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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001395-MR

JESSE E. ALLISON — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 10-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: Jesse Allison appeals from a judgment of the Caldwell Circuit Court finding him guilty of reckless homicide in the death of his daughter, and sentencing him to five years' imprisonment. Upon careful review of the record and applicable law, we AFFIRM.

I. BACKGROUND

Very early on the morning of September 5, 2009, Marae Allison, Jesse's wife, left for work leaving Jesse at home to care for their seven-month-old daughter, Ariel, and Donovan, Jesse's two-year-old stepson. According to Jesse's account, the children woke up at approximately 6:30 a.m. Thereafter, Jesse fed them breakfast. For the next hour or so, the children played in the living room. Sometime between 8:00 a.m. and 8:30 a.m., Ariel became fussy. Assuming she was tired, Jesse took Ariel to her room for her morning nap.[1] Jesse stated he placed Ariel in the middle of the crib on her back.

When Jesse returned to the living room, he found that Donovan had fallen asleep on one of the couches. Jesse stated that he was tired as well and decided to take a nap on the other couch. At around noon, Jesse was awakened by the sounds of Donovan playing in the dining room. Once awake, Jesse went downstairs to check on Ariel. Jesse stated that once inside the bedroom he saw Ariel wedged in a vertical position between the drop-side rail of the crib and the mattress. Jesse states that when he pulled Ariel out, he found her very cold to the touch. At that point, Jesse knew that Ariel was dead.

Jesse then called his father-in-law, Jack Bargerhuff, who lived a few houses down from Jesse and Marae, and told him that he needed him to come over. Mr. Bargerhuff testified that when he arrived, he found Jesse on the back deck at

[1] Ariel shared a bedroom with Donovan. The bedroom was located in the downstairs of the home.

which point Jesse told him "It's too late. She's already gone. There's nothing anybody can do." Mr. Bargerhuff then went to Ariel's room where he saw Ariel lying in the middle of the crib. Jesse told Mr. Bargerhuff that he had not yet called 911 for help so Mr. Bargerhuff did so. At some point, Jesse also called Marae and told her to come home.

The EMS arrived on the scene shortly thereafter. Dana Woolsey, a paramedic with the Caldwell County Ambulance Service, testified that upon arriving on the scene, she observed Ariel on her back in the crib. She reported that Ariel was cold to the touch and a cardiac monitor revealed no electric activity in her heart. Woolsey did not observe any injuries on Ariel at that time. Once it was determined that Ariel was dead, EMS personnel notified the coroner.

Caldwell County Coroner Dewayne Trafford testified that he responded to the call from EMS. Inside of Ariel's room he observed Ariel in the crib and detected two marks on the back of her head. The crib was removed from the home and taken to the coroner's office. Ariel's body was also taken to the coroner's office for an autopsy.

Law enforcement officials were also dispatched to the home. Princeton City Police Department Officer Justin James testified that when he arrived at the scene, Ariel's body was still in the crib. He observed fibers around Ariel's mouth and nose and also inside of her mouth. Princeton Police Department Detective Brian Ward testified that he also arrived on the scene to find Ariel's body in the crib. He explained that as he observed the scene he noted that the top of the

crib was closest to the wall of the room with the foot of the crib scooted out from the wall. He observed a mark under Ariel's chin and two deep marks on the back of her head which he could feel in her scalp. He found that the distance between the marks matched the distance between the slats of the crib. He also observed a wet spot on top inside part of the crib sheet, which he thought was likely either saliva or urine. He did not find any wet spots on the side of the sheets or mattress, only on the top.[2] He also noted that the sheet was still snugly attached to the mattress without any sign of it having come off at the corners.

