

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000202-MR

SARAH TAYLOR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 04-CR-01504

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Sarah Taylor appeals from a jury verdict and judgment of the Fayette Circuit Court finding her guilty of reckless homicide and sentencing her to five years' imprisonment following the death of her live-in

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

boyfriend's infant. She contends that the trial court erred by limiting her ability to cross-examine witnesses and to present testimony relating to "shaken baby syndrome" – the theory that a young child can suffer internal head injuries when vigorously shaken without external signs of injury – thereby violating her constitutional right to present a defense on her own behalf. Upon review, we affirm.

On May 6, 2004, at approximately 10:00 a.m., 911 dispatchers in Fayette County, Kentucky, received a call from Taylor advising that Madison – the 22-month-old daughter of Taylor's live-in boyfriend, David Cundiff – was unconscious after falling down a set of stairs. According to testimony later given by Taylor at trial, Madison and Taylor's own two-year-old daughter had been in their bedroom watching a movie while Taylor was in the basement doing laundry. Taylor subsequently heard multiple thumps on the basement steps and found Madison crying and lying with her head against the wall at the foot of the stairs. Taylor indicated that she had closed the door that led down into the basement, but she did not know whether the door had shut all the way. The door had three latches or locks on it, and it could be locked from either side. According to Taylor, Madison cried for a few seconds as Taylor carried her upstairs to the living room sofa before falling unconscious. Madison did not respond to Taylor's efforts to get her to wake up.

Taylor subsequently called her best friend Miranda Miller, who lived in Elizabethtown, to tell her what had happened. Miller immediately told her to

call 911. Instead, Taylor called David Cundiff at work and told him that Madison had fallen and would not wake up. Cundiff told her he was on his way and hung up. Approximately two minutes later, Taylor called Cundiff again and asked him if she should call the paramedics. He told her to call 911, which she subsequently did. Taylor explained at trial that she was “hysterical” when she called Miller and Cundiff and did not know why she called them first.

Emergency responders arrived on the scene soon thereafter and found Madison lying next to a couch. She was unresponsive and was breathing in heavy gasps. They assisted her breathing and gave her other emergency treatments before transporting her to the pediatric intensive care unit at the University of Kentucky (UK) Hospital.

Dr. Dawn Turner, a pediatric intensive care physician at UK Hospital, testified that Madison arrived at approximately 10:28 a.m. Physicians immediately intubated her to assist her breathing and performed a CT scan of her head. According to Dr. Turner, Madison was “critically ill” and appeared to have suffered “severe head trauma” that had produced brain swelling. Efforts were made to reduce the swelling and to otherwise relieve pressure on the brain, the state of which Dr. Turner described as “severely abnormal.” Madison did not open her eyes or respond to pain at any point, and she experienced multiple seizures and incidents of “posturing” in which she held her arms before her in unusual positions. Dr. Turner indicated that there were extensive retinal hemorrhages in both of Madison’s eyes. The CT scan revealed subdural and subarachnoid

bleeding in multiple areas surrounding the brain. Madison also had multiple abrasions all over her body. She was pronounced dead the next day when doctors no longer found signs of brain activity.

During her testimony, Dr. Turner explained that injuries of the sort suffered by Madison are commonly seen in high-speed car accidents and in cases where “shaking” of a child is involved. Taylor’s counsel asked to approach the bench and moved for a mistrial because the trial court had limited the number of witnesses who could give an opinion as to the cause of Madison’s injuries. The court agreed that this was the case but declined to declare a mistrial. Taylor’s counsel ultimately agreed that a mistrial was not appropriate at that point. The court also did not admonish the jury because it did not want to draw attention to Dr. Turner’s remarks. Dr. Turner was subsequently called to the bench for a conference and admonished not to get into issues of causation.

Because of the sudden nature of Madison’s death and the severity of the injuries that she suffered, an investigation was conducted by the Kentucky Medical Examiner’s Office, and an autopsy was performed on Madison’s body. Dr. Cristin Rolf, the deputy medical examiner who performed the autopsy, concluded that Madison had died as the result of brain injury caused by blunt force trauma, or “shaken impact syndrome.” After consulting with Dr. Betty Spivack, a self-described “forensic pediatrician” also employed at that time with the medical examiner’s office, Dr. Rolf advised the coroner that Madison’s injuries appeared to have been inflicted, and her death should be considered a potential homicide.

On December 14, 2004, the Fayette County grand jury indicted Taylor on one count of murder pursuant to KRS 507.020. The indictment alleged that Taylor “caused the death of Madison Cundiff, by shaking Madison Cundiff and/or striking her head against an unknown object, thereby causing her death[.]” On December 17, 2004, Taylor appeared in open court with counsel and entered a plea of not guilty to the indictment.

