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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001445-MR

SAMANTHA MONAHAN ACOSTA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 05-CR-01349

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: On October 18, 2005, a Fayette County grand jury returned an indictment charging Samantha Monahan<sup>1</sup> with one count of first-degree criminal abuse. In the same indictment, the grand jury charged Roy D. Rankin with one count each of murder and first-degree criminal abuse. The charges arose from the

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<sup>1</sup> Since trial, Monahan is now known as Samantha Monahan Acosta.

death of Monahan's six-month-old daughter, Cecilia Alvarado, on August 22, 2005.

The matter proceeded to a joint trial of both Monahan and Rankin in late April and early May of 2009. Monahan moved for a directed verdict at the close of the Commonwealth's case and again at the close of proof. The trial court denied the motion both times. The trial court instructed the jury on two separate theories of first-degree criminal abuse: that Monahan intentionally abused Cecilia and that Monahan intentionally permitted Rankin to abuse Cecilia. The court also instructed the jury on similar theories of second-degree and third-degree criminal abuse. The jury found Monahan guilty of first-degree criminal abuse under the instruction that she had abused Cecilia. The jury fixed Monahan's sentence at ten years' imprisonment, which the trial court imposed. Monahan now appeals.<sup>2</sup>

Monahan first argues that she was entitled to a directed verdict on the charge of first-degree criminal abuse. When ruling on a directed verdict motion, a trial court must assume that all the evidence for the Commonwealth is true, and draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). However, the Commonwealth is required to present evidence "of substance," and not more than a mere scintilla of evidence from the Commonwealth requires that the trial court grant the motion. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky.

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<sup>2</sup> The jury also found Rankin guilty of murder and first-degree criminal abuse. Since Rankin received a twenty-year sentence, his appeal proceeded directly to the Kentucky Supreme Court (*Rankin v. Commonwealth*, No. 2009-CA-000385-MR; 2010 WL 5135333 (Ky)).

1983). Upon appellate review, the test for a directed verdict is whether “under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty.” *Id.*

For purposes of this appeal, the circumstances surrounding the death of Cecilia Alvarado are not in dispute. Cecilia was born in Florida in February of 2005. Shortly after Cecilia’s birth, Monahan moved to Tennessee to live with her mother. She regularly took Cecilia to the doctor while they lived in Florida and Tennessee. Monahan also began a relationship with Rankin about the same time. She moved to Kentucky to live with Rankin and Rankin’s family around July 4, 2005. She brought both Cecilia and her two-year old son, M.A. From this time on, Rankin regularly cared for both Cecilia and M.A. while Monahan was working.

Cecilia’s last doctor’s visit before moving to Kentucky was on June 7, 2005. No unusual circumstances were reported at that time. On August 18, 2005, four days before her death, Cecilia was examined by Susan Hays, a nurse practitioner at Baby Health in Lexington. Monahan reported that Cecilia was suffering from acid reflux, colic, and a potential liver problem. She did not report any other problems. Nurse Hays noted a bruise on Cecilia’s left forehead and two scabbed areas on each of Cecilia’s legs. Nurse Hays also noted that Cecilia’s muscle tone was poor, but she did not notice any signs of fractured bones.

On August 22, 2005, Monahan was scheduled to go to work at 2:00 p.m. Her car would not start and she was late for work. Monahan testified that she arrived at work around 2:35 p.m., but there was conflicting testimony that it may

have been as late as 4:00 or 4:30 p.m. Rankin watched Cecilia and M.A. at his parent's house next door.

Rankin testified that he left Cecilia in her car seat in the bedroom. He stated that he returned to the bedroom around 7:00 p.m. and found the car seat knocked over, Cecilia on the floor, and M.A. on top of her, digging his knees into her neck. He picked up Cecilia, noticed her head was limp and took her out to the porch where his parents were sitting.

When the police and emergency responders arrived shortly thereafter, Cecilia lacked a pulse and was pale and not breathing. She had dark red/purple bruises on both sides of her neck. The doctor at the emergency room noted this bruising, as well as additional bruising on her legs and scalp. Cecilia briefly regained a pulse at the emergency room, but after thirty minutes of resuscitation efforts, she was pronounced dead.

