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ACTION.

Supreme Court of Kentucky

2010-SC-000184-MR

FINAL

DATE 3-15-12 Elna Grant, DC

DOUGLAS BRANDON BARNHILL

APPELLANT

V. ON APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
NO. 09-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

While under the care of Douglas Brandon Barnhill, toddler Kiara Smith suffered blunt-force trauma to her head. Barnhill called 911 to report that Kiara fell and struck her head, and she was pronounced dead at the hospital one hour later. Following a trial on murder charges arising from this incident, a circuit court jury convicted Barnhill of wanton murder in Kiara's death. He was sentenced to life in prison.

Barnhill now appeals as a matter of right,¹ contending that the judgment must be reversed because:

- 1) the trial court's refusal to preclude the introduction of other-crimes evidence denied him due process of law;
- 2) he was substantially prejudiced and denied due process by the introduction of investigative hearsay;

¹ Ky. Const. § 110(2)(b).

- 3) the trial court erred when it refused to offer an instruction on the lesser-included offense of second-degree manslaughter;
- 4) prosecutorial misconduct substantially prejudiced and denied him due process;
- 5) the trial court abused its discretion by refusing to allow him to play a portion of his recorded statement;
- 6) the trial court abused its discretion by allowing the Commonwealth to prepare transcripts of his statements and 911 call without independent verification;
- 7) the trial court committed reversible error when it permitted a detective to testify on an issue requiring expert knowledge; and
- 8) the admission of inflammatory photographs violated his due process rights.

Because Barnhill was entitled to a jury instruction on second-degree manslaughter, we reverse on the third issue and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY.

Katherine Smith left her thirteen-month-old daughter, Kiara, with her live-in boyfriend, Barnhill, while she attended a funeral. Smith left the apartment in the afternoon; and, approximately three hours later, Barnhill made a 911 call in which he reported that the child had fallen and struck her head on a table. Barnhill reported the child was incoherent and breathing heavily.

When paramedics arrived, Kiara was not breathing and did not have a blood pressure or pulse. Although she showed some electrical activity in the heart and was defibrillated several times on the way to the hospital, Kiara arrived at the hospital unresponsive, without a heartbeat or pulse. After attempted resuscitation efforts according to medical protocol failed, Kiara was pronounced dead.

The emergency room physician observed that Kiara had dilated pupils and retinal hemorrhages, both indicative of significant head trauma. But the emergency room physician reported the retinal hemorrhages were not consistent with the table-striking history Barnhill gave. A nurse was directed to contact the police because of the suspicious nature of the injury.

A Kentucky State Police detective responded to the hospital's report that a child died as a result of injuries inconsistent with a simple fall. Detective Scroggins spoke with the emergency room physician, Smith, and Barnhill at the hospital. After his initial interview, Barnhill accompanied the detective to the apartment where he consented to a search. During the investigation at the apartment, Barnhill made more statements. At this time, Barnhill reiterated his initial story that he bathed Kiara, sat down on the couch, and that she fell and struck her head on a table when he reached for her pajamas.

The autopsy revealed an abrasion on the back of Kiara's head and several areas of internal bruising. The pathologist also compared a ring found at the apartment to the abrasion on the back of the child's head. No DNA was

found on the ring. Although the medical examiner noted the existence of some earlier injuries to the child's head, the investigation focused solely on Barnhill.

About a week into the investigation, Barnhill's attorney contacted Detective Scroggins and informed him that Barnhill wanted to make another statement. In his new statement, Barnhill said he lied in his initial interview and described a scenario in which he tripped and fell on Kiara while he was drying her off after a bath.²

The grand jury indicted Barnhill for Kiara's murder, and Barnhill went to trial on that charge. The Commonwealth's theory at trial was that Barnhill struck Kiara several times in the head, causing fatal blunt-force trauma. Although Barnhill's primary defense theory was that he accidentally tripped and fell on Kiara resulting in her death, he also challenged the timeline of events in an attempt to suggest that someone else might have delivered the fatal blows before he took exclusive control of the girl.

The jury convicted Barnhill of wanton murder and recommended a sentence of life imprisonment, which the trial court imposed.