The following day, Dr. Deidre Schluckebier, a medical examiner at the Western Regional Medical Examiner's Office, performed an autopsy on Ariel's body. Dr. Schluckebier concluded that the two marks on the rear of Ariel's head from the base to the top of her head were consistent with slats of the crib. She observed that the marks were a "yellowish" color and consistent with being sustained either postmortem, after death, or perimortem, at or near the time of death. Dr. Schluckebier testified that she found iron in the siderophages cells located in Ariel's lungs. She explained that the presence of iron in these cells was indicative of either disease or repeated asphyxia. She did not find any disease present that she believed would have accounted for the iron level.

Initially, Dr. Schluckebier listed the cause of Ariel's death as "undetermined." However, Dr. Schluckebier testified that she was uncomfortable with this outcome and recommended further investigation by law enforcement.

[2] DNA testing later revealed the spot to be Ariel's saliva.

Thereafter, Dr. Schluckebier was made aware of Jesse's account that the child had become wedged in between the mattress and the crib slats as well as the fact that DNA laboratory testing determined that the wet spot on the top middle part of the sheet was consistent with being made by Ariel's saliva and that no other saliva was found on the sheet. Dr. Schluckebier testified that after learning more about the investigation she changed the cause of death to "intentional asphyxia death." She testified that she was persuaded to do so by the absence of any indentations or marks on the rest of Ariel's body, which she believed would have been present had Ariel been wedged in the position Jesse described. She also found it significant that no saliva was found anywhere else on the sheet. She believed that the saliva found on the sheet was consistent with Ariel's head having been in a downward position. These additional investigative findings, in combination with the iron she previously detected, led Dr. Schluckebier to conclude that overall the findings were consistent with Ariel having been suffocated by a blanket or pillow while lying face downward in the crib.

Thereafter, Jesse was arrested and charged with murder. He entered a plea of not guilty to the charges. Jesse's first trial began in September of 2011, but ended in a mistrial when the jury could not reach a verdict. Jesse's second trial, which is the subject of this appeal, began on May 29, 2012.

Jesse's primary defense at the second trial, like the first, was that Ariel had accidently suffocated when she became wedged between the mattress and the side rail of her crib. Ultimately, the jury returned a verdict of guilty on the charge

of reckless homicide. The circuit court sentenced Jesse to a maximum term of five years' imprisonment. This appeal followed.

II. Analysis

A. Jesse's Due Process Right to Present a Complete Defense

Jesse's first assignment of error concerns the trial court's refusal to allow him to introduce certain evidence as part of his defense, namely a Consumer Products Safety Commission report concerning Ariel's death and a photograph from a forensic pathology textbook showing an infant trapped in a vertical position between the rails of a crib and the side of a mattress. Jesse maintains that the trial court's refusal to allow the introduction of this evidence prevented him from being able to present a meaningful defense.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[3] *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (Ky.1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)). "This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 319-320, 126 S.Ct. 1727, 1728, 164 L.Ed.2d 503 (2006) (internal citations omitted).

[3] "That right [is] grounded in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution[.]" *Montgomery v. Commonwealth*, 320 S.W.3d 28, 41 (Ky. 2010).

A defendant's right to present a meaningful defense and even relevant evidence, however, is not absolute. "[T]he introduction of relevant evidence can be limited by the State for a valid reason[.]" *Montana v. Egelhoff* , 518 U.S. 37, 53, 116 S.Ct. 2013, 2022, 135 L.Ed.2d 361 (1996). "[W]ell-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*, 547 U.S. at 326, 126 S.Ct. at 1732.

Where a criminal defendant's challenge is premised on the exclusion of evidence, "courts must determine whether the rule relied upon for the exclusion of evidence is arbitrary or disproportionate to the State's legitimate interests." *Montgomery*, 320 S.W.3d at 42. This requires us to balance the competing interests, weighing the probative value of the proffered evidence against the purposes the evidentiary rule at issue was designed to further. *Id.* "[O]nly if application of the rule would be arbitrary in the particular case or disproportionate to the state's legitimate interest must the rule bow to the defendant's right." *McPherson v. Commonwealth,* 360 S.W.3d 207, 214 (Ky. 2012). "When exclusion of evidence does not significantly undermine fundamental elements of the defendant's defense, a trial court has the discretion to exclude evidence to ensure the fairness of a trial; and 'its determination will not be overturned on appeal in the absence of a showing of an abuse of such discretion.'" *Newcomb v. Commonwealth*, 410 S.W.3d 63, 85 (Ky. 2013)(citation omitted).

