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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001157-MR

KAYLA CHRISTINE LORD

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 16-CR-00117-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2017-CA-001158-MR

JARED DYLAN FUTRELL

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 16-CR-00117-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND LAMBERT, JUDGES.

KRAMER, JUDGE: Kayla Christine Lord appeals from the final judgment and sentence of the Pulaski Circuit Court, after a jury convicted her of complicity to reckless homicide. She was sentenced to two years' imprisonment.

Jared Dylan Futrell appeals from the final judgment and sentence of the Pulaski Circuit Court, after a jury convicted him of reckless homicide. He was sentenced to three years' imprisonment. We have consolidated the two appeals for consideration in this single opinion. After careful review of the record and the applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

These appeals arise from a retrial of Lord and Futrell as co-defendants for the death of Lord's seventeen-month old son (hereinafter "Child"). On July 16, 2011, Lord and her boyfriend, Futrell, brought Lord's seventeen-month-old son, Child, to the Wayne County Hospital emergency room, due to his not breathing. Child was airlifted from the Wayne County Hospital to the University of Kentucky Medical Center. After ten days in the hospital, Child was removed from life support and died. Subsequently, Lord and Futrell were arrested and charged with the murder of Child. They were found guilty of having participated, as principal

and accomplice, of wanton murder and both were sentenced to twenty-five years' imprisonment.

In *Futrell v. Commonwealth*, 471 S.W.3d 258 (Ky. 2015), the Kentucky Supreme Court reversed the judgment of the Wayne Circuit Court,¹ and the case was remanded for a retrial of both defendants. This case is now before us as an appeal from the second trial.

In relevant part during the second trial, Lydia Stephenson, Child's paternal aunt, and Lydia's friend, Chancie Pyles, both testified about an incident that occurred between Lord and Futrell in late June 2011. The incident surrounded an argument between Lord and Futrell at Chancie's home, where Lord and Child were residing. During the incident, Chancie testified to hearing Futrell tell Lord he was "tired of your f...king kid crying all the time," and that Futrell pushed Lord, knocking her into Child. Concerned, Chancie and Lydia offered to babysit Child while the two calmed down and took Child to a nearby lake. Chancie testified that during the outing to the lake, Child was clingier than usual but that he was otherwise fine and did not have any bruising when he was returned to Lord that evening.

¹ A change of venue was requested by Lord and Futrell, which was ultimately granted, resulting in the second trial taking place in Pulaski Circuit Court.

Lydia similarly testified about the June 2011 incident. She testified that two days later she went to see Child in the emergency room. When she got there, she observed that Child had bruises, bite marks, and a knot on the back of his head. She also testified that Lord would slap and pinch Child's ears when he misbehaved.

Ruby Upchurch Hurd, who worked at Wayne County Hospital Emergency Room Registration in June 2011, testified to having witnessed Lord in the emergency room with Child. She also testified that Lord seemed nervous, fidgety, agitated, and mad. Hurd explained that she overheard Lord on the phone saying to someone that, "he didn't have to get hit so hard." Nothing in the record indicates that charges were brought after this incident.

Shortly after the June 2011 emergency room visit, Lord and Child moved in with Futrell at the home of Futrell's father, Rick Futrell. Rick testified that on the evening of July 15, 2011, Child was perfectly fine. He also testified that the next morning, he woke Lord up by knocking on the wall and heard her go to the bathroom to get dressed for the day. During her time in the shower, Rick testified that he did not hear anything out of the ordinary. Shortly after hearing Lord return from the bathroom, he heard her screaming that Child was not breathing. Rick testified that he attempted to show his son how to give Child CPR.

Rick drove his son, Lord, and Child to the emergency room, while his son performed CPR in the backseat.

The Commonwealth also presented medical testimony to the jury. Dr. Glen Proudfoot testified at trial that he was the emergency room doctor at Wayne County Hospital that worked on Child when he arrived on July 16, 2011. He testified that Child “looked dead” when he arrived at the hospital and that Child had no pulse. Dr. Proudfoot testified that he began life-saving measures to try to resuscitate Child. He explained that he placed an endotracheal breathing tube down Child’s trachea to establish an airway. Dr. Proudfoot testified that there was no obstruction to Child’s airway. He also attempted to place a naso-gastric tube (“NG tube”) down into Child’s stomach through his esophagus to release air from his stomach. However, he could not get the tube down and when he pulled the tube up it had what appeared to be gum on the end of it.

After getting the NG tube down, Dr. Proudfoot was successful in restoring Child’s vital signs. Arrangements were made to airlift Child to U.K. Medical Center. Before they could get Child on the helicopter to be airlifted, Dr. Proudfoot testified that Child coded again and had to be taken back to the emergency room. Once back in the emergency room, an x-ray revealed that the air was in Child’s abdominal cavity. Dr. Proudfoot testified that he used a needle to release the air, a pulse was recovered, and Child was airlifted to U.K. Dr.

