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Supreme Court of Kentucky

2008-SC-000491-MR

DATE 4-8-10 Kelly Klaber D.C.
APPELLANT

VERONA BRINEGAR

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
NO. 07-CR-00264-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Verona Brinegar appeals as a matter of right from a Judgment of the Madison Circuit Court convicting her of wanton murder and first-degree criminal abuse and sentencing her to a total of thirty-five years in prison. The victim in this case was Brinegar's two-year-old daughter, Callie Robinson, whose death was determined to have been caused primarily by suffocation and secondarily by blunt trauma to the head and extremities. The Commonwealth charged both Brinegar and her boyfriend, Ronald Crabtree, with the murder and criminal abuse of Callie, and tried Brinegar and Crabtree jointly for those offenses. The medical evidence presented during trial indicated that Callie suffered from multiple burns all over her body, bruises on her scalp, contusions and hemorrhaging on the bottoms of her feet, bruises on both ears, and abrasions on her face that were consistent with someone smothering her.

On appeal, Brinegar's single allegation of error is that the trial court erroneously precluded her from impeaching the testimony of Rhonda Crabtree, Crabtree's ex-wife, who testified on Crabtree's behalf that the disagreements she had with him which contributed to their 2002 divorce did not escalate to violence. Brinegar now contends that she should have been able to impeach Rhonda's statement with a Domestic Violence Order obtained by Rhonda against Crabtree in 2000, which stemmed from a petition in which she alleged that Crabtree had hit and kicked her. Finding that the trial court did not abuse its discretion by determining this evidence to be irrelevant and overwhelmingly prejudicial, we affirm.

RELEVANT FACTS

Verona Brinegar lived in an apartment complex with her two-year-old daughter, Callie, her four-year-old son, W., and her boyfriend, Ronald Crabtree. One of Brinegar's neighbors in the apartment complex, Gayle Johnson, testified at trial that on August 9, 2007, she heard loud knocking at her door and after opening it, discovered Brinegar in the hallway holding Callie in her arms. Johnson testified that Brinegar said her baby was not breathing. Johnson suggested that they bring Callie inside, so Brinegar and her son, W., went into Johnson's apartment and placed Callie on the floor in the living room. Once Callie was on the floor, Johnson stated that she could see plainly that Callie was dirty, her skin was a blackish gray color, her toes were burnt, her face and neck were bruised, and the inside of her ears were black. Johnson then told Angie, a resident of her apartment, to call 9-1-1. Johnson

testified that Brinegar had no real expression on her face and that she did not seem upset during this whole process. Johnson stated that after the operator on the phone told Brinegar how to perform CPR, Brinegar smashed “full force” on Callie’s body and she had to hit Brinegar to get her off Callie.

At approximately 2:34 p.m., Officer Chris Butcher of the Richmond Police Department arrived at the scene. He determined that Callie had no pulse and was not breathing. Mark Campbell of the EMS then arrived and attempted to resuscitate Callie. His attempts were unsuccessful, and Callie still had no heartbeat when she arrived at the hospital. Callie was pronounced dead within minutes of arriving at the hospital. Rebecca Daniels, the nurse who initially examined Callie, testified at trial that Callie was small for a two-year-old; that she had multiple bruises, abrasions, and blisters on her body; and that Callie’s burns were consistent in shape with the end of a cigarette.

Dr. Cristin Rolf, the medical examiner who performed Callie’s autopsy, testified on behalf of the Commonwealth that based on her examination, Callie’s death was a homicide, the primary cause being suffocation and the contributory cause being blunt trauma to her head and extremities. Dr. Rolf testified that Callie had burns all over her body, abrasions and contusions on her forehead and cheek, blotchy and irregular-looking lips, a bruise on her forehead, and a dozen bruises on her scalp. She stated that Callie’s hair was abnormally fragile for a two-year-old, which she explained was a condition caused by long-term stress and/or malnutrition. She also testified that Callie’s right ear had bruises and three abrasions on it, and that Callie’s left ear looked

worse than her right. Dr. Rolf noted that Callie had injuries to the backs of her hands and had contusions, abrasions, and hemorrhaging on the bottoms of her feet, none of which would be caused by Callie running around without wearing shoes. Additionally, Dr. Rolf testified that Callie had small, round burns consistent with the shape of a cigarette on her legs, feet, toes, and buttocks. As to her death, Dr. Rolf stated that Callie's wounds indicated that someone held something over her face and smothered her, that a struggle did not occur during the suffocation because there was no evidence of the blood vessels in and around Callie's eyes breaking, and that Callie's injuries were too widespread and severe to conclude that her death was caused by a seizure.

