

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000159-MR

DANIELLE MARIE LUCAS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 07-CR-00467

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, KELLER AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Danielle Marie Lucas, was convicted in the Hardin Circuit Court of reckless homicide and first-degree criminal abuse. She was sentenced to a total of fifteen years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant's convictions stem from the August 2007 death of her six-year-old son, M.L. M.L. lived with Appellant and her boyfriend, codefendant Antwan Hayes. In May 2007, Hayes was investigated by child protective services after a teacher at M.L.'s school reported that M.L.'s face was bruised, and that he had told his teacher that Hayes hit him in the face and kicked him in the stomach.

On Friday, August 24, 2007, M.L. began vomiting at school. Apparently, however, M.L. pleaded with his teacher not to send him home because Appellant and Hayes were there. Nevertheless, Appellant picked him up from school and was aware in the two days that followed that M.L. was vomiting black matter. Subsequently, on Tuesday August 28, 2007, Appellant left for work around 4:00 pm, returning sometime around 11:30 pm. At some point shortly thereafter, Appellant found M.L. unresponsive on the bathroom floor. Appellant placed him in a cold shower and observed that his abdomen was swollen and his breathing was labored. Appellant claimed that she asked him if he wanted to go to the hospital and he said no. Appellant then sent M.L. back to bed and left to go to her sister's house. When she returned an hour later, M.L. was unresponsive and not breathing. M.L. later died at Kosair Children's Hospital. Evidence at trial established that M.L. died from septic shock, the onset being twelve hours prior to his death; duodenal perforation and abdominal trauma, the onset being two to four days prior to his death; cardiac arrest; and cerebral trauma.

In October 2007, Appellant and Hayes were indicted by a Hardin County Grand Jury for murder and first-degree criminal abuse. Following a trial in

August 2008, Appellant was convicted of reckless homicide and first-degree criminal abuse. Hayes was convicted of second-degree manslaughter and first-degree criminal abuse and sentenced to twenty years' imprisonment. His convictions and sentence were subsequently affirmed on appeal. *Hayes v. Commonwealth*, 320 S.W.3d 93 (Ky. 2010). Appellant now appeals her convictions and sentence to this Court as a matter of right.

Appellant first argues that the trial court erred in denying her motion for a directed verdict on all degrees of homicide. She argues that the Commonwealth failed to present any evidence that she knew M.L. was in a state of extremis and dying when she left the house on the night in question. Appellant claims that she only believed M.L. had a stomach ache and was suffering from an asthma attack. Appellant believes that Hayes's admission that he beat M.L. after she left the house proves that he inflicted the fatal blows. In addition, Appellant contends that the Commonwealth failed to establish causation, in that it did not prove that her leaving the house for one hour was the cause of M.L.'s death or that, had she stayed, he would have survived.

The standard for determining whether a directed verdict should be granted is well-settled:

On motion for a 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). “This standard applies whether the evidence is direct or circumstantial.” *Brewer v.*

Commonwealth, 206 S.W.3d 313, 318 (Ky. 2006). “The rule is that if from the totality of the evidence the [court] can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go to the jury even though it is circumstantial.” *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983). *See also Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky.1977). “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.” *Benham*, 816 S.W.2d at 187 (citation omitted).

Kentucky Revised Statutes (KRS) 507.050(1) states that “[a] person is guilty of reckless homicide when, with recklessness, he causes the death of another person.” The jury instruction under which Appellant was convicted required the jurors to believe beyond a reasonable doubt that she “engage[ed] in conduct which created a grave risk of death to [M.L.], by failing to seek medical attention for said child who was in a state of extremis and dying, removing herself from the premises with the only household vehicle and phone[,]” and that in so doing she acted recklessly as that term was defined in Instruction 2. “Recklessly” was defined as follows:

A person acts recklessly with respect to a result or to a circumstance 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.