Proudfoot also testified that he did not recall ever telling anyone that Child choked on chewing gum.

At U.K. Medical Center, Child was treated by Dr. Marion Turner. Dr. Turner testified that Child was pale and was covered in bruises on his face and multiple parts of his body when he arrived. Child had to undergo surgery to repair a perforated bowel and injuries to his intestines. Dr. Turner testified that Child was in shock for hours; that the injury to his bowel was a traumatic injury; and that “he was bleeding to death inside.” Dr. Turner also testified that an MRI showed a bilateral thin-layer subdural hematoma and that such injuries are indicative of trauma. She also testified that the injuries to Child’s brain and abdomen were not the result of him choking on anything. Dr. Turner also testified that when she questioned Lord about the various bruises on Child, Lord got upset and refused to believe that the bruises existed. After ten days on life support, it was determined that Child could not survive his injuries and he was taken off life support.

Dr. Victoria Graham, a forensic pathologist and an assistant Kentucky state medical examiner, performed the autopsy. Dr. Graham determined that Child’s cause of death was a result of hypoxic ischemic encephalopathy due to blunt force trauma to the head, which can also be explained as lack of oxygen to the brain secondary to blunt force trauma. She also testified to the multiple bruises

on Child's body. Dr. Graham used numerous photographs to identify and describe to the jury the injuries on Child's body.

The Commonwealth also introduced testimony by Dr. Melissa Currie, a board-certified child abuse pediatrician. Dr. Currie testified that she had reviewed Child's record and that he has suffered a diffuse bilateral subdural hematoma, which she explained is a result of violent force, such as force usually seen in high speed automobile accidents. Dr. Currie also testified that the injuries to the head were not a result of Child choking on something and that they were inflicted because of the force that is necessary to cause such an injury. She further testified that his skull was fractured through the thickest bone of the skull, at the thickest part, which is not a common fracture in accidents unless it is a major accident such as a car accident. Dr. Currie testified that,

I only make a diagnosis where I am definitive that this is child abuse in about 25% of the cases that we're referred. The other three out of four times its either accidental injury, or its an underlying medical disorder, or there's some other explanation. Or sometimes I just have to say I don't know. You know maybe I am worried that it's abuse, but I can't say for sure. So only one in four times do I make a definitive diagnosis. This is a definitive case.

The Commonwealth also presented the testimony of other acquaintances of Lord and Futrell; other medical personnel present during Child's time at Wayne County Hospital; and the lead detective of the case, Detective

Derrick Lester of the Monticello Police Department. These testimonies were presented in support of the Commonwealth's theory of the case that Lord and Futrell were the only people with access to inflict the injuries that resulted in the death of Child and that there had been a history of both showing aggression toward him.

The defense countered the Commonwealth with expert testimony by Dr. Donald Jason, a board-certified forensic pathologist. Dr. Jason testified to the effect that the skull fracture was only a simple linear fracture, which is not serious; that this fracture could be caused by a toddler falling backwards and hitting his head; that CPR caused the stomach to swell; and that Child choked on chewing gum. Dr. Jason also testified that there were no hematomas, but there were small hemorrhages around the skull.

The defense also had the expert testimony of Dr. Thomas Young, a forensic pathologist. Dr. Young testified that the skull fracture was a healing fracture and had been around for a while. He also testified that the skull fracture would not cause immediate unconsciousness. Also, Dr. Young testified that Child's death resulted from lack of oxygen, not blunt force trauma to the head.

Lord and Futrell did not testify at trial. After five days of testimony, the jury returned a verdict of complicity to reckless homicide as to Lord, with a recommended sentence of two years. As for Futrell, the jury returned a verdict of

reckless homicide with a recommended sentence of three years. These recommendations were adopted by the circuit court and imposed at final sentencing.

These appeals followed.

STANDARD OF REVIEW

Both Lord's and Futrell's only argument on appeal is that the circuit court erred in failing to grant their motions for directed verdict for the charges of complicity to reckless homicide and reckless homicide, respectively. It has long been established that,

[o]n 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. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

ANALYSIS

Although these appeals have been consolidated, we will analyze each appellant's claim separately.

A. FUTRELL

Futrell moved for a directed verdict at the close of the Commonwealth's case and renewed his motion at the close of all the evidence on the basis of insufficient evidence. The crux of his argument on appeal is that the only way the jury could have found him guilty of reckless homicide is by inferring it from the circumstances. Ultimately, Futrell argues that the case against him is entirely circumstantial, therefore, it should have never made it to a jury. We disagree.

KRS² 507.050(1) states that "A person is guilty of reckless homicide when, with recklessness he causes the death of another person." KRS 501.020(4) provides that:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense 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.

² Kentucky Revised Statute.

It has long been established that, “where a sufficiency-of-the-evidence challenge has been preserved in the trial court, the question on appeal is whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).