Regarding Callie's internal injuries, Dr. Rolf testified that she found no congenital malformations and that Callie's bodily systems were consistent with death. Dr. Rolf noted that Callie had some reddish clear liquid in her lungs, but that this fluid is found in nearly every person who dies. Dr. Rolf testified that because she found no acid from Callie's stomach in her lungs or any abnormal amount of fluid in Callie's lungs, there was no evidence of Callie vomiting or aspirating food or drink into her lungs prior to her death. On cross-examination, Dr. Rolf acknowledged that prior to completing her autopsy report, she was not aware of Brinegar's statement that Callie had vomited in the days leading up to her death, nor was she aware that Brinegar kept red juice on the counter of her apartment or that a red smear was found on the wall in the room where Callie died.

Ronald Crabtree also called a medical expert to testify regarding the cause of Callie's death. Dr. Tanya Weiss, a physician with Kentuckiana Pulmonary Associates, testified that based on her examination of Callie's medical and autopsy reports, she also believed that Callie had been abused and that Callie had died from asphyxia or suffocation. However, Dr. Weiss stated that she believed Callie's suffocation was accidental and not a homicide. Dr. Weiss explained that Callie could have vomited the reddish liquid found in her lungs and that this could have caused the asphyxia resulting in her death. Dr. Weiss also theorized that because Callie appeared dehydrated and sick, she could have been too weak and lethargic to remove the blanket that she had been wrapped in from her face, which could have led to her accidental suffocation.

Several of Brinegar's neighbors testified at trial regarding their encounters with Brinegar. Andrea Hoskins testified that a couple of days before Callie's death, Brinegar told her that W., her four-year-old son, had cut Callie's hair, shaved her eyebrows, and burned her foot by putting it into an electrical socket.¹ Mary Watson also testified that Brinegar told her that W. had cut Callie's hair. Stephen Davis testified that two nights before Callie's death, Ronald had told him that he was afraid social services would take Callie away because she had a burn on her foot and part of her eyebrows were gone.

¹ In order to show that Brinegar was lying about how Callie's foot got burned, the Commonwealth called Joe Willis, a licensed electrical inspector. Willis testified that after examining the electrical outlet in Brinegar's apartment, there was no way someone could simply put a foot up to or in the outlet and receive a burn. Willis stated that this type of outlet, which produces 110 volts, could not burn a person because to inflict an electrical burn, at least 220 volts is needed.

Crabtree's former girlfriend, Crystal Johnson, and her son, N.J., were both called by Brinegar to testify at trial regarding the ways in which Crabtree interacted with N.J. when he and Johnson were dating. Crystal Johnson testified that she dated Crabtree on-and-off for approximately three years and that Crabtree lived with her during part of this time. While Johnson and Crabtree were living together, Johnson's son, N.J., informed her that he had been shocked on his hand. Johnson stated that after asking Crabtree how N.J. had gotten shocked, he told her that N.J. had been "messing around" with the wires behind the stereo. N.J., who was eight years old at the time of trial, testified that he had spent time with Crabtree approximately four years prior when Crabtree dated his mother. N.J. testified that on one occasion when his mother was in the shower, Crabtree was pretending that he was a teddy bear, put him under a pillow, and started smothering his face. N.J. stated that Crabtree put all his weight on the pillow, he couldn't breathe, he kicked and struggled to get free from under the pillow, and he was scared. N.J. also testified that Crabtree would sometimes pull on his ears and that it would hurt. On cross-examination, N.J. stated that Crabtree would take him bowling, which was fun, and that even though Crabtree was nice, sometimes when they played together it would hurt.

Although neither Brinegar nor Crabtree testified at trial, redacted portions of their police interviews were admitted by the Commonwealth and played for the jury. During Detective Brian Lafferty's interview of Brinegar, Brinegar told him that Crabtree often would wrap Callie up in a blanket, but

that because two days prior to Callie's death she noticed that Callie's ears were turning black, she told Crabtree that he could not wrap her anymore. Brinegar agreed to videotape a demonstration of how Crabtree would wrap up Callie, and this video was played for the jury. During the video, Brinegar stated that although Callie would usually fall right to sleep after being wrapped up, she sometimes would squirm out of the blanket. Brinegar said that sometimes Callie would pull at her own ears and claw at herself.