II. ANALYSIS.

A. The Trial Court Committed Reversible Error when it Refused to Instruct the Jury on the Offense of Second-Degree Manslaughter.

Barnhill requested and tendered a second-degree manslaughter instruction, which the trial court denied. And the jury was instructed on

² At the time of Kiara's death, Barnhill was approximately 6'2" and weighed around 300 pounds.

intentional murder, wanton murder, and reckless homicide.³ Barnhill contends the trial court's failure to instruct on second-degree manslaughter was reversible error. We agree, finding this issue properly preserved for appellate review.

It is a well-worn tenet of law in the Commonwealth that the trial court has a duty to instruct on the whole law of the case as supported by evidence presented at trial.⁴ And if evidence does not support a requested instruction, it is not error for the trial court to refuse to do so.⁵ Specifically, an instruction on a lesser-included offense of the charged crime "is appropriate if, and only if, on the given evidence a reasonable juror could entertain a reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser charge."⁶ So, on review, "[c]onsidering the evidence favorably to the proponent of the instruction, we ask [. . .] whether a reasonable juror could acquit of the greater charge but convict of the lesser."⁷

In Barnhill's case, it is certainly possible a juror presented with both options might have reasonable doubt about Barnhill's guilt on wanton murder but believe beyond a reasonable doubt he was guilty of second-degree

³ The trial court instructed on reckless homicide because it reasoned the instruction was premised on Barnhill's theory of the case—that he was drying off the child and fell. The prosecutor acknowledged that if Barnhill's theory was accepted then Kiara's death would be the result of a pure accident, not reckless homicide.

⁴ *Thomas v. Commonwealth*, 170 S.W.3d 343, 348-49 (Ky. 2005) (citations omitted).

⁵ *Crane v. Commonwealth*, 833 S.W.2d 813, 817 (Ky. 1992).

⁶ *Osborne v. Commonwealth*, 43 S.W.3d 234, 244 (Ky. 2001) (citations omitted).

⁷ *Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011) (citations omitted).

manslaughter. An individual is guilty of wanton murder when “under circumstances manifesting extreme indifference to human life, he [*wantonly*⁸] engages in conduct which creates a grave risk of death to another person and thereby causes the death of another.”⁹ Second-degree manslaughter differs from wanton murder only because it omits the element that one act with extreme indifference to human life.¹⁰ Although not controlling, Cooper’s Instructions are informative on the issue and specifically note that second-degree manslaughter is “always a lesser included offense of wanton [m]urder.”¹¹

The trial court instructed the jury on reckless homicide, wanton murder, and intentional murder. Clearly, the jury did not believe that Barnhill’s actions were reckless or intentional. But the trial court did not instruct the jury on the full range of options, which included second-degree manslaughter. And under the facts as presented, we conclude that a reasonable juror could believe that while Barnhill behaved wantonly, he did not act with extreme indifference to human life.

⁸ “A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . .” Kentucky Revised Statutes (KRS) 501.020(3).

⁹ KRS 507.020(b).

¹⁰ KRS 507.040.

¹¹ 1 COOPER, *KENTUCKY INSTRUCTIONS TO JURIES*, § 3.28 Comment (5th ed.).

The evidence is uncontroverted that Barnhill called both 911 and Kiara's mother after the child's injury, wrapped Kiara in a blanket and carried her to meet the first-responders, went to the hospital, and became visibly upset when he learned about Kiara's death.¹² A reasonable juror could conclude that these actions negated the "extreme indifference to human life" element of wanton murder. So even though the jury apparently concluded that Barnhill acted wantonly by striking Kiara several times on the head, his later actions warranted a second-degree manslaughter instruction because a trial court must instruct on a lesser offense when "evidence warranting an inference of a finding of a lesser degree of the charged offense"¹³ exists.

As noted by the Commonwealth, in several instances, this Court has found it improper to instruct a jury on second-degree manslaughter as a lesser-included offense of wanton murder.¹⁴ The Commonwealth effectively asks that we recognize Barnhill's "participation in delivering blows to the child's head created circumstances that unquestionably demonstrated an extreme indifference to life" as a matter of law because "[t]he multiple blows to

¹² The detective described Barnhill as obviously upset and "dry heaving."

