

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000613-MR

NICOLE K. RAGOZINE

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 01-CR-00116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: Nicole K. Ragozine appeals from a judgment of the Meade Circuit Court convicting her of first-degree criminal abuse and sentencing her to seven-years imprisonment. Nicole contends that she was entitled to a directed verdict of acquittal and that the trial court made various erroneous evidentiary rulings. For the reasons stated below, we affirm.

Ruby Rose Grammer was born on March 3, 2001. Her parents are Nicole Ragozine (now Grammer) and Nicole's

codefendant, Christopher M. Grammer.¹ In June 2001 the family was living in a trailer owned by Nicole's mother, Kathy Allen. Christopher was 20 and Nicole was 18. The night of June 10 - 11, 2001, Ruby was baby-sat by neighbors Debbie Gorney and Erik Kraus until approximately 2:45 a.m. On the afternoon of June 11, 2001, Ruby would not quit crying. Ms. Allen was first called to the home, but the baby continued to cry. Emergency personnel were then called to the trailer.

Officer Charlie Ashbaugh from the Meade County Police was the first to respond. Ashbaugh observed that Ruby had a bruise on her arm, a circular bruise on her abdomen, a knot on the back of her head, and suffered from severe cradle cap. He also noted that Ruby's diaper was soiled and that she "smelled nasty." Ruby was transported to Kosair Children's Hospital in Louisville, where additional, more severe, injuries were noted, including four rib fractures, a compression fracture of the second lumbar vertebra, and trauma associated elevated liver enzymes.

On November 5, 2001, Nicole and Christopher were indicted on charges of first-degree criminal abuse (KRS² 508.100). Following a joint trial, Christopher and Nicole were each convicted of first-degree criminal abuse. Each was

¹ Nicole and Christopher were not married on June 11, 2001, but married sometime prior to the trial in the case.

² Kentucky Revised Statutes.

sentenced to the recommended jury sentence of seven years. This appeal followed.³

First, the appellant contends that the trial court erred in overruling her motion for a directed verdict when the evidence was insufficient for a reasonable jury to have found guilt on the charge of first-degree criminal abuse.

In ruling on a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). 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. Id. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, reserving to the jury questions as to the credibility and weight to be given to such testimony. Id. 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 is the defendant entitled to a directed verdict of acquittal. Id.

KRS 508.100(1) defines first-degree criminal abuse as follows:

³ Christopher also appealed his conviction and sentence. We address Christopher's appeal in an Opinion rendered this day in Case No. 2002-CA-000530-MR.

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.

KRS 508.090(1) defines "abuse" as follows:

"Abuse" means the infliction of physical pain, injury, or mental injury, or the deprivation of services by a person which are necessary to maintain the health and welfare of a person, or a situation in which an adult, living alone, is unable to provide or obtain for himself the services which are necessary to maintain his health or welfare.

KRS 500.080(15) defines serious physical injury as follows:

"Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ;

A reasonable juror could have concluded that Ruby suffered serious physical injuries. The initial intake examination disclosed that Ruby had dark purple contusions on her right and left cheeks, a light purple contusion on her left forearm, an abrasion or scrape on one of her nostrils, and a

bruise on her abdomen. Dr. Betty Spivack, a forensic pediatrician working at Kosair Children's Hospital, testified that Ruby had four rib fractures of three different ages ranging from one- to two-months old to ten-days old, a compression fracture of the second lumbar vertebra, and that Ruby had elevated levels of enzymes in her liver, which Dr. Spivack identified as usually a sign of trauma.

Dr. Spivack testified that the bruising on Ruby's abdomen were "pattern contusions," reflecting that an object of some circular shape came into contact with her. She further testified that the injury to the vertebra was of the type which usually only occurs with infants if the child is either slammed down on a hard surface or by holding and squeezing the child by the chest so that as the child's legs go up, the lower part of the spine is compressed. Dr. Spivack stated that a substantial risk of death was present based upon significant abdominal trauma and rib fractures, the latter most commonly caused by squeezing a child too hard. In addition, Dr. Spivack testified that the compressed vertebra could result in a life-long injury.

In light of the medical testimony, a reasonable juror could conclude that Ruby suffered serious physical injuries as defined under KRS 500.080(15).

Based upon the medical evidence, abuse occurred, and it is only a question of who inflicted the abuse. Drawing all

fair and reasonable inferences in favor of the Commonwealth, the evidence supports the jury's conclusion that Nicole either intentionally inflicted the abuse herself, or intentionally permitted the abuse to occur.

It is unnecessary for a conviction of first-degree criminal abuse that a person who eye-witnessed the abuse testify at trial and identify the defendant as the perpetrator. Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt. Graves v. Commonwealth, Ky., 17 S.W.3d 858, 862 (2000).

