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Supreme Court of Kentucky

2008-SC-000551-MR

RONALD CRABTREE — APPELLANT

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
NO. 07-CR-00264-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Ronald Crabtree appeals as a matter of right from the Judgment of the Madison Circuit Court convicting him of wanton murder and first-degree criminal abuse and sentencing him to a total of forty-five years in prison. The victim in this case was Callie Robinson, the two-year-old daughter of Crabtree's girlfriend, Verona Brinegar. The Commonwealth charged both Crabtree and Brinegar with the murder and criminal abuse of Callie and tried them 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. After the jury found both defendants guilty of murder and criminal abuse, the

that Crabtree serve a total of forty-five years in prison. On appeal, Crabtree alleges that the trial court erred by (1) failing to dismiss the amended indictment; (2) refusing to instruct the jury on lesser included offenses of the charges of murder and criminal abuse; (3) permitting the Commonwealth to call Dr. John Hunsacker III as a rebuttal witness; (4) allowing Brinegar to admit evidence of Crabtree's prior bad acts in violation of KRE 404(b) and KRE 403; (5) permitting one of Brinegar's witnesses to testify while holding a Bible; and (6) allowing the Commonwealth to engage in prosecutorial misconduct during its closing argument. Because Crabtree was entitled to an instruction for manslaughter in the second degree as a lesser included offense of wanton murder and because the KRE 404(b) evidence was inadmissible, we reverse and remand for a new trial. This Court also agrees that the trial court erred by failing to dismiss Crabtree's amended indictment, but because Crabtree was not prejudiced by this error, it was harmless. Crabtree's other claims of error are now moot and will not be discussed.

RELEVANT FACTS

Ronald Crabtree lived in an apartment complex in Richmond, Kentucky, with his girlfriend, Verona Brinegar, Brinegar's two-year-old daughter, Callie, and Brinegar's four-year-old son, W. According to Crabtree's police interview, a redacted portion of which was played for the jury, on August 9, 2007, the day of Callie's death, Crabtree worked on a painting job with his employer, David Lovings. Crabtree explained that when he returned home that afternoon, he rolled up Callie in a sleeping bag and laid her down on her back for a nap. He

said he typically checked on her every twenty minutes or so, but 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. Brinegar then took Callie and W. to a neighbor's apartment and called 9-1-1. Crabtree admitted that he panicked after giving Callie to Brinegar and fled the scene. He stated that he was wanted for failing to pay child support and did not want the Richmond police to know where he lived. Surveillance photographs revealed that at 2:40 p.m., two minutes after Brinegar's neighbor 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 testified that he gave Crabtree's father $300. After Crabtree's father left, Lovings' wife called the police.

Later that night, after Crabtree had contacted a local news station and demanded to speak with Brinegar, Detective Sergeant Rodney Richardson coordinated a phone conversation between Brinegar, who was then in police custody, and Crabtree. A redacted portion of this conversation was played for the jury. During their phone 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. At the end of their phone conversation, Crabtree asked Brinegar if she was still going to marry him, to which she answered "yes." Crabtree was arrested soon after this phone conversation with Brinegar.

One of the couple's neighbors in the apartment complex, Gayle Johnson, recounted the events that led to the 9-1-1 call. Johnson stated that after responding to a loud knock at her apartment door, she 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 Brinegar 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, her daughter, to call 9-1-1. Johnson testified that Brinegar never appeared upset throughout this process.

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 her 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. Dr. Rolf also testified that Callie's right ear had bruises and three abrasions on it, and that her left ear looked worse than her right. The medical examiner 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. Dr. Rolf testified that Callie had small, round burns consistent with the shape of a cigarette on her legs, feet, toes, and buttocks. Dr. Rolf noted that Callie's wounds on her face were consistent with someone smothering 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. The medical examiner also testified that from the history she received from the police

officers, she understood Callie's body had been wrapped in a blanket, which could have been a cause of her suffocation.

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 stated 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 an 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.

In addition to Dr. Rolf's testimony, Crabtree 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, or that she could have suffered from a hyperthermic

seizure. Dr. Weiss also theorized that because Callie appeared dehydrated and sick, she could have been too weak and lethargic to remove the blanket from her face that she had been wrapped in, which could have led to her accidental suffocation. The Commonwealth called Dr. John Hunsacker III, to rebut Dr. Weiss' testimony.[1]

Several of Brinegar's and Crabtree's neighbors testified at trial regarding their recent encounters with the couple. Andrea Hoskins testified that a few 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.[2] 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, Crabtree had told him that he was afraid social services would take Callie away because she had a burn on her foot and parts of her eyebrows were gone.

