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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-000402-MR

CHANTEL ROACH — APPELLANT

V.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
NO. 02-CR-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Chantel Roach, was convicted of murder and first-degree criminal abuse. The jury recommended a sentence of forty years for murder and ten years for criminal abuse, to run consecutively for a total of fifty years. The trial court entered a judgment consistent with the jury's recommendation. Appellant appeals to this Court as a matter of right,[1] asserting (1) that consolidation of Appellant's trial with that of her co-defendant was reversible error; and (2) that a violation of the Bruton[2] rule was reversible error. Having considered both of Appellant's claims of error, we affirm the conviction.

The deceased victim, Jordan McIntire, was born to Appellant and Joshua McIntire, Appellant's co-defendant, on October 9, 2001. When Jordan was

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[1] KY. CONST. § 110(2)(b).
[2] Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

approximately one month old bruises were discovered on his body. Appellant's mother, Teresa Edgington, noticed that Jordan had a black eye and a burn mark on his left shoulder around Christmas time in 2001. On December 28, 2001 Appellant's aunt placed a call to the Cabinet for Families and Children regarding Jordan. The investigation conducted by the Cabinet reported that Appellant said a bruise under Jordan's eye was from a votive cup that had fallen off the wall and hit Jordan. The report cited no other signs of abuse. Then, in January of 2002, Edgington took Jordan to the hospital because he was cross-eyed and vomiting. Both Teresa Edgington and her husband, Ricky Edgington, discussed the marks on Jordan with Appellant and McIntire.

On January 11, 2002, Francesca Mendoza, a family service worker, visited the home where Jordan lived with Appellant and McIntire. Mendoza reported that both parents seemed very uninformed about Jordan's needs. She further noted that there was smoking in the house and that Jordan slept on his stomach. Mendoza discussed the danger of SIDS (sudden infant death syndrome) with Appellant. During the visit, Mendoza observed that when Jordan woke up crying his cry was not normal. She noticed Jordan's left eye was blood shot, that he had a bruise on his left eyelid and a scratch on his face. Appellant told Mendoza that Jordan might have a condition that caused him to bruise easily and that Jordan had scratched his face while he was sucking his thumb. The family service worker made a note to keep her eyes open for signs of abuse or neglect.

On February 6, 2002, McIntire appeared on the doorstep of his neighbor Jean Carpenter. McIntire wanted to use the phone to call Appellant's mother because Jordan was sick. McIntire was unsuccessful in reaching Appellant's mother but

returned an hour later to try again. At 5:43 p.m. the following day, Jordan was taken to the emergency room. Dr. Robert Biddle, the attending physician, testified that Jordan had trauma about the head including bruising and swelling. There was significant bleeding throughout the soft tissue in his brain. Jordan had skull fractures and his upper right arm was broken. Dr. Biddle opined that Jordan had sustained the abuse within a matter of hours before arriving in the emergency room.

Detective Steve Auvenshine arrived at the hospital the same day and placed Jordan in the custody of the Cabinet for Families and Children. Jordan was then transferred by helicopter to Kosair Children's Hospital in Louisville. Detective Auvenshine questioned both Appellant and McIntire about Jordan. Appellant told Detective Auvenshine that the day before, February 6, Jordan awakened vomiting at 7:30 a.m. and then went back to sleep. Appellant said that at 7:00 p.m. both she and McIntire took Jordan to church and then went to her mother's home. Appellant said that at 10:45 p.m. they returned to their apartment and Jordan was asleep by midnight. Appellant said that at 3:00 p.m. the next day she checked on Jordan and he was "soaked." She then called her mother to take them to the hospital. Detective Auvenshine continued his investigation with a visit to the Appellant's apartment. He described the apartment as "gross." There was moldy food in the kitchen and the bathroom smelled of urine and feces. He reported that Jordan's bed was on the floor in Appellant's bedroom next to her mattress.