1. Consumer Products Safety Commission Report

As part of his defense, Jesse sought to introduce a report prepared by the Consumer Products Safety Commission ("CPSC") in response to an online report it received concerning Ariel's death. Jesse's wife, Marae, filed the report after researching the type of crib Ariel slept in because she believed that the crib might have been defective. The report was generated by a CPSC investigator who spoke with Marae and Jesse at their attorney's office. The CPSC investigator also spoke with a police detective who "provided limited information" and photographs of the crib at the police station. The CPSC investigator did not have access to the autopsy report, the scene photographs, or the complete police investigative file. He also did not interview any additional witnesses such as the EMS first responders or Mr. Bargerhuff.

The report states in part: "It appears the child suffocated when she rolled into a gap between the mattress and the drop-rail. The victim was positioned vertically, and her face completely pressed into the mattress." The report further referenced that the crib at issue had been recalled by the manufacturer due to certain defects that could "lead to the entrapment and suffocation of infants."

Prior to Jesse's first trial, the Commonwealth filed a motion *in limine* seeking to exclude the CPSC Report and "any reference to the recall of other cribs manufactured by the maker of the crib involved in this case." After conducting a hearing, the trial court sustained the Commonwealth's motion. The trial court concluded that the report was relevant because "its existence would tend to make

an accidental death more probable than that defense theory would be without the evidence." The trial court further concluded that the report was admissible as a public record or report pursuant to KRE[4] 803(8). Nevertheless, the trial court determined that the report should be excluded pursuant to KRE 403 because its probative value was substantially outweighed by the danger of confusion of the issues or misleading the jury. Specifically, the trial court explained:

> The probative value would appear to be at the low end of the scale for the defense because it is simply a recitation of the facts gathered by an investigator without conclusions or opinions and without any input from any independent or law enforcement sources. It would appear to the Court to be a possible means of getting Defendant's own version of the facts in front of the jury without the Defendant having to take the stand and without having to be subjected to cross-examination.
>
> On the other side of the scale is the danger of confusion of the issue or misleading the jury. The fact that this would be a "stand alone" exhibit without courtroom testimony from a witness with knowledge to explain it could certainly be confusing. The fact that the report refers to two different crib model numbers, both of which may have been in the household of the Defendant and his wife, is confusing. What particular piece broke and how it was fixed, while subject to possible testimony from Defendant's wife, could be confusing in regard to the problems with other similar cribs. The recall of cribs is mentioned in the report and the Commonwealth introduced a CPSC Safety Alert Photo showing that the defect in the recalled cribs was not involved in the facts of this case. Finally, the report refers to the mention by the law enforcement agent that the husband "had a previous child (less than three years old) that also died while in his custody." This information could well mislead the jury if it came in within the report.

[4] Kentucky Rules of Evidence.

This exclusion remained in place at Jesse's second trial.

As an initial matter, we disagree with the trial court that the report did not contain any conclusions or opinions by the investigator. On Page 1 of the report, the investigator stated that it appeared "the child suffocated when she rolled into a gap between the mattress and the drop-rail." Undoubtedly, this is an ultimate conclusion on the cause of Ariel's death. Thus, the report is far more probative than the trial court suggested in its opinion. Nevertheless, we believe the trial court made the correct decision to exclude the report, albeit for a slightly different reason than it articulated.

