

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001874-MR

JESSICA MARIE ALLEN

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT  
HONORABLE STOCKTON B. WOOD, JUDGE  
ACTION NO. 09-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART AND REVERSING IN PART

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BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jessica Marie Allen appeals from her conviction and sentence for criminal abuse in the first degree and complicity to manslaughter in the first degree. The victim in this case was Allen's daughter, two-and-one-half

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

month old Kaylee Buchanan, who died from lack of oxygen to her brain after an inflicted head injury. On appeal, Allen challenges the sufficiency of the evidence and the admission of several allegedly inflammatory photographs into evidence. Upon a thorough review of the record, we affirm the conviction for criminal abuse in the first degree and reverse the conviction for complicity to manslaughter.

### **History**

In April of 2007, Allen began living with Buchanan, the co-defendant in the underlying case. Buchanan had a two-year-old son, Braden, from a previous relationship who also lived in the home. In August of 2007, Allen discovered that she was pregnant with Buchanan's child. The baby, Kaylee Buchanan, was born in April of 2008. She was a normal, healthy child.

Allen was a certified nursing assistant ("CNA"). After the birth of Kaylee, Allen went back to work. That date was July 14, 2008. From Monday through Thursday of that week, Kaylee was in Mrs. Meade's care from approximately 2:30 in the afternoon when Allen went to work until approximately 5:30 in the evening when Buchanan picked her up. Meade testified that Kaylee was normal and healthy. She further testified that she noticed no strange marks or bruising on Kaylee while Kaylee was in her care.

On July 20, 2008, Allen and Buchanan took Braden and Kaylee down to the river at around 7:00 a.m. to a campsite where Buchanan's father and stepmother were staying. Allen left Kaylee in a camper with Buchanan's mother, Bonnie, who was still sleeping. She and Buchanan then took Braden fishing.

Several individuals who were present at the campsite that day later testified that Kaylee seemed happy and normal.

At around 2:00 or 3:00 that afternoon, everyone at the campsite packed up their things and left. Allen took Kaylee and Braden home while Buchanan drove a friend's truck home and then arrived back at the residence. Allen left Kaylee in her car seat while she made Braden a snack. She then took Kaylee from her car seat carrier and gave her a bottle. After feeding Kaylee and playing with her briefly, Kaylee appeared sleepy and Allen laid her down in the bassinette.

At that point, Buchanan came home and took Braden outside with him to help put a license plate on a vehicle and mow the lawn. During this time Allen made dinner for the family. The family sat down to eat dinner together, and after dinner, Bonnie came over to pick up some leftovers to take home. During the time Bonnie was at the house, Kaylee remained asleep.

After dinner, Buchanan showered and bathed Braden. Kaylee began to stir in her bassinette. Allen asked Buchanan to watch Kaylee while she showered and tanned in the tanning bed. Allen took a quick shower. While she was toweling off, she heard Kaylee giggle from the other room. Allen then set the timer for thirty minutes and got into the tanning bed.

While Allen was tanning, she heard Buchanan say something to Braden about going to bed. She then saw a shadow pass by the tanning room and heard footsteps on the stairs. She assumed Buchanan was putting Braden to bed.

After Buchanan went upstairs with Braden, she heard Kaylee cry. Allen testified that it was “not a normal cry.” However, Allen assumed Kaylee had lost her pacifier. Allen did not get out of the tanning bed to check. Kaylee stopped crying shortly thereafter.

After thirty minutes, just as Allen was about to get out of the tanning bed, she heard loud footsteps running towards the tanning room. Buchanan opened the tanning bed lid and had Kaylee in his arms. Kaylee appeared limp and unresponsive.

Allen told Buchanan to call 911 and then call his mother. Thereafter, Allen began performing the Heimlich Maneuver on the baby. When that was unsuccessful, she began to do rescue breaths and chest compressions. Kaylee was barely breathing and her body was pale and limp. Although Allen was a CNA, she testified that she forgot how to do rescue breaths and chest compressions. Bonnie arrived and took over giving rescue breaths. Thereafter, Donald Feeney, a volunteer firefighter, arrived. He was a friend of Buchanan’s. At this point, Kaylee was blue and had only a slight pulse. Feeney utilized chest compressions and rescue blows, after which point, Kaylee’s skin took on a pinker tone and she moved her legs.

