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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000617-MR

MATTHEW RAQUE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 03-CR-001193

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Matthew Raque appeals from an order of the Jefferson Circuit Court finding him guilty of first-degree criminal abuse and sentencing him to six years' imprisonment. He argues that the trial court improperly allowed evidence of previous injuries suffered by his infant son to rebut his defense that he accidentally dropped the baby, resulting in the skull fracture that gave rise to the indictment. In addition,

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

he contends that he was entitled to a directed verdict because the Commonwealth did not prove that the baby suffered a serious physical injury as defined by Kentucky Revised Statute (KRS) 500.080(15). Finally, he claims that the trial court erred by refusing to instruct the jury on the lesser offenses of second and third-degree criminal abuse. We disagree and affirm the trial court.

Raque and his wife Chastidy are the parents of an infant boy, C.R. On March 8, 2003, Chastidy left the baby with Raque and went out to run some errands in the morning. She returned home and left again that afternoon to attend a baby shower in Bullitt County. Raque, an officer with the Louisville Metro Police Department, was left alone with the baby while she was gone. He called Chastidy around 1:30 p.m. to tell her that the baby's head was swollen. It took her between half an hour and ninety minutes to arrive at their apartment. Chastidy first called C.R.'s doctor; however, she was told it would be awhile before she could speak with a doctor, so the Raques took the baby to the emergency room at Kosair Children's Hospital.

Chastidy questioned her husband about C.R.'s head being swollen, but he did not answer. At the hospital, doctors immediately questioned both parents about C.R.'s injury. Although Raque was home alone with the baby at the time, he denied any knowledge of how C.R. was injured. An x-ray revealed

that the baby's skull was fractured and he had fractured ribs in various stages of healing and two fractured vertebrae. C.R. was admitted to the hospital for three days. Due to the fact that his injuries were suggestive of non-accidental trauma, a social worker contacted the police department's Crimes Against Children Unit.

Officers arrived at the hospital that night, photographed C.R. and interviewed his mother. She told them that he had previously been hospitalized in January after Raque cared for him and discovered C.R.'s arm was paralyzed. When the officers told Chastidy about C.R.'s fractured ribs, she began to cry and said she did not know who had hurt her baby. Raque was taken to CACU's offices for a private interview. At first, he denied any knowledge of how C.R.'s skull fracture occurred. Lieutenant Vittitow was suspicious of Raque's body language, so she asked him to sign a form waiving his rights and proceeded to question him further. His story changed several times, but ultimately he claimed that he had accidentally dropped the baby while preparing a bottle. A forensic pediatrician, employed by the Medical Examiner's Office, examined C.R. and determined that his injuries were not consistent with an accidental fall such as Raque described. The Grand Jury indicted Raque for first-degree criminal abuse and the case went to trial in February 2004.

At trial, Raque maintained that he had accidentally dropped the baby while holding him with one arm. Dr. Betty Spivak, the pediatric forensic expert, testified that C.R.'s injuries were not consistent with an accidental fall, but rather were likely the effect of being slammed forcefully against a hard surface. Over Raque's objection, the Commonwealth was permitted to introduce evidence of C.R.'s previous injuries to rebut Raque's defense that the skull fracture was the result of an accident. The trial court denied Raque's request to instruct the jury on lesser included offenses, and he was convicted. Raque agreed to waive jury sentencing and accepted a six-year recommendation from the Commonwealth while retaining his right to appeal the conviction. The trial court sentenced Raque to six years' imprisonment, and this appeal followed.

Raque first argues that it was error for the trial judge to allow evidence of C.R.'s previous fractures to be introduced. He contends that this evidence was irrelevant and unduly prejudicial. Kentucky Rule of Evidence (KRE) 402 mandates the exclusion of irrelevant evidence. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence of prior bad acts can be excluded by KRE 404; except for certain purposes,

including showing absence of mistake or accident with regard to the conduct charged. Raque's defense to the charge of first-degree criminal abuse was that C.R.'s injuries were the result of Raque accidentally dropping him. The evidence of injuries occurring at different times contributed to Dr. Spivak's diagnosis that C.R. was a victim of battered child syndrome. Therefore, the fact that C.R. had previously suffered fractured bones was admissible as it tended to prove that Raque intentionally injured C.R. in March of 2003.