KRE 803(8) provides that "[u]nless the sources of information or other circumstances indicate lack of trustworthiness . . . reports . . . of a public office or agency . . . from an investigation made pursuant to authority granted by law" are not excluded from the hearsay rules even though the declarant is unavailable. In examining the admissibility of a government report under the analogous Federal Rules of Evidence, FRE 803, the Eleventh Circuit observed that the issue of admissibility with such a report, more often than not, boils down to not so much the specific opinions expressed in the report, but rather whether the report as a whole is trustworthy. *Hines v. Brandon Steel Decks, Inc*., 886 F.2d 299, 303 (11th Cir. 1989). In assessing trustworthiness of a public report, relevant factors include "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Sullivan v. Dollar Tree Stores, Inc.*,

623 F.3d 770, 778 (9th Cir. 2010). While these federal authorities are not binding on us, we find the criteria they cite useful in assessing the credibility of public reports.

It is difficult to fathom how this particular report could be deemed trustworthy enough to satisfy the hearsay exception. The CPSC investigator did not review the autopsy, the scene photographs, or talk with any lay witnesses besides Jesse and his wife. Likewise, it does not appear that the CPSC investigator was privy to information concerning the saliva on the sheet. The investigator specifically mentioned in his report that he had attempted to obtain a more complete picture but was unable to do so due to the criminal investigation. Moreover, the investigator noted that almost all of the information in the report was obtained from Jesse and Marae at their attorney's office. By this time, Jesse and Marae certainly must have been aware that Jesse was potentially facing criminal charges in Ariel's death.

We disagree with the trial court that the report satisfied KRE 803(8). The report was based on an incomplete investigation; it was authored by an investigator about whom the record is silent; there was no hearing; and its contents are largely just a simple paraphrasing of Jesse's and Marae's versions of the events in question. *See McKinnon v. Skil Corp.*, 638 F.2d 270, 278 (1st Cir. 1981) (excluding a consumer protection safety commission report where "[m]ost of the data contained in the reports is simply a paraphrasing of versions of accidents given by the victims themselves who surely cannot be regarded as disinterested

observers."). The report expressed an opinion on the ultimate issue in this case, the cause of Ariel's death. Given this fact, it is impossible to believe that the jury would not have placed some weight on it. We believe any weight the jury placed on the report regarding the ultimate cause of Ariel's death would have been misplaced given the report's significant foundational shortcomings. In short, the report does not bear the indicia of reliability necessary to satisfy KRE 803(8).

Despite these shortcomings, even if the report were admissible under KRE 803(8), we do not believe that in this instance its probative value outweighed the prejudicial effect of its admission. In the normal course, the shortcomings in a report could be explored with the author on cross-examination. However, Jesse desired to introduce the report as a stand-alone piece of evidence. Without cross-examination, the Commonwealth would not have been able to question the author regarding whether the autopsy report, eye witness accounts, and other evidence he was not privy to at the time of the report might have changed his analysis. *See Denny v. Hutchinson Sales Corp*., 649 F.2d 816, 821 (C.A. Colo. 1981) ("We conclude the circuit court properly considered the lack of an opportunity to cross-examine the investigator or someone else knowledgeable about the modification to the citations."); *Staskal v. Symons Corp*., 287 Wis.2d 511, 527, 706 N.W.2d 311, 319 (Wis. Ct. App. 2005).

Likewise, it is important to remember that this was a criminal case where the defendant was being tried for murder, not a product liability case regarding a potentially defective product. While the investigator might have been

skilled in reviewing product complaints by virtue of working at the CPSC, there is nothing to indicate that he was qualified to render an opinion on the cause of death as part of a criminal homicide investigation.

Finally, aside from the investigator's ultimate opinion on the cause of death, Jesse had alternative methods through which to introduce the substantive information contained in the report, such as through Marae's testimony concerning prior incidents of Ariel becoming trapped in the crib.