When paramedic Tony Helphenstein arrived, he found Kaylee with only a slight pulse, and not breathing. He could not register an oxygen level. Helphenstein took Kaylee to the ambulance, hooked up the heart monitor, and

began CPR. Kaylee was transported to the hospital where her heart rate strengthened and her oxygen level came up to 99 percent.

Kaylee was seen by Dr. Gerring at the Fleming County Emergency Room. Gerring was told that the child had cried and suddenly stopped breathing after eating. Neither Allen nor Buchanan provided any other explanation for Kaylee's condition. Gerring noted that Kaylee was breathing spontaneously at that point, but that her pupils were unequal. He intubated her and transferred her to University of Kentucky Children's Hospital. Will Howard, a registered nurse, rode in the ambulance with Kaylee to the hospital. Kaylee was critical, but stable at that point. She was still unresponsive, however.

At the hospital, Kaylee was seen by Dr. Zagul in the pediatric intensive care unit. Zagul was concerned about neurological damage because Kaylee was not moving her upper limbs, her movements in her lower limbs were spinal reflexes, her pupils were unequal, and she was unable to control her own body temperature. Dr. Zagul noted that she had high blood pressure, which meant her brain was in need of oxygen.

Dr. Turner, who took over for Dr. Zagul, was equally disturbed by Kaylee's symptoms. In addition, he noted that her fontanelle was hard and bulging when it should be soft. Dr. Turner looked into Kaylee's eyes and saw blood. A CT scan was performed which revealed that Kaylee had swelling and blood around her brain, preventing it from getting oxygen. Dr. Turner's diagnosis was shaken

baby syndrome, traumatic brain injury, or inflicted head injury. There was also a suspected fracture in her leg<sup>2</sup> which was approximated at seven to ten days old.

On July 23, 2008, Kaylee was pronounced brain dead. Her organs were harvested and she was officially pronounced dead on July 24, 2008. An autopsy was performed revealing that she died of blunt force injury to the head. Dr. Rolf, the medical examiner, noted that the injury had to have been inflicted upon Kaylee because of the bruising, skull fractures and brain trauma present. Rolf also found a muscle injury on the lower right leg. A forensic neuropathologist, Dr. Balko, performed a brain exam. His exam also revealed a finding that the injury was inflicted.

Both Balko and Rolf testified that the injury to Kaylee's head would have occurred soon before her collapse and that she would have displayed symptoms soon after the impact.

Dr. Kriss testified at trial that the victim had an injury to her right leg which would have occurred eight to ten days prior to her x-rays in the emergency room. She concluded the injury was inflicted by Kaylee's leg being yanked so hard that the bone had been pulled off, creating a "bucket handle injury." She testified that there was no other way this injury could have occurred.

After the jury trial, Allen was convicted of criminal abuse in the third degree for the bucket handle injury and one count of complicity to first-degree manslaughter for failing to prevent Buchanan from inflicting the fatal injury to

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<sup>2</sup> The autopsy revealed that there was not a fracture, but a "bucket handle" type injury that would have been caused by someone yanking on the baby's leg.

Kaylee's head. She was sentenced to a term of ten years of imprisonment. She now appeals to this Court as a matter of right.

### **Analysis**

On appeal, Allen argues there was insufficient evidence to sustain a verdict of guilty on each charge. In addition, she argues that the trial court erred by allowing gruesome and duplicative photos to be showed to the jury.

#### ***Sufficiency of the Evidence for Criminal Abuse***

We first address Allen's argument that there was insufficient evidence to support a verdict of guilty for criminal abuse in the first degree. Upon a "motion for directed verdict, the trial court must draw all fair and reasonable inferences" in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In doing so, the court must assume the evidence for the Commonwealth is true and reserve all questions as to credibility and weight of the evidence to the jury. *Id.* On appellate review, the test is whether, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" *Id.* The prosecution must produce more than a "mere scintilla of evidence" to survive this standard. *Id.* at 188.

