, which was too small for [him] to stretch out, for hours at a time.” (L.F. 14).

At trial, one of the police officers who responded to the church on November 25th testified that it “was cool, extremely cool for being the inside of a building. It wasn’t quite as cool as it was outside, but it wasn’t nearly as warm as it was in [the parents’] living quarters.” (Tr. 322, 349). The other officer testified that he had “noticed that the thermostat was registering 54 degrees of internal temperature of the building. I also noticed that the

function was set to cool and it was programmed to cool it to 40 degrees.” (Tr. 426). The Children’s Division investigator testified that when she first encountered Son, “he was physically shivering and trembling” and that she felt uncomfortably cold in the building despite wearing a “long-sleeved turtle neck and Under Armor...” (Tr. 596–97).

Son testified at trial about the conditions of his confinement when he was being punished:

Q: Now were you ever—you talked about being in confinement, what does that mean?

A: Being looked [sic] in a room, a small room.

Q: In particular while you were living at that church, which small room would you get locked into?^[10]

A: The bathrooms.

Q: In the time that you were living in the church, approximately how many times were you put in a bathroom as punishment?

A: Probably around five or six.

¹⁰ While the bathroom door was not locked, the building the bathroom was located in was locked every night, such that the only way Son could leave the building was to crawl out of a window. (Tr. 347, 684, 693).

Q: You said you sometimes called it confinement when you were put in the bathroom. Was there another phrase you used for when you were put in the bathroom?

A: "The hole."

(Tr. 677–78).

Son testified that the room was "about five by four with a toilet and sink" and was not large enough for him to lie down. (Tr. 697; Ex. 12-16). Son was taller than the room was wide. (Tr. 595). Son also testified that while in "the hole," he ate his meals, did his home-school homework, and slept in the bathroom. (Tr. 679-80). Unless he was doing homework, the light in the bathroom was kept off. (Tr. 681). In order to sleep, Son had to lie diagonally across the floor with his knees up inside a sleeping bag. (Tr. 682). When not otherwise occupied, Son was left alone in the dark to think, for at least 8 hours per day. (Tr. 681, 690). He was occasionally allowed out of "the hole" to play outside for 15 to 30 minutes before being returned to the bathroom. (Tr. 683–84). When asked how he felt when "in the hole," Son answered, "worried and angry." (Tr. 694).

Son also provided the following testimony describing the conditions of his confinement:

Q: And what was the temperature of the sanctuary [hall] bathroom when you were put in there?

A: During the day it was in the 50's and during the night it got down to the 30's.

Q: Were you allowed to have a coat when you were in the sanctuary bathroom?

A: Sometimes during the day.

Q: Could you keep the coat with you the whole day and night?

A: No, ma'am.

Q: Why not?

A: 'Cause my dad took it away from me.

Q: Would you describe your bedding in the sanctuary bathroom?

A: It was a sleeping bag with sometimes I had a pillow. I don't exactly remember.

Q: And could you have that bedding during the day while you were in the bathroom?

A: No, ma'am.

Q: And what happened to the bedding during the day?

A: My dad took it.

Q: Generally how did you stay warm in the sanctuary bathroom?

A: I had a coat I used that and if I didn't, then I just cuddled up and tried to stay warm.

(Tr. 686-87).

Son testified that the last time he was confined, he had been in the bathroom "one and a half to two weeks." (Tr. 689). He also confirmed that, collectively, he had spent "about 28 days" sleeping in a bathroom. (Tr. 753).

At trial, Defendant referred to the confinement as the "fellowship hall bathroom punishment." (Tr. 1224). He testified that Son slept in the bathroom and that, on one occasion, Son had been confined for a week. (Tr. 1225). He confirmed the bathroom "was too small for Son to lie down in comfortably." (Tr. 1259). Defendant further described the conditions of Son's confinement, including his removal of the light switch so Son could not signal anyone:

Q: You took the light switch out of the sanctuary bathroom?

A: That is correct.

Q: And why did you do that?

A: 'Cause it was a pull string and I took it out of the bathroom so that [Son] wouldn't be too eager to flash the light during the night.

Q: Why were you concerned about him flashing the light at night?

A: Well, I think the answer would be obvious that who would he attract, what would he attract? And why would—why would I want somebody calling—being called attention that he was in there flashing the light?

Q: So you didn't want anyone['s] attention[] to be drawn to the fact that Son was in the bathroom in the sanctuary?

A: I really don't know.

(Tr. 1265).

