

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONIA JOYCE MILLER,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249412
Calhoun Circuit Court
LC No. 02-003157-FC

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant Tonia Joyce Miller appeals as of right from her jury trial conviction of second-degree murder.¹ Defendant was sentenced to twenty to thirty years' imprisonment for her conviction. We affirm.

I. Facts and Procedural History

The circumstances surrounding defendant's conviction arose from the October 20, 2001, death of her eleven-week-old daughter, Alicia Duff. Defendant was the only adult home with her two young children on the morning of October 19, 2001, as her boyfriend, Alan Duff, was fishing and his parents, with whom they lived, were at work. Defendant testified that she placed Alicia in her swing and went to the bathroom. Upon her return, defendant claimed that she found her toddler pushing the swing quite hard. Defendant took Alicia from the swing and fed her. About an hour later, defendant attempted to feed Alicia again. However, Alicia lurched backwards in a startle reflex, stopped breathing and formula dripped from her nose. Defendant testified that she panicked and shook Alicia to straighten her back out, then placed her on the carpet to administer CPR and call for an ambulance. Defendant admitted that she knew it was wrong to shake an infant and denied dropping Alicia during this incident. The defense also presented evidence that Alicia had stopped breathing on several prior occasions and that her pediatrician denied defendant's requests to place Alicia on a heart monitor.

Alicia was taken by ambulance to Battle Creek Health Systems where she was unresponsive and placed on life support. Two hours later, Alicia was transferred to Bronson

¹ MCL 750.317.

Methodist Hospital and was admitted to the pediatric intensive care unit. Tests revealed symptoms of shaken baby syndrome, now known as abusive head trauma. Children's Protective Services (CPS) and the police were notified. The doctors, defendant and her family were interviewed by CPS investigators Robert Peck and Russell Bell. The investigators testified that defendant had a "flat affect" and provided guarded answers.² The events of that morning unfolded slowly as the CPS investigators consulted with the doctors regarding defendant's answers. Defendant admitted to investigators that she shook Alicia two to three times, but then changed her answer to four or five times. Alicia died the following day before the Family Independence Agency could conduct a hearing.

As will be discussed in more detail in the next section, the prosecution and defense expert medical witnesses presented conflicting testimony regarding the timing and exact mechanism of Alicia's injury. However, both experts agreed that Alicia's death was caused by a severe trauma to the brain and *both* experts used the phrase "child abuse." The prosecution also elicited testimony from defendant on cross-examination that she had been seeing a doctor for headaches since Alicia's birth, was under pressure because she and Mr. Duff were unemployed and that she was Alicia's only caregiver in the week preceding her death.

II. Great Weight of the Evidence

Defendant asserts that her conviction was against the great weight of the evidence as the evidence against her amounted to "a battle of experts." As defendant preserved this issue for appellate review by raising it in a motion for new trial,³ we review her claim to determine whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.⁴ However, conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial.⁵ "Unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination."⁶

The prosecution presented the testimony of Dr. Brian Hunter, a forensic pathologist for Sparrow Hospital, who conducted Alicia's official autopsy. Dr. Hunter found severe cerebral edema, retinal hemorrhaging, and fresh subdural bleeding around the brain that had seeped down the spinal cord. The cerebral edema placed so much pressure on the brain stem that grooving had occurred. Based on the type of cells found in the blood near the injury and the condition of Alicia's brain, Dr. Hunter believed that Alicia had died of abusive head trauma and that the injury would have occurred moments before she exhibited symptoms.

² Defendant admitted that she answered only those questions directly asked because she was afraid she would be arrested and would not be there for her older daughter.

³ *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

⁴ *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

⁵ *Id.* at 643.

⁶ *Id.* at 645-646 (internal citation omitted).

