IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 20, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2000-SC-0997-MR

ROBERT MEADOWS — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN SHAKE, JUDGE
99-CR-00844

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robert Meadows, was convicted in Jefferson Circuit Court of first-degree assault and first-degree criminal abuse and received a sentence of thirty years imprisonment for shaking injuries inflicted on a four month old infant.[1] Appellant appeals to this Court as a matter of right.[2]

Appellant and Tammy Miller, the infant's mother, lived together when the infant was injured. On March 11, 1999, Appellant, who was home babysitting while Ms. Miller was at work, had a neighbor call 911 because the infant had stopped breathing. Upon the arrival of the emergency medical technicians, the infant was found lying on the floor and not breathing. The emergency medical technicians restarted the infant's breathing

[1]The charged incident caused the infant to be in a vegetative state, and the child is no longer living.

[2]KY. CONST. § 110(2)(b).

and took her to the hospital. Appellant remained at the apartment to wait for Ms. Miller. At the hospital the treating physician made a quick assessment and discovered that the infant was suffering from an intracranial injury. The physician also noticed a large burn on the child's forehead that appeared to be at least 24 hours old. Based on this information, the physician contacted Child Protective Services and the Crimes Against Children Unit of the Jefferson County Police Department.

Appellant and Miller were indicted for inflicting the injuries upon the infant. Appellant was charged with assault and criminal abuse, while Miller was charged with criminal abuse. The defendants were provided separate counsel through the Louisville-Jefferson County Public Defender program. On July 9, 1999, Miller entered a guilty plea, conditioned on her testifying at trial against Appellant.

At trial, there was testimony from both sides that Miller and Appellant said cruel things about the infant that reflected their dislike for her. A neighbor, the Commonwealth's witness, testified that he had heard the infant crying for several days prior to March 11, 1999, but that the crying had stopped not long before Appellant knocked on his door. A detective testified that Miller had originally said she burned the infant, but that she had later recanted and implicated Appellant as the one who had burned the child. The Commonwealth's medical expert, Dr. Nichols, testified that the infant had bruises on her body that had been inflicted within the previous 48 hours. He also testified that her injuries were consistent with shaken baby injuries, such that the infant would not have been able to cry after the infliction of this type of injury. According to Dr. Nichols, this was the reason the neighbor did not hear crying after 11:00 that morning. Appellant did not testify, but the defense offered testimony that Ms.

Miller jerked the infant by one arm, did not fasten the child's car seat while driving, and tossed the infant into the car seat. The defense also proposed to present the testimony of Dr. Plunkett, a physician, who would dispute key medical evidence from the Commonwealth.

Appellant's first claim of error is that the trial court failed to comply with RCr 8.30(1) and such failure warrants reversal. From the beginning, Appellant and Ms. Miller had separate counsel but Appellant claims that RCr 8.30 required a signed waiver because the same public defender office employed both attorneys.

Appellant's brief was filed prior to Murphy v. Commonwealth[3] and Kirkland v. Commonwealth.[4] Appellant relied on the RCr 8.30 analysis of Peyton v. Commonwealth.[5] Peyton was overruled in Kirkland and Murphy, and we returned to the previous harmless error analysis by which a case-by-case determination is made as to whether the defendant was prejudiced by noncompliance with RCr 8.30.[6]

Kirkland, supra, addressed the precise error asserted in the present case. We answered the narrow issue of "whether there is a presumption of a conflict of interest when an RCr 8.30 waiver is not executed and each defendant has his or her attorney,

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[3]Ky., 50 S.W.3d 173 (2001).

[4]Ky., 53 S.W.3d 71 (2001).

[5]Ky., 931 S.W.2d 451 (1996) (noncompliance with RCr 8.30 is presumptively prejudicial and requires reversal).

[6]See Smith v. Commonwealth, Ky., 669 S.W.2d 527 (1984); Conn v. Commonwealth, Ky., 791 S.W.2d 723 (1990).

but those two attorneys work for the same legal aid or public defender's office."[7] The Court said:

> where each defendant was represented not by a single firm or single attorney, but by two individually assigned public defenders, and where no conflict or prejudice is claimed, a nonprejudicial or harmless error analysis can be applied. . . . Such failure is not presumptively prejudicial and does not warrant automatic reversal.[8]

While this case bears great similarity to Kirkland in that the joint defendants at trial were represented by separate counsel who worked in the same public defender office, here Appellant goes beyond Kirkland and claims an actual conflict of interest -- antagonistic defenses. Appellant contends that although not apparent at the beginning, the conflict became obvious when Miller agreed to plead guilty for which the Commonwealth agreed not to oppose probation so long as she cooperated and testified against Appellant.

While these joint defendants with antagonistic defenses were represented by separate counsel who worked for the same public defender office, as stated in Kirkland, to warrant reversal there must be a showing of a "real conflict of interest."[9] In the present case, it appears the trial court recognized the need for signed waivers as required under RCr 8.30 because the record contains a signed waiver from Ms. Miller. Yet, Appellant does not make any other assertions as to further explain the actual conflict of interest or demonstrate that he was prejudiced. Based on this, we conclude

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[7]53 S.W.3d at 74.

[8]Id. at 75.

[9]Id.

that the failure of the trial court to comply with RCr 8.30 was harmless error. There is far from a sufficient showing to warrant reversal.