¹³ *Trimble v. Commonwealth*, 447 S.W.2d 348, 350 (Ky. 1969).

¹⁴ See *Crane*, 833 S.W.2d at 818 (Crane fired a handgun at a store clerk but aimed higher than intended because an alarm startled him or the clerk moved to activate the alarm. The Court found that shooting a handgun at someone during the course of an armed robbery manifested an extreme indifference to the value of human life as a matter of law.); *Combs v. Commonwealth*, 652 S.W.2d 859, 860-61 (Ky. 1983) (A Kroger security guard and other employees gave chase to apprehend Combs, who was leaving a store with items for which he did not pay. Once caught, Combs wrestled away an officer's firearm and fired a total of eight shots, several of which were fired in the immediate vicinity of bystanders and the individuals who apprehended Combs. The Court found that no reasonable juror could conclude this conduct was not undertaken with extreme indifference to human life.).

Kiara's head could only have been done with intent to kill her or done wantonly in extreme indifference to her life." Despite the Commonwealth's assertions, we believe that the jury must decide as a matter of fact whether the actions allegedly taken by Barnhill display extreme indifference to human life. So we must reverse the judgment of the trial court and remand the case to the trial court for further proceedings consistent with this opinion. In the event of a retrial, the jury must be instructed on the lesser-included offense of second-degree manslaughter.

B. Other Issues on Remand.

Because other issues raised by Barnhill are capable of repetition at a trial on remand, we offer some limited guidance in areas of concern.

1. *The Hospital Records.*

Before trial, the Commonwealth filed notice under Kentucky Rules of Evidence (KRE) 404(c) that it intended to introduce KRE 404(b) evidence of "other crimes, wrongs or acts involving injuries [Barnhill] caused to Kiara Smith on occasions other than . . . the date he is charged with committing the crime . . . as set forth in the Indictment."

The Commonwealth's motion indicated it "anticipate[d] evidence in its case in chief [would] establish none of Kiara Smith's other [caregivers] inflicted the older injuries and that [Barnhill] was with the child during the time period the injuries were inflicted." At a hearing on the motion, Barnhill rested on his written response, which stated that evidence of earlier injuries to Kiara's scalp was not so intertwined with other evidence essential to the case as to be

deemed admissible; and the Commonwealth's inability to produce direct evidence that Barnhill caused the older injuries made it improper for admission. In response, the Commonwealth observed that the injuries in question were discussed in the autopsy report and so intertwined with it that the case could not be tried without mention of them.

The trial court issued a vague oral finding after the hearing. But, in its written order, the trial court stated:

That on occasions prior to January 4, 2009, [Barnhill] likely caused injuries to Kiara Smith. The evidence of said prior injuries is included within the autopsy report of Kiara Smith and the autopsy photographs, all which have been provided to [Barnhill] in discovery. This evidence includes the following as set forth in the autopsy report, "remnants of aging scalp injuries and subdural hematoma, aging fractures of proximal left tibia and distal radius, L-shaped, pink left parietal scalp."

In its opening statement, the Commonwealth mentioned Kiara's earlier injuries. Certified copies of the records of two hospital visits by Kiara were marked as joint exhibits and admitted through the testimony of Detective Scroggins with Barnhill specifically stating he had no objection. The first hospital visit was related to a reported fall while Kiara was under Barnhill's care for which she was treated and released. The second hospital visit occurred as a result of Kiara falling and hitting her head on a toy while she was in the custody of her grandmother.

During trial, several medical professionals testified about the nature and significance of the earlier, healing injuries and the evidence of injuries that

resulted in Kiara's death.¹⁵ Katherine Smith, Kiara's mother, testified that she never witnessed Barnhill strike Kiara and that he never struck her. Barnhill testified in his own defense and stated that he never hit Kiara. Although Kiara's earlier injuries were discussed by several witnesses, no witness asserted that Barnhill caused the old injuries or that a different caretaker caused Kiara's injuries. In fact, the Commonwealth could only establish conclusively that Barnhill babysat Kiara alone during the time period in which she may have received other injuries.

