

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000491-MR

CARLENE NORTHCUTT

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 00-CR-00317-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Carlene Northcutt (hereinafter "Carlene") appeals as a matter of right from the Kenton Circuit Court's Final Judgment entered February 6, 2002, convicting her of Criminal Abuse in the Second Degree, a Class D felony,¹ relative to abuse to her natural daughter, KR, and sentencing her to a five-year term of imprisonment. She raises two issues on appeal: whether the doctrine of collateral estoppel applies to

¹ KRS 508.110.

prevent the Commonwealth from introducing evidence of abuse and whether the evidence presented was sufficient to defeat her motion for a directed verdict and to support a conviction. Having considered the parties' briefs, the record, and the applicable case law, we affirm.

We shall first summarize the facts underlying the matter before us based upon both the circuit court record and the supplemental record consisting of the record of the Kenton District Court juvenile actions. On October 16, 1998, Carlene, then nineteen years of age, gave birth to a healthy baby girl, KR. KR's father was Carlene's then-boyfriend, twenty-five year-old Jeff Russell (hereinafter "Russell"). After leaving the hospital, Carlene and KR stayed with Carlene's mother, Paula Northcutt (hereinafter "Paula"), for a few days before moving in with Russell. A few days before Thanksgiving, bruises appeared on KR's face. When confronted about the bruises, Russell admitted to Carlene that he had accidentally dropped a baby bottle on her face after being startled. Carlene told him that he was too clumsy with KR and prohibited him from feeding her. Carlene reluctantly attended her family's Thanksgiving dinner, worried about their reaction to the bruising on KR's face. Upon questioning about the bruising, Carlene repeated Russell's explanation regarding the baby bottle incident. However, friends and family members privately doubted that the multiple

bruises, which appeared to be in the shape of three fingers on one side and a thumb on the other, were caused by a falling baby bottle.

On November 28, 1998, Carlene took six-week-old KR to St. Elizabeth Medical Center South when she could not get her to stop crying. At that time, the hospital performed several diagnostic tests on KR, including a CT scan of her head and a pediatric bone survey. The tests results were normal, and the physician's final diagnosis was a corneal abrasion, constipation, and a contusion on the right jaw. Hospital personnel provided Carlene with an ointment to treat KR's scratched cornea. Prior to KR's release, hospital personnel questioned both Carlene and Russell about how the bruising came about. Hospital records from that day note a suspicion of abuse, and that the Cabinet for Human Resources (hereinafter "CHR") was to be notified.

A few weeks later, on December 11, 1998, Carlene and Russell attended a party at a friend's house, and took eight-week-old KR along with them. They arrived at the party at 9:00 p.m. KR apparently slept for the length of the party. Carlene consumed a few alcoholic beverages, as did Russell, who also smoked marijuana. At 3:00 a.m., Carlene, Russell and KR received a ride home from Ty Meadows. KR awoke crying at 5:45 a.m., and Carlene got up to feed her. Carlene played with her

for a few hours and changed her diaper before going back to bed at 9:00 a.m. Shortly thereafter, KR began crying, and Carlene asked Russell to take care of her while she slept. Carlene awoke in the afternoon and went grocery shopping, where she bought items for KR, including jars of baby food.² She then proceeded to her mother's house, and got a ride back to her home at approximately 5:00 p.m. from her friend, Annette Rene Long (hereafter "Rene").

Upon their arrival at Carlene and Russell's residence, Carlene and Rene encountered Russell in the living room having just changed KR's diaper. KR appeared to be very stiff with her arms straight out in front of her, and her eyes were rolling back into her head. Upon questioning, Russell declared that there was nothing wrong with KR. However, he attempted to revive her by first placing her feet in cold water, and then her bare bottom. The only response he elicited from KR was a moan. Carlene went to a neighbor's house to call 911, and the ambulance took KR and Carlene to St. Elizabeth Medical Center North. Russell, Paula and Rene arrived at the hospital shortly after KR and Carlene. KR underwent various diagnostic testing, including a CT of the head and chest x-rays, and was diagnosed with seizures and a subdural hematoma. The medical records also included a social service note from Carol Hutt, in which she

² During its closing argument, the Commonwealth noted that at two-months old, KR was too young to be consuming baby food from a jar.

indicated that both parents denied any trauma to KR's head. However, Russell subsequently reported that he had bumped KR's shoulder on a narrow doorway that morning. The note then contained the following passage:

GM[, Paula,] stated to pt's mother that "something happens to that baby every time you leave." GM stated infant was taken to St E. South 2 wks ago for gas & had bruising of 3 fingers on her face - The pt's mother became very tearful crying "I love him, he would never hurt my baby," when GM confronted mother on suspicious marks on infant.

