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Commonwealth Of Kentucky

Court Of Appeals

No. 96-CA-0478-MR

JOSEPH WAYNE BURDEN — APPELLANT

v. APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAN CORNETTE,JUDGE
ACTION NO. 95-CR-000008

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, GARDNER and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Joseph Wayne Burden (Burden) was convicted of reckless homicide, after a jury trial, and sentenced to one year imprisonment. Burden appeals from the judgment and final sentencing entered by the McLean Circuit Court on February 13, 1996, which denied him probation. We affirm.

On March 24, 1995, an arrest warrant was signed by the McLean District Judge for the arrest of Burden on the charge of murder (KRS 507.020) indicating that on March 19, 1995, in McLean

County, Kentucky, Burden had "unlawfully under circumstances manifesting extreme indifference to human life, wantonly engaged in conduct which created a grave risk of death to Colton Samuel Burden and did in fact cause the death of said infant, 12 days of age. Defendant's actions included the infliction of blunt trauma upon said child and the shaking of said infant, resulting in the child's death in violation of KRS 507.020." Subsequently, Burden was indicted on the murder charge. The indictment alleged that Burden had "murdered Colton Samuel Burden by striking him in the head with an unknown object or striking the head against an unknown object." After several continuances the case was tried before a jury on January 31, 1996. At the conclusion of the evidence the jury found Burden guilty of the lesser offense of reckless homicide and recommended incarceration in the state penitentiary for the minimum period of one year. Burden appeals said conviction and sentence as a matter of right.

The testimony presented at trial reveals that on March 19, 1995, Burden, his wife Karen, and their twelve day old son Colton, were at home together. At 6:00 a.m. Karen awoke to feed the baby who was alert at that time. Again, at 10:00 a.m. that morning Karen fed Colton who was "alert" and "normal" as she took care of him. Around 11:30 a.m. Karen left to go for a walk with a neighbor leaving Colton in the care of Burden. Karen was gone for approximately twenty minutes. During this period Burden had to change the baby's diaper. When Karen returned Burden was just finishing changing the diaper and Colton was still crying.

Burden said he had tried to give the infant a bottle, but that he had choked on it. Karen went directly into the kitchen to cleanup and the baby continued in the care of Burden in the living room. After several minutes passed Burden came into the kitchen and said to Karen that "he's turning blue." Karen panicked and started screaming. At this point Burden picked up the child and "shook" him. Karen tried to call the doctor but no one answered the telephone. Instead of calling 911 they then decided to take the baby to the hospital thinking they could get him there quicker than waiting on the ambulance.

On the way to the hospital Colton stopped breathing and his heart also stopped. The parents then stopped at a relative's house because they knew that Melissa and Jessica Huckleberry, who lived there, were nurse's aides and knew CPR. Melissa Huckleberry started CPR and 911 was called. After a few minutes, an EMT arrived and took over the administration of CPR. Within minutes the ambulance arrived and another EMT continued the CPR and attempted to ventilate Colton on the way to the hospital. Despite these medical efforts and other basic life support measures attempted at the hospital, the infant never regained any activity. All attempts to revive Colton were futile and he was declared dead after several minutes at the hospital.

Dr. Tracey Corey-Handy, the Commonwealth's forensic pathologist, performed the autopsy on Colton Burden in Louisville on March 20, 1995, the day after his death. The autopsy revealed the infant died as a result of blunt head trauma. The child had

subdural hematomas over the surfaces of his brain. This was evidenced by three (3) separate impact sites of the scalp which were indicative of an accelerative/decelerative motion occurring in Colton's head. Although Dr. Corey-Handy acknowledged that she could not say who inflicted these injuries, she added that they were not accidental injuries and that to inflict such injuries would require someone of adult strength or stature.

Dr. Jack Newton, Karen's obstetrician/gynecologist, who delivered Colton, testified that Colton's death could have been caused by several factors other than blunt head trauma. Dr. Newton explained that the thick mucus in the airway could have caused the death, or even improperly administered CPR. He also testified that the baby choking could cause the fragile blood vessels in the brain to rupture, or even the resuscitation efforts if the child had been "banged around" when placed on a hard surface could cause the bruising and aggravated the situation.

