

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001020-MR

BRITTNEY GARCIA

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 10-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Following the December 2009 death of her five-month old daughter, Angel Tucker, due to blunt force trauma, Brittney Garcia¹ was indicted by a Butler County grand jury on one count of murder² and one count of criminal

¹ Throughout the record and briefs, Garcia's first name is recorded as "Brittany." The notice of appeal, however, which dictates the style of the appeal, reflects her first name as "Brittney" and that is the way we will refer to her.

² Kentucky Revised Statutes (KRS) 507.020, a capital offense.

abuse in the first degree.³ Nickolas Staples, the boyfriend with whom Garcia was living when the child died, was indicted separately for the same offenses and being a persistent felony offender in the second degree.⁴ On the Commonwealth's motion, the indictments were consolidated and Garcia and Staples were tried jointly October 18-21, 2011.

While the evidence of guilt was overwhelming, distinguishing who was the principal and who was the accomplice was debatable. Jurors acquitted Garcia of murder, but convicted her of manslaughter in the first degree,⁵ recommending a prison term of ten years. She was also convicted of first-degree criminal abuse, for which jurors recommended she serve a consecutive term of five years. In conformity with the jury's recommendation, on November 8, 2011, the Butler Circuit Court sentenced Garcia to a total of fifteen years. She appeals as a matter of right. Consistent with *Staples*, we affirm in part, reverse in part, and remand for further proceedings.

³ KRS 508.100(1)(c).

⁴ Like Garcia, Staples was convicted of first-degree manslaughter and first-degree criminal abuse. However, he was also convicted of being a second-degree persistent felony offender (PFO II) and sentenced to an enhanced maximum term of 25 years in prison. On direct appeal, the Supreme Court of Kentucky affirmed Staples' first-degree criminal abuse and PFO convictions, but reversed and remanded his manslaughter conviction for further proceedings. *Staples v. Commonwealth*, --- S.W. 3d ----, 2014 WL 1511385 (Ky. 2014). Although a flaw in the complicity language in Staples' manslaughter instruction was unreserved, applying palpable error review, the Supreme Court deemed the flaw—imputing the principal's intentional mental state under KRS 502.020(2)(c) to one convicted as an accomplice rather than resting the accomplice's guilt on his own mental state—constituted manifest injustice and required reversal. Because a virtually identical manslaughter instruction was given for Garcia, and four of the five issues raised in this appeal have already been addressed by our Supreme Court, we use the *Staples* opinion as a blueprint in reaching the same result.

⁵ KRS 507.030, a Class B felony.

FACTS

In August 2009, Garcia and two-month old Angel moved into an apartment in Morgantown, Kentucky, with Staples and his mother. A month later, Staples' mother moved to a new location, and Garcia, Staples and Angel moved to a smaller apartment. James Tucker (Tucker), not Staples, is Angel's father.

On November 6, 2009, Angela Briana—the girlfriend of Garcia's brother—was caring for Angel. When Briana tried to pick up Angel to comfort her, Staples stopped her, saying he and Garcia were trying not to hold the baby so much. Later, when Briana changed Angel's clothing, she noticed severe bruising over the child's left ribs. When Briana asked Garcia the cause of the bruising, Garcia initially denied all knowledge, but then claimed she had fallen down the stairs a few days earlier while carrying the child.

Concerned about Angel's condition, Briana and Garcia's brother contacted Tucker who took Angel to the Bowling Green Medical Center where she was evaluated and x-rayed. Because bruising on the child's chest wall and back was consistent with Garcia's story about falling down the stairs while carrying the baby, Garcia and Angel were allowed to return to Staples' apartment.

Garcia and Angel spent Thanksgiving Eve until the day after Thanksgiving with Tucker. During their stay, Garcia confided in Tucker that she had not fallen down the stairs and did not know how Angel had been injured. The Friday after Thanksgiving, Garcia rejoined Staples at their apartment, and on Saturday, Staples' mother returned Angel to Garcia and Staples at the apartment.

Staples' mother said Angel appeared fine when she left the couple and baby between 7:00 and 8:00 that evening.