The case was tried before a Fayette County jury from December 3 to 11, 2007. The jury heard testimony from, among others, Taylor (who denied killing Madison and gave the version of events provided above), David Cundiff, Dr. Turner, and five expert witnesses – including Drs. Rolf and Spivack – who offered their opinions as to the cause and manner of Madison’s death. These experts were all qualified as such through *Daubert*² hearings prior to trial; therefore, the vast majority of their credentials and qualifications will not be recited here.

As noted above, Dr. Spivack described herself as a forensic pediatrician, or “child abuse pediatrician,” who worked with the Kentucky Medical Examiner’s Office as a consultant to forensic pathologists when they needed pediatric expertise. She was also involved in a clinical forensic program that dealt with suspected abuse cases. Dr. Spivack was a former pediatric intensive care physician who had written a number of articles and medical textbook chapters on

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

the subject of the biomechanics of inflicted head trauma in children. She was also a frequent lecturer in this area.

Dr. Spivack testified that fatal injuries of the sort found in this case were typically inflicted by someone rather than resulting from an accident. She noted that Madison had multiple bruises surrounding her head, including on the inner and outer coils of her ears. According to Dr. Spivack, these latter bruises are typically caused by forceful contact of the ear with a surface. Dr. Spivack also noted that Madison's autopsy revealed a "bunch of bruises flowing together" on the inside of her scalp and that these could only be caused by "extensive" force. She also indicated that her examination revealed that Madison had suffered thin-film subdural hemorrhaging on both sides of her head as a result of "significant trauma," an indication that external forces were applied to her head in an evenly and widely-distributed manner. She further noted that the type of retinal hemorrhaging in Madison's eyes was severe and unusual and of a type rarely found in accidents. Dr. Spivack also testified that Madison had suffered trauma to her neck and chest areas, including the larynx, which she opined were caused by "externally applied forces."

Dr. Spivack concluded that someone had inflicted Madison's injuries upon her via blunt force trauma by "multiple severe impacts" on all sides of her head and that they were not caused by a fall down stairs or any other accident. She testified that the severity of the retinal hemorrhaging found here was indicative of a "rotational" force applied to Madison's head, such as the slamming of the head

against a hard or soft surface after the head has moved downward through an arc. She noted that the rotational forces need not be considerable if some sort of impact to the head was involved, as she believed to be the case here. Dr. Spivack downplayed the possibility that Madison's injuries were caused by mere "shaking" of the child, stating that "we've got lots of impact injuries to the head so if there is shaking, there is shaking in association with multiple impacts to the head, as well."

On cross-examination, counsel for Taylor asked Dr. Spivack a number of questions relating to "shaken baby syndrome." Dr. Spivack indicated that she took a "very middle ground" on the issue of whether shaking alone could cause serious injury to a child, but she thought that "vigorous shaking" could cause retinal bleeding in some cases. However, she did not hold this opinion to the same degree of certainty that she did her opinion that abusive head trauma causes retinal bleeding. When pressed to agree that there was no scientific evidence that shaking causes retinal hemorrhages, Dr. Spivack instead stressed: "This is not a shaking case. This child has bruises all over her head," and emphasized that shaking with impact "is a very different thing."

Dr. Rolf also testified as an expert witness for the Commonwealth. She indicated that her job generally required her to perform autopsies in cases involving suspicious deaths, including trauma cases such as the one at issue. Dr. Rolf noted that Madison's injuries were considered suspicious because they were more extensive than those typically produced by a fall down stairs and that Dr. Spivack was brought in as a consultant because of her expertise in the area of child

abuse forensics. She was also of the opinion that Madison's death was the result of brain injuries caused by blunt force trauma or "shaken impact syndrome." Dr. Rolf described Madison's injuries as being of a type that would typically result from the head being moved in an arc and then stopped abruptly on a hard or soft surface, while the brain continues to move within the skull. She also indicated that increased cranial pressure can exacerbate retinal hemorrhages. Like Dr. Spivack, Dr. Rolf believed that Madison's injuries were inflicted by someone because of their extent and severity, which she believed to be incompatible with a stair fall.

Dr. Rolf acknowledged that while she used the label "shaken impact syndrome" to describe the cause of Madison's death back in 2004, this terminology had fallen out of favor with many pathologists, who preferred the usage of "abusive head trauma." When asked on cross-examination if shaking alone could cause subdural hematomas and bilateral retinal hemorrhages, Dr. Rolf acknowledged that this had been seen in some cases. When further asked about the legitimacy of the science supporting the idea that shaking can cause intracranial injuries, Dr. Rolf reiterated her belief that shaking could cause injury, but she noted that "it's actually more of an impact" that causes hemorrhages because of "the sudden stopping of the head with tearing of the bridging veins. The brain keeps moving forward. The skull stops."