Several other witnesses testified at trial as to their observations as to how the CPR was administered and to their observations of Burden on the day in question. Based upon all the evidence the jury returned a verdict of guilty as to reckless homicide.

On appeal Burden raises three (3) issues of error which he believes requires reversal. We will address each issue separately as it was raised by appellant. First, Burden alleges the trial court erred in denying his motion for a directed

verdict based upon the insufficiency of the evidence. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). The reckless homicide statute, KRS 507.050 provides:

> (1) A person is guilty of reckless homicide when, with recklessness he causes the death of another person.

KRS 501.020 provides, in part, that the following definition applies in the Kentucky Penal Code:

> (4) "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.

Burden argues that the Commonwealth failed to produce evidence of substance and further failed to produce "no more than a mere scintilla of evidence." Benham, supra; See also, Edwards v. Commonwealth, Ky., 906 S.W.2d 343, 347 (1995). Burden claims the evidence of record reveals a prosecution theory of supposition and speculation insufficient to meet the Commonwealth's burden on a motion for directed verdict. We do not agree.

The Supreme Court set forth the standard for a directed verdict in Benham, at 187:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

In the case sub judice, the evidence clearly placed Burden as the individual with exclusive control of the child immediately prior to the onset of his medical crisis. Burden admitted that he had shaken the infant. Prior to his control over the child and his activity with the child, the baby was normal and alert. Dr. Corey-Handy, the Commonwealth's pathologist, stated the infant sustained subdural hematomas consistent with an adult "taking a baby and shaking the baby and slamming the baby down so that its head hit the mattress." Despite Burden's other explanations and theories as to how the death occurred, there was more than sufficient evidence to overcome Burden's motion for a directed verdict.

The next issue raised by Burden relates to Dr. Newton's opinion as to the cause of death of Colton. The Commonwealth objected to the following question asked of Dr. Newton:

> In reviewing the autopsy report, looking at the ambulance run sheet, the other medical records and photos, what is your opinion as to the cause of death of this baby?

The Commonwealth objected questioning whether or not Dr. Newton would be "qualified in the area of determining cause of death." After allowing further qualification of the witness, including voir dire cross-examination, the trial court sustained the objection. Thus, Dr. Newton was not permitted to testify as to his opinion of the cause of death of Colton. Burden did not request that Dr. Newton's excluded testimony be offered by avowal under RCr 9.52. It is well-settled that without an avowal to show what the witness would have said, an appellate court has no basis for determining whether an error in excluding the proffered testimony was prejudicial. Caudill v. Commonwealth,Ky., 833 S.W.2d 839 (1992). Despite appellant's failure to comply with RCr 9.52, we will nonetheless examine his argument. Burden contends that the trial court's ruling placed him at a great disadvantage because it required him "to extract Dr. Newton's opinions in hypothetical questions in stark contrast to the Commonwealth's pathologist's ability to render an expert medical opinion as to cause of death." We do not agree.

KRE 702 permits a witness qualified as an expert "by knowledge, skill, experience, training or education" to testify as to his opinion in his area of expertise. The decision as to whether a witness is a qualified expert and the limits of his expertise are matters which fall within the sound discretion of the trial court. Bush v. Commonwealth,Ky., 839 S.W.2d 550, 555 (1992). A review of Dr. Newton's testimony relative to his qualifications, certifications, training and expertise leads us

to the conclusion that the trial court did not abuse its discretion in this matter. We have no doubt that Dr. Newton is a very qualified and highly regarded physician in his field of expertise-gynecology and obstetrics. However, by his own testimony it is obvious that, although he is a medical doctor, he is not trained or qualified to determine the cause of death or its origin. We perceive no error in the trial court's ruling on this issue.

Also, as the Commonwealth points out, Dr. Newton did testify as to the other possible causes of Colton's death which contradicted the forensic pathologist's explanation. Specifically, Dr. Newton testified as follows:

> Q And as a hypothetical question, when a child, from your experience in dealing with thousands of these babies, when it has mucus thick in the airway, can CPR, especially if administered improperly, do more harm than good?
>
> A Yes, sir.
>
> Q And in fact, what is the first rule of being a physician?
>
> A Do no harm.
>
> Q Could the mucus think in the airway, as described in the ambulance sheet, cause the death of an infant?
>
> A Yes, sir. As a mechanism of obstruction of airway.
>
> * * *
>
> Q Now, you were describing how the capillaries wills start becoming or having acidic blood in them?

