

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000847-MR

ANGELITA TURNER

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Angelita Turner has appealed from the judgment of the Calloway Circuit Court convicting her of Second Degree Manslaughter, and sentencing her to ten years imprisonment, for causing the death of her newborn daughter by asphyxiation. On appeal, Turner raises issues concerning the denial of her motions for directed verdict, her ability to discover information about and cross-examine an expert witness of the Commonwealth, and the inclusion of an instruction for Second Degree Manslaughter. We affirm.

On March 27, 2001, Turner, a 19-year-old pre-med student at Murray State University, delivered a 5½-pound baby

girl in her dormitory room. Turner had previously given birth by Caesarean section to a premature baby girl, Tia, and later suffered a miscarriage. After using scissors to cut the umbilical cord, she wrapped the baby in a towel, placed her in a tied plastic garbage bag that she then put inside of another tied plastic garbage bag, and ultimately placed the bags in a cabinet under the sink in her room. Turner called her grandmother, Johnnie Turner, who is a Tennessee resident, and asked her to pick her up because she was not feeling well and had been bleeding. Johnnie Turner took Turner to her home, bringing along the blood-soaked linens from her bed to clean. Johnnie took Turner to the Henry County Medical Center the following morning where she received treatment from obstetrician Dr. Scott Smith. Turner denied that she had been pregnant, but stated that she had passed a mass of tissue into the toilet and fainted. Dr. Smith determined that she had recently given birth and recovered parts of the placenta in her body. The Murray State Police Department and later the Kentucky State Police were notified about a possible live birth. The body of the baby girl was later recovered from the dormitory room pursuant to a search warrant, and police also recovered scissors and cuttings from the mattress. After being released from the hospital on March 29th, Turner returned to her dorm room armed with cleaning supplies. When she attempted to enter the room, she was stopped

by Murray State Police and was later arrested and detained at the county jail. While in the county jail, Turner related to her grandmother that the baby had made a gurgling sound.

In April, the Calloway County Grand Jury indicted Turner on charges of intentional murder, wanton murder and first-degree criminal abuse. After several delays, the matter proceeded to trial on September 10, 2002. The Commonwealth dropped the criminal abuse charge, and the jury was instructed only on intentional and wanton murder. The jury was unable to reach a unanimous decision. A second trial began on January 21, 2003. At the close of the parties' respective cases, the trial court denied Turner's motion and renewed motion for a directed verdict and instructed the jury not only on the two murder charges, but also on second-degree manslaughter and reckless homicide. The jury returned a verdict of second-degree manslaughter and recommended a ten-year sentence. The trial court entered a judgment of conviction and sentenced Turner in accordance with the jury's recommendation. This appeal followed.

On appeal, Turner raises several issues. First, she argues that her motions for directed verdict should have been granted because of a lack of evidence of a live birth. She then turns her attention to medical examiner Dr. Mark LeVaughn and her attempts to gain information concerning his termination and

the limitations placed on her cross-examination. She then argues that the trial court should not have instructed the jury on second-degree manslaughter because there was no evidence to establish that she acted wantonly. Finally, she argues that she was denied a fair trial because Dr. LeVaughn's opinion regarding the live birth was based upon a fact not proven and was also denied the right to exculpatory evidence when the Commonwealth did not have blood from the mattresses tested. The Commonwealth responds to each issue in turn.

We shall first address Turner's argument concerning the denial of her motion and renewed motion for a directed verdict. In Commonwealth v. Benham,¹ the Supreme Court of Kentucky stated the directed verdict rule as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

The Supreme Court went on to state the standard of appellate review to be afforded to such rulings: "[T]he test of a directed verdict is, if under the evidence as a whole, it would

¹ 816 S.W.2d 186, 187 (Ky. 1991).

be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."² With this standard in mind, we shall review the trial court's rulings on Turner's motion and renewed motion for directed verdict.

Here, Turner asserts that there was no evidence from which a rational juror could find that the baby was born alive beyond a reasonable doubt. But the Commonwealth reminds us that under the applicable case law, the trial court must draw all fair and reasonable inference in its favor when ruling on a motion for directed verdict, and this court cannot consider the matter *de novo*. Rather, the reviewing court looks to see if it would be clearly unreasonable for a jury to find guilt.