An autopsy revealed that Cecilia's skull was fractured and she had multiple subdural and epidural hemorrhages. The Commonwealth introduced expert testimony that these fatal injuries were likely caused by blunt force trauma. The experts also opined that Cecilia's injuries could not have been caused by a two-year old as claimed by Rankin. The autopsy also revealed that Cecilia also had suffered multiple fractures to her arms, legs and ribs, round, cigarette-type burn marks to her legs, a tear to the frenulum inside the upper front of her mouth, and a dislocated shoulder joint. These latter injuries showed signs of various

stages of healing, indicating that they occurred between two and twelve weeks prior to Cecelia's death.

Under Kentucky Revised Statute ("KRS") 508.100(1), a person may be guilty of first-degree criminal abuse under two different theories. The Commonwealth must prove the offense by showing either that the defendant intentionally abused another person, or intentionally permitted another person of whom she has actual custody to be abused. Under either theory, the Commonwealth must further show that a defendant thereby:

- (a) Causes serious physical injury; or
- (b) Places him in a situation that may cause him serious physical injury; or
- (c) Causes torture, cruel confinement or cruel punishment;  
to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

Monahan maintains that there was no evidence that she intentionally abused Cecilia or that she intentionally permitted Rankin to abuse Cecilia. In her initial brief, Monahan primarily contends there was no evidence showing that she was aware Rankin was abusing Cecilia and that she was intentionally permitted him to continue the abuse. The Commonwealth responds that the jury found her guilty of intentionally abusing Cecilia and did not reach the instruction allowing it to find her guilty for intentionally permitting the abuse. Consequently, the Commonwealth argues that her complaint about the sufficiency of the evidence on the alternative theory is moot. In her reply brief, however, Monahan notes that she moved for a directed verdict under both theories of first-degree criminal abuse.

We agree with Monahan that her timely motions for a directed verdict preserved her objection to the sufficiency of the evidence under both theories. We are also concerned that the language of the trial court's instruction may have been misleading to the jury. The focus of the first element of first-degree criminal abuse concerns the action of the defendant, either inflicting the abuse or permitting another to inflict the abuse. The focus of the second element concerns the result of that action. However, the wording of the trial court's Instruction No. 3 suggests that the jury could find that Monahan intentionally abused Cecelia by permitting Rankin to abuse her. Such an interpretation would meld the two theories of first-degree criminal abuse.

However, the trial court directly followed the wording of the statute. Moreover, Monahan did not object to the wording of the instruction, so this issue is not preserved.<sup>3</sup> In any event, we must look to the sufficiency of the evidence under both theories.

At trial, the prosecution did not argue that Monahan abused Cecilia on August 22, 2005. Rankin suggested that Monahan could have done so given her opportunity within the time frame of the events on that date. On appeal, the Commonwealth picks up on that suggestion. However, Monahan was not charged

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<sup>3</sup> We note that Monahan tendered a combined instruction for both theories of first-degree criminal abuse. A combined instruction might have resolved the apparent ambiguity caused by the separate instructions submitted by the trial court. On the other hand, a combined instruction could also create problems in determining whether there was a unanimous verdict, since some jurors might find guilt under one theory, while others might find guilt under another. *Davis v. Commonwealth*, 967 S.W.2d 574, 582 (Ky. 1988).

with murder, and the jury's finding of guilt on the charges against Rankin would appear to eliminate that possibility.

The medical evidence, as noted above, showed that Cecilia suffered numerous injuries over an extended period prior to August 22, 2005. While the autopsy revealed evidence of broken bones, Monahan maintains that these injuries were not apparent to Nurse Hays, who examined Cecilia four days prior to her death. Monahan maintains that she had no reason to suspect that Rankin was abusing Cecilia or that Cecilia was suffering from conditions caused by physical abuse.

