

RENDERED: SEPTEMBER 8, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000848-MR

CHRISTOPHER EARL NAIL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 02-CR-00071

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Appellant Christopher Nail appeals his conviction for second-degree criminal abuse stemming from severe injuries suffered by his seven and one-half week old son. He argues in this appeal that the trial judge erred in amending the indictment against him to include the phrase "by means of a dangerous instrument" and in refusing to inform the jury that his co-defendant's case had been dismissed. We affirm.

---

<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Approximately seven and one-half weeks after the birth of his twins, appellant called 911 to report that his infant son was not breathing. Within approximately ten minutes, paramedics arrived at the home and transported the infant to Hardin Memorial Hospital. Upon arrival at the hospital, the infant had no carotid pulse, spontaneous respiration or responsiveness to external stimuli and blood was visible on his nostrils. Physicians at the hospital were able to sufficiently resuscitate the infant in order to transport him to Kosair Children's Hospital in Louisville.

The child was ultimately diagnosed with diffuse cerebral edema, or swelling of the brain, in both hemispheres, with blood having collected outside the brain and between the two hemispheres. Dr. Charles Maxfield, chief of radiology at Kosair, testified that the infant's injuries were most likely caused by vigorous and forceful shaking. The medical testimony also indicated that the infant's twin sister, who was tested shortly after her brother's admission to Kosair, had previously suffered similar injuries. It was the opinion of several Kosair physicians who treated the baby boy that his injuries could not have been caused by a short fall.

A state police detective interviewed appellant at the hospital. At that time, appellant stated that he had been watching the twins and their three-year-old half sister while

their mother, appellant's girlfriend, was at work. In that interview, appellant also raised the possibility that the boy's three-year-old sister might have dropped him or caused him to fall off the couch. After leaving the infant propped on the couch while he was briefly out of the room, appellant stated that he heard a thump and returned to find the infant in a different position than he had left him. Neither in this interview, nor in conversations with the child's treating physicians, did appellant say anything about shaking the child.

However, in a video-taped interview with a Louisville police officer approximately two months later, appellant stated that upon finding the child in an unresponsive state, he picked the child up and shook him vigorously in an attempt to revive him. Appellant was subsequently indicted on charges of first-degree assault and criminal abuse of his infant son, as well as being charged with criminal abuse with respect to the injuries suffered by his twin sister. Although he was acquitted of the charges involving his daughter, appellant was convicted of second-degree assault and second-degree criminal abuse of his son. This appeal followed.

Appellant first argues that the trial court improperly allowed the Commonwealth to amend the first-degree assault indictment by the addition of the words "by means of a dangerous instrument." He maintains that this amendment added an

additional element which had not been presented to the grand jury, and which materially altered the charges against him. We disagree.

This exact question was considered by the Supreme Court of Kentucky in Schambon v. Commonwealth,<sup>2</sup> which held that a similar amendment did not have the effect of charging a new offense in the absence of a showing of prejudice:

Appellants further claim error when the trial court allowed the Commonwealth to amend its indictments at the close of its case in chief. The applicable rule, RCr 6.16, is a lenient rule which provides for the amendment of an indictment at any time before the verdict and upon a finding that no additional or different offense has been charged and that the substantial rights of the defendant are not prejudiced. The amendment allowed did not result in appellants being charged with a different offense. To the contrary, the amendment merely altered the designation of the subsection of the statute under which appellants were charged. The offense was the same. No additional evidence was required to prove the amended offense and appellants have not shown that they were prejudiced by the amendment. There was no error.

In our case, the amendment merely conformed the indictment to the language of KRS 508.010 which includes the use of a dangerous instrumentality as an alternate means of committing the same offense. Appellant was well-aware that the Commonwealth's theory of the case was that he had severely

---

<sup>2</sup> 821 S.W.2d 804, 809-10 (Ky. 1991).

injured his child by vigorous shaking with his hands. He was in possession of the video-taped interview in which he demonstrated to the officer how he had shaken the child. On these facts, we fail to perceive how appellant could have been surprised or prejudiced by the amendment. Thus, like the Court in Schambon, we find no error in permitting amendment of the indictment to include the alternate and to conform the indictment to the evidence presented.

A subpart of appellant's "amendment" argument focuses upon the claim that his hands could not be considered as dangerous instruments under these circumstances, because the injuries the child suffered were caused by the shaking, not by his hands. We view this contention as utterly specious.

"Dangerous instrument" is defined in KRS 500.080(3) as:

[A]ny instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury....

Appellant's undisputed statement conclusively establishes that he used his hands in circumstances that resulted in the infliction of serious physical injury to his infant son, regardless of whether that was his intent. The use of one's hands to strike, poke or squeeze an infant in a manner that

causes serious injury has been determined to fall within the statutory definition.<sup>3</sup> It is thus very clear to us that the use of one's hands to violently shake an infant differs from striking or squeezing only in the type of injury that is produced. The manner in which appellant used his hands to shake his infant son squarely fits the statutory definition and provided a reasonable basis for assessment of liability by the jury. There was no error.

Appellant's third allegation regarding the amendment of the indictment challenges the wording of the instruction on second-degree assault. Again, we find no error. Although he predicates this argument upon the instruction's failure to comport with the law, appellant's true complaint appears to return to his contention that it was error to allow the Commonwealth to amend the indictment and to instruct the jury that it could find that his hands were dangerous instruments.

The only statutory element omitted from the instruction as given relates to the infliction of physical injury as opposed to serious physical injury. Based upon the medical testimony as to the extent of the child's injuries, it cannot be seriously argued that the evidence would have supported an instruction on merely physical injury. Contrary to appellant's contention, we find nothing in this instruction that

---

<sup>3</sup> Johnson v. Commonwealth, 926 S.W.2d 463 (Ky.App. 1996).

might produce an unreliable result or that fails to properly reflect the evidence adduced at trial. Thus, no reversible error was occasioned by the submission of this instruction to the jury.

Finally, appellant argues that the trial judge erred in refusing his request to inform the jury that the similar charges against the twins' mother had been dismissed. At the close of the Commonwealth's case, and after her attorney moved for a directed verdict, the prosecutor moved to dismiss the charges against the mother. In granting the motion to dismiss, the trial judge stated that she would inform the jury only that it would no longer be considering the case against the mother and that its deliberations would be limited to those aspects of the case that involved appellant.

Because the children's mother was at work when the injuries to her son were inflicted, we fail to perceive the relevance to appellant's case of the dismissal of the charges against her. The dismissal of her charges added nothing to probability of appellant's guilt or innocence. Accordingly, the failure to inform the jury that the Commonwealth had dismissed its case against the children's mother did not prejudice appellant and did not result in reversible error.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Roberts Horsman  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

James Havey  
Assistant Attorney General  
Frankfort, Kentucky