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OPINION OF AUGUST 7, 2015, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001874-MR

JESSICA MARIE ALLEN

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 09-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * ** * **

BEFORE: D. LAMBERT, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jessica Marie Allen appeals the Fleming Circuit Court's judgment convicting her of criminal abuse in the first degree, and complicity to commit manslaughter in the first degree, for which she was sentenced to ten years of incarceration. The victim in this case was Allen's three-month old daughter, Kaylee Buchanan, who died from a lack of oxygen to her brain resulting from a

head injury, and who also suffered a prior leg injury that was found upon autopsy. Kaylee's father, Terry Buchanan, was charged separately with manslaughter and criminal abuse in the first degree. *Buchanan v. Commonwealth*, 2010-SC-000663-MR, 2012 WL 1478778 (Ky., Apr. 26, 2012).

This case has been the subject of a previous opinion of this Court. In *Allen v. Commonwealth*, 2010-CA-001874-MR, 2012 WL 4838988 (Ky. App., Jan. 18, 2013), we reversed Allen's conviction for complicity to commit manslaughter in the first degree due to insufficient evidence, but affirmed her conviction for criminal abuse in the first degree. Allen then filed a motion for discretionary review with the Supreme Court of Kentucky. The Supreme Court, in a one-page Opinion and Order, granted discretionary review, vacated this court's decision, and ordered the case "remanded to the Court of Appeals for further consideration in light of *Buchanan*[, *supra*]." *Allen v. Commonwealth*, 2013-SC-000107-D (Ky., Oct. 16, 2013). In *Buchanan*, the court affirmed Buchanan's manslaughter in the first degree conviction, but overturned his criminal abuse in the first degree conviction due to insufficient evidence. After further review of this case, we reverse Allen's convictions for complicity to commit manslaughter in the first degree and criminal abuse in the first degree.

I. FACTUAL BACKGROUND.

We incorporate relevant portions of the case's facts, as recited in our previous opinion:

In April of 2007, Allen began living with Buchanan, the co-defendant in the underlying case. [Allen¹] had a two-year-old son, Braden, from a previous relationship who also lived in the home. In August of 2007, Allen discovered that she was pregnant with Buchanan's child. The baby, Kaylee Buchanan, was born in April of 2008. She was a normal, healthy child.

Allen was a certified nursing assistant ("CNA"). After the birth of Kaylee, Allen went back to work. That date was July 14, 2008. From Monday through Thursday of that week, Kaylee was in Mrs. Meade's care from approximately 2:30 in the afternoon when Allen went to work until approximately 5:30 in the evening when Buchanan picked her up. Meade testified that Kaylee was normal and healthy. She further testified that she noticed no strange marks or bruising on Kaylee while Kaylee was in her care.

On July 20, 2008, Allen and Buchanan took Braden and Kaylee down to the river at around 7:00 a.m. to a campsite where Buchanan's father and stepmother were staying. Allen left Kaylee in a camper with Buchanan's mother, Bonnie, who was still sleeping. She and Buchanan then took Braden fishing. Several individuals who were present at the campsite that day later testified that Kaylee seemed happy and normal.

At around 2:00 or 3:00 that afternoon, everyone at the campsite packed up their things and left. Allen took Kaylee and Braden home while Buchanan drove a friend's truck home and then arrived back at the residence. Allen left Kaylee in her car seat while she made Braden a snack. She then took Kaylee from her car seat carrier and gave her a bottle. After feeding Kaylee

¹ In our previous opinion, we stated that Braden was Buchanan's child. In its Petition for Modification, the Commonwealth advises that Braden was Allen's son, and not Buchanan's.

and playing with her briefly, Kaylee appeared sleepy and Allen laid her down in the bassinette.

At that point, Buchanan came home and took Braden outside with him to help put a license plate on a vehicle and mow the lawn. During this time Allen made dinner for the family. The family sat down to eat dinner together, and after dinner, Bonnie came over to pick up some leftovers to take home. During the time Bonnie was at the house, Kaylee remained asleep.

After dinner, Buchanan showered and bathed Braden. Kaylee began to stir in her bassinette. Allen asked Buchanan to watch Kaylee while she showered and tanned in the tanning bed. Allen took a quick shower. While she was toweling off, she heard Kaylee giggle from the other room. Allen then set the timer for thirty minutes and got into the tanning bed.

While Allen was tanning, she heard Buchanan say something to Braden about going to bed. She then saw a shadow pass by the tanning room and heard footsteps on the stairs. She assumed Buchanan was putting Braden to bed. After Buchanan went upstairs with Braden, she heard Kaylee cry. Allen testified that it was “not a normal cry.” However, Allen assumed Kaylee had lost her pacifier. Allen did not get out of the tanning bed to check. Kaylee stopped crying shortly thereafter.