At trial, evidence was introduced that Kaylee suffered a "bucket handle" type injury to her leg which could have only been inflicted by intentional yanking or pulling. This injury was dated somewhere between seven and ten days prior to the fatal blow that killed her. Testimony at trial showed that Allen was the primary caregiver for Kaylee during this time period.

Further, Allen's account of the injury appeared inconsistent. A social worker with UK hospital testified that Allen told him Kaylee hurt her leg either when it got stuck in the car seat or when it struck a doorframe in the house. Expert testimony indicated that the leg injury could not have been caused in either of these ways. Allen told the social worker that Kaylee was a happy baby. However, when asked if Kaylee cried when her leg was injured, Allen's story to the social worker changed, and her account of Kaylee was not one of a happy, cheerful baby, as she had previously described, but of a baby who cried almost constantly.

Based upon this evidence, a jury could have reasonably concluded that Allen abused Kaylee by pulling or yanking on her leg, causing "serious physical injury" to her under KRS 508.100. The Commonwealth came forward with more than a scintilla of evidence to support this conviction. Hence, we affirm the conviction for criminal abuse in the first degree.

### ***Sufficiency of the Evidence for Complicity to Manslaughter***

We now address Allen's conviction for complicity to manslaughter in the first degree. The evidence clearly showed the injury to Kaylee was massive and non-accidental. It did not show that Allen was aware that Buchanan was abusing the child, or that Kaylee was in danger of abuse at Buchanan's hands.

To find Allen guilty of complicity to manslaughter in the first degree under KRS 502.020(2)(c), the jury would have had to believe that Allen knew, or should have known, that Buchanan was harming Kaylee and that death was a



possible result, but that she failed to get out of the tanning bed and intervene. As the Supreme Court has stated:

[A] defendant can be found guilty of complicity to an unintentional homicide under KRS 502.020(2) if there is evidence that he/she either actively participated in the actions of the principal, or failed in a legal duty to prevent those actions, *without the intent* that those actions would result in the victim's death, but with recklessness, *i.e.*, failure to perceive a substantial and unjustifiable risk that death would result, KRS 501.020(4), supporting a conviction of reckless homicide by complicity, KRS 507.050; wantonness, *i.e.*, an awareness of and conscious disregard of a substantial and unjustifiable risk of that result, KRS 501.020(3), supporting a conviction of manslaughter in the second degree by complicity, KRS 507.040; or aggravated wantonness, *i.e.*, wantonness creating a grave risk of death under circumstances manifesting an extreme indifference to human life, supporting a conviction of wanton murder by complicity, KRS 507.020(1)(b).

*Tharp v. Commonwealth*, 40 S.W.3d 356, 361 (Ky. 2000) (footnotes omitted).

Kentucky law imposes a duty on a parent to make proper efforts to protect his or her child from harm at the hands of another. *Lane v. Commonwealth*, 956 S.W.2d 874 (Ky. 1997), *cert. denied*, 522 U.S. 1123, 118 S.Ct. 1067, 140 L.Ed.2d 127 (1998).

Allen's testimony at trial was that she could hear everything that happened while in the tanning bed. She testified she heard Kaylee make a strange cry while she was in the tanning bed, although she did not get out of the tanning bed to check on her. This cry was reported to have lasted about twenty seconds. Allen testified that she didn't get out of the tanning bed because she was afraid the

tingly tanning bed lotion she used might burn the baby. In either event, Allen was clearly indisposed at the time, and Allen believed the baby to be under the care of Kaylee's father, Buchanan, the other responsible adult in the house. There was no evidence that Allen knew Buchanan had harmed Kaylee in the past, or that he was harming her while she was in the tanning bed. As there was no evidence that Allen was aware of any abuse at Buchanan's hands, there could be no evidence that she acted with a conscious disregard of a substantial and unjustifiable risk that death would result by leaving Kaylee in Buchanan's care.

As we vacate Allen's conviction for complicity to manslaughter based upon insufficiency of the evidence, Allen cannot be retried, and any issue regarding the admission of photographic evidence is now moot.

### **Conclusion**

In light of the foregoing, we affirm the judgment and conviction for criminal abuse in the first degree, but reverse the conviction for complicity to manslaughter on grounds of insufficiency of evidence.

ALL CONCUR.

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