The Commonwealth produced substantial medical evidence that explained in detail the injuries that Child suffered. Medical testimony was presented to the jury from the two doctors, Dr. Proudfoot and Dr. Turner, who attended to Child when he arrived at Wayne County Hospital and U.K. Medical Center. Testimony was also presented through Dr. Graham, who conducted Child’s autopsy, as to the injuries sustained and cause of death. Not only did Dr. Graham testify orally, she also presented several photographs of Child’s injuries. Along with the medical testimony of doctors that personally worked on Child, the Commonwealth also presented the testimony of Dr. Currie, a child abuse pediatrician, who testified that this was definitively a case of child abuse.

The Commonwealth also presented evidence to the jury that Child was in the sole custody of Futrell and Lord when the injuries were inflicted. The evidence presented was undisputed that the night before the injuries were inflicted, Child was acting normally. It was also undisputed that Lord went to shower leaving Futrell alone with Child; and when she returned from the bathroom, Child

was injured. The evidence presented to the jury also showed that Futrell had previously expressed anger toward Child.

Viewing the evidence in the light most favorable to the Commonwealth, the jury could reasonably believe that the injuries inflicted occurred when Futrell was alone with Child while Lord was in the shower. It was upon Lord's return from the restroom that Child was discovered injured and taken to the hospital. At U.K. Medical Center, Dr. Turner determined that Child had a brain injury indicative of trauma. During the autopsy, Dr. Graham found the skull fracture and determined that the cause of death was blunt force trauma to the head.

The evidence establishing Futrell's access to Child and the Commonwealth's medical proof concerning the injuries sustained permit an inference that Futrell subjected Child's head to a blow forceful enough to fracture his skull and cause a fatal brain injury. Considering the totality of the evidence that Child suffered a serious brain injury causing his death, a rational juror could easily determine that Futrell caused the fatal injury.

The Kentucky Supreme Court has previously explained that,

The Supreme Court has also made clear, however, that *Jackson*³ did not alter the jury's fundamental role as finder of fact in criminal cases. In the context of direct appeals, the Court has explained that

³ *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

‘it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.’

Jenkins v. Commonwealth, 496 S.W.3d 435, 445 (Ky. 2016) (citations omitted).

Therefore, the circuit court did not err in denying Futrell’s motion for directed verdict.

B. LORD

Like Futrell, Lord moved for a directed verdict at the close of the prosecution’s case and renewed her motion at the close of all the evidence on the basis of insufficient evidence. Lord also argues that the only way that jury could find her guilty of complicity to reckless homicide was by inferring it from the circumstances. Likewise, she argues that because the case against her is entirely circumstantial it should have never made it to the jury. We disagree.

The Kentucky Supreme Court has previously explained 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[.]

Tharp v. Commonwealth, 40 S.W.3d 356, 361 (Ky. 2000).

Along with the medical evidence presented to the jury that has been previously discussed, the Commonwealth also presented evidence that Lord showed aggression toward Child. The Commonwealth produced the testimony of Lydia, which established that Lord would slap and pinch Child. The Commonwealth also produced the testimony of Ruby Hurd, which implied that Child was at the hospital in June 2011 due to being hit too hard.

This Court has previously explained that, “[m]ere presence at the scene of a crime is not sufficient to attach guilt to the accused, but other facts and circumstances must be shown connecting him with the affray to justify submission of the case to the jury.” *Crabtree v. Commonwealth*, 312 Ky. 738, 740-41, 229 S.W.2d 752, 753 (1950). There is no dispute that on the night of July 15, 2011, the night Child went to sleep without traumatic injury, Lord and Futrell had exclusive control over him. This undisputed fact, along with the medical evidence and the testimony of Lord’s aggression toward Child is enough for a rational jury to connect Lord to being complicit in the crime.

The Kentucky Supreme Court has also explained that, “Kentucky law imposes a legal duty upon a parent to make a proper effort to protect his/her child from harm at the hands of another, thus triggering the ‘legal duty’ aspects of KRS 502.020(1)(c) and (2)(c).” *Tharp v. Commonwealth*, 40 S.W.3d 356, 361-62 (Ky. 2000). Our review of the record in its entirety against Lord does not indicate that it

would be unreasonable for the jury to believe that Lord, with respect to her duty toward Child, acted as a complicitor. Based upon the medical evidence presented by the Commonwealth, a reasonable juror could conclude that abuse occurred. It is only a question of who inflicted the injuries causing the death of Child. Drawing all fair and reasonable inferences in favor of the Commonwealth, the evidence supports that a reasonable jury could conclude that Lord was guilty of complicity. Therefore, the circuit court did not err in denying Lord's motion for a directed verdict.

CONCLUSION

For the reasons stated above, we affirm the final judgment of the Pulaski County Circuit Court.

ALL CONCUR.

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