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RENDERED: APRIL 26, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000663-MR

TERRY BUCHANAN — APPELLANT

V.

ON APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
NO. 09-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, AND REVERSING AND REMANDING IN PART

A Fleming Circuit Court jury found Appellant, Terry Joe Buchanan, guilty of first-degree manslaughter and first-degree criminal abuse. For these crimes he received sentences of fifteen-years and five-years in prison, respectively, to be served consecutively for a total of twenty years. He now appeals as a matter of right, Ky. Const. § 110(2)(b), and claims that the trial court erred by: (1) failing to enter a directed verdict on both charges due to insufficient evidence; (2) admitting into evidence his co-defendant's statement that had not been disclosed prior to trial; (3) denying his motion for a mistrial after the Commonwealth intimidated a defense witness; and (4) allowing an expert to opine on an ultimate issue.

I. BACKGROUND

In April 2007, Jessica Marie Allen and her son, Braden, started living with Appellant at his residence in Fleming County, next door to Appellant's

father and step-mother. One year later, Appellant and Allen had a baby girl, Kaylee Buchanan. Appellant and Allen both worked outside the home, and when their work schedules conflicted, Kaylee and Braden were left with a babysitter.

On the morning of July 20, 2008, Appellant and Allen took three-month-old Kaylee and two-year-old Braden, to a campsite on the river where Appellant's parents and several of their friends were camping. Bonnie Buchanan, Appellant's stepmother, took care of Kaylee while Allen and Appellant took Braden fishing. According to Bonnie, Kaylee was "fine, happy, and smiling" all morning.

Later that afternoon, Appellant, Allen, and the children left the campsite and returned home. Allen fed Kaylee, changed her diaper, and laid her in the bassinette where she slept while Allen cooked dinner. Later on, Allen showered, put on tanning lotion, and got in her tanning bed. According to Allen, she was going to tan while Appellant fed Kaylee.

While in the tanning bed, Allen heard Kaylee make an abnormal cry for several minutes. Shortly thereafter, she left the tanning bed. Appellant brought Kaylee to her and said, "Something is wrong with Sissy." Kaylee appeared to be unconscious, and Allen shook her in an attempt to wake her up. Allen told Appellant to call 911 and then Bonnie, and began performing the Heimlich maneuver, rescue breaths, and chest compressions upon Kaylee. Allen and a neighbor continued the resuscitation efforts until an ambulance

arrived. When Bonnie got to the house, she found the baby was pale and limp, and barely breathing.

Emergency responders took Kaylee to the local hospital emergency room, and from there she was taken to the University of Kentucky Children's Hospital where she was treated by Dr. Dawn Turner, a pediatric critical care physician. Based upon a CT scan, an MRI, and upon her physical examination of the child, Dr. Turner concluded that Kaylee had sustained the kind of traumatic brain injury caused by being shaken. Dr. Turner also found that Kaylee had suffered an injury to the tibia in her right leg that she estimated to be at least eight days old. Dr. Turner testified that this injury, known as a "bucket handle injury" usually results from a person pulling or jerking a baby's leg and would have caused considerable pain for Kaylee.[1]

A few days later, Kaylee died. An autopsy revealed that she had a very large bruise on the side of her head, several skull fractures, and severe brain damage. These observations led doctors to conclude that Kaylee's death was caused by blunt force injury to the head.

Appellant and Allen were both charged with murder for inflicting the injuries that killed Kaylee, and with criminal abuse for inflicting the leg injury. They were tried jointly. The trial court submitted the case to the jury with a comprehensive set of instructions that included the full spectrum of homicide offenses from murder to reckless homicide, and the alternative theories by

[1] Appellant argues that the evidence obtained from the autopsy failed to confirm the existence of the bucket handle injury.

which each might have been committed, including complicity. Appellant was convicted of the lesser-included offense of first-degree manslaughter. The jury used a specific verdict form to indicate its belief that Appellant killed Kaylee by striking her head, but that he "did not intend to kill [her], but intended to cause serious physical injury to [her]." The verdict is consistent with the theory of criminal culpability specified in KRS 507.030(1)(a).