Dr. Hunter based his findings in part on the report of an independent neuropathologist who studied the brain, dura mater (the brain's protective covering) and spinal cord. The neuropathologist used specialized stains and inks to detect the presence of inflammation cells around the injury and the extent of damage to the nerve endings in the brain. Following an injury, the body begins a "process of organization" to clean out the hemorrhaged blood. The first inflammation cells to appear to begin the healing process are neutrophil leukocytes, followed by macrophages. The stain turns each type of cell a different color, making the type and quantity of cells near an injury discernable. Based on the stain test, the neuropathologist determined that Alicia's injury was fresh, as no inflammation cells appeared near the injury. The test also revealed that nerve endings in Alicia's brain had been sheared from the shaking that caused her trauma. However, he also found a secondary injury which he determined to be a week old, as a number of macrophages appeared elsewhere in the brain. Dr. Hunter concluded that this secondary injury was a benign trauma caused at birth and sent the report to a second neuropathologist who confirmed his theory.

The defense presented the testimony of Dr. Ljubisa Dragovic, Chief Pathologist and Medical Examiner for Oakland County. Based on the reports of Dr. Hunter and the first independent neuropathologist commissioned by Dr. Hunter, Dr. Dragovic found evidence that Alicia's injury was in the healing process and had occurred about a week prior to her death. From the same evidence viewed by the other doctors, Dr. Dragovic found a greater number of inflammation cells indicating that the fatal injury was older than believed. He also determined that Alicia's brain swelled slowly so that the subsequent hemorrhage was gradual.⁷ Dr. Dragovic based this conclusion on the stain test. He found that the blood around Alicia's brain and spinal cord was not fresh, due to the color it was turned by the stain. Dr. Dragovic agreed that the injury was caused by child abuse, but found that Alicia was likely tossed onto a soft surface as she exhibited no bruising to indicate that she was shaken hard enough to cause the injury.

The expert witnesses agreed that Alicia's death was the result of a trauma. Defendant's contention that the evidence represents "a battle of experts" is, therefore, irrelevant. Defendant admitted on the stand that she actually shook Alicia knowing that she should not and that she was Alicia's sole caregiver in the week prior to her injury. Furthermore, defendant never contended that Alicia's injury was caused by any accidental method other than the shaking immediately prior to her death. Accordingly, we reject defendant's contention that her conviction was against the great weight of the evidence. The evidence that Alicia died of a traumatic injury to her brain, combined with a lack of accidental explanation, was sufficient to support the jury's finding of guilt.

III. Admission of Expert Testimony

Defendant also challenges the admission of Dr. Hunter's testimony. Defendant contends that Dr. Hunter relied on the report of non-witness independent neuropathologists in violation of her right to confront the witnesses against her. Defendant also contends that Dr. Hunter

⁷ Dr. Dragovic testified that Alicia might have been more sleepy, lethargic or cranky in the week between her injury and her death. The defense, however, elicited no testimony on topic.

improperly relied on the neuropathologists' laboratory reports without laying the proper foundation for their admission. We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo.⁸

A. Right of Confrontation

Defendant first contends that she was denied her Sixth Amendment right to confront the witnesses against her at trial, as Dr. Hunter was permitted to base his findings, in part, on the reports of independent neuropathologists who did not testify at trial. As previously noted, Dr. Hunter removed Alicia's brain, dura mater and spinal cord and sent them to an independent neuropathologist for further review. When that neuropathologist found evidence of a prior injury that was in the healing process, Dr. Hunter sent the information to a second neuropathologist to confirm his theory that the earlier injury was a benign birth trauma.

It is well established in Michigan that an expert witness may base his or her expert opinion on hearsay or the opinions of other experts.⁹ However, pursuant to the recent United States Supreme Court decision in *Crawford v United States*,¹⁰ we must now closely scrutinize the admission of hearsay evidence in relation to a claimed violation of a defendant's right of confrontation.

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v*] *Roberts*,^[11] and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.^[12]

A report completed by one pathologist at the request of another pathologist for the investigative purpose of determining a victim's cause of death is clearly not testimonial. "Testimonial" evidence is defined as follows: "In the nature of testimony. Evidence is said to be testimonial when elicited from a witness in contrast to documentary evidence or real evidence."¹³ Although the *Crawford* Court intentionally "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'"¹⁴ it is clear that the description applied to evidence

⁸ *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

⁹ See *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992); *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 72; 577 NW2d 150 (1998); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995).

¹⁰ *Crawford v United States*, ___ US ___, 124 S Ct 1354; 158 L Ed 2d 177 (2004).

