RENDERED: APRIL 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001082-MR

PATRICK O'CONNER — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 08-CR-00118 AND 08-CR-00118-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Patrick O'Conner appeals his conviction on three counts of first-degree criminal abuse of his children. The issues presented for review are whether the trial court erred by failing to grant O'Conner's motion for directed verdict and whether the trial court erred by failing to exclude evidence of other crimes, wrongs, or bad acts to prove O'Conner's character and wrongful

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

propensities. Having considered the record, briefs, and oral argument, we conclude that O'Conner was entitled to a directed verdict on the first-degree criminal abuse charges. Thus, we reverse and remand.

On the morning of August 24, 2007, Deputy Sheriff Larry Wesley of the Pulaski County Sheriff's Department responded to a 911 call placed by Michelle Wright, a social worker for the Cabinet for Health and Family Services, who arrived at the O'Conner residence to conduct a routine home visit. After knocking at the door with no response, Wright placed the call and reported that she had observed one of the O'Conner children through a bedroom window but that no one had responded to her knocking. After Deputy Wesley arrived, O'Conner opened the door and explained that he and his wife had been asleep.

Once inside the home, Wright and Wesley discovered O'Conner's two sons in a bedroom with its door jammed from the outside with a screwdriver. There was no ventilation or sanitation in the bedroom and flies were in the room. There were no sheets on the beds and the blankets were soiled with feces. The infant was speckled with feces and his diaper was wet. The three-year-old boy had voided his bowels under a dresser drawer. After observing the boys, Wright asked about the O'Conners' daughters. The O'Conners responded that the oldest child was at preschool and that the three-year-old was in her bedroom. The girls' bedroom door was firmly secured from the outside with a hasp. When the door was opened, Wright and Wesley found the child standing inside, wearing a urine-

soaked nightgown. There were no toys or bed linens and the windows were boarded. None of the children were physically injured.

O'Conner and his wife were placed in separate police cruisers while an investigation of the circumstances surrounding the incident was conducted. In response to questioning, O'Conner agreed to give a recorded statement in which he emphasized that his wife was asleep that morning and played no role in his decision to lock the children's doors. He explained that the three-year-old had gone near the stove earlier that same morning and he feared that if able to roam the home, the children could be endangered. He repeatedly indicated that this was the only time that he had locked the children in their bedrooms and that he did so because he had taken medication that morning and had intended to rest, but that he had accidentally fallen asleep.

At trial, the jury was instructed on three counts of first, second, and third-degree criminal abuse. The court also instructed the jury with respect to the definition of *abuse* and the three potentially applicable states of mind. After deliberating, the jury convicted O'Conner of three counts of criminal abuse in the first degree, a Class C felony. In due course, he was sentenced to fifteen-years' imprisonment. This appeal followed.

O'Conner contends that the trial court erred by refusing to grant his motion for a directed verdict. We conclude that there was insufficient evidence to support a conviction on the charge of first-degree criminal abuse but that a reasonable jury could have found him guilty of the lesser-included offenses.

We review the denial of O'Conner's motion for a directed verdict under the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). Under the *Benham* standard, O'Conner was entitled to a directed verdict only if it was clearly unreasonable for the jury to find him guilty. The evidence must be viewed in a light most favorable to the Commonwealth to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.

As a prelude to our discussion, it is necessary to point out that there are three degrees of criminal abuse, divided into an intentional act, a wanton act, and a reckless act. *Commonwealth v. Chandler*, 722 S.W.2d 899 (Ky. 1987); KRS 508.100; KRS 508.110; KRS 508.120. "Criminal abuse covers a broader range of prohibited conduct against persons under the age of 12 and those who are physically and mentally helpless." *Chandler*, 722 S.W.2d at 900. The initial question we address is whether O'Conner's conduct constituted criminal abuse; if so, the issue remains whether the Commonwealth met its burden in demonstrating that he possessed the mental state necessary to commit first-degree criminal abuse.

The elements of the offense of first-degree criminal abuse are codified at Kentucky Revised Statute(s) (KRS) 508.100 as follows:

> (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.

Abuse is defined, in relevant part, as the infliction of physical pain, injury, or mental injury, or the deprivation of services that are necessary to maintain the victim's health and welfare. KRS 508.090.

Based on the parties' representations and this Court's independent legal research, this case poses a novel situation where a parent has been prosecuted under our criminal abuse statutes on the theory that the children were confined in unsanitary and filthy rooms. Nevertheless, the pertinent statutes are unambiguous that criminal abuse does not require that the abuse result in physical injury. It is sufficient to constitute criminal abuse if the child is placed in a situation that may cause serious physical injury or that causes torture, cruel confinement or cruel punishment. KRS 508.100; KRS 508.110; KRS 508.120.

