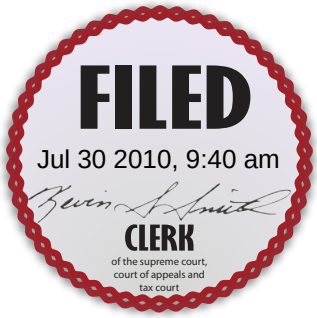


ATTORNEY FOR APPELLANT:

**MATTHEW D. ANGLEMEYER**
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**ANN L. GOODWIN**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| WILLIAM FOSTER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0908-CR-435 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0805-MR-130314

**July 30, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

William Foster appeals his conviction of Neglect of a Dependent,[1] a class A felony, and Reckless Homicide,[2] a class C felony. Foster presents the following restated issues for review:

1. Did the trial court err in admitting a physician's expert testimony that the victim suffered a grade-four splenic injury?

2. Did the trial court improperly exclude a videotaped interview offered by Foster?

We affirm.

The facts favorable to the convictions are that on July 5, 2007, Foster was at home in the apartment he shared with his three-year-old daughter, his infant son, William D. Foster (nicknamed Bubby), who was almost four months old at the time, and Vickie Capps, the children's mother. Capps departed for work at around 3:30 p.m., leaving the children in Foster's care. At the time Capps left, Bubby had appeared and acted normally all day and the day before. He had eaten normally and had not had any recent falls or accidents.

Shortly before 8:00 p.m. that evening, Foster appeared at the door of Mykista Patton, the manager of the apartment complex, and informed Patton that his baby was dead. Patton called 911 for Foster, who did not have a telephone. Patton's fiancé, Bryon Mitchell, ran to Foster's apartment and found Bubby lying on the floor, cold and grey, inside the apartment door. Mitchell, who had been trained to administer CPR, found nothing obstructing Bubby's airway, but detected no sign of breath or pulse. Mitchell administered two short puffs of breath into Bubby's mouth and nose and used his fingers to administer compressions just

[1] Ind. Code Ann. § 35-46-1-4 (West, Westlaw through 2010 Public Laws approved and effective through 3/25/2010).

under Bubby's sternum, but to no apparent avail.

Emergency personnel arrived shortly and took over the effort to revive Bubby. They also found no objects or vomit clogging Bubby's airway. They noted that Bubby was markedly cold, indicating he had been dead for some time. Foster had re-entered the apartment at that point. He reported that he had fed Bubby a jar of sweet potatoes and a bottle, put him down on his back in his crib, and played with his daughter for approximately forty minutes before discovering Bubby face down in his crib, not breathing. He also informed emergency personnel that he attempted CPR on Bubby before seeking Patton's assistance. Orange vomit was found on the couch and floor in the living room. A wet spot containing Bubby's blood was found in Bubby's crib where his head had been.

After Bubby arrived at St. Francis Hospital in Beech Grove, Indiana, medical personnel succeeded in reviving his heart, although he was still unable to breathe without mechanical assistance. Bubby was transferred to Riley Hospital, where he was treated by a medical team under the direction of Dr. Antoinette Laskey, who specialized in pediatrics trauma and who held the position of Assistant Professor of Pediatrics at Riley Hospital. Dr. Laskey examined Bubby, spoke with medical personnel who had been involved in Bubby's treatment to that point, reviewed all of the scans, studies, and films that had been taken of Bubby, and examined Bubby's medical records prior to July 5, 2007. On July 6, Dr. Laskey also met with Foster and Capps, neither of whom reported that Bubby had acted unusually before July 5, 2007. Dr. Laskey specifically asked Foster and Capps if Bubby had had a fall or a bump to his head, which they both denied. Foster indicated to Dr. Laskey that he had

[2] I.C. § 35-42-1-5 (West, Westlaw through 2010 Public Laws approved and effective through 3/25/2010).

used only two fingers on Bubby's chest when performing CPR.

Bubby was intubated and never regained the ability to breathe independently, or indeed ever again exhibited any signs of life. He was kept on a ventilator until his condition deteriorated to a point that life support was withdrawn on May 23, 2008. He died within twenty minutes. Further facts will be provided where relevant.

On May 30, 2008, Foster was charged with murder, battery as a class A felony, and neglect of a dependent as a class A felony. Following a jury trial, Foster was convicted of reckless homicide as a class C felony (a lesser included offense of murder) and neglect of a dependant as a class A felony and was found not guilty of battery. He was received a thirty-year sentence for the neglect of a dependent conviction and a concurrent eight-year sentence for the reckless homicide conviction.

1.

Foster contends the trial court erred in admitting Dr. Laskey's expert testimony that Bubby suffered a grade-four splenic injury. To place this issue in its proper factual context, we examine the details of Bubby's injuries more closely.

