

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000316-MR

TONYA BROCK

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 99-CR-00119

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: DYCHE, JOHNSON AND KNOPE, JUDGES.

JOHNSON, JUDGE: Tonya Brock has appealed from a judgment and sentence pursuant to a jury verdict entered by the Bell Circuit Court on February 8, 2001, that convicted her of criminal abuse in the second degree¹ of her 22-month-old daughter and sentenced her to prison for one year. Having concluded that the trial court erred by denying Tonya's motion for a directed verdict of acquittal on the charge that she permitted another person to abuse her daughter, we reverse and remand for a new trial.

¹Kentucky Revised Statutes (KRS) 508.110.

In January 1998 Tonya² and her previous boyfriend, Robert Mason, had separated after having lived together with their daughter, TRM.³ A few weeks later in February 1998, Arlin Covey Brock, who Tonya had just recently met at her neighbor's house and who she had started dating, moved into Tonya's mobile home in Pineville, Bell County, Kentucky.⁴

On February 20, 1998, TRM was very sick when she was returned to Tonya by her paternal grandmother and her paternal grandmother's boyfriend following an overnight visit. TRM was vomiting, acting tired, and was generally "fussy." Tonya took her daughter to the emergency room at Middlesboro Hospital for treatment. The emergency room staff prescribed TRM an antibiotic to be taken orally. Two days later, on February 22, Tonya again took TRM to the emergency room at Middlesboro Hospital after her condition remained essentially unchanged. TRM was released from the hospital on the same day.

Tonya testified that on February 23, 1998, she was "so stressed out" that she asked Covey to take TRM with him when he went to a store. The trip to the store took between 15 and 45 minutes, and Covey immediately returned when TRM began to

²Tonya was known as Tonya Atkins before she married Arlin Covey Brock on January 1, 1999.

³In the interest of protecting the privacy of the abused child, TRM will be referred to by her initials. TRM was born on April 3, 1996.

⁴The household consisted of Tonya, Covey, TRM and Braxton, who was Tonya's four-year-old son from a previous relationship. Tonya and Covey married on January 1, 1999.

experience seizures. Tonya and Covey immediately took TRM to the Pineville Community Hospital, which was only a few minutes away.

The staff at Pineville Community Hospital observed that TRM was pale, very moist, unresponsive, and experiencing difficulty breathing. Approximately two hours after TRM arrived at Pineville Community Hospital, she was transferred to Middlesboro Hospital.

Sandra Duncan, a registered nurse at Middlesboro Hospital who treated TRM, testified that she noticed bruises on the child's cheek. Duncan questioned Tonya about the bruises, and Tonya claimed that the bruises were the result of TRM falling off a couch and hitting a coffee table. The hospital staff at Middlesboro Hospital then contacted Edward Denny, who is a family services clinician employed by the Kentucky Cabinet for Families and Children. Denny's investigation revealed a bruise on TRM's forehead, bruises on each cheek, and bruises on her buttocks. Denny noted that the bruises on the child's cheek appeared to be the imprint of a thumb and forefinger.

On February 24, 1998, Denny obtained an emergency protective order for TRM from the Bell Circuit Court. Upon TRM's release from Middlesboro Hospital, she was placed by the Cabinet with a paternal aunt and uncle, Lynn and David Wilson.⁵ On February 26, 1998, Denny, along with his supervisor Karen Jones, again interviewed Tonya concerning TRM's bruises. Denny testified that during the interview, Tonya "was very upset,

⁵Lynn Wilson is Robert Mason's sister.

weeping and very emotional." Tonya informed Denny and Jones that she had grabbed and squeezed TRM's face while attempting to administer oral medication. Tonya claimed that the bruise to TRM's buttocks occurred when she fell while climbing on her brother's bicycle. TRM was returned to Tonya's custody on February 27, 1998.

On March 2, 1998, TRM was again rushed to the Pineville Community Hospital after suffering a second episode of seizures. TRM arrived "in a life-threatening condition" and was "gasping" for breath. She was intubated and given oxygen. After TRM was stabilized, she was transferred to the East Tennessee Children's Hospital in Knoxville, Tennessee, where she came under the care of Dr. Joseph Childs.