Detective Eric Long, the lead investigator in this case, also interviewed Brinegar, a videotape of which was played for the jury. During this interview, Brinegar stated that the day before Callie's death, Callie had thrown up three times and W. had hit Callie on the forehead with a coat rack, leaving a large bruise on her head. Regarding the day of Callie's death, Brinegar first stated that she had made a pallet on the floor for Callie that afternoon and laid her down for a nap. About forty-five minutes to an hour later, Brinegar checked on Callie and noticed she was not breathing. Although this was Brinegar's first recitation of the events, later in the interview, she stated that Crabtree had actually laid Callie down for her afternoon nap and that he had poked his head in her room once to check on her.

After discovering that Callie was not breathing, Brinegar recounted that she smacked Callie on the face and tried to give her CPR. After about thirty seconds, she realized she did not know what she was doing and took Callie next door to Gayle Johnson's apartment. Brinegar stated that before she left, Crabtree had begged her to wait until he could leave before going to the

neighbor's apartment. After Brinegar took Callie next door, Crabtree fled the scene. Surveillance photographs reveal that at 2:40 p.m., two minutes after Johnson called 9-1-1, Crabtree was buying gasoline and cigarettes at the Circle K near their apartment complex. David Lovings, Crabtree's boss, testified at trial that Crabtree called him that afternoon and asked to get the money he was owed for the week because he needed to get out of town. Subsequently, Crabtree's father arrived at Lovings' house and demanded Crabtree's money. Lovings stated that he gave Crabtree's father \$300. After Crabtree's father left, Lovings' wife called the police.

Later that night, after Crabtree had contacted the local news station and demanded to speak with Brinegar, Detective Sergeant Rodney Richardson coordinated a phone conversation between Brinegar and Crabtree, a redacted portion of which was played for the jury. During the conversation, Brinegar told Crabtree that she had started to lie to the police for him by telling them that he had not been at the apartment earlier in the day. Crabtree admitted on the phone that he was the one who had gone into Callie's room that afternoon to check on her, and after finding her not breathing, then took her to Brinegar.

Crabtree was eventually arrested and interviewed by Sgt. Richardson and Detective Rodney Tudor. A redacted portion of this interview was also played for the jury. In this interview, Crabtree explained that when he returned from work on the afternoon of August 9, he rolled up Callie in a sleeping bag and laid her down on her back for a nap. He said he checked on her every twenty minutes or so, and that the second time he checked on her, he noticed that she

was laying face down and he heard her gasp for breath a couple of times. He immediately took Callie out of the sleeping bag and yelled for Brinegar.

Crabtree admitted that he panicked after finding Callie and fled. When asked about Callie's other injuries, Crabtree explained that W. would hit Callie on the head with a wooden crayon and that W. burned her foot by putting it up to the electrical socket. Crabtree also explained that the night before her death, Callie had squeezed her body between the metal railing and springs of a foldaway bed, which gave her bruises on her head and ears. Crabtree claimed that her bruises got larger every day because she would pull at her ears and throw herself off the toilet.

After the two defendants and the Commonwealth made their closing statements, the jury deliberated for nine hours before returning a verdict. After being instructed on intentional murder, wanton murder, complicity to murder, intentional criminal abuse, and complicity to criminal abuse, the jury found Brinegar and Crabtree both guilty of wanton murder and intentional criminal abuse.² The jury recommended and the trial court imposed on Brinegar a twenty-five year sentence for the murder and a ten year sentence for the

² Like Brinegar, Crabtree appealed his murder and criminal abuse convictions to this Court, however, he alleged six instances of trial court error. This Court agreed with Crabtree regarding two of his allegations of error: we held that the trial court erred in refusing to instruct the jury on second-degree manslaughter and in allowing Brinegar to admit evidence of Crabtree's prior bad acts involving N.J., the son of one of Crabtree's former girlfriends. Brinegar was not entitled to a new trial based on the jury instruction error because at trial, Brinegar specifically informed the trial court that she would not be asking for an instruction on second-degree manslaughter or reckless homicide. Brinegar is also clearly not entitled to a new trial based on the erroneous admission of prior bad act evidence because Brinegar offered this evidence at trial as a way to implicate Crabtree in the abuse and murder of Callie.

criminal abuse, which were to run consecutively for a total of thirty-five years in prison. This appeal followed.

ANALYSIS

The Trial Court Did Not Err In Finding that Rhonda Crabtree’s March 9, 2000, Domestic Violence Order Was Irrelevant, Overwhelmingly Prejudicial, and Inadmissible.