When he arrived at the hospital for treatment, Bubby exhibited no external signs of trauma or injury. A computerized axial tomography (CAT) scan performed on Bubby's brain shortly after he arrived at the hospital, however, revealed that he had suffered an acute subdural hematoma, "acute" in this context meaning fresh or new. Dr. Laskey described Bubby's subdural hematoma as "a devastating brain injury", *Transcript* at 286, and testified that the hematoma was "most consistent with inflicted injury." *Id.* at 313. A CAT scan of Bubby's abdominal area shortly after he arrived at the hospital revealed that he also had

suffered a grade-four splenic injury, which Dr. Laskey described as a laceration to the spleen. Such lacerations are categorized in severity using grades one through four, with grade one being the least and grade four the most severe. In fact, Dr. Laskey described a grade-four splenic injury as "the worst possible splenic injury that you can have[.]" *Id.* at 277.

The State's theory of the case was that Foster had inflicted Bubby's injuries sometime between when Capps left for work and when Foster went to Patton's apartment for assistance. Foster's theory of the case was that Bubby aspirated vomit, which led to respiratory and cardiac arrest. Foster sought to convince the jury that Bubby's acute subdural hematoma and splenic laceration were caused by his (Foster's) alleged efforts to administer CPR to Bubby. Obviously, Laskey's testimony that Bubby's grade-four splenic laceration was likely caused by severe abuse undercut Foster's theory. At trial, Foster objected to Dr. Laskey's testimony regarding the splenic injury on grounds that she was impermissibly relying on the opinion of others, i.e., the radiologist who read Bubby's CAT scan and an unnamed surgeon who treated Bubby. Dr. Laskey did not read the CAT scan herself, or at least did not specifically remember doing so. Foster contends Dr. Laskey's testimony violated Rule 703 of the Indiana Rules of Evidence.

Our standard of review for the admissibility of evidence is well established. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id*. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. In reviewing

the admissibility of evidence, we consider only the evidence supporting the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.*

Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

Rule 703 generally permits an expert to rely upon facts not before the jury in rendering an opinion, so long as it is the type reasonably relied upon by experts in the field. In *Schmidt v. State*, 816 N.E.2d 925, 938 (Ind. Ct. App. 2004), *trans. denied*, we noted the following with respect to the types of information that may be used by an expert in rendering an opinion: "[E]arlier Indiana cases, and other courts governed by Rule 703, generally have found the following sorts of information to be reasonably relied upon by experts in various fields: hospital records, laboratory reports, X-rays, and doctors' medical records relied on by medical professionals[.]" (Quoting 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE § 703.107, 427-30) (footnotes omitted). More to the point, we have noted:

> "In the conduct of regular affairs … many persons who testify as expert witnesses customarily rely upon information received from others. For example, one seeking treatment from a physician would hardly demand that the physician exclude from consideration radiologists' reports concerning X-rays, records of past hospital admissions and treatment by other physicians, or nurses' reports concerning blood pressure and vital statistics. Instead, the physician is expected to assimilate and evaluate every available source of information in arriving at a diagnosis or prescription for treatment."

*Schmidt v. State*, 816 N.E.2d at 925 (quoting MILLER, *supra*, at § 703.107, 422-23)

(footnotes omitted). Thus, an expert may rely upon hearsay in forming his or her opinion and may testify thereto so long as "(1) the expert has sufficient expertise to evaluate the accuracy and reliability of the information, (2) the report is of the type normally found reliable, and (3) the information is the type customarily relied upon by the expert in the practice of his profession." *Id.* at 940.

Foster does not challenge elements (2) and (3) above, i.e., that the radiologist's report interpreting Bubby's CAT scan is of the type normally found reliable and that it is the type customarily relied upon by other physicians such as Dr. Laskey. Rather, relying upon *Schmidt* and *Faulkner v. Markkay of Indiana, Inc.*, 663 N.E.2d 798 (Ind. Ct. App. 1996), *trans. denied*, Foster contends that Dr. Laskey's testimony vis-à-vis the radiologist's assessment of Bubby's splenic injury and any testimony relying upon that assessment violated Evid. R. 703 because she did not possess the expertise to verify that it was accurate and reliable. As Foster explains it:

> Even though Laskey is a medical doctor, she stated she does not know how to grade splenic lacerations. She did not have the training, experience and expertise to do so. Since two other doctors, who did not testify at Foster's trial, graded the splenic laceration, they could not be cross-examined as to their opinion the splenic laceration was "Grade Four." This opinion was otherwise inadmissible hearsay. Laskey's reliance on the other doctors should not have been employed as a conduit for placing the doctors' inadmissible hearsay opinion that the splenic laceration was "Grade Four" before the jury.

*Appellant's Brief* at 13. Foster's interpretation of *Schmidt* and *Faulkner* is overly restrictive.

*Schmidt* held that neither a toxicologist nor an expert in field sobriety tests could testify regarding the findings of a medical doctor, while *Faulkner* held that chiropractors cannot testify regarding the medical reports of physicians. In both cases, the holding was

based upon the rationale that the expert in question did not have the same training, education, or expertise as the physician who prepared the report. We note that neither case involved a medical doctor relying upon the report of another medical doctor, as is the case here. In point of fact, Dr. Laskey *did* possess the same level of training and education in the same general field as the doctors upon whose reports she relied. It is true that she apparently did not specialize in interpreting CAT scans, but we can find no authority for the proposition that the testifying expert must possess precisely the same credentials, area of medical expertise, or knowledge as those providing the source material for the opinion. We refuse to create such a rule here.