As the parents, Nicole and Christopher were Ruby's principal caretakers. Ruby was substantially under their exclusive supervision and control. The injuries occurred at various occasions over a period of time. A compelling alternative perpetrator was not identified who could have inflicted injuries on various occasions over a period of time. Applying the basic principles of circumstantial evidence, it was not clearly unreasonable for the jury to conclude that Nicole or Christopher perpetrated the abuse. Further, the jury could reasonably have concluded that the one permitted the other to carry out the abuse.

With regard to whether the abuse was intentional, it has long been held that intent can be inferred from the act

itself and the surrounding circumstances. Commonwealth v. Suttles, Ky., 80 S.W.3d 424, 426 (2002). Because a person is presumed to intend the logical and probable consequences of his conduct, a person's state of mind may be inferred from his actions preceding and following the charged offense. Id. Here, the evidence was that the abuse occurred on various occasions over a period of time. Moreover, on the occasions of the previous injuries, the defendants did not seek medical treatment for Ruby. Under these circumstances the jury could reasonably infer that the infliction of the abuse was intentional.

While it is suggested that perhaps neighbors Debbie Gorney and Erik Kraus perpetrated the abuse, the jury was not required to accept this theory. Gorney and Kraus were not called as witnesses, and the identification of these two as the perpetrators is supported by little more than innuendo. In addition, other than the night before the injuries, we are not cited to any other occasion upon which Gorney and Kraus baby-sat the child. Thus the theory fails to explain the multiple injuries at various times. Since the medical evidence was that some of the injuries occurred on various occasions over a period of time, it would have been reasonable for the jury to reject the theory that Gorney and Kraus were the perpetrators.

Next, the appellant contends that the trial court erred when it permitted evidence to be introduced by the

Commonwealth regarding the conditions of the defendants' residence when such evidence had no relevancy and was unduly prejudicial.

In the course of the investigation following the events of June 11, 2001, it was determined that the defendants' mobile home was maintained in a deplorable condition. Garbage and clothes, including dirty diapers, were strewn throughout the home. Animal feces was in the living area. Broken glass and numerous small items were all over the floor. Dirty dishes were piled up and the floor was filthy. Photographs were taken depicting the residence in this appalling condition.

Prior to trial the defendants filed a motion in limine to prevent the Commonwealth from introducing evidence, including the photographs, regarding the condition of the mobile home. The trial court initially ruled in favor of the defendants, but left open the possibility that if the evidence showed that the condition of the trailer had a nexus to the crime, then the ruling was subject to change. During the course of the trial the prosecutor on several occasions sought to delve into the condition of the trailer; however, the trial court continued to rule that the evidence was not admissible.

Then, during the defense case in chief, Christopher's father, Ronnie Grammer, was called as a witness. In the course of direct examination, Ronnie was asked about his opinion

regarding Christopher and Nicole as parents. Ronnie responded that the parents showed love to their baby and were "concerned about her care and always took care of her."

At the close of the defense case the prosecution, referring to Ronnie Grammer's testimony, again sought to present evidence regarding the condition of the trailer, including the pictures depicting the filthy condition of the residence. The trial court ruled that Grammer's testimony had opened the door to rebuttal evidence concerning the condition of the trailer.

This issue presents the doctrine of curative admissibility, commonly known as "opening the door." Norris v. Commonwealth, Ky., 89 S.W.3d 411, 414-415 (2002) (citing R. Lawson, The Kentucky Evidence Law Handbook, § 1.10, 30-33 (3d ed. Michie 1993)). Wigmore distilled the issue to this question: "If the one party offers an inadmissible fact that is received, may the opponent afterwards offer similar facts whose only claim to admission is that they negative or explain or counterbalance the prior inadmissible fact?" Id. (citing 1 Wigmore, Evidence in Trials at Common Law, 731 (Tillers' rev. 1983)). In a typical case, a witness will make an inadmissible assertion and the opposing party is then permitted to introduce evidence to the contrary.⁴ Id. (citing United States v. Jansen, 475 F.2d 312

⁴ We are not suggesting that Ronnie Grammer's testimony regarding Nicole and Christopher's parenting was per se inadmissible under the rules of evidence;

(7th Cir.1973) (Defendant improperly asserted that he had never been convicted of a crime; prosecutor then permitted to introduce otherwise inadmissible evidence that defendant had earlier been convicted of a misdemeanor) and Dewey v. Funk, 211 Kan. 54, 505 P.2d 722 (1973) (In a paternity action the mother improperly testified that she had been a virgin prior to intercourse with the alleged father. Kansas Supreme Court ruled that the defense should have been permitted to introduce otherwise inadmissible evidence that the mother had admitted to intercourse with other men)).

The admission of rebuttal evidence is largely a matter of judicial discretion. Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 799 (2001); RCr⁵ 9.42. 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, Ky., 993 S.W.2d 941, 945 (1999).

In this case, the defendants opened the door to the issue of Nicole and Christopher's parenting by eliciting the statements of Ronnie Grammer on the matter. The trial court exercised restraint in permitting the Commonwealth to present evidence rebutting Ronnie Grammer's statements in praise of their parenting. Only six of twenty-five pictures of the

however, it stands to reason that the same rationale would apply to an admissible assertion of opinion on an issue under dispute.