After thirty minutes, just as Allen was about to get out of the tanning bed, she heard loud footsteps running towards the tanning room. Buchanan opened the tanning bed lid and had Kaylee in his arms. Kaylee appeared limp and unresponsive.

Allen told Buchanan to call 911 and then call his mother. Thereafter, Allen began performing the Heimlich Maneuver on the baby. When that was unsuccessful, she began to do rescue breaths and chest compressions. Kaylee was barely breathing and her body was pale and limp. Although Allen was a CNA, she testified that she forgot how to do rescue breaths and chest compressions. Bonnie arrived and took over giving

rescue breaths. Thereafter, Donald Feeney, a volunteer firefighter, arrived. He was a friend of Buchanan's. At this point, Kaylee was blue and had only a slight pulse. Feeney utilized chest compressions and rescue blows, after which point, Kaylee's skin took on a pinker tone and she moved her legs ...

Kaylee was seen by Dr. Gerring at the Fleming County Emergency Room. Gerring was told that the child had cried and suddenly stopped breathing after eating. Neither Allen nor Buchanan provided any other explanation for Kaylee's condition ... Dr. Turner, who took over for [the previous physician], was equally disturbed by Kaylee's symptoms. In addition, he noted that her fontanelle was hard and bulging when it should be soft. Dr. Turner looked into Kaylee's eyes and saw blood. A CT scan was performed which revealed that Kaylee had swelling and blood around her brain, preventing it from getting oxygen. Dr. Turner's diagnosis was shaken baby syndrome, traumatic brain injury, or inflicted head injury. There was also a suspected fracture in her leg [Original footnote: "The autopsy revealed that there was not a fracture, but a 'bucket handle' type injury that would have been caused by someone yanking on the baby's leg"] which was approximated at seven to ten days old.

On July 23, 2008, Kaylee was pronounced brain dead... An autopsy was performed revealing that she died of blunt force injury to the head. Dr. Rolf, the medical examiner, noted that the injury had to have been inflicted upon Kaylee because of the bruising, skull fractures and brain trauma present. Rolf also found a muscle injury on the lower right leg. A forensic neuropathologist, Dr. Balko, performed a brain exam. His exam also revealed a finding that the injury was inflicted.

Both Balko and Rolf testified that the injury to Kaylee's head would have occurred soon before her collapse and that she would have displayed symptoms soon after the impact.

Dr. Kriss testified at trial that the victim had an injury to her right leg which would have occurred eight to ten days prior to her x-rays in the emergency room. She concluded the injury was inflicted by Kaylee's leg being yanked so hard that the bone had been pulled off, creating a "bucket handle injury." She testified that there was no other way this injury could have occurred.

After the jury trial, Allen was convicted of criminal abuse in the first degree for the bucket handle injury and one count of complicity to first-degree manslaughter for failing to prevent Buchanan from inflicting the fatal injury to Kaylee's head.

Allen, 2012 WL 4838988, at *1-3.

This court previously affirmed Allen's conviction for criminal abuse in the first degree, but reversed the conviction for complicity to manslaughter on the grounds of insufficiency of evidence. In accordance with the Supreme Court's order, we now reexamine the case in light of the Supreme Court's disposition in *Buchanan*.

II. STANDARD OF REVIEW.

Allen argues insufficient evidence exists to support guilty verdicts on the charges, and therefore the trial court erred by refusing to grant her directed verdict of acquittal. On a motion for a directed verdict:

[T]he 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). Furthermore, “[o]n 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.” *Id.* at 187. “There must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.” *Id.* at 188.

A. Complicity to Commit Manslaughter in the First Degree.

As an initial matter, Allen, as a parent, had a legal duty to protect her child. *See Lane v. Commonwealth*, 956 S.W.2d 874, 875 (Ky. 1997) (imposing a duty on a parent to make proper efforts to protect his or her child from harm at the

hands of another). In *Tharp v. Commonwealth*, 40 S.W.3d 356, 361 (Ky. 2000),

the court held that

a defendant can be found guilty of complicity to an unintentional homicide under KRS 502.020(2) if there is evidence that he/she either actively participated in the actions of the principal, or failed in a legal duty to prevent those actions, *without the intent* that those actions would result in the victim's death, but with recklessness, *i.e.*, failure to perceive a substantial and unjustifiable risk that death would result, KRS 501.020(4), supporting a conviction of reckless homicide by complicity, KRS 507.050; wantonness, *i.e.*, an awareness of and conscious disregard of a substantial and unjustifiable risk of that result, KRS 501.020(3), supporting a conviction of manslaughter in the second degree by complicity, KRS 507.040; or aggravated wantonness, *i.e.*, wantonness creating a grave risk of death under circumstances manifesting an extreme indifference to human life, supporting a conviction of wanton murder by complicity, KRS 507.020(1)(b).

