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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001288-MR

JERMAINE BROWN — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 1996-CR-000033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Jermaine Brown appeals from an April 28, 1997, judgment of the Graves Circuit Court convicting him, in accord with a jury verdict, of criminal abuse in the first degree (KRS 508.100) and sentencing him to seven (7) years in prison. Brown was indicted along with his girlfriend, Allison Clark, for allegedly having abused the couple's six (6) week old son, Devon. Brown complains on appeal that the trial court erred by consolidating his and his co-defendant's trials and by denying his motions for a directed verdict of acquittal. He also complains that his trial was rendered unfair by the trial court's numerous admissions of improper evidence. He claims, in

particular, to have been unduly prejudiced by the admission of expert testimony concerning the so-called "shaken baby syndrome." For the reasons that follow, we affirm the judgment of the Graves Circuit Court.

Brown and his co-defendant Clark were jointly tried from February 11 through February 13, 1997. During rebuttal following presentation of the defendants' cases, the Commonwealth, in an attempt to impeach Clark's claim that her relationship with Brown had been tranquil, elicited testimony concerning Brown's alleged mistreatment of Clark. Brown argues that this testimony, admissible in the case against Clark but inadmissible in his case, provides compelling grounds to grant him a new trial separate from his co-defendant. He acknowledges that he raised no objection to the Commonwealth's pre-trial motion for a consolidated proceeding, but he insists that the joint trial proved to be so unfair as to entitle him to relief pursuant to RCr 10.26, the substantial error rule. We disagree.

At trial, Brown and Clark both denied having abused their son, neither accused the other, and both attempted to show that the serious injuries the child suffered could have resulted from innocent causes. These defenses are not incompatible, Brown's contrary assertion on appeal notwithstanding. Nothing demonstrates that fact more emphatically than Brown and Clark's utter lack of objection to the Commonwealth's motion for a joint trial. Given Brown's apparent strategic acquiescence in the joint proceeding and in light of the policy favoring consolidated trials of all alleged crimes arising from the same facts, there was no error, much less a palpable one, in the trial court's

decision to try Brown and Clark together. RCr 9.16; Foster v. Commonwealth, Ky., 827 S.W.2d 670 (1992). The evidentiary question Brown raises does not change this analysis. That question does, however, merit discussion in its own right. We will address that question below, when we take up Brown's other claims that evidence was improperly admitted.

The trial court did not err by trying Brown and Clark together, nor did it err by denying Brown's motions for a directed verdict of acquittal. Brown points out that all the evidence against him was circumstantial, and he contends that, because the evidence does not compel an inference that he abused Devon, his guilt is sufficiently in doubt to entitle him to acquittal as a matter of law. The law, however, does not require that a defendant be found guilty beyond all doubt, but only beyond a reasonable doubt.

As our Supreme Court has explained,

> [o]n motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant

> is entitled to a directed verdict of acquittal. (Citation omitted.)

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). To establish a defendant's guilt, the Commonwealth "must have more than a mere scintilla of evidence and . . . it must be evidence of substance." Johnson v. Commonwealth, Ky., 885 S.W.2d 951, 953 (1994). On the other hand, circumstantial evidence is not, *per se*, insubstantial. Such evidence will support a conviction for criminal abuse if it permits a reasonable inference that the defendant is guilty. Commonwealth v. Collins, Ky., 933 S.W.2d 811 (1996).

Criminal abuse in the first degree is defined at KRS 508.100 as follows:

> A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby:
> (a) Causes serious physical injury; or
> (b) Places him in a situation that may cause him serious physical injury; or
> (c) Causes torture, cruel confinement or cruel punishment;
> to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

The question before us, therefore, is whether, based upon "the evidence as a whole," it was "clearly unreasonable" for the jury to find that Brown intentionally abused Devon or allowed him to be abused. We find that it was not.

The Commonwealth's evidence showed that on the evening of November 11, 1995, Clark had called 911 to request emergency assistance with her six (6) week old baby. The baby's eyes, she told the 911 operator, had rolled back in its head, its side had

collapsed, and it seemed dead except for very intermittent breathing. Devon was rushed initially to the Pine Lake Medical Hospital in Mayfield, Kentucky, and was eventually seen by three (3) physicians: Dr. Gaw, who examined Devon in the hospital emergency room; Dr. Ross, the intensive care pediatrician at Kosair Children's Hospital in Louisville; and Dr. Burrows, a forensic pathologist who works for the Commonwealth. All three (3) doctors testified at trial, and each confirmed that the baby's serious injuries--broken ribs, cranial and retinal bleeding, and seizures--are injuries that commonly occur when a baby is subjected to a forcible whiplash motion such as violent shaking. Dr. Burrows testified that shaking is so often the cause of such injuries that together they have come to be referred to in the medical profession as "shaken baby syndrome."