Appellant's second claim of error is that the trial court improperly denied a continuance requested because medical expert, Dr. John Plunkett,[10] was unavailable on the scheduled trial date. Appellant argues that under his particular facts and circumstances and the seven factors outlined in Snodgrass v. Commonwealth,[11] the trial court abused its discretion. We disagree.

The seven factors for consideration when a continuance is sought are: "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice."[12] In the present case, newly appointed and substituted

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[10]Dr. Plunkett is a Minnesota physician who had reviewed the child victim's medical records and formed an opinion as to the nature of the infant's injuries. In 1999, he published an article *Shaken Baby Syndrome and the Death of Matthew Eappen*, AMERICAN JOURNAL OF FORENSIC MEDICINE AND PATHOLOGY, Vol. 20 No.1, 17-21, (March 1999). In his affidavit filed herein on September 20, 2000, Dr. Plunkett testified:

> Dr. Nichols' testimony regarding the force required to cause these injuries, the nature of the injuries themselves, the significance of retinal hemorrhage, and the impossibility of a 'lucid interval' is scientifically indefensible and demonstrably wrong. I have written an article that has been accepted for publication and will be published in the American Journal of Forensic Medicine and Pathology (the official journal of the National Association of Medical Examiners) in December of this year. This article will directly address and disprove the testimony of Dr. Nichols' in Commonwealth v. Meadows.

[11]Ky., 814 S.W.2d 579 (1991).

[12]Id. at 581.

counsel[13] sought a continuance on July 21, 2000, after unsuccessfully attempting to secure a time to depose and consult with Dr. Plunkett. Counsel had made numerous attempts to contact Dr. Plunkett, and also had made the trial court aware of her difficulties in reaching Dr. Plunkett. The motion for a continuance was denied, and the trial was held as scheduled on August 1, 2000.

In denying the continuance, the trial court considered several facts significant. Over the course of approximately a year, there had been five continuances in the case -- all requested by the defense and consented to by the Commonwealth.[14] However, the Commonwealth objected to this sixth and last continuance, sought by the defense less than ten days before trial. The previous continuance postponed a February 2, 2000 trial date because the trial court had been informed that Appellant's medical expert was not available on that date but would be available for the August 1, 2000 trial. For that date, the Commonwealth had already secured the attendance of 25 witnesses. The trial court found that a deposition of Dr. Plunkett would be an alternative to his trial testimony and concluded that a continuance would prejudice the Commonwealth "by the aging of this case." The trial court offered well-reasoned, legitimate justifications for her ruling, notably the multiple previous continuances. As such the trial court did not abuse its discretion.

As revealed in a post trial affidavit attached to Appellant's motion for new trial, Dr. Plunkett's proposed testimony was that there was another plausible cause for the injury to the infant and that such an injury could have occurred in a time frame where

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[13]On April 25, 2000, the trial court requested by letter that the public defender office appoint counsel for Appellant and noted that the trial was set for August 1, 2000.

[14]The trial dates had been set for: August 24, 1999, September 28, 1999, October 26, 1999, December 7, 1999, February 2, 2000 and August 1, 2000.

someone other than the accused could have caused the injury. There is no uncertainty as to the proposed testimony. It is quite clear that Dr. Plunkett did not believe that shaking caused the injuries. This proposed testimony directly refuted the testimony presented by the Commonwealth that Appellant was the only one who could have injured the infant. At the time of the ruling, however, the trial court was not presented with these facts from the affidavit as they were revealed only after the trial via the motion for a new trial. As such, the trial court did not abuse its discretion by not granting the continuance in order to allow Appellant's medical expert to testify.

Appellant also claims that defense counsel's failure to secure the testimony of the medical expert meets the standard for ineffective assistance of counsel in Strickland v. Washington.[15] He concedes this issue is not preserved, but he asserts this issue is a part of the trial record based upon the July 21, 2000 hearing on the motion for continuance and the trial court's ruling on the motion for new trial. At the hearing, defense counsel stated that her inability to depose and consult with her expert witness would deprive Appellant of his right to effective representation. In the order overruling Appellant's motion for a new trial, the trial court found that defense counsel did not act with due diligence concerning the medical expert. Appellant claims that this shows that defense counsel was deficient.

This Court does not generally address claims of ineffective assistance of counsel on direct appeal.[16] Although there are statements in the record regarding defense counsel's inability to provide effective assistance, the trial court did not hold an

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[15]466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

[16]Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998).

evidentiary hearing or make any rulings on such. Therefore, there is not a sufficient basis by which to rule and this claim is better suited for an RCr 11.42 motion.

Appellant's final claim of error is that the admission of a video showing the infant in a vegetative state was a violation of KRE 403. He claims the video purportedly was used to show the child's physical condition, but was actually used only to inflame and prejudice the jury. He asserts that the video was needless because there were numerous enlarged pictures depicting the child's condition.

To be admissible under the KRE 401 relevancy standard, the video must be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] However, under KRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice."

The Commonwealth used the video to show the seriousness of the injuries inflicted on the infant. This evidence is clearly relevant. As to the KRE 403 standard, the general rule is that photographs are not inadmissible merely because they are gruesome or the crime was heinous, instead there must be some alteration to the body not related to the crime as such to appall or inflame the jury.[18] Here, the video lasted about 2 ½ minutes, and showed the child lying motionless throughout this time. Although, Appellant complains that the video is "obscene," the video was merely an accurate visual depiction of the child's physical condition. There was no error in admitting the video.

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[17]KRE 401.

[18]Clark v. Commonwealth, Ky., 833 S.W2d 793, 794 (1991).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

All concur.

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