The social worker contacted CHR and spoke to protective services counsel worker Fonda Reis (hereinafter "Reis") regarding the suspected abuse of KR.

KR was quickly transferred to Children's Hospital in Cincinnati, Ohio. At Children's Hospital, KR received treatment from various physicians, including Dr. Charles Shubert, and was diagnosed with two broken ribs, a broken clavicle, a subdural hematoma on the left side of her brain, and fifteen retinal hemorrhages in her left eye. The rib fractures had occurred at least several days prior to December 12th, because the diagnostic tests revealed that they were healing. Dr. Shubert believed that the subdural hematoma and retinal hemorrhaging were caused by Shaken Baby Syndrome. KR stayed in intensive care for two weeks, where she was placed in a medically induced coma due to

her seizures, and she was eventually released on December 30, 1998, to foster parents.³

Detective Steve Wills responded to the report of a possible abused child on December 12, 1998, and Detective Ray Haley was assigned the case for investigative purposes the following Monday. Reis had also become involved in the case on December 12, 1998, when she received a report of a possible shaken baby and possible fatality. Reis, on behalf of the Commonwealth, filed an abuse petition in Kenton County on December 30, 1998, based upon her belief that KR was an abused child. The district court placed KR in the temporary custody of the Cabinet for Families and Children. A hearing was held, and on March 13, 2000, the district court entered its Findings of Fact and Conclusions of law, which were later amended on July 3, 2000.⁴ The district court found that KR's injuries were not accidental, that she had been in the sole custody of Russell prior to the two occasions she was taken to the hospital, that Carlene had not been present during the two incidents, and that she had not allowed any physical injury to be inflicted upon KR. However, the district concluded that KR was an abused child in that Russell inflicted physical injury on her and that neither

³ KR has undergone surgery to correct, to some extent, her permanently limited vision, but the full extent of the injury to her brain resulting from her abuse is not yet known.

⁴ The Commonwealth was also seeking protection in the district court abuse action for DR, the second child of Carlene and Russell, born on December 15, 1999.

she nor DR would be able to live safely at home because the parents continued to live together and continued to deny that Russell had committed any abuse. On May 8, 2000, the district court entered an order committing KR to the Cabinet for Families and Children. KR's guardian *ad litem* appealed from the district court's order of commitment, and Carlene cross-appealed from the same order. However, on August 10, 2001, the circuit court dismissed the appeal and cross-appeal because both parents had agreed to terminate their parental rights to KR and DR in a separate action.

On June 16, 2000, the Kenton County Grand Jury indicted Carlene, along with Russell, of Criminal Abuse in the First Degree⁵ for either abusing KR or permitting the abuse of KR from November 28, 1998, to December 12, 1998. Following some early court appearances, Russell disappeared from the area and an arrest warrant was issued. On November 15, 2001, Carlene moved the circuit court to prohibit the introduction of evidence that she had abused KR, or permitted her to be abused, on collateral estoppel grounds based upon the district court's prior finding. The circuit court denied this motion, relying upon the Supreme Court's decision in Gregory v. Commonwealth, Ky., 610 S.W.2d 598 (1980).

⁵ KRS 508.100.

The matter proceeded to trial on December 13 and 14, 2001. The Commonwealth introduced testimony from Detective Steve Wills, Detective Ray Haley, social worker Fonda Reis, treating physician Dr. Charles Shubert, ophthalmologist Dr. Constance West, Rene Long, Paula Northcutt, and Carlene's aunt, Betty Northcutt. Carlene moved for a directed verdict at the close of the Commonwealth's case, arguing that the Commonwealth had not presented any evidence that it was her conscious objective to cause the result of the abuse or to permit Russell to commit any abuse. The trial court denied the motion, agreeing with the Commonwealth that there was sufficient evidence that a jury could believe that Carlene either committed the offense herself intentionally or intended Russell to do so. Carlene then presented a defense, relying primarily upon her own testimony, during which she vehemently stated that she did not abuse KR, that she was not aware of any abuse by Russell, and that no one told her of any suspicions of abuse. Carlene renewed her motion for a directed verdict at the close of her case on the same basis. The trial court denied her renewed motion, noting that the circumstances indicated that only Carlene and Russell had the opportunity to commit the abuse, and that a jury could find each or both responsible. Following deliberations, the jury returned a guilty verdict on the instruction for the lesser included charge of Criminal Abuse in

the Second Degree. On February 5, 2002, the trial court entered its final judgment imposing the jury's recommended sentence of five years.⁶ This appeal followed.