The Commonwealth relied upon the expert testimony of Dr. LeVaughn, the medical examiner who performed the autopsy on the baby girl. In his post-mortem examination report, he indicated that the baby died due to asphyxia after being placed in a plastic bag following a vaginal delivery. He estimated the baby's gestational age as being 37- to 38-weeks old. Dr. LeVaughn found mucous in the nasal airways, but found no external lethal blunt or penetrating trauma. His external and microscopic examination of the lungs revealed that they were aerated due to spontaneous respiration. He also noted a mild overlap of the lambdoidal sutures of the baby's skull. Finally,

² Id.

he indicated that the umbilical cord was a normal three-vessel cord, containing two arteries and one vein. On the other hand, Turner presented expert testimony from Dr. Louis Roh, a pathologist from New York. He testified that the baby was both premature and stillborn based upon his examination of the evidence. Dr. Roh did not find any evidence of aeration in the lungs, and disagreed with Dr. LeVaughn's conclusion regarding the umbilical cord. In his opinion, the cord was abnormal in that it contained only one artery and one vein, rather than the normal two arteries, which would increase the likelihood of problems with the pregnancy. Concerning the reported gurgling noise, Dr. Roh testified that even a dead baby could make a gurgling sound, as maneuvering a body can cause trapped air to escape. Turner also relied upon the medical testimony of her treating physician, Dr. Smith, who agreed that the umbilical cord was abnormal. He also agreed that touching the stillborn body of a baby who died in utero could cause a sound due to the presence of amniotic fluid.

When considering the evidence presented with all inferences decided in favor of the Commonwealth, it is clear that there was sufficient evidence to overcome Turner's motion and renewed motion for directed verdict. Based upon Dr. LeVaughn's testimony, the jury could reasonably and rationally find that the baby was born alive and that Turner's actions

caused her death under either the murder statute (KRS 507.020) or the second-degree manslaughter statute (KRS 507.040). The trial court properly denied Turner's motions and allowed the case to proceed to the jury.

Next, Turner presents several arguments concerning Dr. LeVaughn, who was the subject of much pre-trial and trial litigation. Between the first and second trials, Dr. LeVaughn was terminated from his employment as a state medical examiner. The trial court denied Turner's pre-trial attempts to obtain Dr. LeVaughn's personnel file and information as to why he was terminated. On the first day of the trial, chief medical examiner Dr. Tracey Corey was questioned in chambers concerning Dr. LeVaughn's termination. She indicated that Dr. LeVaughn had not been given a reason for his termination, and that it had nothing to do with his work or ability as a pathologist, but rather had to do with office management and administrative issues. She also indicated that a criminal investigation had been initiated related to the circumstances surrounding the termination, but that Dr. LeVaughn was not aware of the investigation. The trial court then questioned Dr. Corey *in camera*, and determined that the circumstances surrounding Dr. LeVaughn's termination were not relevant to his impeachment in Turner's case.

First, Turner argues that the trial court should have granted her motion to compel the Justice Cabinet to release Dr. LeVaughn's personnel files so that she could determine the reason for his termination. The trial court reasoned that Turner would be able to subpoena representatives from the Justice Cabinet, which Turner did by issuing a subpoena to Dr. Corey. Furthermore, Turner, through her attorney, was permitted to ask what she considered to be necessary questions through the trial court during its *in camera* examination of Dr. Corey. Having reviewed the videotape of the *in camera* hearing³ and noted that the trial court asked and received answers for all but one of the questions requested by defense counsel, we hold that based upon that record the trial court's ruling that the information was not relevant was correct. The information Turner sought to elicit had nothing to do with Dr. LeVaughn's ability to perform the work of a pathologist, but only had to do with personal, unrelated matters. However, although this Court believes that the right result was reached, we do not agree that the trial court's decision to hold an *in camera* hearing outside the presence of either party's counsel was the most appropriate one. Rather, the trial court should have conducted a hearing with all counsel present. Based upon the facts of this case, the trial court's decision to hold the *in camera* hearing does

³ The Clerk of the Calloway Circuit Court certified the videotape of the *in camera* hearing as a supplemental record on January 7, 2005.

not constitute reversible error. Thus, the trial court did not abuse its discretion in denying Turner's motion to compel.⁴

Second, Turner argues that she was denied a fair trial when she was not permitted to cross-examine witnesses concerning the substance of a police investigation of Dr. LeVaughn. In the *in camera* hearing, Karen Quinn, deputy general counsel for the Justice Cabinet indicated that she had requested the investigation, and that at least one area under investigation had arisen after the events in this case. Furthermore, the investigation had nothing to do with his credibility. More importantly, Dr. Corey testified that Dr. LeVaughn was unaware of the criminal investigation, meaning that he would not have been able to testify about its substance had he been asked on cross-examination. Furthermore, because he did not have any knowledge of the investigation, Dr. LeVaughn would not have been able to color his testimony to gain favor.

