First District Court of Appeal
State of Florida

No. 1D19-4392

Kelvin Antonio Mutch III,

Appellant,

v.

State of Florida,

Appellee.

On appeal from the Circuit Court for Madison County.
Melissa G. Olin, Judge.

December 16, 2020

B.L. Thomas, J.

Appellant was charged with aggravated manslaughter by culpable negligence of a child. The fatal injuries occurred when the nineteen-month-old child was in Appellant's exclusive custody for approximately forty minutes when Appellant took the child with him to run errands or visit friends. The child was not in a car seat. Appellant gave several exculpatory statements that he moved the child from the back seat to the front seat, that the child vomited, and that the child fell out of the car once or twice and hit his head. When Appellant returned the child to his mother, the child was "lifeless" and had no pulse. The mother was a certified nursing assistant who tried to resuscitate her son. The child died days later when life support was terminated.

The impacts to the child were so severe that the child bit his tongue and caused extensive internal hemorrhaging, an injury

which the medical examiner testified she had never before observed. The child died from "anoxic brain injury due to marked cerebral swelling, which is the brain swelling, and subarachnoid hemorrhaging resulting from blunt head trauma" according to the medical examiner. The trauma to the child's head was global and inconsistent with falling from a parked car as Appellant alleged. The jury found Appellant guilty as charged.

Appellant now argues the trial court committed reversible error by allowing the medical examiner to testify that the injuries resulted from "blows," because the State did not charge Appellant with intentionally causing the injuries. Appellant does not argue that the evidence was legally insufficient to uphold the conviction. Rather, Appellant argues that because the State did not charge him with second-degree murder or aggravated manslaughter by act, the evidence of "blows" was not relevant and could have confused or misled the jury.

A person commits manslaughter of a child by "caus[ing] the death of any person under the age of 18 by culpable negligence under s. 827.03(2)(b)." § 782.07(3), Fla. Stat. (2017). In *McCreary v. State*, the supreme court stated:

> We have repeatedly said that the culpable conduct necessary to sustain proof of manslaughter under section 782.07 must be of a *gross and flagrant character, evincing reckless disregard of human life*, or of the safety of persons exposed to its dangerous effects, or there is that *entire want of care* which would raise the presumption of a *conscious indifference to consequences*, or which shows *wantonness or recklessness*, or a *grossly careless disregard of the safety and welfare of the public*, or that *reckless indifference to the rights of others which is equivalent to an intentional violation of them*.

371 So. 2d 1024, 1026 (Fla. 1979) (internal citations omitted).

In this case, the jury was correctly instructed on the definition of culpable negligence:

> Culpable negligence is a course of conduct showing reckless disregard of human life or of the safety of persons

> exposed to its dangerous effects or such an entire want of care as to raise a presumption of conscious indifference to consequences or which shows wantonness and recklessness or a grossly careless disregard for the safety and welfare of the public or such an indifference to the rights of others as is equivalent to intentional violation of such rights. A negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily injury.

Fla. Std. Jury Instr. (Crim.) 7.7.

Thus, the State was required to prove that Appellant was guilty of culpable negligence resulting in the horrific injuries that caused the child's death. Here, the evidence was legally sufficient to prove a charge of second-degree murder even under the now-discredited "hypothesis of innocence" standard of review. *See State v. Law*, 559 So. 2d 187 (Fla. 1989) (holding medical evidence of severe injuries and testimony that Law was in a position to inflict injuries were sufficient to sustain murder conviction); *Bush v. State*, 295 So. 3d 179, 184 (Fla. 2020). But the State was not required to file the highest degree of criminal culpability to render the medical examiner's testimony relevant.

After the trial, the supreme court in *Bush*, 295 So. 3d at 184, abandoned the special standard of review requiring an evaluation of hypotheses of innocence in circumstantial criminal cases. The supreme court further held:

> To apply this standard to a criminal case, an appellate court must "view[ ] the evidence in the light most favorable to the State" and, maintaining this perspective, ask whether "a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Rogers v. State*, 285 So. 3d 872, 891 (Fla. 2019) (quoting *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001)); *see also Tibbs*, 397 So. 2d at 1123 ("[T]he concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences

> therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and the judgment."); *accord De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (defining "[s]ubstantial evidence" as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion" and instructing that evidence is "competent" if it is "sufficiently relevant and material"). This standard should now be used in all cases where the sufficiency of the evidence is analyzed.[7]

Id. at 200–01 (footnote omitted).