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

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[1] Because Dr. Rolf was out-of-town and unavailable for re-call, the Commonwealth called her supervisor, Dr. Hunsacker.

[2] In order to show that Brinegar was lying about how Callie's foot was 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.

that because two days prior to Callie's death she had 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 the only thing she could think of that would cause Callie harm was being rolled up in the blanket. Brinegar also said that sometimes Callie would pull at her own ears and claw at herself. Brinegar reiterated that W. would often pick on Callie, and that she had once told W. "that if he didn't quit being mean he was going to end up killing his sister."

Detective Eric Long, the lead investigator in this case, also conducted an interview of 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 had 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.

In Crabtree's police interview, in addition to recounting what occurred on the day of Callie's death, Crabtree attempted to explain the source of Callie's other injuries. Crabtree explained that four-year-old W. smuggled a knife into his room every day, hit Callie on the head with a wooden crayon, and 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 while she was being potty-trained.

After Crabtree, Brinegar, 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. The jury recommended and the trial court imposed on Crabtree a sentence of thirty-five years for the murder and ten years for the criminal abuse, which sentences were to run consecutively for a total of forty-five years in prison. This appeal followed.

ANALYSIS

I. Because the Evidence Presented Support a Second-Degree Manslaughter Instruction, the Trial Court Erred by Only Instructing the Jury on Intentional and Wanton Murder.

After the Commonwealth submitted its jury instructions to the trial

court, Crabtree requested that the trial court include an instruction on manslaughter in the second degree and reckless homicide.[3] The Commonwealth responded that it understood Crabtree's argument regarding the wantonness aspect, but that based on what happened to the two-year-old victim, the defendants' conduct manifested an extreme indifference to human life and only warranted an instruction on intentional and wanton murder, not on manslaughter in the second degree. The trial court agreed, explaining that absent any testimony from the defendants, this case was either one of intentional or wanton murder. On appeal, Crabtree argues that because the evidence presented at trial reasonably supported instructions on second-degree manslaughter and reckless homicide, the trial court's failure to instruct the jury on these lesser included offenses entitles him to a new trial. Although Crabtree was not entitled to an instruction on reckless homicide, the question of whether he was entitled to a second-degree manslaughter instruction is more difficult. Kentucky case law indicates that a wanton murder instruction must be accompanied by a second-degree manslaughter instruction unless the act was shown to be so incredibly brutal that a jury would undoubtedly find that it was committed either intentionally or wantonly with an extreme indifference to human life. Although the facts of this case are admittedly abhorrent, we conclude that Crabtree should have received a second-degree manslaughter instruction and, therefore, is entitled to a new trial.

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[3] Prior to Crabtree's request, Brinegar's counsel specifically informed the trial court that she had conferred with her client and would not be asking for an instruction on second-degree manslaughter or reckless homicide.

While a trial court has a duty to instruct the jury on the whole law of the case, an instruction is proper only if it is supported by the evidence presented at trial. *Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005). When faced with the question of whether the jury should have been instructed on a lesser-included offense, this Court has held that

> [a]n instruction on a lesser-included offense is required only if, considering the totality of the evidence the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.

Baker v. Commonwealth, 103 S.W.3d 90, 94 (Ky. 2003). In this case, for Crabtree to have been entitled to an instruction on second-degree manslaughter, it must be possible for a juror to have a reasonable doubt as to his guilt of wanton murder, and yet believe beyond a reasonable doubt that he is guilty of second-degree manslaughter.