The next day, December 1, 2009, paramedics were called to the Staples' apartment at 6:00 a.m. Angel, in cardiac and pulmonary arrest, was taken to the Bowling Green Medical Center, but was quickly transferred to Vanderbilt University Children's Hospital in Nashville where she died three days later.

An autopsy showed Angel had suffered numerous broken ribs and a broken clavicle during the last thirty to sixty days of life; all her injuries had not occurred at the same time as evidenced by various stages of healing. By comparing x-rays taken on November 6 and December 1, it appeared the clavicle fracture had occurred between those dates. There was evidence of a bruise on the side of Angel's head, and massive bleeding in and around her brain and the top of her spinal cord. The medical examiner attributed death to a lack of oxygen to the brain, preceded by a head injury resulting from severe blunt force trauma like violent shaking or slamming Angel's head against a floor or wall.

Kentucky State Police Detective Brad Stevenson interviewed Staples and Garcia soon after Angel had been taken to the hospital. He noticed their stories about how Angel's ribs had been bruised did not match. When the bruising was first noticed, Garcia denied knowledge; she then told Briana she had fallen *down* the stairs while carrying the baby; she then told Angel's father she had not fallen down the stairs and did not know how Angel had been injured. Staples initially portrayed himself as being unaware of Angel's condition—he claimed he

did not know Garcia had fallen while carrying Angel *up* the stairs, did not know Angel had fractured ribs, and, did not know Angel had been taken to the hospital. Staples denied hurting Angel, but then acknowledged Angel had been taken to the hospital and social services had determined Angel had not been abused, but she did have a contusion. After the couple had talked with one another, Garcia's version changed to reflect the same story told by Staples.

At the subsequent trial, neither Staples nor Garcia testified, but statements Staples had made to Det. Stevenson after the child's death, and recorded telephone conversations in which he told his mother to visit Garcia in jail and warn her to say nothing, were played for the jury. One of Staples' cellmates testified Staples had said he hated Angel because she was another man's child and he had squeezed her around the chest. This appeal followed conviction and formal sentencing.

ANALYSIS

Garcia's first complaint, also raised by Staples, is she was deprived of a peremptory strike during jury selection. While meritorious, this complaint was unpreserved and, therefore, waived.

When two criminal defendants are tried jointly, each defendant is to receive nine peremptory strikes (rather than the customary eight)—which are to be exercised jointly—and one additional strike—which is to be exercised independently. *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999); RCr⁶

⁶ Kentucky Rules of Criminal Procedure.

9.40. Then, if one or two alternate jurors are seated, each defendant receives a second strike—to be exercised independently. Neither Garcia nor Staples received the second independent strike, even though two alternate jurors were seated. However, neither defendant objected to the trial court’s ruling, despite *pre-voir dire* discussion of the need for additional strikes and citation to *Springer*. While the trial court erred, without a contemporaneous objection to the ruling, we will not deem it reversible error. *Mills v. Commonwealth*, 95 S.W.3d 838, 843 (Ky. 2003). *Staples*, at *21.

Garcia’s second complaint is the trial court played for jurors recorded statements between Staples and Det. Stevenson, and telephone conversations between Staples and his mother recorded while Staples was in jail. Garcia claims Staples’ words implicated her in her child’s death, and because Staples did not testify at trial, she was denied her Sixth Amendment right to confront and cross-examine an adverse witness in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Admission of the evidence was error, but harmless beyond a reasonable doubt. *Heard v. Commonwealth*, 217 S.W.3d 240, 244 (Ky. 2007) (errors of federal constitutional proportion are subject to harmless error analysis). *Staples*, at *19.

We are convinced the challenged evidence, in light of the trial as a whole, did not contribute to Garcia’s conviction. *Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Staples told multiple, inconsistent stories to

Det. Stevenson. When his various versions were played for the jury, his credibility, without any additional questioning from defense counsel, became suspect. Initially, he denied knowing Angel had even been to the hospital. He then changed his story to acknowledge Angel had not only been to the hospital, but social services had investigated the baby's physical health and could not substantiate child abuse. Garcia has not quoted any statement made by Staples in which he directly identified Garcia as the person who harmed or killed Angel.