A Yes, sir. And this results in further decomposition, particularly the vessels of a newborn brain, and the intrauterine brain or fetus. The vessels of a newborn brain are not supported by connected tissues structures that older children and adults have. And, therefore, are more likely to be prone to rupture as a result of acidosis, lactic acidosis, a low blood PH. This is done, proven and shown by studies of Dr. Gluck, for example. Microscopic studies of brain tissues. I'm not talking about gross studies. I'm talking about microscopic studies, which would indicate hemorrhages around the ventricles of the brain, which are indicative of an anoxic event, initiating the cause of death.

Q Okay. Now when you say anoxic event, tell the jury what you mean by that?

A Lack of oxygen.

Q So, in laymen's terms, if a baby is choking, that's going to make the blood vessels in the brain more subseptible (sic) to hemorrhaging. Is that a correct statement?

A Yes, If a baby chokes long enough that the oxygen tension, oxygen levels drop, and the carbon dioxide levels build up, which makes them more acidosis, and the metabolism gets reversed from the normal production of glucose down to carbon dioxide, water and energy molecules, if that gets stopped at the level where it produces lactic acid and pyruvic acid, you have more acidosis. These vessels become very fragile. They rupture. Resuscitative attempts, such as I've read here, would result in increased intracranial pressure.

There will be increased intracranial flow of blood to anybody's brain in distress to preserve the brain.

Q Is this the body's natural reaction to preserve the most important organ of the brain, correct?

A Yes, sir. It is a natural reaction for the body to do that.

Q So, not only is the blood acidic, but there's more of it in the brain when a choking occurs?

A Yes, sir. And engorging, this is a stress reaction. Then Resuscitative efforts, particularly as I see here with the--it says intubation unsuccessful, bag--they bagged the baby, forcing, struggling, no oxygen going through and a lot of increased intrathoracic pressure with cardiac--cardiopulmonary resuscitation, these vessels rupture.

Q And hypothetically, if resuscitation efforts included moving the child around, putting it on a hard surface, banging on the child causing bruises, would that aggravate that situation?

A I think it would. Yes, sir.

Q And cause some rupturing?

A Yes, sir. I would.

* * *

Q All right. You know, I want to be very clear about this. When it's described as mucus thick in the airway in a child this age, is that a life threatening situation?

A Yes, sir.

Q Would untrained efforts of CPR aggravated that?

A Yes, sir.

Q Now, I'm going to show you photos of the autopsy that the jury has already seen. I want you to review those. Those are for the record Commonwealth Exhibit 9 and 10.

First of all, have you seen brain injuries of this type before?

A Yes, sir. In adults.

Q And have you also seen them in children in car accidents and things like that?

A I have not attended autopsies of many children in accidents.

Q All right. What would you expect the condition of the skull to be if there were intentionally inflicted blows to cause that type of hemorrhaging?

A I'd expect to see a cracked skull. X-rays showing fractures of the skull.

Q And although there were, from the pathologist's testimony, three separate blows or wounds, it revealed no, absolutely no fracture of the skull, did it?

A From what I understand, there were no skull fractures evidence.

Q Would the choking process have enabled this type of hemorrhaging to occurred (sic) without cracking the skull?

A Yes, sir.

Q So even though the child wasn't--well, in other words, this type of hemorrhaging could have occurred with much less force if the child was choking?

A Yes, sir.

Q Is that a fair statement?

A The vessels of the brain are of an extreme fragile state just being born. Get worse as the acidosis increases and the struggle to make the infant--the brain survive, increases the risk of this happening, and it wouldn't take much force to do the damage.

You have to treat these babies like orchids in winter, very carefully.

Q Especially under these choking type of situations?

A Yes, sir.

Q The good doctor from Louisville also shows us Commonwealth's Exhibit #7, showing how a baby if placed with some force on a hard surface that can cause brain injury. Is this the position you would put an infant in in attempting CPR?

A Yes, sir.

Q And would--if the child were placed on a hard surface, too hard, and a choking situation, how much force would have had to been used to cause these type of hemorrhages, with the choking situation you described?