⁵ Kentucky Rules of Criminal Procedure.

residence were permitted to be presented to the jury. Under the circumstances, we cannot say that the trial court abused its discretion in permitting the Commonwealth to present evidence directly rebutting the testimony of Ronnie Grammer on the issue of Nicole and Christopher's parenting. "In short, the appellants, having opened the book on the subject, were not in a position to complain when their adversaries sought to read other verses from the same chapter and page." Harris v. Thompson, Ky., 497 S.W.2d 422, 430 (1973).

Next, the appellant contends that the trial court abused its discretion when it excluded pictures of Ruby at various stages of her 13-week life prior to June 11, 2001. The defense sought to introduce the photographs to demonstrate her condition at various intervals from the time of her birth.

Defense counsel first produced the photographs and sought their introduction the morning of the trial. Following an objection by the Commonwealth, the trial court ruled that the pictures were inadmissible on the basis that defense counsel had failed to timely provide the pictures to the Commonwealth in compliance with the case discovery order.

On November 8, 2001, the trial court entered a discovery order which, among other things, required the defendants to "provide[] a list of, and an opportunity to inspect, copy, or photograph all . . . tangible objects which

the Defendant intends to produce at the trial and are in his possession, custody or control, within fifteen (15) days after receiving discovery." Such an order is authorized under RCr

7.24. RCr 7.24(9) provides as follows:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

In matters dealing with discovery, it is within the discretion of the trial court to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or to enter such other orders as may be just under the circumstances. RCr 7.24(9); Neal v. Commonwealth, Ky., 95 S.W.3d 843, 848 (2003).

It is undisputed that the defendants did not disclose the photographs proposed to be introduced until the morning the trial was scheduled to begin. Consequently, the Commonwealth would have had minimal, if any, opportunity to investigate the circumstances surrounding the taking of the photographs. RCr 9.24 specifically authorizes the trial court, at its discretion,

to prohibit the defendants from introducing the material into evidence. As noted by the trial court during argument of the issue, the defendants were free to introduce witnesses who could testify concerning the condition of the child during the time periods covered by the photographs. Under these circumstances, the trial court did not abuse its discretion in ruling that the photographs could not be admitted.

Finally, the appellant contends that the trial court abused its discretion in denying an instruction on third-degree criminal abuse.

Defense counsel sought an instruction on third-degree criminal abuse; however, the trial court denied the instruction and instructed only on first-degree criminal abuse and second-degree criminal abuse. KRS 508.120, the statute which defines third-degree criminal abuse, provides, in relevant part, as follows:

(1) A person is guilty of criminal abuse in the third degree when he recklessly 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.

KRS 508.100, the statute which defines first-degree criminal abuse, is substantially identical except that the required mental state is intentional, and KRS 508.110, the statute which defines second-degree criminal abuse, is substantially the same except that the required mental state is wantonly.

The trial court has a duty to prepare and give instructions on the whole law of the case, including any lesser-included offenses which are supported by the evidence. Neal v. Commonwealth, Ky. 95 S.W.3d 843, 850 (2003). However, that duty does not require an instruction on a theory with no evidentiary foundation. Id. An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Id.

KRS 501.020(4) provides that

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive 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 failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

The medical evidence suggested that Ruby's injuries were caused by the shaking, squeezing, and/or striking of the child. As previously discussed, the injuries inflicted upon the child were very severe. Among other things, Ruby had four rib fractures that were of three different ages; a compression fracture on the second lumbar vertebra; elevated levels of enzymes in her liver which were suspected to be as a result of trauma; dark purple contusions on her right and left cheeks; a light purple contusion on her left forearm; an abrasion or scrape on one of her nostrils; and a bruise on her abdomen.

Given the severity of the injuries, the force of shaking, squeezing, and/or striking was necessarily excessive. The evidence does not support the theory that Nicole failed to perceive the substantial and unjustifiable risk that excessive physical abuse could produce severe injuries to a 13-week-old child. The risk was too obvious. There was no evidence that Nicole was so naive so as not to appreciate that a child, in the early weeks of her life, requires gentle handling or that she did not perceive the risk that severe handling could result in serious injuries. Absent this failure to perceive the risk, there was no evidentiary foundation for the instruction.

In her brief, the appellant fails to articulate a rational theory in support of the instruction. She refers to the placing of the child in the care of Debbie Gorney and Erik

Kraus, apparently suggesting that they were the perpetrators and that her reckless conduct was placing Ruby in their care.

However, as previously noted, the evidence does not support the theory that the abuse occurred solely during the night prior to the police being called when Ruby was with Gorney and Kraus. On the contrary, the medical evidence suggested that the abuse was continual and ongoing.

In summary, we are persuaded that the trial court did not commit error when it denied the appellant's request for a third-degree criminal abuse instruction.

For the foregoing reasons the judgment of the Meade Circuit Court is affirmed.

ALL CONCUR.

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