On the other hand, the Commonwealth produced evidence that Monahan had reason to know that Cecilia had suffered serious injuries. Multiple people testified they noticed Cecilia crying in an unusual manner and that she was not able to hold a bottle on her own. The Commonwealth also pointed to Monahan's statements and conduct before and after Cecilia's death as showing that she knew of the abuse. Rankin's sister, Wanda Goodlet, noticed Cecilia had a fever that would not go away and threatened to call social services if Monahan would not take her to the doctor. Goodlet also testified that Monahan was reticent about taking the child to the doctor because Cecilia had a bruise on her head and a cigarette burn on her leg.

Monahan told Nurse Hays that Cecilia had fallen off a bed several times. After Cecilia's death, Monahan also stated that she had been in an automobile accident with Cecilia several weeks prior to the accident. However,

there was no evidence that Monahan and Cecilia had been involved in an accident. Furthermore, Cecilia's injuries were not consistent with either a fall from a bed or an automobile accident. While the evidence was circumstantial, we conclude that it would support a reasonable inference that Monahan intentionally permitted Rankin to abuse Cecilia.

The inferences do not as strongly support a finding that Monahan personally inflicted any of the abuse. However, the evidence establishes that the injuries Cecilia suffered were caused intentionally. Furthermore, those injuries were inflicted during a period while Cecilia was in the exclusive custody of either Monahan or Rankin. While it seems more likely that Rankin inflicted the majority of the injuries, a jury could reasonably infer that Monahan committed at least one of the acts of abuse. *See Carpenter v. Commonwealth*, 771 S.W.2d 822, 824 (Ky. 1989). Consequently, we conclude that the trial court properly submitted both theories of first-degree criminal abuse to the jury.

Monahan next argues that the trial court erred by allowing the Commonwealth's expert, Dr. Murray Marks, to testify concerning the age of the injuries Cecilia suffered prior to August 22, 2005. She contends the Commonwealth failed to establish that Marks's method of dating infant bone injuries was scientifically reliable, as required by Kentucky Rule of Evidence ("KRE") 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). However, Monahan concedes that this issue was not preserved for review.



Prior to trial, Monahan moved *in limine* to exclude several of the Commonwealth's expert witnesses, including Dr. Marks. The court stated that it would address any *Daubert* challenges on a "witness-by-witness" basis. Monahan raised *Daubert* challenges to several other witnesses, but did not request a *Daubert* hearing specifically with regard to Dr. Marks's testimony. This Court cannot speculate on the outcome of an unrequested *Daubert* hearing or hold that the trial court's failure to conduct such a hearing *sua sponte* constitutes palpable error. *Clay v. Commonwealth*, 291 S.W.3d 210, 217 (Ky. 2009), citing *Tharp v. Commonwealth*, 40 S.W.3d 356, 367 (Ky. 2000).

Finally, Monahan contends that the trial court improperly denied a motion to strike a juror for cause. During *voir dire*, the Commonwealth asked if any juror or someone they knew had been abused by a parent or care provider. Juror 462 approached the bench and informed the court that she had been a victim of childhood sexual abuse. The Commonwealth explained that this case involved only physical abuse, and asked Juror 462 if she would be able to decide the case based solely on the evidence. Juror 462 answered that "it would be hard," but stated that she believed she could decide the case based on the evidence.

Rankin's counsel moved to strike Juror 462, but Monahan's counsel did not join in the motion. Consequently, any error with respect to Monahan was not preserved. *Brown v. Commonwealth*, 780 S.W.2d 627, 629 (Ky. 1989).

Furthermore, a determination whether to exclude a juror for cause lies within the sound discretion of the trial court and will not be disturbed on appeal unless it is

clearly erroneous or an abuse of discretion. *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002). Juror 462 stated that she could decide the case based on the evidence despite her childhood experience.<sup>4</sup> We find no basis to disturb the trial court's denial of the motion to strike.

Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Susan Jackson Balliet  
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Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

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<sup>4</sup> We note that the Kentucky Supreme Court recently addressed this issue in the case of Acosta's co-defendant and found the trial court did not abuse its discretion in denying Rankin's motion to strike Juror 462. *Rankin v. Commonwealth*, 2009-SC-000385-MR (2010 WL 51353333).