Garcia also alleges it was error to admit three telephone conversations between Staples and his mother in which he tells his mother to visit Garcia in the Warren County Jail—while he was lodged in the Butler County Jail—and warn her “to keep her mouth shut.” In one of the phone calls, Staples said of Garcia, “[s]he already knows when it comes to Detectives, keep ya mouth shut.” After the phone call was played, Det. Stevenson testified Staples’ comment caused him to wonder why Garcia “needed to keep her mouth shut.” Det. Stevenson further stated he thought Staples feared Garcia would reveal new details. However, Staples never specified any incriminating details and never placed the blame on Garcia. While it was error to admit the statements and telephone conversations without giving Garcia the opportunity to cross-examine her co-defendant, we discern no prejudice and declare the error harmless. *See Staples*, at 18-21.

Garcia’s third complaint is the first-degree manslaughter instruction misstated the law of complicity. We agree and reverse and remand for further proceedings on this issue alone. *Staples*, at *13-17.

Garcia and Staples were both charged with murder. Jurors were instructed on murder, manslaughter in both the first and second degrees, and reckless homicide. Both defendants were convicted of first-degree manslaughter under virtually identical instructions that read:

You will find the Defendant guilty of First–Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. (1) That in this county on or about December 1, 2009, and before the finding of this Indictment herein, she killed Angel Tucker by blunt force trauma;

AND

(2) That in so doing, she did not intend to kill Angel Tucker but intended to cause serious physical injury to Angel Tucker.

OR

B. (1) That in this county on or about December 1, 2009, and before the finding of the Indictment herein, Nickolas Staples killed Angel Tucker by blunt force trauma;

(2) That in so doing, Nickolas Staples did not intend to kill Angel Tucker but intended to cause serious physical injury to Angel Tucker;

(3) That the Defendant was the mother of Angel Tucker;

AND

(4) That at the time of Angel Tucker's death, the Defendant was acting wantonly or recklessly with respect to the risk that Nickolas Staples would inflict death or injury upon Angel Tucker and failed to make an effort reasonable under the circumstances to

protect Angel Tucker from such harm.

OR

C. If you believe from the evidence beyond a reasonable doubt that the Defendant is guilty under this Instruction, but you are unable to determine from the evidence whether the Defendant committed First–Degree Manslaughter as Principal under Section A or Accomplice under Second B, then you will find her guilty of First–Degree Manslaughter, Principal or Accomplice, and so state in your verdict.

[Emphasis added]. According to the verdict form, jurors convicted Garcia under Section (C), principal or accomplice.

Section (B)(4) of the instruction, which generally mirrors § 10.16 of 1 Cooper, *Kentucky Instructions to Juries (Criminal)*, misstated the law of complicity in that it allowed jurors to find Garcia guilty as an accomplice based not on her own *mens rea*, but upon Staples’ *mens rea*, if Garcia acted (or failed to act) “wantonly or recklessly.” Because the principal’s mental state is immaterial to an accomplice’s guilt, *Tharp v. Commonwealth*, 40 S.W.3d 356, 365 (Ky. 2000), the

instruction should not have imputed [Staples’] *mens rea* to [Garcia], but rather should have required the jury to find that [Garcia’s] own *mens rea* was “the kind of culpability” required for that offense, *i.e.*, that in breaching [her] duty to protect Angel [she] had acted (or failed to act) with the intent that [Staples] seriously injure, but not kill, the child.