Appellant was sentenced to fifteen years for manslaughter and five years for criminal abuse, to be served consecutively for a total of twenty years. Allen was also found guilty of first-degree manslaughter and first-degree criminal abuse, but as Appellant's accomplice in the crimes. She received sentences totaling ten years.[2]

II. ANALYSIS

A. The Trial Court's Failure to Direct Verdicts of Acquittal

Appellant contends that the trial court erred in failing to direct a verdict of acquittal on the lesser included first-degree manslaughter instruction and the first-degree criminal abuse charge. In *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) we outlined the now-familiar standard by which a trial court should evaluate a motion for a directed verdict:

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth

[2] Allen's convictions are currently under review by the Kentucky Court of Appeals.

is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

For our purposes, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.* (*citing Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)); *see also Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009). However, we reemphasize that an evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont*, 295 S.W.3d at 68 (*citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

1. The First-Degree Manslaughter Instruction

Appellant argues that there was insufficient evidence to sustain a conviction for first-degree manslaughter, and that the trial court should therefore have directed a verdict in his favor on that theory of homicide.[3] As relevant to our review, "A person is guilty of manslaughter in the first degree when: (a) *with intent to cause serious physical injury* to another person, he causes the death of such person or of a third person." KRS 507.030(1) (emphasis added).[4] Serious physical injury "means physical injury which

[3] Appellant moved for a directed verdict on the murder charge at the close of the Commonwealth's proof, and at the close of all the proof, he moved for a directed verdict upon all charges. It is does not appear from the record that he objected to instructing the jury on the lesser included charge of first-degree manslaughter for which he was ultimately convicted. The Commonwealth does not question the preservation of the issue, and we proceed to address the substantive issue as presented by Appellant.

[4] The verdict form in this case distinguished between alternate theories of first-degree manslaughter. The jury returned its verdict pursuant to KRS 507.030(1)(a).

creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15).

Appellant argues that the trial court should have entered a directed verdict with respect to first-degree manslaughter because there was insufficient evidence to establish, under the *Benham* standard, that he inflicted the fatal injury but had only the intent to injure her. According to Appellant, the only theory of guilt supported by the evidence is that he either acted with the intention of causing the victim's death,[5] or he wantonly caused her death. In support, Appellant directs us to this Court's decision in *Parker v. Commonwealth*, 952 S.W.2d 209 (Ky. 1997).

The Commonwealth responds that the jury could have inferred from the evidence an intention to cause a serious physical injury. The Commonwealth relies on our language in *Harper v. Commonwealth* where we opined that "a person is presumed to intend the logical and probable consequences of his actions and, thus, 'a person's state of mind may be inferred from actions preceding and following the charged offense.'" 43 S.W.3d 261, 265 (Ky. 2001) (*quoting Parker*, 952 S.W.2d at 221).

a. Parker v. Commonwealth

In *Parker*, this Court held that the trial court correctly declined to instruct the jury on second-degree manslaughter and reckless homicide as lesser included offenses to murder. 952 S.W.2d at 211. In that case, the

[5] Acting with the intent to kill would constitute murder. However Appellant's conviction for manslaughter is an implicit acquittal on the murder charge.

defendant testified that he never disciplined, harmed, or hit the minor victim, while the prosecution offered competing medical evidence:

> The medical evidence demonstrated that the child received four blows to his head. Dr. Nichols, who performed the autopsy, testified that one blow was probably delivered by the fist of an adult and another blow was delivered by striking the child's head against a fixed object. The blows caused serious internal brain injury, including bleeding, bruising and swelling. Within moments, the child fell into a fatal coma as indicated by the medical evidence.

Id. at 211-212. Based upon this evidence, the court concluded that "[t]he medical evidence clearly supports a finding that the defendant acted with the specific intent to cause death. *A finding of any other mental state would have been unwarranted.*" *Id.* at 212 (emphasis added).

Invoking our declaration that "a finding of any other mental state would have been unwarranted" from *Parker*, Appellant argues that it would be unreasonable for him to intentionally cause a serious physical injury to Kaylee, as such an injury would necessarily require taking her to the hospital for treatment, which in turn would lead to his prosecution for assault or child abuse. Essentially, Appellant contends that a rational trier of fact could not have found that he intended to cause serious physical injury because it would have been irrational to do so. As such, Appellant posits that the evidence only supported a theory that he either intended to cause the victim's death or wantonly caused her death.