Third, Turner asserts that she did not receive a fair trial when she was denied the right to cross-examine Dr. LeVaughn on or make any reference in her opening statement to the circumstances of his termination or the criminal investigation. We disagree. Turner did in fact question LeVaughn regarding the circumstances of his termination; he testified that he was never told the reason for his termination.

⁴ Mullins v. Commonwealth, 956 S.W.2d 210 (Ky. 1997).

Dr. Corey also testified that Dr. LeVaughn was never told the reason for her termination because he was an at-will employee. Turning to the criminal investigation, Dr. Corey testified that Dr. LeVaughn was unaware that the investigation had even been initiated. Therefore, Turner could not have been prejudiced in any way in her ability to cross-examine Dr. LeVaughn on those topics.

Finally, Turner contends that she was denied the opportunity to make an avowal of her proposed cross-examination of Dr. LeVaughn. We agree with the Commonwealth that Turner actually asked for an *in camera* examination of Dr. Le Vaughn similar to the one held for Dr. Corey. Regardless of what was requested, we cannot hold that the trial court abused its discretion in disallowing this. The trial court correctly held that the information Turner sought to elicit was not relevant to the case, and it had already been made clear that Dr. LeVaughn was not told the reason for his termination and did not know anything about the criminal investigation.

Next, Turner raises an issue concerning the jury instruction for second-degree manslaughter. Turner argues that the evidence presented did not support a finding that her actions were wanton, but were rather intentional or reckless. After noting that Turner failed to preserve this issue for review, the Commonwealth argues that there was sufficient

evidence to support the jury's finding that Turner's actions were wanton.

First, we agree with the Commonwealth that Turner failed to preserve this issue. The videotaped record reveals that although defense counsel objected to the instruction for second-degree manslaughter, the reason put forward was the lack of language in the instruction regarding the method of asphyxiation, not the lack of evidence of wanton behavior. Defense counsel went so far as to tender a proposed instruction on second-degree manslaughter to the trial court. It is clear under RCr 9.54(2) that:

No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.[⁵]

Even under RCr 10.26, we cannot hold that any palpable error existed. As pointed out by both Turner and the Commonwealth, the Supreme Court of Kentucky in Barbour v. Commonwealth⁶ stated:

The court's duty in a criminal prosecution is to instruct the jury on the whole law of the case. The jury is to be instructed on every state of the case deducible from and

⁵ See also Johnson v. Commonwealth, 105 S.W.3d 430 (Ky. 2003).

⁶ 824 S.W.2d 861, 863 (Ky. 1992)(citations omitted).

supported by the evidence presented. The instructions, however, must follow the evidence actually presented and no theory of the case unsupported by the evidence is entitled to an instruction.

In this case, the jury instructions contained a definition of "wanton", which reads, in part, that a person acts wantonly if that person "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."

We disagree with Turner's assertion that her actions could only have been intentional or reckless, but not wanton. Clearly, enclosing a newborn infant in a plastic garbage bag can support a finding that Turner was aware of and consciously disregarded a substantial and unjustifiable risk to the baby. We perceive no error in the trial court's inclusion of an instruction on second-degree manslaughter.

Turner next argues that she was denied a fair trial when evidence concerning a live birth was admitted based upon a fact not proven by the Commonwealth. Specifically, Turner asserts that Dr. LeVaughn based his opinion of a live birth on information he received that the baby cried, which evidence was never introduced at trial. Rather, the only evidence introduced

was that the baby made a gurgling noise. But the Commonwealth points out that Dr. LeVaughn did not rely upon that fact alone in determining that the baby was born alive and that the record contains a notation that the baby cried, which Dr. LeVaughn could have reviewed. We again perceive no error in the introduction of Dr. LeVaughn's testimony that the baby was born alive.

Lastly, Turner argues, under the palpable error rule, that she was denied her right to potentially exculpatory evidence when the Commonwealth failed to perform DNA testing on the blood found on the mattress. However, we cannot hold that this in any way prejudiced Turner because she was not precluded from requesting that the material be tested, but apparently chose not to do so. Furthermore, the trial court allowed Turner to raise the lack of testing by the Commonwealth in her closing argument. We observe no palpable error.

For the foregoing reasons, the judgment of the Calloway Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David T. Eucker
Assistant Public Advocate
Frankfort, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, KY