Dr. Childs testified that a series of tests revealed the presence of blood between TRM's brain and skull, at the base of her brain, and behind her retinas. These test results showed "hemorrhage around the brain, as well as hemorrhage in the eyes themselves." The inability of the child's family to provide an explanation for these medical findings led Dr. Childs to conclude that TRM was a victim of Shaken Baby Syndrome.⁶ Dr. Childs

⁶Dr. Childs described "Shaken Baby Syndrome" as

a condition in which a child is violently shaken, causing the brain inside the skull to bounce back-and-forth, tearing veins that connect the skull and the brain together causing bleeding, especially over the areas that are bouncing-the front and the back. As well, the eye, the eye socket itself and the eyeball in the eye socket is bouncing, and

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opined that the shaking incident had probably occurred "a few hours" prior to TRM having her first seizures on February 23, 1998. However, under cross-examination, Dr. Childs admitted that he could not say with certainty when the shaking incident had occurred and he conceded that in some cases a baby may have her first seizure some days, weeks or even months after she was shaken.

After TRM was released from East Tennessee Children's Hospital, she was placed by the Cabinet with the Wilsons, her paternal aunt and uncle. Since that time Tonya has been permitted to see TRM only during monthly supervised visits. TRM has remained in the Wilsons' custody and is by all accounts a relatively healthy child.

On September 9, 1999, Tonya was indicted by a Bell County grand jury for criminal abuse in the first degree.⁷ The indictment alleged that Tonya "intentionally abus[ed] [TRM] and/or . . . permitt[ed] Arlin Covey Brock to cause physical injury to the person of [TRM], age [sic] 1 year old, who [was] in her custody, by shaking her. . . ." By separate indictment, Covey was also indicted for criminal abuse in the first degree;

⁶(...continued)
that causes tearing of the internal membranes
of the eye and bleeding.

⁷KRS 508.100.

and in an order entered on January 14, 2000, the two cases were consolidated for purposes of trial. Tonya and Covey were jointly tried before a jury from January 9-11, 2001.

At the conclusion of the case for the Commonwealth, both defendants moved the trial court to grant a directed verdict of acquittal, and both motions were denied. The parties then presented their defenses, which included testimony from each defendant. At the conclusion of all the evidence, both defendants again moved the trial court to grant a directed verdict of acquittal. This time the trial court granted Covey's motion but once again denied Tonya's motion. The trial judge stated:

The motion for a directed verdict, as to the Defendant, Tonya Brock, is overruled. The motion for a directed verdict, as to the Defendant, Covey Brock, is sustained. We will proceed, be back in one hour. Mr. Brock, the Court--has directed a verdict--is directing a verdict of acquittal. This Court has heard the evidence in this case. And does not believe that the evidence in this case is such that the jury should be permitted to speculate, or surmise, about your guilt. There is simply not enough evidence here. Particularly, there is no evidence, in other words, yes, there is evidence of opportunity, but the time frame in this case, is such that and also given the fact that we have the most--a victim, a victim that will garner the most sympathy from the jury, which is only natural. I simply don't think--I think the jury has to go in there, at this point in time, and make a guess, as to whether or not Mr. Brock did this. I do not think the Commonwealth has presented sufficient evidence against this Defendant, to submit this case to a jury, given the fact that the indictment against this Defendant is that he did, in fact, cause this act. The Court's ruling is different in

the case of Mrs. Brock, because of the fact that she is, also an element of her indictment is that she had custody at the time of the abuse of this child. That is it, until the jury gets back.