C. The jury could reasonably find that Defendant's confinement of Son constituted "cruel and inhuman punishment."

As in the prior point, Defendant does not deny his actions, but argues that they do not constitute "cruel and inhuman punishment." (Deft's Brief 35). That claim is wholly unreasonable. Common sense dictates that keeping a 13-year-old boy locked for days at a time in a cold, dark bathroom in which he could not even lie down violates a statute designed to protect children from emotionally abusive punishment. (Tr. 677–84, 686–87, 689–90, 694, 753, 1265); *See Horton*, 325 S.W.3d. at 480; *Dunson*, 979 S.W.2d. at 243; *Bass*, 950 S.W.2d at 946. Son had to endure prolonged sensory deprivation, stark boredom, the discomfort of being bitterly cold, and confinement so restrictive that he could not fully stretch out to sleep. Juveniles confined in detention

facilities are by law provided with more space to live than Son was. *See* Rule 129.¹¹ Confining Son in “the hole” was “cruel and inhuman punishment.” The trial court did not err in overruling the motion for judgment of acquittal on Count II.

The severe physical and mental misery caused by living in this environment is certainly why Defendant conceived of the punishment in the first place. Defendant admitted as much to the arresting police officer when he explained his approving use of solitary confinement on Son. (Tr. 363). Defendant even admitted at trial that he removed the light switch so Son could not draw anyone else’s attention to his confinement. (Tr. 1265); *See State v. Barton*, 998 S.W.2d 19, 28 (Mo. banc 1999) (“Conduct and declarations of a defendant that are relevant to show a consciousness of guilt or a desire to conceal the offense are admissible because they tend to

¹¹ The second Appendix A of Supreme Court Rule 129 is titled “Standards for Operation of a Secure Juvenile Detention Facility.” Section 15 is titled “Physical Plant.” Item 1.6 of that section provides that “sleeping rooms shall have at least 70 square feet of floor space for single occupancy....” This provision can be located on page 689 of the soft-bound 2014 Westlaw edition of Missouri Court Rules, Volume I – State. Based on Son’s testimony, the “4 by 5” bathroom only had 20 square feet of floor space. (Tr. 697).

establish the defendant's guilt of the charged crime.”). The jury could reasonably infer that Defendant was aware that what he was doing would trigger the intervention of authorities.

Defendant asserts that “even if this confinement was poor parenting, it was not cruel and inhuman punishment” and that his conduct is “akin to sending a child to his room for punishment.” (Deft’s Brief 35). These assertions are unpersuasive. Son was not locked in a heated, well-lit, furnished bedroom for an evening. He spent days living in a cold, dark bathroom that was not much bigger than most closets. (Tr. 697; State’s Exhibits 12–18).

Defendant also claims that he allowed Son to have a coat. (Deft’s Brief 36). While this may have been true during the day, the record shows that Defendant took the coat away at night. (Tr. 667–68). Depriving Son of his coat was especially cruel given that Defendant deliberately kept “the hole” at a frigid temperature. (Tr. 426, 686). The fact that Son could occasionally ride his bike for 15 to 30 minutes per day, also did not preclude the jury from finding that the conditions of confinement constituted cruel and inhuman punishment. (Deft’s Brief 36; Tr. 683–84). Defendant’s argument to the contrary indulges facts and inferences contrary to the verdict. This type of extreme discipline cannot be excused as misguided, aggressive parenting.

It was, as the jury reasonably and justifiably concluded, felony abuse of a child.

Unfortunately, this is not the first time a court has encountered this type of child abuse. *See State v. Esker*, 658 S.W.2d 49, 50 (Mo. App. W.D. 1983) (defendants convicted of child abuse, in part, for locking 7-year-old son in basement for a period of 4 months); *See Fisher v. State*, 786 A.2d 706, 733 (Md. App. 2001) (holding in a homicide case that locking victims in “the hole” (a small bathroom stall) for days at a time with no light was “child abuse”). These cases are especially troubling, because these children are not in regular contact with “outsiders” who can summon the authorities. Indeed, the very seclusion of the confinement prevents anyone from intervening to stop the abuse, and here, Defendant took affirmative steps to prevent Son from attracting aid.

In sum, the State presented sufficient evidence from which the jury could reasonably find that Defendant inflicted cruel and inhuman punishment on Son. Defendant subjected Son to repeated periods of solitary confinement in a dark, cold bathroom as a punishment. The trial court did not err in overruling Defendant’s motion for acquittal on Count I.

CONCLUSION

The trial court committed no reversible error. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,181 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on August 25, 2014, to:

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