As both the State and Appellant argued in closing arguments, no one witnessed how the injuries to the child were caused, as often is the case with fatal injuries inflicted on children. *See, e.g.*, *Law*, 559 So. 2d 187; *Lukehart v. State*, 776 So. 2d 906 (Fla. 2000); *Green v. State*, 680 So. 2d 1067 (Fla. 3d DCA 1996). Thus, both parties could argue that the injuries to the child which occurred while Appellant had sole custody of the child were either accidental or the result of culpable negligence.

The trial court did not err by allowing the medical examiner's testimony that the fatal injuries were inconsistent with Appellant's exculpatory statements made before trial. The medical examiner's testimony was relevant to prove that the fatal injuries could not have been caused in an accident that did not involve criminal conduct, whether by intentional blows or some other type of force. *See* § 90.401, Fla. Stat. (2020) ("Relevant evidence is evidence tending to prove or disprove a material fact."); s*ee Dial v. State*, 922 So. 2d 1018 (Fla. 4th DCA 2006) (holding jury did not render inconsistent verdict in case where defendant intentionally kicked and beat the child's abdomen, resulting in fatal perionitis, when the jury acquitted defendant of felony murder and aggravated child abuse but convicted him of aggravated manslaughter of a child by culpable negligence). The medical examiner's testimony was relevant to prove whether the circumstantial evidence was sufficient to find the fatal injuries were proof beyond a reasonable doubt of Appellant's culpable

negligence.[*] The State's charging decision did not render the evidence at issue inadmissible. *See Calloway v. State*, 37 So. 3d 891, 894–95 (Fla. 1st DCA 2010) (holding the fact that some of the state's evidence could have proven an uncharged crime did not preclude the evidence from being offered to prove the charged crime) (citing *McLean v. State*, 934 So. 2d 1248 (Fla. 2006)).

AFFIRMED.

OSTERHAUS, J., concurs; BILBREY, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., concurring in result.

I agree we are correct to affirm and agree with the majority's holding that the medical examiner's testimony about "blows" suffered by the child victim was relevant to prove culpable negligence. As the majority discusses, to prove culpable negligence there must be proof of "consciously doing an act or following a course of conduct." Fla. Std. Jury Instr. (Crim.) 7.7(a); *see also Lanier v. State*, 264 So. 3d 402, 406 (Fla. 1st DCA 2019) (discussing evidence necessary to establish the crime of culpable negligence).

---

[*] Although it is true that culpable negligence does not require the State to prove intent, the converse is not logically correct: that the State *cannot* prove culpable negligence if the evidence can reasonably be interpreted to show intentional conduct. *Kent v. State*, 43 So. 773 (Fla. 1907) ("Culpable negligence *does not necessarily* result from an intentional act. If the killing was by 'culpable negligence,' then it was not *necessarily* 'intentional.'") (emphasis added). Criminal conduct may be both intentional and culpable negligence.

Respectfully however, I would not speculate on whether the State could have charged Appellant with second-degree murder and whether the evidence admitted at trial would have supported such a charge. *See Garrett v. State*, 87 So. 3d 799, 802 (Fla. 1st DCA 2012) ("The decision to charge and prosecute a defendant is an executive responsibility and the State Attorney has complete discretion in deciding whether and how to prosecute."). "The primary distinction between second-degree murder and manslaughter is the intent to kill." *Holmes v. State*, 278 So. 3d 301, 304 (Fla. 1st DCA 2019) (citing *Jacobson v. State*, 248 So. 3d 286, 288 (Fla. 1st DCA 2018)). Whether the State could have met its burden to prove intent to kill is not before us here.

M. Blair Payne, Public Defender, Lake City; David W. Collins of Collins Law Firm, Monticello, for Appellant.

Ashley Moody, Attorney General, and Daren L. Shippy, Assistant Attorney General, Tallahassee, for Appellee.