The Commonwealth proceeded under the "torture, cruel confinement, or cruel punishment" prong.[2] Nothing under this prong suggests that the Commonwealth was required to show that the children were in imminent danger, nor did it produce medical evidence reflecting the physical condition of the

[2] There was, in fact, evidence introduced to indicate that the children were placed at risk for serious physical injury as a result of their confinement. Here, we assume for the sake of argument that the proof applied only to the "cruel confinement" portion of the statute. It is reasonable and within the ordinary juror's knowledge that the nature of securing doors from the outside constitutes a hazard in the event of a fire, affording no possibility of escape. There was no evidence that the children's confinement was for the purpose of punishing or torturing them.

children in order to prove criminal abuse. While the Commonwealth had to prove beyond a reasonable doubt that O'Conner caused the torture, cruel confinement, or cruel punishment of the children, it was not required to prove that any physical harm resulted from the treatment or omission of care – or that the children were at risk for serious physical injury during their confinement.

In *Cutrer v. Commonwealth*, 697 S.W.2d 156 (Ky.App. 1985), this court concluded that the term *cruel,* as used in the criminal abuse statutes and according to its ordinary usage, is treatment that is devoid of human feeling. Under that definition, there was sufficient evidence in this case to indicate that O'Conner abused the children by withholding necessary services to insure their health and welfare and caused them to endure a period of cruel confinement under dehumanizing conditions.

When officials examined the children, they were hungry, dirty, and had been without access to a toilet for a substantial period of time. They appeared to be too frightened to come out of their rooms once they were unlocked, and the conditions inside were beyond deplorable. The circumstances could have reasonably been regarded by the jury as evidence of cruel confinement as affirmed in *Cutrer* sufficient to support a charge of criminal abuse.

The question remains whether there was sufficient evidence that O'Conner's conduct was intended to inflict abuse on his children as required for first-degree criminal abuse.

This is a problematic case because it appears that the conditions in the home were the result of extreme poverty and a lack of parenting skills, which we caution cannot serve as the basis for criminal charges against the parents. Courts in other jurisdictions that have dealt with comparable factual situations have expressed similar concerns over the imposition of criminal sanctions for parental conduct generally within the realm of civil actions, notably parental rights termination cases. Although under statutes worded differently, it has been emphasized that the element of intent cannot be based solely on unsanitary conditions and there must be an actual intent to cause the harm or potential harm alleged. *See State v. Chavez*, 146 N.M. 434, 211 P.3d 891 (2009); *Brewton v. State*, 266 Ga. 160, 465 S.E.2d 668 (1996). Quoting Justice Sears in her concurrence in *Woodbury v. State,* 264 Ga. 31, 440 S.E.2d 461 (1994), in *Brewton*, the Court concisely stated the complexity of the problem:

> [T]he crime of cruelty to children ... may not be based on a parent's or guardian's negligent mistake in judgment ..., but must be based on the malicious failure to provide ... care.... This distinction is important as far too many parents today are themselves either underage, undereducated, unhealthy, underfed, or unhoused, or a combination of the foregoing, and therefore are not cognizant of the standards that society expects them to uphold regarding the ... care of their children.

Id. at 669-670.

The Court concluded as follows: "Given the fact that there are conceivable justifications for the existence of unsanitary conditions and the fact that a parent may permit unsanitary conditions to exist without an awareness that

harm may result, it is clear that such conditions, alone, cannot serve to prove the element of malice in a prosecution for cruelty to children." *Id*. at 670.

We share the view that was expressed by the Georgia Supreme Court and stress that our first-degree criminal abuse statute requires that the accused intend to commit criminal abuse. In this case, although the conditions of the entire home were deplorable and the children locked in their rooms for a period of time without access to basic necessities, there was no evidence that O'Conner intended to abuse his children. Indeed, although certainly a misguided decision, he placed the children in their rooms to keep them from harm while he napped, not with the intent to abuse them. However, our conclusion does not exculpate O'Conner.

Under our criminal abuse statutes, intent is not a necessary element of second or third-degree criminal abuse, and their respective mental states, wanton and reckless, are subject to criminal punishment. Second-degree criminal abuse only differs from first-degree criminal abuse in that it requires that the accused acted wantonly. KRS 508.110. As used in the Kentucky Penal Code, KRS 501.020(3) wantonly is defined as follows:

> '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.

