

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ADAM DAVID MARKOS,

Defendant-Appellee.

UNPUBLISHED

April 22, 2008

No. 282211

Calhoun Circuit Court

LC No. 2007-003362-FC

Before: Markey, P.J., and Meter and Murray, JJ.

MURRAY, J. (*concurring*).

I concur with the lead opinion reversing the trial court's decision on this evidentiary issue. The fact that both the lead and dissenting opinions contain reasonable but opposing views on this issue adds to my view that the answer is not an easy one. However, my reading of *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004), which is virtually on all fours with this case, requires me to conclude that the esteemed trial court committed an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, I write separately to point out my concern that at least one of the stated purposes of introducing this evidence was improper.

In *People v Knox*, the prosecutor sought to introduce prior incidents of the child victim's fatal injuries in a prosecution against the father. The prosecution had no evidence that defendant committed the crime other than defendant was the only individual with the child at the time of the injury. *Knox, supra* at 513. The Supreme Court held that although evidence of the victim's prior injuries were relevant to prove that the later injuries were not accidental, the prosecutor could not utilize the evidence to prove defendant caused the injuries because of a lack of evidence:

Turning to evidence of Xavier's prior injuries, we agree with both the Court of Appeals' majority and the dissent that the signs of past physical abuse of the child were relevant to prove that his subsequent fatal injuries were not inflicted accidentally. We concur, however, with the dissent that *the trial court committed error, requiring reversal in permitting the prosecutor to use this evidence for an improper purpose. The prosecutor introduced the evidence of prior injury not only to show that the earlier events were abusive, but also to convince the jury that defendant had caused those prior injuries, despite the*

absence of any evidence that defendant had committed the past abuse. [Id; emphasis added.]

The prosecutor in this case appears to have intended the evidence for this same dual purpose, i.e., to prove the subsequent lethal injuries were not accidental, and that defendant caused the prior injuries. At the initial motion hearing on November 5, the prosecutor admitted during a colloquy with the trial court that his purpose in seeking to admit the testimony of the prior injuries was to show that defendant inflicted the injuries:

MR. KABOT: What it is [the prosecution's theory], Your Honor, is there were previous injuries that the child sustained. Obviously this is prior to death. On those occasions it is the prosecution's theory that Mr. Markos was the sole provider of care at that point in time and that the mother was not around. So, therefore, the injuries were sustained while under, you know, the father's care and our theory again is that he is the person that inflicted those injuries.

Additionally, the prosecutor noted that the only evidence that defendant committed the charged crime was his alleged exclusive care of the child at the time of the injury:

THE COURT: Well, excuse me if I may. Mr. Kabot, is your theory simply that the child was in the care of Mr. Markos? You don't have any evidence about what he may or may not have done during those times.

MR. KABOT: I think that's an accurate statement, Judge. It really is a matter of him being in the care when the child sustained injury. And Dr. Dejong is indicating as well as the neuropathologist that injuries of this nature were not injuries that would have been sustained accidentally.

* * *

THE COURT: You don't have any direct action by this defendant –

MR. KABOT: Correct.

THE COURT: - at the time of those injuries?

MR. KABOT: Correct.

THE COURT: - at the time of those injuries?

MR. KABOT: Correct, I do not.

THE COURT: Okay. All right. Thank you.

Hence, this case seems to be just like *Knox*, and thus the testimony is admissible to show that there was an absence of mistake or accident in relation to the fatal injuries, or for other proper

purposes.¹ However, *Knox* also concluded that the evidence of prior injuries was not admissible to show that defendant committed the prior acts because of the lack of other evidence. *Id.* at 513. The prosecutor may have abandoned this purpose between the initial motion hearing and the evidentiary hearing. Then again, he may not have. The record is unclear. I presume, however, that the trial court (and the parties) will adhere to the dictates of *Knox*.

/s/ Christopher M. Murray

¹ The trial court correctly ruled that the experts testimony would be admissible “as to defendant’s explanation as to how certain things happened in the past concerning alleged child abuse . . .”