As one of his rebuttal witnesses, Ronald Crabtree called his ex-wife, Rhonda Crabtree, to the stand. Rhonda testified that she married Crabtree in 1997, they had two children together, and their marriage lasted for five years. Rhonda stated that she and Crabtree divorced in 2002 because he was having an affair with Crystal Johnson. While on the witness stand, Crabtree’s counsel asked Rhonda who was in charge of disciplining their children. Rhonda stated that she was in charge of the discipline, that Crabtree never disciplined the children or changed any diapers, and that Crabtree worked during the day and rested when he was home. This was the extent of Rhonda’s testimony on direct examination; significantly, she did not testify that Crabtree was a non-violent person or that he had never been violent around her or her children.³ On cross-examination, Brinegar’s counsel first asked Rhonda if there were other contributing reasons for the couple’s 2002 divorce in addition to Crabtree’s affair with Crystal Johnson. Rhonda answered that she and Crabtree had

³ In her brief before this Court, Brinegar contends that “[o]n direct examination, [Rhonda] testified that she had absolutely never seen Ronnie [Crabtree] be violent in any way towards her or her children.” This recitation of the record is incorrect. Rhonda was never asked during her direct examination whether Crabtree was violent or whether she had ever seen him be violent and never testified that Crabtree was a non-violent person. The only question even close to the topic of violence was the question about who disciplined the children. Counsel is ethically obligated to portray accurately the record on appeal. See SCR 3.130-3.3(a)(1).

disagreements because he was often childish. Brinegar's counsel next asked if those disagreements ever rose to violence. Rhonda replied, "No."

Brinegar's counsel then attempted to introduce into evidence a copy of a March 9, 2000 Domestic Violence Order (DVO) sought by Rhonda against Crabtree. In the petition, which was attached to the DVO, Rhonda alleged that in February 2000, when Crabtree came to their house to get some clothes, he hit her, kicked her, yelled around their children, and caused her to be scared for her own safety.⁴ Upon showing these documents to opposing counsel, Crabtree objected to their admission and the parties approached the bench. Crabtree's counsel argued that because he limited his questions on direct to why the couple had divorced and never asked Rhonda whether Crabtree had been violent, Brinegar's question regarding whether the couple's disagreements rose to violence was improper as being outside of the scope of his direct examination.⁵ Crabtree also argued that this was merely an attempt to introduce improper and irrelevant Kentucky Rule of Evidence 404(b) evidence. In response, Brinegar argued that because Rhonda had stated there was no violence, the DVO was admissible to impeach her statement. After noting that nothing in the DVO was relevant to abusing a little baby, the trial court ruled

⁴ In her brief, Brinegar contends that Rhonda also stated in her petition that "she was fearful that Ronnie [Crabtree] would hurt the children." After reviewing the petition, this statement is also incorrect. Rhonda never stated in her petition that she was afraid Ronnie would hurt the children, but rather, alleged that Crabtree yelled at her in a rage, that she did not want her son around "that kind of behavior," and that she was scared for her safety. Appellate counsel is admonished to refrain from misrepresenting the record. See also footnote 2, *supra*.

⁵ Kentucky does not limit cross-examination to those matters addressed in direct examination. See KRE 611(b).

that “the overwhelmingly prejudicial effect of this irrelevant evidence outweighs any probative value that it would have.” The trial court then sustained Crabtree’s objection and permitted Brinegar to admit the DVO by avowal.⁶

On appeal, Brinegar argues that because witness credibility is always at issue, the trial court should not have precluded her from impeaching Rhonda’s statement with the DVO. Brinegar also contends that this evidence is relevant to this case because it refuted Crabtree’s defense that he was not a violent person and would not have been violent towards Callie. Disagreeing that the March 9, 2000 DVO actually impeached Rhonda’s statement that the Crabtrees’ disagreements in 2002 did not rise to violence, and agreeing with the trial court that the DVO was irrelevant and overly prejudicial, we affirm.