Under KRS 508.120, third-degree criminal abuse requires only that the accused acted recklessly which is defined as follows:

> "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.

KRS 501.020(4).

We do not need to again reiterate the conditions in which the children lived nor the potential hazards of even a brief confinement in rooms that were filthy, had no ventilation, and no bathroom facilities. Although O'Conner did not intend to abuse his children, there was sufficient evidence from which a reasonable jury could find that he disregarded the risk of abuse to the children or failed to recognize the hazards posed by his actions.

We have concluded that there was insufficient evidence to convict O'Conner of first-degree criminal abuse. However, second-degree criminal abuse and third-degree criminal abuse are lesser-included offenses and there was an instruction given on each offense. Because we have concluded that the evidence presented was sufficient to support a conviction on either lesser offense, O'Conner may be retried on those offenses. *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006).

Because we are remanding the case, mention is warranted regarding

the issues presented concerning admission of evidence of other crimes, wrongs, or bad acts to prove O'Conner's bad character and his propensity for having committed the acts with which he was charged. However, because it is unclear from his brief what O'Conner challenges as evidence of other bad acts, and because it is not likely that the same issues will arise at any further trial, we decline to consider whether there was reversible error as a result of the admission of the "other bad acts" evidence.

O'Conner mentions in passing that the Commonwealth violated the "fair warning" requirement of due process by using the provisions of KRS 508.100 to criminalize his actions with respect to the children. As we have noted, this Court has not previously addressed the application of our criminal abuse statutes to a fact situation such as that now presented. However, criminal abuse as defined in our statutes has withstood a constitutional challenge on vagueness grounds. *Carpenter v. Commonwealth,* 771 S.W.2d 822 (Ky. 1989). O'Conner had notice that confining his young children under the circumstances as they existed on the morning of August 24, 2007, might lead to his criminal prosecution. O'Conner's right to due process was not infringed.

We reverse the judgment of conviction of the Pulaski Circuit Court and remand for further proceedings consistent with this opinion.

HARRIS, SENIOR JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I vigorously dissent from the majority opinion in this case, a case which truly sets a dramatic and dangerous precedent for Kentucky courts in responding to the epidemic of child abuse in this state.

Directed verdicts are granted by trial courts only in the most extraordinary of circumstances. Even more rarely does an appellate court second guess and reverse the considerable discretion of a trial court when it had refused to grant a directed verdict. The egregious factual circumstances involved in this case strenuously militate against the decision of the majority to disregard the discretion of the court when it properly upheld the unanimous verdict.

A **jury** heard compelling evidence about the appalling neglect of four children. I need not be redundant in reiterating details about the squalid and dangerous living conditions in which these children were placed. They were confined in rooms with locks fastened from the outside so that no escape was possible in the event of a fire or other natural disaster. Hasps were secured with devices placed on the exterior of the doors; their bedroom windows were boarded up. And the parents **knew that a fire had occurred** in this trailer on at least one previous occasion.

The degree of filth in which these children lived was not a one-time occurrence. The record contains a litany of details as to the unsanitary conditions that were truly a pattern and way of life. O'Conner had been cited before (only three weeks earlier) and was ordered to ameliorate the situation. He utterly failed

to do so. A **jury** found these conditions horrendous enough to find him guilty of **three** counts of criminal abuse in the first degree.

KRS 508.100 (b) provides that a person is guilty of criminal abuse when he or she **places** a child under the age of twelve years (or any helpless person) "in a situation that may cause him serious physical injury …." At (c), the statute also provides that "cruel confinement" may serve as a separate basis for conviction. A jury found that both portions of the statute were met in this case. Additionally, that jury found that the statutory definition of abuse at KRS 508.090 was satisfied: namely, the deprivation of services necessary to maintain health and welfare.

The majority opinion has impermissibly stepped into the shoes of a jury and has substituted its judgment with respect to evidence that the jury alone was entitled to evaluate. The majority opinion cannot remotely meet the *Benham* standard that it has cited as a precedential basis for this reversal. In its own words at page 4, the majority opinion acknowledges that "O'Conner was entitled to a directed verdict only if it was **clearly unreasonable** for the jury to find him guilty." (Emphasis added.)

The jury verdict in this case was wholly reasonable -- both in light of the evidence presented and in compliance with more than one of the several elements of the statutes under which O'Conner was charged. Although one element would have sufficed for his conviction, he met at least three.