In this appeal, Barnhill argues that this "other crimes evidence" was so highly prejudicial that it denied him due process of law. And while we understand that the introduction of hospital records was originally framed as a KRE 404(b) issue by the Commonwealth "out of an abundance of caution," we do not believe that those items were actually evidence of any collateral criminal activity or bad acts committed by Barnhill. When these items were introduced as joint exhibits at trial, it appears the Commonwealth intended to use them to

¹⁵ Dr. Warren, the emergency room physician, testified by video deposition about his efforts to resuscitate Kiara and her physical examination. Dr. Tayce, Kiara's regular physician, testified by video deposition. Dr. Tayce testified that she did not observe any of the injuries reported in the autopsy. Dr. Wanger, the forensic pathologist who performed Kiara's autopsy, described her injuries as consistent with blows to the head that were not accidental and noted there was some evidence of older injuries that did not contribute to Kiara's death. Dr. Balko, an employee of the Medical Examiner's Office who consulted with Dr. Wanger, testified that there were several impact sites on Kiara's head that were extremely unlikely to be caused by an accidental fall and that the blunt-force trauma was sufficient to cause death. Finally, Dr. Nichols, a forensic pathologist, slightly contradicted Dr. Balko's report when he testified that the multiple injuries could be a result of accidental and intentional blunt force trauma.

present the relatively long medical history of a girl with a tragically short life.¹⁶ Kiara suffered one injury in Barnhill's care and one in her grandmother's care. But the other healing injuries described in the autopsy report could not be linked to any specific individual, merely a timeframe. Consequently, the hospital reports are not inadmissible KRE 404(b) evidence because the reports are not the types of evidence controlled by KRE 404(b).

Nonetheless, the description of these injuries might still be considered more prejudicial than probative in the context of the case. The Commonwealth submitted to the jury information that Kiara may have been abused but did not create any significant linkage between the potential abuse and Barnhill. But this creates an opportunity for a juror to infer that Barnhill abused Kiara before, making him more likely to have struck Kiara the day she died, and making it more likely his actions were either intentional or done with extreme indifference to human life.

Because the original hearing dealt with the matter as a KRE 404(b) issue and, at trial, the reports were admitted as joint exhibits without an objection, the trial court was not asked to consider the admission of the reports under KRE 403.¹⁷ On remand, it is proper for the trial court to exercise its discretion

¹⁶ Although we cannot say for certain why the Commonwealth initially attempted to admit these reports under KRE 404(b) and did not continue that argument through the trial, we note that the Commonwealth reminds us on appeal that "evidence at trial may differ from that contemplated before trial. . . ."

¹⁷ "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

to determine whether the risk of undue prejudice outweighs the probative value of the hospital records and description of earlier, healing injuries in the autopsy report.¹⁸

2. Prosecutorial Misconduct.

Barnhill asserts that the Commonwealth's Attorney acted in an improper manner on several occasions during the course of the trial, resulting in the cumulative effect of substantially prejudicing him before the jury. Specifically, Barnhill states that the Commonwealth's Attorney solicited testimony about facts not in evidence;¹⁹ subjected Barnhill to demeaning courtroom histrionics;²⁰ interrupted Barnhill's trial counsel's objection by exclaiming, "Let

¹⁸ We also note that the Commonwealth contends the descriptions of the earlier, healing injuries are so inextricably intertwined with evidence of the cause of death presented in the autopsy report that it is permissible to show Kiara's recent health and physical condition. But testimony at trial conclusively established that the earlier, healing injuries did not contribute to Kiara's death as a result of blunt-force trauma. Consequently, if the trial court exercised its discretion and chose to prevent or limit the testimony and submission of evidence regarding Kiara's earlier, healing injuries, it would not limit the parties' abilities to present and discuss the actual cause of Kiara's death. Simply redacting the information from the report would be proper.