On appeal, Carlene presents two arguments. She first argues that the trial court was bound by the district court's earlier finding that she neither abused KR nor allowed Russell to abuse her. She next argues that the Commonwealth failed to prove beyond a reasonable doubt that she wantonly abused KR or wantonly permitted the abuse to occur. On the other hand, the Commonwealth argues that the trial court properly denied Carlene's motion to prohibit the introduction of evidence relating to abuse and that the evidence was sufficient to support the conviction for Criminal Abuse in the Second Degree.

Carlene's first argument addresses the collateral estoppel issue. Prior to the trial of this matter, Carlene filed a motion to prohibit the Commonwealth from relying upon evidence that she abused KR, citing the district court's earlier finding that she did not abuse KR or allow anyone to abuse KR. She argued that the doctrine of collateral estoppel should bar the re-litigation of the same issue in the circuit court because

⁶ Russell was arrested in Florida in early 2002, and was returned to Kentucky where he was reindicted on charges of Assault, First Degree; Criminal Abuse, First Degree; and Bail Jumping, First Degree. He entered a guilty plea on all counts, and on August 1, 2002, received a 10-year sentence on the assault conviction, a 5-year concurrent sentence on the criminal abuse conviction, and a 1-year consecutive sentence on the bail jumping conviction, for a total of eleven years.

it was an essential issue in the district court, citing Gregory v. Commonwealth, Ky., 610 S.W.2d 598 (1980). The Commonwealth also relied upon the Supreme Court's opinion in Gregory, and asserted that it should be not collaterally estopped from pursuing criminal charges against Carlene because the criminality of her actions was not before the district court. After reviewing the Gregory opinion, the trial court denied Carlene's motion, noting that the issue must be fully and fairly litigated for the party against whom the doctrine would apply. Because this issue constitutes a question of law, we shall review the trial court's decision *de novo*.

The issue as to whether the doctrine of collateral estoppel acts to bar the relitigation of a factual finding in a dependency proceeding in a subsequent criminal trial has not been the subject of extensive appellate review in the Commonwealth. One case that squarely addresses this issue is Gregory v. Commonwealth, *supra*. In Gregory, the defendant was convicted of first-degree sodomy by the Greenup Circuit Court following a district court dependency hearing in which it was found that he had not subjected his children to deviate sexual intercourse. He argued that the doctrine of collateral estoppel should bar the Commonwealth from trying him on criminal charges. In discussing collateral estoppel, the Supreme Court stated:

Collateral estoppel, or issue preclusion, is part of the concept of res judicata and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding. . . . Generally, a judgment of a civil court is not binding on a court trying a criminal case, and a civil judgment is not admissible in a subsequent criminal prosecution where the judgment is offered to prove facts adjudicated in the civil proceedings, although exactly the same questions are in dispute in both cases. 46 Am.Jur.2d, Judgments sec. 620. However, the doctrine of issue preclusion has been found not to be inapplicable when invoked in a criminal case where the prior proceeding was civil in character. Yates v. U.S., 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). Nevertheless, "the doctrine makes conclusive in subsequent proceedings only determinations of fact . . . that were essential to the decision." Id. at 336. Likewise, this Court has held that

[]a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment.[]

Sedley v. City of West Buechel, [Ky., 461 S.W.2d 556, 558 (1970).]

Gregory, supra, at 600. The Supreme Court went on to hold that "the criminality of Gregory's actions was not before the court which was charged generally with the well-being of the children. The court's findings vis a vis Gregory were not essential to its decision which, based on other considerations, resulted in the

children's commitment to the Department for Human Resources."

Id.

Other jurisdictions have reviewed the same issue and reached similar results. In People v. Moreno, 319 Ill.App.3d 445, 744 N.E.2d 906 (2001), an Illinois appellate court held that collateral estoppel did not bar a criminal prosecution against the defendant for aggravated battery of a child even though every factual issue to be tried was resolved in her favor in a prior wardship proceeding in juvenile court. The Moreno court relied upon public policy considerations espoused in two appellate court decisions in Washington and California. In People v. Percifull, 9 Cal.App.4th 1451, 12 Cal.Rptr.2d 331 (1992), the California appellate court noted "the importance of preserving the criminal trial process as the exclusive forum for determining guilt or innocence, and the ability of a trial, as opposed to a dependency proceeding, to vindicate society's insistence that every citizen obey the penal laws." Moreno, supra, at 451. The Washington appellate court in State v. Cleveland, 58 Wa.App. 634, 794 P.2d 546 (1990), also looked to the sense of urgency in dependency proceedings that affects the extent to which the state prepares as opposed to the typical extensive preparation for a criminal felony trial.