Both wanton murder and second-degree manslaughter require that the defendant, in causing the victim's death, consciously disregarded a substantial and unjustifiable risk; the risk must be such that disregard of it constituted a gross deviation from how a reasonable person would have acted in the same situation. *See* KRS 507.020 cmt. Wanton murder is distinguished, however, by the additional requirement that the defendant's conduct manifested an extreme indifference to human life.[4] Thus, while both offenses require that the

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[4] KRS 507.020(b) provides that a person is guilty of murder when "under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KRS 507.040(1) states that "[a] person is

defendant wantonly caused the victim's death, *i.e.*, consciously disregarded a substantial and unjustifiable risk, wanton murder requires that the defendant did so under circumstances indicating an extreme indifference to human life. As noted above, for Crabtree to be entitled to an instruction on second-degree manslaughter, it must be possible for a juror to have a reasonable doubt as to whether he acted with an extreme indifference to human life, and yet believe beyond a reasonable doubt that he consciously disregarded a substantial and unjustifiable risk in his actions toward Callie. In fact, there was evidence presented at trial to support a juror's reasonable doubt as to Crabtree's guilt of wanton murder and yet support beyond a reasonable doubt a juror's verdict as to second-degree manslaughter.

Although Crabtree did not testify at trial, he argued in his opening and closing statements that he never abused or hurt Callie; that Brinegar, Callie's mother, abused, neglected, and caused the death of Callie because she felt like her children were a burden to her; and that because Brinegar did not supervise the children properly when she was home, she allowed W. to abuse Callie. Crabtree presented evidence that he worked during the day while Brinegar stayed at home to care for her children and that she was often the only adult at home to supervise Callie and W. Crabtree also presented medical testimony showing that Callie could have asphyxiated on the red drink or that her

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guilty of manslaughter in the second degree when he wantonly causes the death of another person." A person acts wantonly "when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." KRS 501.020(3).

suffocation could have been caused by being wrapped up too tightly in the blanket. Through his statements made to the police, which were played for the jury at trial, Crabtree admitted that he often wrapped Callie in a blanket and that he wrapped her in a blanket and laid her down for her nap the afternoon of her death.

In the rare cases where this court has determined that a defendant is entitled to a wanton murder instruction but not a second-degree manslaughter instruction, "the evidence was virtually undisputed not only that the defendant killed the victim, but also with respect to the defendant's state of mind when he or she did so." *Commonwealth v. Wolford*, 4 S.W.3d 534, 538 (Ky. 1999). For example, in *Crane v. Commonwealth*, 833 S.W.2d 813 (Ky. 1992),[5] this Court affirmed the trial court's refusal to instruct the jury on the lesser included offenses of a wanton murder charge. In that case, Crane, while attempting to rob a liquor store, shot and killed the store clerk. *Id.* at 814. At trial, Crane testified that he fired the shot into the air rather than at the clerk directly. *Id.* at 817. However, because there was undisputed forensic proof that the bullet

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[5] Westlaw reflects that *Crane, supra*, has been impliedly overruled by this Court's recent unpublished opinion in *Edmonds v. Commonwealth*, 2009 WL 4263142 (November 25, 2009). In *Edmonds*, this Court recognized that "[i]n most cases involving wanton killings, the evidence is such that a jury could reasonably find wantonness with or without extreme indifference, and a wanton murder instruction should be accompanied by an [sic] second-degree manslaughter instruction." However, this Court concluded that the facts of that killing qualified for the exception to the rule. As the Court explained, *Edmonds* constituted "the rare situation where the attack was so incredibly brutal that, if the jury believes the facts presented, the act must be either intentional, or wanton with extreme indifference to human life." *Id.* at 17. This conclusion is not inconsistent with *Crane, supra*, which held that a jury may be instructed only on intentional and wanton murder if the evidence only supports those theories.

entered the clerk in a straight-line trajectory from approximately six feet above the floor, there was no evidence to support Crane's claim that he was shooting into the air. *Id.* Reasoning that Crane's "shot had to have been fired into the victim intentionally or, at the very least, under circumstances indicating extreme indifference to the value of human life," this Court concluded that he was not entitled to a second-degree manslaughter or reckless homicide instruction. *Id.* at 817.

By contrast, in *Wolford v. Commonwealth*, 4 S.W.3d 534 (Ky. 1999), this Court held that it was proper for the trial court to instruct the jury on intentional murder, wanton murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. In *Wolford*, the two victims, Franklin and Kevin Coleman, decided to confront the Wolfords after learning that the Wolfords had accused them of "calling the law" and reporting the Wolfords to the police. Shortly after Franklin and Kevin Coleman left their residence, they were found shot dead on the road between the Wolford and Coleman property. *Id.* at 536. Duffy Wolford, Blaine Wolford, and Charlie Wolford were all convicted of second-degree manslaughter. At trial, "none of the defendants admitted firing the fatal shots, all claimed an alibi, and the evidence of guilt was purely circumstantial." *Id.* at 538. Agreeing that the defendants were entitled to instructions on all the lesser included offenses of wanton murder, this Court explained that "when the evidence is entirely circumstantial and only establishes the *corpus delicti* and other circumstances from which the

defendant's connection with the crime might be inferred, the jury should be instructed on all degrees of homicide . . . ." *Id.* at 539.