The Commonwealth presented evidence at trial that a couple of days prior to M.L.'s death, Appellant had been called to pick him up at school, and that she was aware he was throwing up black matter, which medical testimony established was blood, and complaining that his stomach hurt. On the day of M.L.'s death, Appellant left for work at 4:00 pm and returned home sometime between 11:30 pm and midnight. Although Appellant's version of events changed several times, at some point shortly after she returned home, she found M.L. lying on the bathroom floor unresponsive. She thereafter undressed him and put him in a cold shower. Appellant admitted that M.L.'s abdomen looked very swollen and his breathing was labored. Nevertheless, Appellant put M.L. back into bed and left to go to her sister's house, taking the only household vehicle and phone. Upon returning an hour later, M.L., having gone into cardiac arrest, was unresponsive and not breathing. M.L. was subsequently transported to Kosair Children's hospital where he died.

Under the evidence as a whole, it was not clearly unreasonable for the jury to find that Appellant committed the offense of reckless homicide. The expert testimony and physical evidence formed a sufficient basis upon which the jury could reasonably conclude that M.L. was in a state of extremis and dying at the

time Appellant left him to go to her sister's house and that her failure to seek medical attention despite his obvious condition equated to reckless homicide as set forth in KRS 507.050(1).

Appellant maintains that Hayes's admission to beating M.L. after she left the house proves that he delivered the fatal blows. However, Appellant fails to acknowledge that the Commonwealth's evidence established that M.L. suffered the fatal injuries hours and even days prior to his death. When the trial court drew all fair and reasonable inferences from the evidence in favor of the Commonwealth, it properly denied her motion for a directed verdict. As such, we find no error.

Next, Appellant alleges that "palpable, cumulative error occurred due to prosecutorial exploitation of inadmissible, highly prejudicial evidence." Specifically, Appellant claims that the Commonwealth engaged in a pattern of misconduct by: (1) improperly recounting during closing argument that Appellant lived in subsidized housing; (2) eliciting the testimony of Appellant's school registrar regarding Appellant's poor grades to impeach the testimony of Appellant's sister; (3) cross-examining Appellant regarding the "educational neglect" proceedings that resulted from M.L.'s truancy; (4) eliciting testimony from a paramedic that Appellant did not ask to ride in the ambulance with M.L.; (5) eliciting testimony from M.L.'s teacher that he did not want to go home after becoming ill at school; (6) presenting Dr. Stewart's testimony regarding battered child syndrome; (7) cross-examining Appellant's father about M.L.'s estate; and (8) badgering Appellant's father during cross-examination. Appellant concedes

that with the exception of the registrar's testimony and her father's testimony about M.L.'s estate, none of these issues were properly preserved for appeal.

Accordingly, she requests palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26.

Prosecutorial misconduct is “[a] prosecutor's improper or illegal act ... involving an attempt to ... persuade the jury to wrongly convict a defendant or assess an unjustified punishment.” *Black's Law Dictionary* (9th ed. 2009). Prosecutorial misconduct may result from a variety of acts, including improper questioning and improper closing argument. *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). “Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial.” *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008).

Significantly, however, as our Supreme Court has previously acknowledged, “[t]here has developed a recent tendency in criminal appeals to characterize unpreserved issues as ‘prosecutorial misconduct’ for the purpose of raising them on appeal.” *Davis v. Commonwealth*, 967 S.W.2d 574, 579 (Ky. 1998). *See also Noakes v. Commonwealth*, 354 S.W.3d 116 (Ky. 2011). Clearly, “unpreserved claims of error cannot be resuscitated by labeling them cumulatively as ‘prosecutorial misconduct.’” *Young v. Commonwealth*, 50 S.W.3d 148, 172 (Ky. 2001).

In the instant case, all of Appellant's allegations of prosecutorial misconduct are nothing more than alleged evidentiary errors. We have reviewed all of the allegations, preserved and unpreserved, and find that no error occurred, especially none that rises to the level of palpable error affecting Appellant's substantial rights or resulting in manifest injustice. RCr 10.26.

For the reasons set forth herein, the judgment and sentence of the Hardin Circuit Court are affirmed.

ALL CONCUR.

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