The jury was instructed that it must find Tonya guilty of criminal abuse in the second degree if it believed from the evidence beyond a reasonable doubt "[t]hat in Bell County, from on or about the 21st day of February, 1998, through on or about the 26th day of February, 1998 and before the finding of the Indictment herein, she wantonly abused [TRM] OR she had actual custody of [TRM] and wantonly permitted her to be abused by another person. . ." [emphasis added].⁸ Thus, the jury instructions given by the trial court substantially deviated from Tonya's indictment by substituting the words "another person" for "Arlin Covey Brock." Apparently, after the trial court granted Covey a directed verdict of acquittal, the trial court realized that Tonya could not be convicted under KRS 508.110 for any abuse allegedly caused by Covey. Accordingly, no direct reference to Covey was included in Tonya's jury instructions.

Tonya was convicted of criminal abuse in the second degree and the jury recommended the minimum sentence of one year. Tonya was sentenced to prison for one year on February 8, 2001, and this appeal followed.⁹

The appellate brief filed on behalf of Tonya is

⁸The jury was also instructed on criminal abuse in the first degree and criminal abuse in the third degree.

⁹Tonya was granted release on an appeal bond.

confusing. The only legal argument raised in the brief was summarized in the following heading:

The trial court erred to the appellant's substantial prejudice and denied the appellant her constitutional rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution when the trial court gave a jury instruction not supported by the facts adduced at trial.

However, after a short discussion concerning the insufficiency of the evidence and the denial of Tonya's motion for a directed verdict of acquittal, the brief goes off on a tangent about Tonya being required "to defend against a charge different from the charge in her indictment." The argument section of the appellant's brief concludes by returning to the claim that "the evidence did not support the Commonwealth's contention that an unknown, other person committed the abuse."

In the Commonwealth's brief, it understandably chases the wild goose that the appellant let loose. In fact, both parties expended a large part of their briefs discussing the questions of preservation of error and palpable error in relation to the jury instructions.¹⁰ However, when the issue on appeal is

¹⁰The Commonwealth states in its brief:

Brock contends her motion for directed verdict preserved this issue for appellate review. However, the issue raised in her appeal is whether there was palpable error in the trial court using an instruction which did not mirror the indictment. This issue was not objected to at trial. A motion for

(continued...)

viewed as whether the Commonwealth presented sufficient evidence to prove that Tonya "wantonly permitted" TRM to be abused by Covey, it becomes obvious that Tonya properly preserved this issue for appellate review by timely moving the trial court to grant a directed verdict of acquittal.¹¹

It is conceded by the Commonwealth that Covey was the only person the jury instructions could have been referring to when reference was made to "another person."¹² Thus, since the trial court ruled that there was insufficient evidence of record to support a finding by the jury that Covey abused TRM, the trial court erred when it denied Tonya's motion for a directed verdict

¹⁰ (...continued)
directed verdict does not serve to preserve this type of claim. Thus, the issue is not preserved.

¹¹Long v. Commonwealth, Ky., 559 S.W.2d 482, 485 (1977).

¹²The Commonwealth states in its brief:

Brock has attempted to couch this argument as an amendment of the indictment. However, this is simply not the case. The jury instructions tendered merely changed the specific description that it was Arlin Covey Brock who was permitted to abuse TRM to a more general description of "another person." This is analogous to an indictment reading that "John Doe murdered Victim by shooting him with a .357 handgun" and the jury instructions reading "John Doe murdered Victim by shooting him with a handgun." There is no error here. The only evidence presented to the jury was that either Brock personally abused TRM or she permitted Covey to abuse TRM while she was in Covey's custody.

of acquittal on the charge that she wantonly permitted TRM to be abused by Covey.

The test for whether a trial court erred by denying a motion for a directed verdict of acquittal was reiterated in Commonwealth v. Benham.¹³

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.

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 the defendant is entitled to a directed verdict of acquittal [citation omitted].

Since the trial court concluded that the evidence of record was insufficient to induce a reasonable juror to believe beyond a reasonable doubt that Covey had abused TRM, Tonya was entitled to a direct verdict of acquittal on this theory of the Commonwealth's case against her.