The jury also heard testimony from an acquaintance of Brown and Clark, Steve Hicks, who visited the couple early in the afternoon of November 11, 1995. Hicks testified that he had knocked on the door of Brown and Clark's apartment that afternoon and as he was waiting for a response he had heard from inside dull slapping sounds, sounds like someone's breath being forcibly expelled, and what he was sure was the sound of Devon's suppressed crying or whimpering. Before anyone responded to his knock, Clark had driven up and after entering the apartment through the rear door had opened the front door for him. When he entered the apartment Hicks saw Brown, who had apparently just come from the shower, and he saw Devon lying on a changing table. Later, Clark carried Devon into the living room where she, Brown, and Hicks watched a video. According to Hicks, Devon had

appeared unusually dazed, listless, and unresponsive. Hicks also testified that, unlike her usual practice of leaving Devon uncovered, during that visit Clark had kept Devon completely wrapped in a blanket.

There was also testimony by Dr. Gaw that when Devon was admitted to the Pine Lake Medical Hospital he was bruised on his back, chest, and left ear and had a severe diaper rash. Dr. Gaw testified that when he first saw them that night, all of Devon's bruises were probably a day or two (2) old. He described the bruises on the baby's chest as looking like finger prints. The two (2) large bruises on the baby's back, he said, were probably thumb marks.

Clark and Brown both denied having abused Devon and sought to show that Devon's injuries could have resulted from an unfortunate conjunction of innocent causes, such as an enzyme deficiency, a genetically based seizure disorder, a lung infection, a car-seat buckle, a day-care swing-seat strap, Brown's having once accidentally dropped Devon after a bath, Clark's having laid the baby down too hard, Brown's over zealous and untrained application of CPR immediately before Clark's 911 call, and the jolt that occurred when the EMT worker who carried Devon to the ambulance leaped from the apartment's stoop with Devon in his arms. The doctors all testified, however, that none of these factors, either alone or in combination, was at all likely to account for Devon's injuries, which could only result from the sort of violent shaking the doctors believed had occurred or from some other severe trauma such as an automobile accident.

This was the evidence at the core of the Commonwealth's case. Although this evidence is circumstantial, Devon's serious injuries and the doctors' testimony concerning the probable cause of those injuries permits a reasonable inference that Devon had been abused. Hicks's testimony, furthermore, about the sounds he heard emanating from Brown's apartment when Brown was alone with Devon and about Devon's uncharacteristically lethargic demeanor shortly thereafter; Dr. Gaw's testimony that Devon's bruises were probably hand prints and were a day or two (2) old; and the testimony by all the doctors that Brown's and Clark's accounts of what happened to Devon were implausible is evidence permitting a reasonable inference that Brown abused Devon in the first degree.

Anticipating this response to his directed verdict argument, Brown also contends that the inference of his guilt was unfairly bolstered by Dr. Burrows's reference to the "shaken baby syndrome." This reference, Brown claims, was unduly prejudicial because it lent an unwarranted aura of scientific certainty to the inference that Devon's injuries resulted from child abuse. Brown argues that "shaken baby syndrome" is no better established as a medical diagnosis than is "child sexual abuse accommodation syndrome," (CSAAS) and so evidence of the former should have been disallowed at trial as evidence of the latter has been. *See* Hellstrom v. Commonwealth, Ky., 825 S.W.2d 612 (1992) (observing, at 614, that "[n]either the syndrome [CSAAS] nor the symptoms that comprise the syndrome have recognized reliability in

diagnosing child sexual abuse as a scientific entity.").[1] We disagree.

We disagree first with Brown's suggestion that the meaning of the word "syndrome" is so varied within the scientific community as to render the word inherently unsuitable for evidentiary purposes.[2] It is true, as Brown notes, that different scientific disciplines use the word for different purposes. For example, "the behavioral syndromes [such as CSAAS] were not devised to determine the truth of events leading up to their manifestations but merely to identify emotional problems." State v. Lopez, 412 S.E.2d 390, 394 (S.C. 1991). Accordingly, evidence concerning the existence of such syndromes has been held to be inadmissible as proof that a particular causative event occurred. Bussey v. Commonwealth, Ky., 697 S.W.2d 139 (1985).

Frequently, however, physical syndromes not only characterize a disease or disorder but provide insight into the cause of the condition as well. Proof of such syndromes provides a basis for legal inferences concerning events prior to the

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[1]Brown also complains that the Commonwealth failed to establish a proper foundation for this testimony. He argues, therefore, that there are procedural as well as substantive grounds for deeming Dr. Burrows's "shaken baby syndrome" testimony improper. The procedural issue was not raised before the trial court, however, neither at the pre-trial hearing when objection was entered to the substance of such testimony, nor during trial when Dr. Burrows's qualifications as an expert and her assertions regarding the scientific status of "shaken baby syndrome" went unchallenged. Because the alleged procedural error was not preserved at trial, we may not address it on appeal. RCr 9.22; RCr 10.12.