Furthermore, the Commonwealth in its brief has cited to the Supreme Court of Michigan's opinion in People v. Gates,

434 Mich. 146, 452 N.W.2d 627 (1990), which held that collateral estoppel did not apply to bar a subsequent criminal prosecution where the factual allegations were essentially the same as those in a child-protective probate proceeding. The Michigan court explained that "[c]ollateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." Id. at 630. To be "necessarily determined," an issue must be "essential" to the judgment. Id. at 631.

In the present appeal, Carlene argues that the district court's determination that she did not abuse KR or allow her to be abused was essential to the prior judgment, and therefore evidence of abuse could not be used against her in a subsequent criminal proceeding regarding the same facts and circumstances. We disagree. The district court juvenile actions were brought to determine the best interests of both KR and DR, which included a determination as to whether KR was an abused child within the meaning of KRS 600.020(1)(a). Because the district court determined that KR was indeed an abused child, the identity of the abuser became the next question. However, the conclusions that Russell was the abuser and that Carlene was not the abuser and did not allow any abuse to occur

did not go to the criminality of their actions. Instead, the conclusions went to the district court's determination as to the best interests of the children and how they could be raised in a protected, safe environment. We also note that the Unified Juvenile Code contains a provision addressing criminal charges arising from the same circumstances as the abuse. KRS 600.120 provides that "[i]n cases where criminal charges arising out of the same transaction or occurrence are filed against an adult alleged to be the perpetrator of child abuse or neglect, such charges shall be tried separately from the adjudicatory hearing held pursuant to this chapter."

Therefore, we hold that the trial court did not commit any error in denying Carlene's pre-trial motion to prohibit the introduction of evidence relating to abuse at her criminal trial.

Carlene next argues that the Commonwealth did not present sufficient evidence to support a conviction for Criminal Abuse in the Second Degree, and that the trial court erred in failing to direct a verdict in her favor. On the other hand, the Commonwealth argues that this issue is unpreserved because Carlene only moved for a directed verdict on the charge of Criminal Abuse in the First Degree and only argued that she did not intentionally abuse KR or intentionally allow Russell to abuse her. Although we disagree with the Commonwealth's

argument regarding preservation, we nevertheless hold that the trial court properly denied Carlene's motion and renewed motion for directed verdict and that there was sufficient evidence to support the jury's verdict.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), the Supreme Court enunciated the directed verdict rule as follows:

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. [Commonwealth v. Sawhill], Ky., 660 S.W.2d 3 (1983)].

In the present matter, Carlene was indicted and tried on a charge of Criminal Abuse in the First Degree pursuant to KRS 508.100, which criminalizes the intentional abuse or permission to allow someone else to abuse another person that, among other options, causes serious physical injury. In a light most favorable to the Commonwealth, we believe that the evidence

could have induced a reasonable juror to find Carlene guilty of Criminal Abuse in the First Degree. The evidence was clear that Carlene's family members and friends, as well as hospital personnel, strongly suspected that KR was being abused. These witnesses did not see KR every day, but were still able to recognize signs of abuse in the odd bruising on her face and the redness in her eye, and doubted the veracity of the explanations provided by Carlene and Russell because of the nature of the injuries. Carlene, as KR's mother, should also have been able to recognize the signs of continued abuse her friends and family so readily noticed. Hospital records reveal that even Carlene's mother feared for KR's safety when left alone with Russell because "something happens to that baby every time [Carlene] leave[s]." Carlene's failure to acknowledge that KR was being abused could have allowed the jury to determine either that she intentionally performed the abuse herself or that she intentionally permitted someone else to do so. Therefore, we hold that the trial court properly denied Carlene's motion and renewed motion for a directed verdict and allowed the matter to go to the jury.

Furthermore, we disagree with Carlene's contention that there was insufficient evidence to support a conviction for Criminal Abuse in the Second Degree, on which instruction the jury eventually convicted her. KRS 508.110(1) provides that "A

person is guilty of criminal abuse in the second degree when he wantonly abuses another person or permits another person of whom he has actual custody to be abused and thereby: (a) Causes serious physical injury." The instructions provided to the jury in this case defined "wantonly" as follows:

A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards 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 the disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in a situation.

The Commonwealth presented sufficient evidence through both lay and medical testimony to establish that Carlene acted wantonly by continuing to consciously disregard the substantial and unjustifiable risk that the abuse to KR would continue and that KR would be seriously injured.

For the foregoing reasons, the Final Judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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