¹¹ *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

¹² *Crawford*, *supra* at 1374.

¹³ Black's Law Dictionary (6th ed).

¹⁴ *Crawford*, *supra* at 1374.

like affidavits, custodial examinations, prior ex-parte testimony of witnesses, depositions and confessions, *i.e.* statements of an official nature that resemble testimony.¹⁵ An autopsy report documenting the doctor's medical observations clearly does not meet this definition.

We also note that, if not bound by *Crawford*, we would find that defendant waived this claimed constitutional violation. Not only did defendant fail to object to the proffered testimony, but Dr. Dragovic actually relied on the first neuropathologist's report in forming his expert opinion. Accordingly, we would find that defendant waived the claimed error which was thereby extinguished.¹⁶ Pursuant to *Crawford*, however, a defendant's right to confrontation is preeminent and cannot be so easily waived.

As Dr. Hunter's testimony was based on nontestimonial evidence, we must determine if the evidence is admissible under the standard of *Ohio v Roberts*. As the evidence bears adequate indicia of reliability, we find that it is admissible. We first note that the neuropathologists' reports fell within a firmly rooted hearsay exception, and therefore, reliability may be inferred.¹⁷ Dr. Hunter testified that it was standard practice in conducting an autopsy of a victim who suffered a brain injury to send the brain, dura mater, and spinal cord to a neuropathologist for examination. The neuropathologists, therefore, in the regular practice of their occupation, conducted tests and prepared reports to determine the cause of death for incorporation into the autopsy reports of the requesting medical examiner.¹⁸ Such records are excluded from the hearsay exception.¹⁹ The neuropathologists' reports were otherwise reliable, pursuant to *Roberts*, as they were based on medical observations relating to real evidence to determine the cause and time of death. These reports did not, on their own, implicate defendant as the perpetrator. Furthermore, it would appear that the defense conceded the reliability of these reports as Dr. Dragovic similarly relied on the first neuropathologist's report in forming his expert opinion. As independent pathologists, neither doctor had a motive to falsify his findings to point to abuse. As the reports fell within a firmly rooted hearsay exception and bore adequate indicia of reliability, the trial court did not abuse its discretion in admitting Dr. Hunter's testimony.

Furthermore, *Crawford* recognizes a state's right to exempt nontestimonial hearsay "from Confrontation Clause scrutiny altogether."²⁰ MRE 803 provides a comprehensive list of those types of evidence *not* "excluded by the hearsay rule, even though the declarant is available as a witness."²¹ Accordingly, confrontation is not required with regard to such evidence. Dr.

¹⁵ *Id.* at 1365.

¹⁶ *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001), (After Rem) 468 Mich 135 (2003), quoting *People v Carter*, 462 Mich 206, 214-216, 219; 612 NW2d 144 (2000).

¹⁷ *Roberts*, *supra* at 66.

¹⁸ MRE 803(6).

¹⁹ *Id.*

²⁰ *Crawford*, *supra* at 1374.

²¹ MRE 803.

Hunter's testimony based on his own report is clearly admissible under MRE 803 as an autopsy report is a public record or report prepared as part of the statutorily defined duties of a medical examiner.²² As noted previously, the independent neuropathologists' reports also fall within a hearsay exception provided in MRE 803—records of regularly conducted activity.²³ As the Michigan Rules of Evidence have excepted these types of evidence from the hearsay exclusion, regardless of the availability of the declarant, the evidence is exempted from a Confrontation Clause challenge.

B. Foundation

Defendant also asserts that the trial court improperly admitted Dr. Hunter's testimony as he based his findings on the neuropathologists' reports without laying a proper foundation for their admission. However, as noted previously, defendant not only failed to object to this testimony, but the defense expert witness also relied on the report of the first neuropathologist in making his findings. Accordingly, defendant waived the right to appellate review and the error is deemed extinguished.²⁴

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

²² MRE 803(8). See also MCL 52.202(1)(a) (mandating a medical examiner to conduct an autopsy when the deceased's death was unexpected), MCL 52.207 (mandating a medical examiner to conduct an autopsy upon the order of a prosecuting attorney).

²³ MRE 803(6).

²⁴ See *Riley*, *supra* at 449.