[2]A standard definition of "syndrome" is "[a] group of symptoms that collectively characterize a disease or disorder." *The American Heritage Dictionary*, 3rd Edition (1992).

syndrome's manifestation. This sort of "syndrome" evidence is admissible in court. State v. Lopez, *supra*.

We also disagree with Brown's assertion that "shaken baby syndrome," like CSAA syndrome, merely names or characterizes a particular constellation of injuries without providing genuine insight into causation. Although apparently this issue is one of first impression in Kentucky, several of our sister states have already addressed it and have unanimously found that evidence of "shaken baby syndrome" is admissible. Those states have observed that the causative correlation between this set of injuries and the type of child abuse that gives the syndrome its name is well established. *See* State v. Compton, 701 A.2d 468 (N.J. 1997) (collecting cases); State v. McClary, 541 A.2d 96 (Conn. 1988); State v. Lopez *supra*. We may and do, therefore, take judicial notice of the fact that "shaken baby syndrome" has been adequately analyzed and recognized in the scientific literature to permit testimony about it by a properly qualified expert. *Cf.* United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993), *cert. denied*, 510 U.S. 1062, 114 S.Ct. 734, 126 L.Ed.2d 697 (1994) (taking judicial notice of the validity of certain DNA profiling techniques). The trial court did not err, therefore, by admitting Dr. Burrows's expert testimony to the effect that Devon suffered from "shaken baby syndrome."

There was thus no error with respect to the Commonwealth's core case. Brown's remaining contentions all concern the trial court's admission of allegedly improper

evidence that was tangential to the core issues. Our review of these alleged errors, therefore, must be especially careful to ask not only whether the trial court erred but also, if it did, whether the error was sufficiently serious to entitle Brown to relief. RCr 9.24.

First, as discussed above, Brown complains that, during rebuttal, evidence of his bad character and prior bad acts was improperly admitted to impeach his co-defendant. This situation confronted the trial court with a difficult instance of the need to balance the probative value of proffered evidence against its potential to cause undue prejudice. KRE 403. We agree with Brown that the trial court miscalculated the balance here and abused its discretion.

We note that the joint trial was at the behest and primarily for the convenience of the Commonwealth. It goes without saying, however, that the Commonwealth's convenience provides no justification for slighting a defendant's right to a fair trial. In general, when the Commonwealth chooses a joint proceeding it must (absent a showing of compelling need) forego evidence otherwise admissible against one defendant if that evidence is inadmissible with respect to another. However, compromises are possible. Instead of foregoing the evidence entirely, the Commonwealth may limit the proffered evidence in such a way as to minimize its improper extraneous effect. The impeachment evidence introduced in this case should at least have been so limited.

Although relevant, evidence that Clark and Brown's relationship had not been as placid as Clark claimed was not

vital to the case against Clark. That testimony was also broader in scope—more critical of Brown—than it needed to be. Both rebuttal witnesses, Clark's mother and Clark's employer, could have contradicted Clark in general terms without specifying instances of Brown's alleged abuse of Clark. The trial court erred by not limiting their testimony in this way so as to safeguard Brown's right to a fair trial.

We are persuaded, however, that this error was harmless beyond a reasonable doubt. As noted, this testimony did not bear upon the core case against Brown. Nor was it sensational or inflammatory. The record in no way suggests that the jury is likely to have been misled by this testimony to convict Brown on improper grounds. *Cf.* Harman v. Commonwealth, Ky., 898 S.W.2d 486 (1995) (ruling that various evidentiary errors were harmless in light of the otherwise compelling case against the defendant).

Brown also complains of what he characterizes as improper opinion testimony. Three (3) witnesses, Steve Hicks, the friend who visited Clark and Brown at their apartment; Edrie Hunt, a social worker; and Steve Perry, a Kentucky State Police detective, all saw Devon either shortly before or shortly after his admission to the hospital. They all testified that Devon's condition suggested to them that Devon had possibly been abused. Brown contends that none of these witnesses was qualified to offer such an opinion. Again, however, even if we agreed with Brown that the testimony of these witnesses should have been more limited than it was, we would not agree that Brown was therefore entitled to relief from his conviction. Given the three (3)

doctors' expert opinions that Devon almost certainly had been abused, any error in the admission of Hicks, Hunt, and Perry's testimonies to that effect was harmless. RCr 9.24.

To summarize, the trial court did not err by admitting expert testimony regarding "shaken baby syndrome" as evidence of the cause of Devon's injuries. Those injuries, the expert testimony concerning their cause, and Brown's virtually exclusive opportunity to have abused Devon was sufficient evidence to support Brown's conviction. Brown's trial, moreover, was fundamentally fair notwithstanding the possible erroneous admission of testimony adversely characterizing Brown and referring to Devon's injuries as the result of child abuse. For these reasons, we affirm the April 28, 1997, judgment of the Graves Circuit Court.

ALL CONCUR.

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