Brinegar contends that the trial court should have admitted the DVO in order to impeach Rhonda’s testimony on direct examination that Crabtree was never violent. However, as explained above, this was not Rhoda’s testimony. Rhonda simply stated that Crabtree never disciplined their children or changed their diapers. Then on cross-examination, Rhonda stated that in addition to Crabtree’s affair, there were disagreements which contributed to their divorce

⁶ After this ruling, Brinegar’s counsel resumed her questioning by stating, “I believe the last question was . . . you said there had been no violence, correct?” Rhonda answered, “Yes.” The trial judge then interrupted and said, “Well, maybe I misunderstood the question. I thought it was why she had sought a dissolution against Mr. Crabtree. I believe her testimony was primarily because of the affair and then also because he acted like a child or childish behavior was the reason that she said she sought a divorce.” Crabtree’s counsel then asked to approach the bench again, and the trial judge called a recess. During this break, the parties asserted again the same arguments that had been presented previously regarding why the DVO should or should not be admitted. Consistent with its prior ruling, the trial court explained that why Crabtree and Rhonda divorced was not relevant to this case and excluded the DVO.

in 2002, but those disagreements did not give rise to violence. Thus, Brinegar was specifically trying to impeach Rhonda's testimony that the disagreements she had with Crabtree in 2002 that contributed to their divorce did not rise to violence. There are several deficiencies in Brinegar's position regarding her right to impeach Rhonda Crabtree.

First, this attempted impeachment plainly was not directed to Rhonda Crabtree's bias and, because Brinegar does not even attempt to articulate her bias argument, we properly reject it without further comment. Second, whether the Crabtrees' marital arguments in 2002 were violent was clearly a collateral fact and impeachment on a collateral fact is prohibited. *Purcell v. Commonwealth*, 149 S.W.3d 382, 397-98 (Ky. 2004). Third, the DVO evidence did not actually impeach Rhonda Crabtree's statement. A DVO petition from March 9, 2000 fails to impeach a statement that marital arguments occurring in 2002, two years later, did not rise to violence.

Moreover, as this Court has explained, "the right to cross-examination is not absolute and the trial court retains the discretion to set limitations on the scope and subject" of such questioning. *Davenport v. Commonwealth*, 177 S.W.3d 763, 767-68 (Ky. 2005). In particular, the trial court retains the authority to exclude from cross-examination "interrogation that is repetitive or only marginally relevant." *Id.*, quoting *Delaware v. Van Arsdall*, 475 U.S.673, 679 (1986). In this case, Rhonda's DVO petition simply revealed that in February 2000, she had sworn that Crabtree hit her, kicked her, and yelled around their children. Although under appropriate circumstances this

evidence may have been relevant to a charge alleging that Crabtree abused a spouse or girlfriend, this DVO was wholly irrelevant to whether Crabtree abused two-year old Callie Robinson and caused her death in 2007, more than seven years later. In addition, the prejudicial effect of this seven-year-old DVO far outweighed any probative value it would have had. Thus, the trial court acted within its discretion in concluding that this irrelevant and overwhelmingly prejudicial evidence should be excluded.

Finally, Crabtree's insistence at trial that allowing Rhonda Crabtree to testify about a prior domestic violence incident would violate KRE 404 is correct. KRE 404(b) prohibits introduction of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity herewith." However Brinegar may characterize the evidence, it was indisputably evidence of a prior violent act by Ronald against his former wife. This evidence did not bear in any way on the issues surrounding Callie Robinson's death. In essence, Brinegar sought to introduce evidence of Ronald's prior "wrongs or acts" in order to show that he was a violent person, the very thing prohibited by KRE 404(b). Brinegar makes no attempt to argue, and indeed there is no credible basis for finding, that this evidence comes within any of the exceptions to the general rule such as being offered as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident" or because it is "so inextricably intertwined with other evidence essential to the case." KRS 404(b)(1) and (2).

CONCLUSION

Brinegar contends that she is entitled to a new trial because the trial court erred by refusing to allow her to impeach Rhonda Crabtree's testimony with evidence regarding a DVO Rhonda sought against Ronald Crabtree in March 2000. The trial court did not err. The impeachment was not for bias, it related to a collateral fact and, in any event, the March 2000 DVO did not impeach Rhonda's specific testimony that the marital disagreements she had with Crabtree that led to their 2002 divorce were not violent. Moreover, the trial court acted within its discretion in finding the DVO to be irrelevant to the issue of who abused and killed Callie and to be overwhelmingly prejudicial. For the foregoing reasons, the July 2, 2008 Judgment of the Madison Circuit Court convicting Brinegar of wanton murder and first-degree criminal abuse and sentencing her to a total of thirty-five years in prison is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Christian Kenneth Ray Miller
Assistant Attorney General
Office of Attorney General
Office of Criminal Appeals
1024 Captial Center Drive, Suite 200
Frankfort, KY 40601