We are convinced that the report, while relevant, was not admissible under KRE 803(8) because it lacked trustworthiness in this instance. Additionally, even if otherwise admissible, we believe the prejudicial effect far outweighed the probative value of the report. Accordingly, we find that the trial court properly excluded the report under KRE 403.

2. Photograph

Next, Jesse asserts that the trial court denied him a meaningful opportunity to present a defense when it refused to allow him to introduce a photograph from a forensic textbook depicting a child wedged vertically between a crib and mattress during the testimony of his expert, Dr. George Nichols.

The Commonwealth objected to the admissibility of the photograph on the basis of late discovery and undue prejudice. During a bench conference the trial court sustained the Commonwealth's objection finding that the textbook photograph was provided late and that the probative value of the photograph was outweighed by the risk of undue prejudice and confusion to the jury. In its

balancing test, the trial court noted that the textbook picture was "freestanding" "as opposed to having the crib that was involved. . . ." Further, the trial court stated that the "specifics" behind the photograph were unknown and it did not believe Dr. Nichols would be able to testify as to those "specifics." As such, the trial court excluded the textbook photograph, but noted that its exclusion of the textbook photograph would not limit the testimony of Dr. Nichols.

We believe this issue is conclusively resolved by KRE 803(18), which provides:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. *If admitted, the statements may be read into evidence but may not be received as exhibits.*

KRE 803(18) (emphasis added).

Based on this rule, we believe that the trial court appropriately ruled that Jesse could not introduce the photograph as a trial exhibit. While Dr. Nichols was free to testify concerning his reliance on the forensic textbook and to read portions from it to the jury, our rules prohibited the textbook from being introduced into evidence.

Additionally, our Supreme Court has recently clarified that when introduction of a staged photograph is at issue, "the trial court must find that the

dangers of [] distortion or wrong emphasis are sufficiently remote so that the trier of fact may consider the photographs for the purposes offered." *Mitchell v. Commonwealth*, 423 S.W.3d 152, 163 (Ky. 2014) (quoting *United States v. Stearn*, 550 F.2d 1167, 1170 (9th Cir.1977)).

According to Jesse, he sought to introduce the photograph for the purpose of proving the plausibility of Ariel having gotten herself wedged in between the mattress and crib as Jesse described to police. The Commonwealth denied that it was possible for a child of her size to do so. Given the purpose for the photograph, we believe the trial court properly excluded it where there was no indication that either the child or crib depicted in the photograph was similar to Ariel or the crib in which she died. *See Mitchell*, 423 S.W.3d at 163 ("[W]e find that the photos at issue may be technically accurate, but they portray a scene 'materially different from a scene that is relevant to the issues at trial.' Therefore, the potential for 'wrong emphasis' by the jury is sufficient to deny admission of the photographs.")(Internal citations omitted.)

B. CPR Doll In-Court Demonstration

Jesse's final point of error concerns an in-court demonstration performed by Detective Ward in front of the jury. During this demonstration, Detective Ward wedged a plastic CPR doll in between the side rail of the crib and the mattress. The doll did not go into the position easily, requiring Detective Ward to "force" it there. Jesse argues that because the doll would not easily fit, the jury was left to infer that Ariel could not have gotten herself into the position. Jesse

claims this is problematic because the doll was significantly smaller than Ariel, made of hard plastic, and in no way resembled a real child having the same strength and range of motion as Ariel.

At trial, Jesse objected to the demonstration on the basis that it was substantially similar to a demonstration that was recorded during his interview with police in which he used a CPR doll to show police how Ariel was positioned when he found her. He claimed that the video was the best evidence and, therefore, the in-court use of the doll should not be allowed. The trial court overruled Jesse's best evidence objection.

On appeal, Jesse asserts that the trial court should have excluded the demonstration because the doll was not representative of Ariel. Jesse concedes that he did not proffer this specific objection at trial. As a result, he asks us to review this issue for palpable error.