In the case at hand, neither the guilt of Crabtree nor his mental state was undisputed: the only proof showing that Crabtree killed Callie was circumstantial, and although the evidence certainly indicated that one or both of the defendants intentionally abused Callie, the evidence did not prove conclusively their mental states when they caused Callie's death. Although a juror can infer intent based on the severity and type of injuries inflicted on the victim, there was evidence in this case to dispute even the cause of Callie's death. Dr. Rolf testified that Callie's primary cause of death was asphyxia through suffocation, that contributory causes of her death were blunt trauma to her head and extremities, that the wounds on Callie's face were consistent with someone smothering her, and that Callie being wrapped in a blanket could also have been the primary cause of her suffocation. Based on all this evidence, a juror could have believed that Crabtree severely abused Callie and wrapped her too tightly in a blanket, and that he consciously disregarded how his abuse and behavior could weaken her and ultimately cause her death. Although it may be more likely that a juror would conclude that Crabtree also acted with extreme indifference to human life, the fact remains that the evidence was not so conclusive on this issue as to prevent a reasonable juror from finding wanton conduct without extreme indifference. For these reasons, Crabtree is entitled to a new trial where the jury is instructed on second-degree manslaughter.

Although Crabtree was entitled to an instruction on second-degree manslaughter, the evidence did not support an instruction on reckless homicide. Reckless homicide requires a finding that Callie's death was caused not wantonly but recklessly. KRS 501.020(4) states that a person acts recklessly "when he failed to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." Here, based on Callie's injuries and the evidence presented at trial, a reasonable juror could not believe beyond a reasonable doubt that Crabtree completely failed to perceive that his conduct created a substantial risk to two-year-old Callie. There was overwhelming evidence presented at trial demonstrating the severe injuries that Callie suffered before her death, including multiple burns all over her body, bruises on her head, bruises and abrasions on her ears, blotchy lips, contusions and abrasions on her hands and feet and bruises on her face consistent with smothering. A reasonable juror could not find that the person who inflicted these injuries on a two-year old would be unable to perceive that his conduct could result in Callie's death or serious injury. In addition, because Crabtree did not testify at trial and in his defense denied ever harming Callie, there was absolutely no evidence to support a juror's finding that Crabtree engaged in harmful conduct but did not perceive at the time that his conduct could result in her death. Rather, the evidence indicated three possibilities: that Crabtree was innocent, that he intentionally killed Callie, or that he consciously disregarded the risk that his conduct would result in her death, which, in so doing, may or may not have constituted an extreme

indifference to human life. A reckless homicide instruction was not required in light of the "totality of the evidence." *Baker, supra.*

Crabtree also argues on appeal that he should have received jury instructions on second-degree and third-degree criminal abuse. Second-degree criminal abuse requires that the defendant wantonly engage in abuse, while third-degree criminal abuse required that the defendant do so recklessly. KRS 508.110, KRS 508.120. Here, there was no evidence on which a reasonable juror could rely to conclude that Crabtree wantonly or recklessly engaged in the criminal abuse of Callie. At trial, Crabtree completely denied ever abusing or harming Callie and instead, blamed Callie's injuries on her brother, W., or on Callie herself. Crabtree stated that Callie would sometimes claw at herself and throw herself off the toilet, and that W. would often hit her. Crabtree never offered evidence of how he engaged in unintentional, abusive conduct that was merely wanton or reckless. Despite Crabtree's claim in his brief, he never presented evidence at trial that he physically hurt Callie, but did so only to punish Callie or attempt to make her settle down and not to actually abuse her. With no evidence that Crabtree engaged in wanton or reckless criminal abuse, the severity of Callie's injuries—including the bruises on her head, abrasions on her forehead and cheek, bruises on her ears, cuts and bruises on her hands and feet, burns all over her body—support only an instruction on intentional criminal abuse.