A Children like this, you put your hand down and lay them down. I don't know exactly. It wouldn't take much. Pop - (demonstrating) - and you've done the damage.

* * *

Q Have you ever seen this type of injury without a cracked skull?

A. No, sir.

Q Would you expect this injury without a cracked skull even in a 12 day old?

A No, sir.

Q Would the process that you've described in choking have allowed for this type of injury without the force enough to crack the skull?

A I think it could. Yes, sir.

Q Okay. When a baby chokes does it matter how healthy it is?

A No, sir.

Q I mean you could have the healthiest baby in the world, and if it chokes, it's going to die?

A And lose it. Yes, sir.

Q He asked you about putting this child down on a cushioned surface. Let me ask you about

> if these CPR attempts were attempted out on a porch, or a metal chair?
>
> A That would be more of a blow to the already fragile circulation of the baby.
>
> Q To the already fragile?
>
> A Yes, sir.
>
> Q So, it would make these type of rupturings and hemorrhaging more likely?
>
> A I would think so. Yes, sir.
>
> Q Without the force necessary to cause a skull fracture?
>
> A Yes, sir.

Thus, Dr. Newton's testimony assisted in placing appellant's theory of the case before the jury even without giving a specific opinion as to cause of death. Any error, therefore, was harmless since Burden suffered no prejudice by the trial court's ruling. See e.g.: Commonwealth v. Donovan, Ky., 610 S.W.2d 601 (1980); Hill v. Commonwealth, Ky. App., 779 S.W.2d 230 (1989).

The final issue raised by appellant concerns the trial court's denial of a motion for a continuance. On January 16, 1996, Burden filed a motion to continue the jury trial scheduled for January 31, 1996. Defense counsel asserted that his expert witness, a forensic pathologist, was unavailable. After a hearing on the motion, the trial court denied the continuance noting that there was "no affidavit in the record and the court having no evidence before it... ." Without the continuance, appellant argues he was forced to try the case without his own forensic pathologist which resulted in undue prejudice.

At first blush this issue would appear problematic. However, a thorough review of the record tells another story. First, the appellant was indicted on May 15, 1995, and trial originally set for July 12, 1995. On that date both parties moved for a new trial date, which was granted. Trial was then set for October 10, 1995. On the day before the trial was to start, Burden requested a second continuance. This motion was granted and trial was then rescheduled for December 15, 1995. Before this trial date appellant sought yet another continuance. The trial court granted this request and rescheduled the trial for January 31, 1996. Burden's fourth motion for a continuance filed on January 16, 1996, included no affidavit as required by RCr 9.04. This rule requires an affidavit be attached to a continuance motion specifically setting forth what the witness will prove. In part, RCr 9.04 provides:

> A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidenced expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

In Pennington v. Commonwealth,Ky., 371 S.W.2d 478 (1963), the trial court denied the defendant's continuance motion because, like appellant, he also failed to include an affidavit with his continuance motion stating the materiality of the missing witness. On appeal, the Court upheld the trial court's ruling

since "[t]here is no basis on which the trial court could have judged, nor on which this court can say now, that the absence of the witness was prejudicial." Pennington, 371 S.W.2d at 479.

Appellant failed to comply with RCR 9.04 and provide the court with the basis for his request. In his previous motion for a continuance, Burden had complied and the requested continuance was granted. Additionally, appellant had the opportunity to take his alleged expert's testimony by deposition or seek another expert to assist him at trial.

The second important factor that the record reveals on the issue is that when the case was called for trial, appellant announced he was ready to proceed. By affirmatively stating that he was ready to proceed with the trial, Burden effectively waived any alleged error regarding his motion for a fourth continuance. Stepp v. Commonwealth, Ky., 608 S.W.2d 371 (1980). For the foregoing reasons, we cannot say that the trial court abused its discretion in denying Burden's motion for a continuance. Dishnan v. Commonwealth, Ky., 906 S.W.2d 335 (1995).

Having thoroughly reviewed the record, we find no error in the trial court's rulings in this case. Hence, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Vincent Aprile, II
Assistant Public Advocate
Frankfort, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Michael L. Harned
Assistant Attorney General

Frankfort, KY