The majority opinion speculates on *mens rea* and concludes that O'Conner did not possess the "mental state necessary to commit first-degree criminal abuse." (M.O., p.5) I am persuaded that the majority has erroneously construed the criminal abuse statutes to mean that physical injury of a child or helpless person is a condition precedent to conviction. In fact and in law, it is not. The statute clearly and unambiguously provides for conviction under the very circumstances that exist in this case: where a custodian "places [that child] in a situation that **may cause** him serious physical injury…." KRS 508.100(b) (Emphasis added.)

In its analysis of *mens rea*, the majority relies on the Georgia case of *Brewton, supra*. It has cited language that is in no way at odds with Kentucky statutory law on defining abuse. *Brewton* held that malicious neglect could not be found in cases involving young, inexperienced parents or parents lacking in essential parenting skills due to unavoidable incapacities resulting from their being "underage, uneducated, unhealthy, underfed, or unhoused, or a combination of the foregoing," who were, therefore, "**not cognizant** of the standards that society expects them to uphold regarding the . . . care of their children." *Id.* at 670. (Emphasis added.) The *Brewton* court held that where a parent was unaware that harm could result, these factors **alone** could not serve as a predicate for finding malicious failure to provide adequate care.

I agree with *Brewton*. But *Brewton* simply is neither relevant nor applicable to the facts in the case before us. O'Conner did not meet any of the

criteria cited in *Brewton* as constituting excusable neglect rather than deliberate abuse. On the contrary, the O'Conners had been notified and advised by social services to rectify the dangerous and filthy conditions in which their children lived. They were, in the words of *Brewton*, fully cognizant rather than excusably ignorant of the hazards that they created and allowed to persist for their four children. When they were told to buy a fan to provide ventilation for the children, they bought the fan. But they placed it in their own room rather than making it accessible to the children – a small example of the long-term, continuing pattern of placing children in conditions "that my cause … serious physical injury …." KRS 508.100(b).

Rather than being analogous to *Brewton* and similar cases cited by the majority, this case is more comparable to the solidly established line of Kentucky cases upholding criminal convictions for injury and death flowing from violations of the DUI statutes. Undoubtedly, a person who drinks excessively at a bar or elsewhere does not get into a car with the actual intent to commit a homicide. Yet our courts have consistently imputed homicidal *mens rea* to the person who voluntarily engages in such behavior with tragic but unintended consequences. In *Walden v. Commonwealth*, 805 S.W.2d 102, 104, (Ky. 1991) (overruled on other grounds by *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996)), the Kentucky Supreme Court discussed the interplay among wantonness, intoxication, and *mens rea*:

> The appellant asserts he was entitled to a directed verdict of acquittal as to the wanton murder charge because the evidence was insufficient to prove the essential element of "extreme indifference to human life" as required by KRS 507.020(1)(b). In *Hamilton v. Commonwealth*, Ky., 560 S.W.2d 539, 541 (1978), this Court recognized driving under the influence as sufficient to prove the element of wanton conduct required in KRS 507.020(1)(b). As here, in *Hamilton*, the appellant contended that "mere speeding and intoxication are not sufficient to sustain a conviction for murder because the defendant [Hamilton] **did not have the culpable state of mind required**." We stated:
>
> "A majority of the members of this Court is of the opinion that the legislature enacted KRS 507.020(1)(b) to deter such conduct." *Id.* at 544.
>
> (Emphasis added.)

Kentucky need not look to other states for guidance in construing our child abuse statutes. They are clear and unambiguous on their face. Equally clear is the shocking reality that child abuse is singularly rampant in Kentucky and without parallel or counterpart in the sister jurisdictions relied on by the majority.

Recent news stories have reported that Kentucky now ranks **first in the nation** for instances of **fatal** child abuse – another deplorable entry into our list of questionable "firsts." More shocking is the fact that of the 41 children who died over the last 12 months from abuse, many died **after** the authorities had been alerted as to the deplorable situations in which they were living.

KRS 508.100(b) unambiguously provides for conviction of abuse short of physical injury or death. The jury was properly instructed on each and every element of each degree of the offenses chargeable under our abuse statutes.

It returned a verdict of first-degree criminal abuse, and we have no basis in statutory law, case law, or public policy to set aside that verdict.

Additionally, I would note the latitude for a trial court to probate a criminal sentence in a case. O'Conner could easily go home with his sentence probated contingent upon his compliance with proper safety conditions for his children. A previous warning did not suffice to cause him to comply whereas a probated sentence might serve as a viable deterrent for repeated neglect or abuse.

It may well be that the threat of a return to prison is the only deterrent against tragedy-laden recidivism in his case. But again, that discretionary call is within the legitimate purview of the trial court – not the Kentucky Court of Appeals.

Accordingly, I file this dissent.

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