II. The Trial Court Erred By Permitting Brinegar to Introduce Evidence of Crabtree's Prior Bad Acts Relating to His Interactions with N.J.

During her case-in-chief, Brinegar called Christal Johnson and Christal's son, N.J., to testify about their prior relationship and interactions with Crabtree. Crabtree objected, arguing that Johnson's and N.J.'s testimony constituted prior bad act evidence prohibited by KRE 404(b). The trial court disagreed and found that this testimony was admissible to prove Crabtree's common scheme or plan and not his propensity to commit child abuse. Johnson testified that she dated Crabtree on-and-off for approximately three years and that Crabtree lived with her and her son during part of this time. Johnson stated that while she and Crabtree were living together, N.J. informed her that he had been shocked on his hand. Johnson stated that after asking Crabtree how N.J. had been 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 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 N.J. was a teddy bear and that he put him under a pillow and started smothering his face. N.J. stated that Crabtree put all his weight on the pillow, N.J. could not 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.

Crabtree argues on appeal that Johnson's and N.J.'s testimony violates the prohibition against prior bad act evidence as set forth in KRE 404(b). We agree. KRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts to be introduced to prove a defendant's character for engaging in criminal conduct, but does permit such prior bad act evidence to be admissible if it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This Court has acknowledged that this list is not exhaustive, and we have recognized that prior bad acts may also be admitted to show a defendant's "common scheme." *Commonwealth v. English*, 993 S.W.2d 941, 943-44 (Ky. 1999). However, for the "common scheme or plan" exception to apply, the charged offenses must be "part and parcel of a greater endeavor" that included the prior bad acts. *English*, 993 S.W.2d at 945.

Despite the Commonwealth's argument in this case that Johnson's and N.J.'s testimony was admissible under the common scheme or plan exception, Crabtree's current charges of abusing and murdering Callie in August 2007 cannot be said to be "part and parcel" of a greater plan that began with and included his abuse of N.J. Crabtree's abuse of Callie was a separate instance of misconduct that occurred three years after his alleged abuse of N.J. Thus, the common scheme or plan exception simply does not apply in this case. The *modus operandi* exception, addressed extensively in *Clark v. Commonwealth*,

223 S.W.3d 90 (Ky. 2008) also does not apply because there is insufficient evidence that any of Callie's injuries were inflicted in the same manner as N.J. testified to being abused by Crabtree. On remand, Christal Johnson's and N.J.'s testimony should be excluded pursuant to KRE 404(b).

III. The Trial Court's Error in Failing to Dismiss the Amended Indictment Was Harmless.

On October 11, 2007, the Madison County Grand Jury returned an indictment charging Crabtree and Brinegar with murder. On February 29, 2008, the trial court set the joint trial of Crabtree and Brinegar for April 7, 2008. A week after the trial date had been set, on March 6, 2008, the grand jury returned another indictment under the same number as the original indictment that contained the previous murder charge plus an additional charge of criminal abuse. On March 14, 2008, the trial court conducted a second arraignment where it notified the defendants of the amended indictment and the new charge of criminal abuse. Both Crabtree and Brinegar received a copy of the amended indictment and entered a plea of not guilty to both charges.

After entering his plea, Crabtree moved that the Commonwealth should be required to elect which charge—murder or criminal abuse—it would be proceeding with at trial because the same facts supported both charges and because adding a new charge three weeks prior to trial was not fair. The Commonwealth first responded that no new evidence was being presented to support the charge of criminal abuse, and second, that the amended indictment was simply a recognition that Callie suffered from many injuries,

such as cigarette burns and bruises on her hands and feet, that did not cause her death but were indicative of criminal abuse. The Commonwealth explained that it was not until after the original grand jury proceeding that it was able to more thoroughly review the final autopsy report and discover that a criminal abuse charge was warranted.

Rather than enter a ruling on Crabtree's motion at that time, the trial court stated that it would allow the Commonwealth until March 21, 2008, to submit a response to Crabtree's motion. Subsequently, on March 18, 2008, Crabtree withdrew the motion to require the Commonwealth to elect a charge and filed instead a motion to dismiss the amended indictment. After the Commonwealth submitted its response to this motion, the trial court, on March 28, 2008, overruled Crabtree's motion to dismiss. On that same day, Crabtree filed a motion for a continuance, which the trial court granted. The trial court extended the trial date by two months, setting trial for June 2, 2008.