The jury instruction for criminal abuse in the second degree contained the conjunction "or" and allowed for a finding

¹³Ky., 816 S.W.2d 186, 187 (1991).

of Tonya's guilt under two separate theories. Since there was sufficient evidence to support a finding that Tonya was guilty of wantonly abusing TRM herself, but not sufficient evidence to support a finding that Tonya was guilty of wantonly permitting another person to abuse TRM, it is not possible to conclude that the jury was unanimous in its verdict finding Tonya guilty.¹⁴ The Commonwealth argues in its brief that "[t]he jury could reasonably infer from these facts that TRM was violently shaken by either Brock or Covey, because they were the only individuals to have custody of TRM immediately prior to both seizures on February 23, 1998, and March 2, 1998." Thus, the Commonwealth contends that the unanimous verdict requirement of Davis was satisfied because "the evidence was sufficient to support a conviction of abuse caused by Brock and a conviction based on her permitting another to cause injury to TRM." This argument ignores the trial court's finding that the evidence was insufficient to prove that Covey had abused TRM and the testimony from the Commonwealth's own expert.

Dr. Childs testified that based on the tests conducted "[i]t is difficult to be very precise" "in trying to age the blood that is there." Dr. Childs conceded that in a Shaken Baby Syndrome case a baby can be shaken, lose consciousness, become

¹⁴Davis v. Commonwealth, Ky., 967 S.W.2d 574, 582 (1998) ("Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another. If the evidence would support conviction under both theories, the requirement of unanimity is satisfied" [citations omitted]).

awake again and not have a seizure until days, weeks or even months later. Dr. Childs also stated that the blood on a shaken child's brain "can take weeks to months for it to finally be reabsorbed." Thus, the Commonwealth is incorrect when it attempts to limit the time period that this abuse to TRM could have occurred to "immediately prior to both seizures on February 23, 1998, and March 2, 1998." The same evidence that the trial court concluded would only leave the jury "to speculate, or surmise" about Covey's guilt was also insufficient to support a finding of Tonya's guilt for "wantonly permitt[ing] [TRM] to be abused by another person."

In Roberts v. Commonwealth,¹⁵ the former Court of Appeals observed that if the evidence will sustain a finding of guilt on one of the Commonwealth's two theories of the case but not the other, so much of the indictment as charges a commission of the crime in the other manner is surplusage, and an instruction embracing both theories "may be prejudicial if it invites the possibility of conviction on a theory not sustained by the evidence."¹⁶

In its conclusion to its brief, the Commonwealth cites Commonwealth v. Sego,¹⁷ for the proposition that "even if a co-conspirator or co-defendant is acquitted of or not charged with the offense, the co-defendant could still be convicted." The

¹⁵Ky., 339 S.W.2d 640, 642 (1960).

¹⁶Id. at 642.

¹⁷Ky., 872 S.W.2d 441, 443 (1994).

Commonwealth's reliance on Sego is misplaced. Sego concerned the application of KRS 506.070(3) which provides that "[a] defendant cannot be convicted of conspiracy if all of his co-conspirators have been acquitted or discharged under circumstances amounting to an acquittal." The case sub judice does not involve a conspiracy; and if it did, since Covey was acquitted, Sego would support Tonya, not the Commonwealth. Additionally, KRS 502.030 is of no benefit to the Commonwealth's position since it applies only to prosecutions under KRS 502.010¹⁸ and KRS 502.020¹⁹ which were not applicable to the case sub judice.

For the foregoing reasons, the trial court erred when it denied Tonya's motion for a directed verdict of acquittal on the theory that she wantonly permitted TRM to be abused by another person; however, since there was sufficient evidence to support a finding of guilt that Tonya herself wantonly abused TRM, Tonya was not entitled to a directed verdict on that theory of the Commonwealth's case. Accordingly, we reverse the judgment of conviction of the Bell Circuit Court and remand this case for a new trial only on the charge that Tonya committed criminal abuse in the second degree by wantonly abusing TRM.

KNOPF, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

¹⁸"[A]n offense committed by an innocent or irresponsible person[.]"

¹⁹"[P]romoting or facilitating the commission of the offense[.]"

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