When Taylor's counsel attempted to question Dr. Rolf regarding an article that questioned the validity of "shaken baby syndrome," the trial court, *sua sponte*, asked the attorneys to approach the bench. The court told Taylor's

counsel: “There’s been an inordinate amount of time talking about shaking and this is not a shaking case.” The court expressed concern that dwelling on the issue of whether shaking alone caused injury was potentially confusing to the jury and that the argument also did not reflect the facts of the case, which were that Madison’s death was caused by exterior impacts to her head. Taylor’s counsel argued that the defense should be allowed to pursue the matter with further questioning because the Commonwealth’s experts had opined that retinal hemorrhages and subdural hematomas could be caused by shaking alone; since this theory allegedly had no scientific basis, the experts’ belief in it could be used to attack their credibility.

In response, the trial court noted that if the proof at trial had been that shaking alone had caused Madison’s injuries, questions challenging that position would be relevant and appropriate. It continued:

All I’m saying is that I don’t want anymore discussion about shaking alone and the debunking of that theory because it has nothing to do with our case. If it rolls over into shaking with impact or a description that they’re making, and you want to make sure they’re not just talking about shaking alone or whatever, that’s fine, but we’re going off now and I think you’re getting ready to show her an article about something that happened in the shaking-only area. And I’m just not going to allow it.

Taylor’s counsel responded by saying that he only wanted to show Dr. Rolf an article that would impeach her opinion that shaking alone could cause subdural hematomas. The court replied by saying that counsel could ask her:

. . . “Did you say on direct that shaking alone can cause subdural hematomas?” and then if you want to show her this article and see what her opinion is. Then we’re done.

I don't want to go into any more shaking, okay? Or, if you do, you've got to come up here and convince me as to how it's relevant to our case.

When asked this question, Dr. Rolf indicated that she thought she had testified to this effect on direct, but she noted that her personal experience was limited to cases in which impact was involved. Because of this, she did not want to offer any opinions as to the possible effects of shaking alone and asked that those be left to another expert. Dr. Rolf then emphasized: "This is a case with impacts. This is blunt impacts to the head." When later asked if retinal hemorrhaging could be caused by shaking alone, Dr. Rolf replied that she did not know; however, she indicated that a rotational injury caused by the head's sudden impact on an object can cause them.

The Commonwealth's final expert witness was Gina Bertocci, PhD, PE. Dr. Bertocci is an associate professor at the University of Louisville who teaches in the fields of mechanical and bio-mechanical engineering and pediatrics, with a particular focus in the relationship between bio-mechanical engineering and child abuse pediatrics. She opined that Madison's "constellation of injuries were not compatible with a single stair-fall event" and therefore were not compatible with what Taylor indicated had happened. According to Dr. Bertocci, the academic literature in this field reflected that fatal or serious injuries were typically not caused by stair falls and that when multiple serious injuries are claimed to have resulted from such a fall, a different cause should be suspected and investigated. Dr. Bertocci agreed with Dr. Spivack that bruising of the ear is not typically

achieved through accidental injury, so the fact that Madison displayed such bruises was significant. Dr. Bertocci also testified that the size of the bruises on Madison's head were notable.

On cross-examination, Dr. Bertocci was asked about a letter from two prominent researchers indicating that the word "shaken" should not be used in connection with describing abusive head trauma. She agreed that referring to "shaking" alone was probably inappropriate but had no qualms with using the term "shaken impact." Bertocci also discussed research from the aforementioned researchers in which it did not appear that sufficient acceleration and deceleration was created to produce brain injuries from the mere shaking of test models. However, she noted that their research had also revealed that if a model's head was slammed onto a hard surface, this generated sufficient acceleration and force to cause brain injuries.

Taylor called two expert witnesses to testify on her behalf. The first, Dr. George Nichols, was the former Chief Medical Examiner in Kentucky and has extensive experience in forensic pathology. Dr. Nichols testified that Madison's death was caused by blunt force injuries resulting from multiple impacts to her head. He indicated that Madison's injuries were consistent with a stair fall; however, he conceded on cross-examination that "[t]here's nothing that tells me that these [injuries] could not have been inflicted by someone." He did not believe evidence of shaking existed in this case because there were no bruises reflecting "grab marks" on Madison's body.

The second expert called by Taylor was Dr. Ronald Uscinski, a renowned and board-certified neurologist from Washington, D.C. with extensive experience as an expert witness in this area. He diagnosed Madison's death as being caused by "blunt trauma to the head" and concluded that her injuries were consistent with a stair fall. Dr. Uscinski conceded on cross-examination that Madison's injuries were "not inconsistent with inflicted injury," but he believed that they were equally or more consistent with a stair fall. Dr. Uscinski also did not believe that shaking had occurred here because Madison's body showed no signs of shaking, such as grip marks.