A palpable error is one that is: 1) clearly contrary to existing law; 2) substantial (meaning that it probably--not just possibly--affected the result or denied the defendant due process); and 3) so sufficiently egregious that leaving it uncorrected would constitute a manifest injustice. *See Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009).

Initially, we note, "our rules of evidence do not address out-of-court experiments specifically, but leave the admissibility of such evidence to the general rules of relevance." *Rankin v. Commonwealth,* 327 S.W.3d 492, 498 (Ky.

2010) (citing Robert C. Lawson, *The Kentucky Evidence Law Handbook,* § 11.15(3) (4th ed.2003)).

Generally, relevant evidence is admissible unless its probative value is substantially outweighed by its unduly prejudicial effect. *Id.*

> [E]xperiment evidence is generally admissible if it bears upon a material issue and if the proponent establishes a sufficient similarity between the conditions of the experiment and those of the event in question.
>
> What counts as "sufficient" similarity depends on the purpose for which the evidence is being offered. If the experiment is offered as a simulation of actual events, then there must be a substantial similarity between the experimental conditions and those which are the subject of the litigation. If, on the other hand, the experiment is not meant to simulate what happened, but rather to demonstrate some general principle bearing on what could or what was likely to have happened, then the similarity between the experimental and the actual conditions need not be as strong. In either case, however, the similarities must be such as to afford a fair comparison, and the court should be mindful of the significant risk of undue prejudice inherent in dramatic presentations offered to the jury as reenactments of the events being litigated. If the experiment evidence is sufficiently similar to be probative and if its probative value is not outweighed by undue prejudice, then differences between the experiment and the event at issue go to the weight of the evidence, not its admissibility.

Rankin, 327 S.W.3d at 498-99 (citations omitted).

During the testimony of Detective Ward, the Commonwealth posed a series of questions in which Detective Ward pointed out the many differences between Ariel and the CPR doll. Specifically, Detective Ward testified that the CPR doll measured much smaller than Ariel and weighed significantly less. The testimony

of Detective Ward, describing the differences between the CPR doll and Ariel, leads us to conclude that the Commonwealth did not offer the in-court demonstration as evidence of what happened to Ariel, but rather to show how Ariel was found, at the time of her death, as described by Jesse. Moreover, the jury also received the testimony of Dr. Nichols who also testified regarding the dissimilarities between the CPR doll and Ariel.

Having reviewed the record, we do not believe that the purpose of the demonstration was to prove the impossibility of Jesse's story; rather, it was to show the jury how Jesse claimed to have found his daughter in her crib. The Commonwealth could then argue that the other evidence in the case (lack of saliva on the side of the sheet; the first responders' observations that the sheet was still intact on the mattress and fitted snuggly thereto when they arrived; and the lack of marks on Ariel's arms, legs, and torso) was inconsistent with Jesse's account of how he found the child positioned. In other words, the doll was used to demonstrate a position, not as an experiment to disprove that Ariel could have become wedged in the crib as Jesse claimed.[5]

Having reviewed the record, we believe the jury had enough information to understand that the purpose of the demonstration was to depict how Jesse told Detective Ward he found his daughter and not to prove that it was impossible for a

[5] "Demonstration is defined as 'an illustration or explanation, as of a theory or product, by exemplification or practical application.' Experiment is defined as 'a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried.'" *State v. Hunt* , 80 N.C.App. 190, 193, 341 S.E.2d 350, 353 (N.C.App.,1986)

child to become wedged in that position. Moreover, even if the jury was tempted to draw such an inference from the demonstration, we believe that they were provided with enough testimony regarding the dissimilarities between the doll and a real child of Ariel's size and strength to prevent them from placing undue weight on it. As such, we do not believe that the in-court demonstration caused Jesse to suffer the kind of "manifest injustice" the palpable error rule is intended to remedy.

III. CONCLUSION

For the reasons set forth above, we affirm the Caldwell Circuit Court.

CLAYTON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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