RENDERED: OCTOBER 6, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001092-MR

MATTHEW LEHR — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 03-CR-00577

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,[1] SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Matthew Lehr appeals his conviction for criminal abuse in the second degree stemming from severe injuries sustained by a five-month-old infant left in his care while her mother was at work. Three issues are presented for review: 1) whether the trial court erred in instructing the jury on lesser included offenses; 2) whether appellant was denied his

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

right to a unanimous verdict; and 3) whether the trial judge erred in striking for cause a juror who indicated he could render a fair and impartial verdict. We affirm.

Appellant shared a residence with the infant's mother. On the day of the child's injury, appellant called his mother who lived nearby and told her that the baby had fallen off the bed and appeared unresponsive. Appellant and his mother then transported the infant to the hospital where she was diagnosed with potentially life-threatening head injuries, as well as extensive bruising, both of which the pediatric staff felt could not be explained by a simple fall off the bed. Appellant was subsequently indicted on one count of criminal abuse in the first degree.

The Commonwealth's theory of the case was that appellant intentionally abused the infant victim by shaking her and throwing her down. He defended the action by alleging that the baby simply rolled off the bed when he fell asleep after putting the child down for a nap. Appellant's conviction for second-degree criminal abuse, for which he was sentenced to 18 months' imprisonment, precipitated this appeal.

The elements of the offense of first-degree criminal abuse are codified in KRS 508.100(1):

> 1) 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.

Criminal abuse in the second and third degree, KRS 508.110 and 120, contain identical elements to the first degree offense, varying only with respect to the mental state of the actor. Second degree criminal abuse is based upon wanton conduct and third degree criminal abuse substitutes a reckless mental state to the same elements. Based upon his claim that the infant's injuries were merely accidental, appellant argues that there was no evidence to support the giving of instructions on the lesser included offenses of criminal abuse in the second and third degrees. We disagree.

Clearly, instructions must be grounded in the testimony and evidence presented at trial. Although appellant denied harming the child, we are convinced that the ample medical evidence as to the extent of her injuries, the likelihood that those injuries could not have been caused by simply rolling off the bed, and the likelihood that they were incurred as a result of being shaken or subjected to abusive head trauma, provided sufficient evidentiary support for

instructions on the lesser included offenses. This evidence provided a reasonable basis for concluding that the child had sustained injuries from being shaken at a time when she was under appellant's exclusive control. Contrary to appellant's assertion, we are convinced that the medical testimony as to causation and the undisputed facts as to the timing of her injuries supplied the requisite foundation for instructions based on wanton and reckless conduct.

The rationale underlying the principle permitting intent to be inferred from actions or results is that a person is presumed to intend the logical and probable consequences of his conduct. This principle continues to hold true despite a defendant's denial of having taken any action which could have resulted in the victim's injuries. In such cases, state of mind may be inferred from actions preceding and following the charged offense.[2]

Furthermore, it is very well-settled that proof of intent may be inferred from the character and extent of the victim's injuries.[3] This case presents such a scenario. The jury had before it substantial medical evidence that an infant under appellant's sole custody and control sustained life-threatening injuries which could not have been caused in the

[2] Wilson v. Commonwealth, 601 S.W.2d 280 (Ky. 1980).

[3] Davidson v. Commonwealth, 340 S.W.2d 243 (Ky. 1960).

manner appellant claimed. There was also testimony that the infant's injuries were consistent with shaken baby syndrome. Lesser-included offense instructions are proper if the jury could consider a doubt as to the greater offense and also find guilt beyond a reasonable doubt on the lesser offense.[4] Based upon the evidence in this case, the jury could have believed that the baby suffered trauma while in appellant's care that did not result from his intentional conduct, but was rather the result of actions which could be labeled wanton or reckless, for example by shaking. Thus, the medical evidence provided the evidentiary underpinnings for instructions on offenses based on states of mind other than intentional.

Appellant also complains that he was denied his right to a unanimous jury by the giving of an "alternate theory" instruction. Each of the criminal abuse instructions allowed the jury to assess guilt if it found that appellant "caused a serious injury" to the victim or caused her "to be placed in a situation which might have caused her physical injury." Appellant argues that because there was no evidence to support the latter theory, the instructions violate the unanimous verdict requirement. Again, we disagree.

As previously stated, the medical testimony was clearly sufficient to support a finding that appellant had

[4] Skinner v. Commonwealth, 864 S.W.2d 290 (1993).

shaken the infant. It is therefore not difficult to imagine that all the jurors could have formed a mental picture of appellant shaking the five-month-old baby in such a way that she was either seriously injured or placed in a situation that might have caused her serious injury, or both. We are thus convinced that reasoning set out in Wells v. Commonwealth[5] disposes of appellant's unanimous verdict argument:

> We hold that a verdict cannot be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.

Finally, appellant predicates error on the trial judge's decision to excuse for cause a juror who stated that he worked with someone who had been accused of child abuse by a child with a history of making false accusations. The juror explained that the co-worker pled guilty to avoid going to prison and that his friend's experience had made him "kind of leery" of the criminal justice system. The prosecutor then inquired whether his friend's experience would influence his decision in this case and the juror responded "Pretty much." The juror then went on to outline his problems with the justice system, which included his perception that people with money

[5] 561 S.W.2d 85, 88 (Ky. 1978).

could “get away with just about anything.” Although he subsequently indicated that he could be fair, he added that he would have a problem weighing the evidence against appellant if it was not “totally conclusive”.

The decision whether to exclude a juror for cause lies within the sound discretion of the trial court. Absent a clear showing of abuse, appellate courts must defer to the trial judge’s exercise of that discretion. The question of whether a juror’s response to an isolated question is sufficient to rehabilitate him must be viewed in the totality of his voir dire responses. It is not limited to his response to a single “magic question.”[6] Based upon a review of the totality of the juror’s responses, we are not persuaded that the trial judge in any way abused his discretion in removing this juror for cause.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky

[6] Gamble v. Commonwealth, 68 S.W.3d 367, 373 (Ky. 2002).