The jury was instructed on murder and the lesser-included offenses of first-degree manslaughter, second-degree manslaughter, and reckless homicide. The instruction on each offense allowed the jury to find Taylor guilty only if it found that she "caused the death of Madison Cundiff, by inflicting blunt force impacts to the head." The jury found Taylor guilty of reckless homicide and recommended a sentence of five years' imprisonment.

On December 17, 2007, Taylor filed a motion to set aside the jury verdict and to have a judgment of acquittal entered on the grounds that the evidence presented at trial did not support a finding that she had committed reckless homicide. This motion was denied. Taylor's subsequent motion for probation or probation with an alternative sentence was also denied. On January 30, 2008, the trial court entered a judgment and sentence in accordance with the jury's verdict. This appeal followed.

Taylor argues on appeal that she was denied a fair trial and due process of law because the trial court improperly restricted her cross-examination of witnesses and her attempts to present testimony relating to “shaken baby syndrome,” thereby denying her right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution. She specifically contends that “the playing field was not level” because the trial court prevented cross-examination addressing the validity of the Commonwealth’s experts’ purported opinions “that injuries like Madison’s could be caused by shaking alone.”

Taylor correctly notes that “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). The right to cross-examine witnesses and to produce evidence on one’s own behalf is a critical element of this process. *Id.* Therefore, “[w]henver limitations on the right of cross-examination are analyzed, it should be remembered that the right implicated is a fundamental constitutional right and that such limitations should be cautiously applied.” *Commonwealth v. Maddox*, 955 S.W.2d 718, 720 (Ky. 1997).

However, even with these protections in place, the Constitution still gives trial courts “wide latitude” to exclude evidence that is marginally relevant or that poses a risk of confusing the issues. *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986). Accordingly, “well-established

rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” *Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006); *see also* Kentucky Rules of Evidence (KRE) 403.

Trial courts retain broad discretion when it comes to regulating cross-examination; therefore, error will only be found when there has been an abuse of that discretion. *See Maddox*, 955 S.W.2d at 721. This same standard applies to evidentiary rulings as to relevancy or as to whether evidence might confuse or mislead the jury. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001); *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The trial court’s concern in this case was that questions and testimony relating to shaking alone were irrelevant and potentially confusing to the jury because the facts did not suggest that her injuries and eventual death were caused by shaking alone. The Commonwealth’s experts repeatedly emphasized that Madison’s death was caused by severe blunt impacts to her head. Taylor’s experts similarly opined that her death was caused in this manner. The evidence reflected that Madison had multiple bruises all over the inside and outside of her scalp and that she unquestionably suffered severe and obvious head trauma. Accordingly,

the jury was instructed that it could only find Taylor guilty of reckless homicide if it found beyond a reasonable doubt that Taylor “caused the death of Madison Cundiff, by inflicting blunt force impacts to her head” and “[t]hat in so doing, she was acting recklessly.” The instructions for murder, first-degree manslaughter, and second-degree manslaughter all similarly required the jury to find that Taylor had inflicted “blunt force impacts” to Madison’s head. No mention of shaking alone was made.

After completing an exhaustive review of the record, this Court cannot say that the trial court abused its discretion by limiting the scope of Taylor’s cross-examination as to the issue of “shaken baby syndrome” or injuries caused by shaking alone. This case ultimately involved a considerable amount of medical testimony and included opinions from five experts. Consequently, the court felt it necessary to limit the medical evidence to those matters directly related to Madison’s death in order to avoid confusing the jury. The court appropriately exercised its discretion under the circumstances at hand. Despite the court’s decision in this respect, Taylor was still afforded leeway to ask questions relating to shaking; therefore, this avenue of inquiry was not entirely cut off. No limitations were placed on Taylor’s cross-examination of Dr. Spivack as to the issue of shaking, and permission was expressly given to question Dr. Rolf about her testimony concerning shaking and its relation to retinal hemorrhaging. Taylor was also allowed to question Dr. Bertocci about the scientific validity of “shaken

baby syndrome,” and her own experts were asked if shaking had caused Madison’s injuries, which they denied.

Taylor additionally cites to a number of decisions relating to the right of a defendant to cross-examine a witness as to matters of bias, motive, or prejudice, but she fails to adequately specify how those concerns are applicable here. She also seems to suggest that she was somehow limited in asking questions relating to “shaken impact syndrome” or blunt force trauma because “shaken baby syndrome” was a “predecessor” theory to these concepts, but we believe this argument to have little merit. The Commonwealth’s experts repeatedly emphasized that there was a distinct difference between shaking alone and “shaken impact syndrome,” and that this case reflected an example of the latter. Taylor was given free rein to question witnesses about their belief that “shaken impact syndrome” was a cause of Madison’s death. The trial court’s decision to keep evidence relating to shaking alone out of the picture was not in error.

Taylor finally raises a related argument that the trial court violated KRE 703 by restricting her ability to question the basis of expert opinions. We reject this argument for the reasons noted above.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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