Appellant misinterprets our conclusions in *Parker*. Again, *Parker* addressed second-degree manslaughter and reckless homicide as lesser

included offenses to murder, not first-degree manslaughter. Simply put, our reference to "any other mental state" referred to other mental states besides specific intent, i.e., wantonness or recklessness; it did not distinguish between a specific intent to cause death and a specific intent to cause serious physical injury. To hold otherwise would effectively eradicate first-degree manslaughter (intent to cause serious physical injury) as a lesser included offense to murder.

Notwithstanding our interpretation of *Parker*, Appellant's logic — that a trial court should enter a directed verdict because intentionally committing a heinous act would be irrational — is seriously flawed. To say the least, it is resoundingly refuted by our common experience that a great number of heinous crimes are committed without a rational purpose or motivation. To sustain a conviction, we need not plumb the depths of the criminal mind in search of a rationale that might explain *why* one might engage in senseless criminal conduct. We decline to obfuscate Kentucky's criminal statutes by interjecting such perverse logic into our jurisprudence. We reject Appellant's contention that while the evidence could support a theory that he intended to cause Kaylee's death, it could not support a verdict that he intended to inflict serious physical injury upon her. Thus, we turn to whether the prosecution presented sufficient evidence from which Appellant's intent to inflict serious physical injury could reasonably be inferred.

b. Sufficiency of Evidence

Viewing the evidence in the light most favorable to the verdict, the jury could reasonably believe that the head injury occurred when Appellant was

alone with Kaylee while Allen was in the tanning bed. It was then that Allen heard Kaylee's abnormal cry for several minutes. It was then that Appellant brought Kaylee to her and said that "something is wrong with Sissy." It was then that the need to call 911 became apparent. At the hospital, Dr. Turner diagnosed Kaylee as suffering from a traumatic brain injury resulting from being shaken, while Dr. Rolf attributed Kaylee's death to a blunt force injury to the head.

It is within the everyday experience of ordinary jurors that, with a three-month-old baby, the difference between a blow that causes serious physical injury and a blow that causes death can be exceedingly small. Considering the complete dearth of evidence that Kaylee suffered the mortal head injury in the hours or days before that unusual cry, a rational juror could easily have determined that Appellant struck or shook the child intending to cause serious physical injury, but not her death. We therefore affirm his conviction for first-degree manslaughter.

2. First-Degree Criminal Abuse

The first-degree criminal abuse charge was predicated upon the injury to Kaylee's right leg, which the evidence established had been inflicted some eight to ten days prior to July 20, 2008, when doctors at the emergency room examined her head injury. Appellant asserts that he was entitled to a directed verdict on the criminal abuse charge because the evidence was insufficient to prove that he had anything to do with inflicting the leg injury. We agree that

under the *Benham* standard, the evidence, both direct and circumstantial, failed to establish that Appellant was responsible for inflicting the leg injury.

"A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby: (a) Causes serious physical injury . . . to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless." KRS 508.100(1).[6] Here, the trial court's instruction on first-degree criminal abuse read as follows:

> You will find the Defendant, Terry Buchanan, guilty of First-Degree Criminal Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about the period of July 9-13, 2008 and before the finding of the Indictment herein, he intentionally abused Kaylee Buchanan;
>
> B. That he thereby caused a serious physical injury to Kaylee Buchanan;
>
> AND
>
> C. That Kaylee Buchanan was at that time, less than 12 years of age.

In the light most favorable to the verdict, the medical proof established that the leg injury was inflicted some eight to ten days before Kaylee's hospitalization for the head injury. The medical proof also established that the leg injury would have caused significant pain. There was absolutely no evidence of any kind to indicate that during the relevant time period anyone

[6] The instruction in this case was solely based upon KRS 508.100(1)(a).

observed Kaylee in significant pain. There was no evidence that anyone around Kaylee, which includes her babysitter and several family members, observed any sign of an injury until the night she was taken to the hospital for the head injury. The best case that the Commonwealth could muster for its criminal abuse charge against Appellant is set out in the Commonwealth's brief, as follows:

- Allen and Appellant were the primary caregivers of the child;
- Allen knew nothing about the leg injury;
- A bucket handle injury such as Kaylee sustained could only be caused by human hands;
- The injury to Kaylee's leg occurred at least a week, or between eight and ten days, prior to her appearance at the hospital in the late night hours of July 20, 2008.