Staples, at *15. Although the flaw is unpreserved, we must reverse under RCr 10.26 because leaving uncorrected an error relating to the *mens rea* needed for a finding of guilt would constitute “manifest injustice.” *Martin v. Commonwealth*,

207 S.W.3d 1, 3 (Ky. 2006). On remand, Section (B) of the combination first-degree manslaughter instruction should read:

B. (1) That in this county on or about December 1, 2009, and before the finding of the Indictment herein, Nickolas Staples killed Angel Tucker by blunt force trauma;

(2) That Defendant (Garcia) was the mother of Angel Tucker;

(3) That at the time Angel Tucker was killed, Defendant (Garcia) intentionally breached her legal duty to protect Angel Tucker by failing to prevent Nickolas Staples' use of the blunt force which killed Angel Tucker;

(4) That, regardless of whether Defendant (Garcia) intended for Angel to be killed, she at least intended that Nickolas Staples seriously physically injure her; and

(5) That Defendant (Garcia) was physically capable of performing her duty to protect Angel Tucker from serious physical injury.

Garcia's fourth complaint is the first-degree criminal abuse instruction⁷ did not require proof of every element and therefore, denied her a unanimous verdict. The instruction read:

You will find the Defendant guilty of First-Degree Criminal Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. (1) That in this county on or about November 6, 2009, to December 1, 2009, and before the finding of the Indictment herein, she intentionally abused Angel Tucker;

(2) That she thereby caused a serious physical injury to

⁷ The instruction printed in Garcia's brief pertains to Staples; it is not the instruction for Garcia.

Angel Tucker;

AND

(3) That Angel Tucker was at that time 12 years of age or less.

OR

B. (1) That in this county on or about November 6, 2009, to December 1, and before the finding of the Indictment herein, she had actual custody of Angel Tucker and intentionally permitted her to be abused by Nickolas Staples;

(2) That as a result thereof, Angel Tucker sustained a serious physical injury;

AND

(3) That Angel Tucker was at that time 12 years of age or less.

OR

C. (1) That in this County on or about November 6, 2009, to December 1, and before the finding of the Indictment herein, she had actual custody of Angel Tucker and intentionally permitted her to be abused by Nickolas Staples;

(2) That as a result thereof, Angel Tucker was placed in a situation which might have caused her serious physical injury;

AND

(3) Angel Tucker was at that time 12 years of age or less.

The verdict form gave the jury only two options, “guilty” or “not guilty.” Garcia argues jurors should have been required to specify whether they believed she was guilty under Section A, B or C to ensure unanimity. We disagree.

So long as evidence of all three theories of guilt was developed at trial, it matters not whether all jurors believed Garcia was guilty under the same theory. *Malone v. Commonwealth*, 364 S.W.3d 121, 130-31 (Ky. 2012). In her brief, Garcia argues some jurors may have believed she was guilty under Section A, while others may have believed she was guilty under either Section B or C. Importantly, she does not argue any of the three theories reflected in the instruction was unsupported by the evidence. Her singular complaint is jurors should have been required to agree upon and specify a theory of guilt—but that is not the law and, therefore, reversal is unjustified.

Garcia’s fifth and final complaint is the trial court abused its discretion in admitting gruesome autopsy photos. Generally, “a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous.” *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992) (citing *Salisbury v. Commonwealth*, 417 S.W.2d 244 (Ky. 1967)). An autopsy does not impermissibly alter a body’s condition making such photos inadmissible. *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006). Moreover, autopsy photos are not automatically excluded, especially when introduced in conjunction with a medical examiner’s testimony—as here—to explain the cause

and manner of the victim's injuries and death. *See, Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010).

The Commonwealth introduced five photographs to illustrate the medical examiner's testimony. Their relevance was unmistakable. They showed Angel's injuries—specifically, the fatal head injury that was most likely inflicted and not accidental. A photo showing Angel's exposed spinal cord was particularly demonstrative of the point that a seemingly innocuous surface bruise on the child's head did not reveal the massive internal bleeding occurring underneath such that a pool of blood had collected around her spinal cord. Furthermore, photos taken after Angel's body had been harvested for organs did not reveal organs had been removed.

The selected autopsy photos were highly relevant; they showed the condition of Angel's body as a result of Garcia's action or inaction. Contrary to Garcia's position, the probative value of the photos outweighed any prejudice. KRE⁸ 403.

WHEREFORE, Garcia's conviction of first-degree criminal abuse is affirmed. Her conviction for first-degree manslaughter is reversed due to the flawed instruction and remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

⁸ Kentucky Rules of Evidence.

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