Dr. Laskey was a medical doctor who, in rendering treatment to patients, customarily relied upon reports prepared by other medical doctors with respect to CAT scans. The reports upon which she relied in testifying in the instant case were of a type customarily relied upon by experts in the practice of Dr. Laskey's profession. In fact, Dr. Laskey indicated that she was not only familiar with the radiologist and surgeon who assessed the laceration as grade four, but also that they "work[ed] closely as a medical team." *Transcript* at 261. Although Dr. Laskey acknowledged that she could not then "detail the specifics" of the differences between the four grades of spleen lacerations, her testimony revealed that she was more than conversant in the nature of a grade-four laceration in general and also the way such an injury is manifest in a CAT scan. *Id.* at 260. We conclude that under these circumstances, any difference between the relevant radiologist's and Dr. Laskey's knowledge and expertise relative to grade four-splenetic lacerations went to the weight of Dr. Laskey's testimony, not its admissibility. The trial court did not err in admitting the evidence.

2.

The second evidentiary ruling challenged by Foster concerns the CPR method used by Foster, which carried implications with respect to whether his efforts could have caused Bubby's splenic laceration. The State's theory was that Foster's efforts could not have caused the damage noted by the treating physicians. To contradict the State's evidence, which we will detail below, Foster sought to introduce a videotape of an interview with Foster conducted by Officer Robert Mercuri of the Beech Grove Police Department. The offer occurred during Foster's cross-examination of Officer Mercuri at trial. In the videotaped interview with Officer Mercuri, Foster apparently described and/or demonstrated the CPR method he employed in attempting to resuscitate Bubby. Foster contends the trial court improperly excluded the videotaped interview.

Foster seems to suggest that the tape was admissible under Evid. R. 106, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

The rule embodies the "doctrine of completeness", *see DesJardins v. State*, 759 N.E.2d 1036, 1037 (Ind. 2001), whereby, in order to prevent one party from misleading the jury by presenting statements out of context, a party may place the remainder of the statement or document before the jury after the opposing party has introduced a portion of that statement or document into evidence. By its own clear terms, however, Evid. R. 106 applies only when "a writing or recorded statement" has been produced by a party. Foster concedes that such

did not occur here. That is, the State did not introduce into evidence any portion of the videotaped interview in question or a transcript thereof. We decline to extend Rule 106 to apply in these circumstances. *See Farmer v. State*, 908 N.E.2d 1192 (Ind. Ct. App. 2009).

Foster also contends the videotape was admissible under the common-law doctrine of completeness. We reiterate that the doctrine of completeness provides that a party may place the remainder of the statement or document before the jury after the opposing party has introduced a portion of that statement or document into evidence. Unlike Evid. R. 106, the common-law doctrine applies to oral as well as written and recorded statements. *See id.* We note that during a colloquy arguing the admissibility of the videotaped statement, Foster's attorney implicitly conceded that during the direct examination of Officer Mercuri, the only reference made to the videotaped interview in question was an oblique, passing reference to the fact that Officer Mercuri had interviewed Foster. Nothing of the substance of that interview was divulged; Officer Mercuri did not testify on direct examination about any statements made by Foster. In fact, it is apparent from Foster's arguments on this subject at trial and on appeal that the statement he wishes to "complete" is that of Dr. Laskey.[3] So far

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[3] *E.g.*,

> The State elicited a detailed recitation from Laskey, who took notes of and then did a written report of Foster's statements to her. Laskey even referred to these notes during Foster's trial. Therefore, the exculpatory videotape of the July 9 statement to Mercuri should, in fairness, have been considered by the jury.

*Appellant's Brief* at 15;

> Judge, we really believe that Dr. Laskey went into quite a bit of detail with Mr. Foster's statement. There was a difference in the testimony of Vickie Capps and Dr. Laskey. That is addressed on two separate occasions in this statement, the manner in which Mr. Foster administered CPR. So we think since they put in, in detail, Dr. Laskey's recitation, who took notes and then did a written report containing the written statements of William Foster, we think the videotape of the statement July 9 to Detective Mercuri should, in fairness, be considered in conjunction with the testimony of Dr. Laskey about her interview with William Foster.

as we can tell, Dr. Laskey interviewed Foster only one time with respect to the manner in which he administered CPR to Bubby. That interview occurred on July 6, 2007 in the emergency room of the hospital, shortly after Bubby was admitted for treatment. She questioned Foster closely with respect to the technique he used. Her trial testimony regarding his technique and the injuries it may or may not have caused was based entirely upon that July 6 interview. No mention was made of Officer Mercuri's interview of Foster several days later. Thus, Dr. Laskey's testimony concerning Foster's resuscitation efforts was entirely unrelated to Officer Mercuri's videotaped interview and the latter cannot be said to "complete" Dr. Laskey's testimony in any meaningful way. The trial court did not err in excluding the videotaped interview.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.

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*Transcript* at 450-51.