Raque argues that evidence of C.R.'s injuries two months earlier and the presence of partially healed rib and vertebrae fractures lacked probative value because the Commonwealth could not prove Raque had previously injured C.R. The Commonwealth points out that both of C.R.'s hospital visits occurred after he had been left home alone with Raque. There was no evidence linking the baby's mother, grandmother, or babysitter to any of the injuries. Raque admitted that he spent a lot of time alone with C.R. and stated that he may have squeezed the baby too hard and bounced him up and down too forcefully while watching him. Finally, no additional injuries occurred once Raque was arrested and only allowed highly supervised visits with C.R.

The trial court's decision to allow evidence of C.R.'s previous injuries relied on the case of Parker v. Commonwealth,

952 S.W.2d 209 (Ky. 1997), involving a stepfather charged with murder in the abuse-related death of a toddler. Despite the lack of direct evidence that Parker had previously inflicted injuries on the child, the Kentucky Supreme Court opined that there was "other evidence from which a jury could reasonably infer that Parker was the perpetrator of the prior injuries." Parker at 213. This included the fact that Parker often cared for the toddler alone, the injuries ceased when Parker was not around the child for a prolonged period of time, the lack of evidence of other perpetrators, and Parker's defense at trial that he did not know how the child was injured. The facts in Parker are similar to the case at hand. Because Raque maintained that C.R.'s injuries were accidental, the trial court properly admitted evidence that C.R. had previously suffered broken bones. We disagree that the prejudicial effect of this evidence outweighed its probative value.

Raque next claims that the trial court erred by failing to direct a verdict. He argues that it was clearly unreasonable for the jury to find him guilty because the Commonwealth did not introduce evidence that C.R. suffered a serious physical injury. KRS 508.100(1) defines first-degree criminal abuse as follows:

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.

The jury found Raque guilty under the instruction pertaining to subsection (a). KRS 500.080(15) defines serious physical injury as "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." C.R. suffered a long parietal skull fracture and required hospitalization for three days. Raque argues that because C.R. was smiling and laughing in the hospital and because he was released without restrictions, his injury was not serious within the meaning of the statute. The hospital monitored C.R. around the clock every two hours during his hospitalization; however, not much more can be done to treat a skull fracture. Dr. Spivak testified that C.R. had injuries of the type frequently seen in children who die from their injuries. It was not unreasonable for the jury to decide that C.R.'s fractured skull was a serious physical injury.

Finally, Raque argues that the trial court committed reversible error by refusing to instruct the jury on second and

third-degree criminal abuse. The trial court has a duty to instruct the jury on every applicable offense covered by the indictment or supported by the evidence produced at trial. Commonwealth v. Collins, 821 S.W.2d 488 (Ky. 1992). Instruction on lesser included offenses is proper only where a jury could find a defendant guilty beyond a reasonable doubt of the lesser offense while entertaining a reasonable doubt as to the original offense. Parker at 211. Nevertheless, the trial court is not required to instruct the jury on an offense if there is no evidentiary foundation. Houston v. Commonwealth, 975 S.W.2d 925 (Ky. 1998). While first-degree criminal abuse requires that a person act intentionally, second and third-degree criminal abuse encompass different mental states, namely wanton and reckless behavior respectively. KRS 501.020 defines the relevant mental states as follows:

(1) "Intentionally"--A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct.

. . . .

(3) "Wantonly"--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. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

(4) "Recklessly"--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.

Raque's account of how C.R.'s injury occurred was that he was holding the baby with one arm while preparing a bottle. C.R. slipped from his grasp, hit his head on the counter, was pinned between the dishwasher and Raque's leg, and, finally, landed on the floor. Dr. Spivak testified that in falls from a height of three to four feet, less than 1% would result in a skull fracture, and those fractures would not be as long as the one suffered by C.R. The baby's injury was consistent with an accelerated impact such as being slammed forcefully against a hard surface. Based on this evidence, we do not agree that the jury could have found Raque not guilty of first-degree abuse and yet convicted him of a lesser offense. If the jury believed Raque's version of events, then he was not guilty of a criminal offense as there was no substantial and unjustifiable risk of

such an injury created by carrying a four month-old baby in one arm. If the jurors believed that C.R.'s injuries were not caused by an accident, then they could only find him guilty of acting intentionally. Thus, the trial court's refusal to instruct the jury on lesser offenses was not erroneous.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel N. Potter  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Jeffrey A. Cross  
Assistant Attorney General  
Frankfort, Kentucky