¹⁹ The Commonwealth asked Dr. Nichols, an expert for the defense, if he knew Dr. Balko; whether Barbara Weakly-Jones was the coroner for Jefferson county and former employee of Dr. Nichols's; and if it was recognized that poly onset, a cellular measurement used to estimate the time a trauma occurred, began one to two hours after injury. The Commonwealth also made comments about Dr. Nichols's fees for consultation and his history as a defense witness.

²⁰ While Barnhill was on the stand, the Commonwealth asked him to demonstrate how he fell with Kiara. Barnhill demonstrated how he fell and ended up on his stomach, face-down before the jury. The prosecutor ordered Barnhill to remain in this prone position on the floor as he continued questioning him. And, over Barnhill's objection, the Commonwealth was allowed to continue questioning him from his position on the floor. After a second objection, Barnhill was allowed to arise from the floor. In its closing statement, the Commonwealth stated, "And if defense counsel is upset because I showed his client little or no use for him, it's because I believe the evidence is overwhelming that he clearly beat a child to death. So in my eyes, I treated him the way he should have been treated."

me finish”; interrupted and shouted at Dr. Nichols during questioning;²¹ and improperly bolstered the credibility of two witnesses.²²

Most of these issues regarding prosecutorial misconduct are unpreserved and might properly be described as evidentiary issues to which Barnhill failed to object.²³ And we do not reach a conclusion about whether any error, palpable or otherwise, was committed because we are remanding this case. As a cautionary note, we observe that an appellate court is required to focus on the overall fairness of the trial and not the culpability of the prosecutor.²⁴

The general concern is whether the conduct of the prosecutor is so egregious as to compromise the defendant’s right to due process.²⁵ We recognize it is permissible to use demonstrative evidence during the course of the trial; but we cannot condone the continued cross-examination of the defendant, who was compelled to lie prostrate before the jury. Many of the

²¹ Dr. Nichols was in the process of answering a question, which Barnhill objected to because the question was asked and answered. The trial court overruled the objection because it felt Dr. Nichols had not answered the Commonwealth’s question.

²² During closing argument, the Commonwealth indirectly referred to Dr. Nichols as a hired gun and stated with respect to his medical experts, “I brought two of the best before you that I have seen in thirty-plus years. You will have to decide their credibility and believability. But, from my seat, I have never heard a better explanation of why they believe what they believe in the case.”

²³ No matter how Barnhill characterizes the alleged errors, “[i]ssues involving the admission of evidence or testimony, when ruled upon by the trial court, do not constitute prosecutorial misconduct.” *Stopher v. Commonwealth*, 57 S.W.3d 787, 806 (Ky. 2001). And “unpreserved claims of error cannot be resuscitated by labeling them cumulatively as ‘prosecutorial misconduct.’” *Young v. Commonwealth*, 50 S.W.3d 148, 172 (Ky. 2001) (citation omitted).

²⁴ *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-12 (Ky. 1988) (citation omitted).

²⁵ *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

issues raised by Barnhill would not rise to the level of prosecutorial misconduct alone.²⁶ But the cumulative effect of improper behavior by the prosecution can rise to a level of reversible error. Without a doubt, jury trials are emotionally charged events and, perhaps, none more so than one related to the death of a child. It is vital that the emotion of the trial never overcomes the defendant's fundamental rights to due process.

C. Remaining Issues.

The other issues raised by Barnhill are evidentiary in nature. So we decline to take this case as an opportunity to expound on already well-settled areas of the law. And we note that as part of its gatekeeper function under KRE 403, trial courts are better suited to make evidentiary rulings, which will not be disturbed unless there is an abuse of discretion.²⁷ If similar issues arise on remand, they will be resolved with the trial court.

III. CONCLUSION.

For the foregoing reasons, the trial court's judgment is hereby reversed and remanded for proceedings consistent with this opinion.

All sitting: Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Scott, J., concurs, in part, and dissents, in part, and states:

Although I agree with the majority on all other issues, I would uphold the trial

²⁶ In fact, many of the statements Barnhill characterizes as improper were responses in the Commonwealth's closing statement to issues raised by Barnhill in his closing statement.

²⁷ *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citation omitted).

court's refusal to give a second-degree manslaughter instruction under these facts. Schroder, J., joins.

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