On February 8, 2002, Dr. Paul Rychwalski, a pediatric ophthalmologist, examined Jordan and stated that he believed that Jordan's injuries were non-accidental trauma related to shaking. Appellant and McIntire were arrested and charged with first degree criminal abuse. Jordan died on February 13, 2002 and the charge of murder

was added. The medical examiner who performed the autopsy listed the cause of death as massive head injuries as a result of battered child syndrome or repeated episodes of inflicted trauma.

On February 20, 2002, Appellant was indicted for murder and first-degree criminal abuse. McIntire was indicted on the same charges. The indictments were consolidated and the trial began on March 17, 2003. At trial, several of Appellant's fellow inmates testified as to what Appellant had told them regarding Jordan. Many of the statements made by Appellant to other inmates incriminated herself and McIntire. The trial court ruled that under Bruton,[3] the testimony of other inmates was required to be restricted to information concerning Appellant's role in the abuse.

The jury found Appellant guilty of murder and first-degree criminal abuse. The jury recommended and the trial court ordered Appellant to serve forty years for murder and ten years for criminal abuse to run consecutively for a total of fifty years. McIntire was convicted of complicity to murder and first-degree criminal abuse. He was sentenced to twenty years for complicity and ten years for criminal abuse to run concurrently for a total of twenty years.

Appellant's first argument is that the trial court erred when it granted the Commonwealth's motion to consolidate the co-defendants' cases for trial. The Appellant concedes that this issue is unpreserved. However, Appellant argues that under palpable error, a new trial is necessary. Appellant asserts that it was prejudicial for her to be tried with McIntire because, although they were charged with the same criminal conduct, the Commonwealth could not prove which defendant committed the act of murder or criminal abuse. Also, if there had been separate trials for the

[3] Bruton, 391 U.S. 123.

defendants, the statements made by Appellant's fellow inmates regarding McIntire would have mitigated Appellant's guilt. Because the defendants were tried together however, those statements were not admissible under the Bruton[4] rule. The Commonwealth responds to Appellant's argument that no error has been shown that would justify intervention through RCr 10.26, therefore the trial court did not abuse its discretion in granting the Commonwealth's motion to consolidate the co-defendants' cases for trial.

RCr 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Because Appellant's claim of error is unpreserved it is reviewed for palpable error. Appellant's only claim of prejudice is that Appellant's fellow inmates were not allowed to testify to what Appellant told them regarding McIntire's role in the abuse. Presumably, if the witnesses had so testified, it would have allowed for Appellant to mitigate her own guilt. However, the rule is that "[n]either antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice . . . conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial."[5] Moreover, Appellant's statements to other inmates would have no greater

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[4] Id., at 123.

[5] Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999) (citing Ware v. Commonwealth, 537 S.W.2d 174, 177 (Ky. 1976)); Caudill v. Commonwealth, 120 S.W.3d 635, 651 (Ky. 2003).

probative value than such statements directly from Appellant. Accordingly, there was no palpable error in the trial court's consolidation of the co-defendants' cases for trial.

Appellant's second argument is that the trial court's exclusion of certain statements made by Appellant to her fellow inmates because of the Bruton rule constitutes reversible error. Appellant concedes that this issue is also unpreserved. Therefore, the issue must be reviewed under RCr 10.26 for palpable error.

The Bruton Rule is that a confession by one co-defendant inculpating another in a crime may not be used as evidence in a joint trial unless the confessing co-defendant elects to testify and is therefore available for cross-examination by the non-confessing co-defendant. The prosecution did not introduce the statements Appellant made while in jail regarding McIntire during its case-in-chief. After Appellant took the stand in her own defense, the prosecution recalled one of Appellant's cellmates, Teresa Feeback, and introduced Appellant's comments to Feeback concerning McIntire. Both defendants had an opportunity to cross examine Feeback. In addition, Appellant had her own opportunity to present other evidence regarding McIntire's involvement to mitigate her own guilt and Appellant has failed to demonstrate any violation occurred.

The statements Appellant made to inmates concerning her own involvement in the crime were properly admitted under the statement against penal interest exception to the hearsay rule. The statements Appellant made to her cellmate Feeback concerning McIntire were properly admitted after Appellant testified under Bruton. There was no reversible error.

The judgment is affirmed.

All concur.

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