(footnotes omitted). Thus, in order to sustain a conviction for complicity to commit manslaughter in the first degree, Allen would have had to know that Buchanan may harm Kaylee and that death was a possible result.

Allen testified she was in the home tanning bed at the time that Kaylee suffered her head injury. Although she heard the baby cry in a strange way, Allen did not get up to check on Kaylee because she was under the supervision of her father, the other responsible adult in the home. Furthermore, no evidence was presented that Buchanan had ever harmed Kaylee before or that Allen should have known he would harm Kaylee that night. With such a dearth of evidence that Allen knew or should have known the danger to Kaylee, we find no

evidence that Allen acted with “conscious disregard of a substantial and unjustifiable risk that death would result” in leaving Kaylee with her father while she tanned. The conviction for complicity to commit manslaughter cannot be affirmed without such evidence, and is therefore reversed.

B. Criminal Abuse in the First Degree.

In *Buchanan*, the Kentucky Supreme Court held that the trial court had erred in failing to direct a verdict of acquittal in favor of Buchanan. In doing so, the court stated:

The first-degree criminal abuse charge was predicated upon the injury to Kaylee's right leg, which the evidence established had been inflicted some eight to ten days prior to July 20, 2008, when doctors at the emergency room examined her head injury. [Buchanan] asserts that he was entitled to a directed verdict on the criminal abuse charge because the evidence was insufficient to prove that he had anything to do with inflicting the leg injury. We agree that under the *Benham* standard, the evidence, both direct and circumstantial, failed to establish that [Buchanan] was responsible for inflicting the leg injury.

“A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby: (a) Causes serious physical injury . . . to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.” KRS 508.100(1). Here, the trial court's instruction on first-degree criminal abuse read as follows:

You will find the Defendant, Terry Buchanan, 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. That in this county on or about the period of July 9–13, 2008 and before the finding of the Indictment herein, he intentionally abused Kaylee Buchanan;

B. That he thereby caused a serious physical injury to Kaylee Buchanan;

AND

C. That Kaylee Buchanan was at that time, less than 12 years of age.

In the light most favorable to the verdict, the medical proof established that the leg injury was inflicted some eight to ten days before Kaylee's hospitalization for the head injury. The medical proof also established that the leg injury would have caused significant pain. There was absolutely no evidence of any kind to indicate that during the relevant time period anyone observed Kaylee in significant pain. There was no evidence that anyone around Kaylee, which includes her babysitter and several family members, observed any sign of an injury until the night she was taken to the hospital for the head injury. The best case that the Commonwealth could muster for its criminal abuse charge against Appellant is set out in the Commonwealth's brief, as follows:

- Allen and [Buchanan] were the primary caregivers of the child;
- Allen knew nothing about the leg injury;
- A bucket handle injury such as Kaylee sustained could only be caused by human hands;
- The injury to Kaylee's leg occurred at least a week, or between eight and ten days, prior to her appearance at the hospital in the late night hours of July 20, 2008.

Disregarding the undisputed fact that several other people had contact with Kaylee during the time in which the injury could have been inflicted, and that for at least a week following the apparent infliction of the leg injury, no one noticed any indication that Kaylee's leg had been injured, and drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we are satisfied that this evidence is not sufficient to induce a reasonable juror to believe beyond a reasonable doubt that [Buchanan] inflicted the leg injury. *See Campbell v. Commonwealth*, 564 S.W.2d 528 (Ky. 1978) (where the only evidence connecting the defendant with the crime was the fact that he was in the company of the victim one to three hours before the murder, and therefore the evidence was insufficient to sustain murder conviction); *Powell v. Commonwealth*, 312 Ky. 219, 226 S.W.2d 944 (1950) (evidence that the defendant had a motive to kill the victim, was in general vicinity when the crime occurred, and that he made an ambiguous statement which, if otherwise corroborated, might be regarded as an admission was insufficient to support a conviction.) Accordingly, with respect to [Buchanan's] conviction for first-degree criminal abuse, we reverse the judgment of conviction and the sentence imposed therefore.

Buchanan, 2012 WL 1478778, at *4-5.

In light of the foregoing, much of which applies to Allen as well as it does to Buchanan, we hold that the trial court erred in failing to direct a verdict in favor of Allen on the criminal abuse in the first degree.

IV. CONCLUSION.

Accordingly, we reverse both of Allen's convictions: complicity to commit manslaughter and criminal abuse in the first degree. The Fleming Circuit Court's judgment is reversed.

ALL CONCUR.

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