On appeal, Crabtree now argues that because it is improper for a grand jury to amend a rendered indictment in order to add new charges, the trial court committed reversible error by failing to dismiss the amended indictment and by not requiring the Commonwealth to seek a separate indictment for the criminal abuse charge. Although this Court agrees that the trial court erred in not dismissing the amended indictment, Crabtree did not suffer prejudice from this error and is thus, not entitled to a new trial.

RCr 6.16 states that an indictment may be amended "if no additional or different offense is charged and if substantial rights of the defendant are not

prejudiced." Further, in *Bishop v. Caudill*, 87 S.W.3d 1, 3 (Ky. 2002), this Court stated that "there is no authority permitting a grand jury to . . . amend a rendered indictment to add new charges . . . ." Here, Crabtree's amended indictment did add the new charge of criminal abuse. Thus, we agree with Crabtree that the Commonwealth acted improperly in seeking the amended indictment in this case and that the trial court erred by failing to dismiss it.

However, as Crabtree recognizes in his brief, it would have been appropriate for the Commonwealth to seek a second indictment charging only criminal abuse, and then move to join the two indictments under RCr 9.12 for trial. This acknowledgment by Crabtree supports the Commonwealth's contention that any error with regard to the amended indictment was harmless. RCr 9.24 states that

> No error . . . is ground for granting a new trial . . . unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Here, because the trial court's error did not affect any of Crabtree's substantial rights, it was harmless. The trial court informed Crabtree of the additional offense of criminal abuse on March 14, 2008. As the Commonwealth explained, no new evidence was presented to support the criminal abuse charge, which removed the need for any new discovery to take place among the parties. Further, after overruling Crabtree's motion to dismiss the indictment, the trial court continued the trial date for two months to ensure that the defendants had an adequate amount of time to prepare a defense for the

criminal abuse charge. Thus, because Crabtree was not prejudiced by the improper procedure by which the Commonwealth obtained the amended indictment, the trial court's error in this instance is harmless.

CONCLUSION

In this case, based on the evidence presented, a juror could have a reasonable doubt that Crabtree was guilty of wanton murder and yet believe beyond a reasonable doubt that he was guilty of manslaughter in the second degree. Because the trial court failed to provide this instruction to the jury, Crabtree's murder conviction must be reversed. In addition, Christal Johnson's and N.J.'s testimony constituted prior bad act evidence prohibited by KRE 404(b), and thus, Crabtree's convictions for both wanton murder and first-degree criminal abuse are reversed on this basis. This KRE 404(b) testimony should be excluded during Crabtree's second trial. Accordingly, the July 2, 2008 Judgment of the Madison Circuit Court convicting Crabtree of wanton murder and first-degree criminal abuse and sentencing him to a total of forty-five years in prison is reversed. This matter is remanded for further proceedings not inconsistent with this opinion.

Minton, C.J.; Abramson, Schroder, and Venters, JJ., concur. Noble, J., concurs in result only. Scott, J., dissents by separate opinion in which Cunningham, J., joins.

SCOTT, JUSTICE, DISSENTING OPINION: I dissent for reasons that I do not believe the evidence supports any instruction other than intentional or

wanton murder; nor do I believe the trial court erred in allowing Johnson and N.J. to testify concerning Crabtree.

Cunningham, J., joins.

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Supreme Court of Kentucky

2008-SC-000551-MR

RONALD CRABTREE — APPELLANT

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
NO. 07-CR-00264-001

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

The Appellee having filed a Petition for Rehearing of the Memorandum Opinion of the Court, rendered March 18, 2010; and the Court being otherwise fully and sufficiently advised;

The Court ORDERS that the Petition for Rehearing is DENIED. The Court, modifies the Memorandum Opinion of the Court, rendered March 18, 2010, to reflect a change to the heading of Section II. The attached page 18 is SUBSTITUTED in lieu of the original page 18. Said modification does not affect the holding.

All sitting. Minton, C.J., Abramson, Cunningham, Noble, Schroder and Venters, JJ., concur. Scott, J., would grant.

ENTERED: August 26, 2010.

CHIEF JUSTICE