Disregarding the undisputed fact that several other people had contact with Kaylee during the time in which the injury could have been inflicted, and that for at least a week following the apparent infliction of the leg injury, no one noticed any indication that Kaylee's leg had been injured, and drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we are satisfied that this evidence is not sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Appellant inflicted the leg injury. *See Campbell v. Commonwealth*, 564 S.W.2d 528 (Ky. 1978)(where the only evidence connecting the defendant with the crime was the fact that he was in the company of the victim one to three hours before the murder, and therefore

the evidence was insufficient to sustain murder conviction); *Powell v. Commonwealth*, 312 Ky. 219, 226 S.W.2d 944 (1950)(evidence that the defendant had a motive to kill the victim, was in general vicinity when the crime occurred, and that he made an ambiguous statement which, if otherwise corroborated, might be regarded as an admission was insufficient to support a conviction.) Accordingly, with respect to Appellant's conviction for first-degree criminal abuse, we reverse the judgment of conviction and the sentence imposed therefor.[7]

B. Failure to Disclose the Co-Defendant's Incriminating Statement

Appellant next argues that the trial court erred by admitting into evidence an out-of-court statement made by Allen in violation of a pre-trial discovery order requiring the disclosures of such statements in advance of trial. Appellant asserts that this error requires reversal.[8] We disagree.

The trial court had entered a discovery order pursuant to RCr 7.24 requiring disclosure of "any oral incriminating statement known by the Attorney for the Commonwealth to have been made by the Defendant to any witness." At trial, Allen testified and upon cross-examination was asked, if she

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[7] Appellant also argued that the evidence failed to establish that the bucket handle injury was a "serious physical injury" as defined in KRS 500.080(15). Because we reverse the conviction upon other grounds, we decline to address this question.

[8] By his own admission in his reply brief, Appellant incorrectly designated this issue as being based on the denial of his motion for a mistrial. However, based upon the recitation of facts and authority in his original brief, as well as his assertion that "[i]t was error to allow the introduction of this evidence," we believe the Commonwealth had sufficient notice of Appellant's contention. Moreover, we note that Appellant's trial counsel not only moved for a mistrial after the evidence had been admitted, but also rendered a timely objection prior to admission by arguing that he had not received notice of the statement made by Allen. As a result, we address this issue on its merits.

had told Jamie Black that she would leave Appellant after the case ended and that she was still with him because she was afraid he would turn on her, and he was afraid she would turn on him.[9] Allen denied making such a statement. Despite Appellant's objection that no pre-trial notice of the alleged statement had been provided, the trial court permitted the Commonwealth to call Jamie Black as a rebuttal witness to refute Allen's denial. Black testified that Allen had told him that she was probably going to leave Appellant after the trial and that she would leave now but she was "scared that he would turn on her."[10]

The failure of the Commonwealth to disclose a defendant's incriminating oral statement during discovery constitutes a violation of the discovery rules. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008); *see also* RCr 7.24(1)("Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness."). The obligation to disclose applies even if the Commonwealth only intended to use such statements in rebuttal:

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[9] Initially, the prosecutor informed the court and opposing counsel that he wished to ask Allen if she was afraid of Appellant. As a basis for this question, the prosecutor noted that Black would testify that Allen had reason to be fearful of violence. However, the issue remained unresolved until the next morning, when the prosecutor informed the court and the parties that Black instead indicated Allen told him she would leave Appellant when the case ended and she was still with him because she was afraid he would turn on her, and he was afraid she would turn on him.

[10] Contrary to the prosecutor's belief, Black did not also testify that Allen said Appellant was afraid she would turn on him. *See supra* note 8.

> The Commonwealth asserts that even if the failure to disclose the statements was a discovery violation, the statements could be used in rebuttal. However, the duty of discovery imposed by RCr 7.24(1) to disclose incriminating statements does not end at the close of the Commonwealth's case in chief. Rebuttal does not offer a protective umbrella, under which prosecutors may lay in wait. "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972).

Id. at 297.

We also agree with Appellant that the pre-trial disclosure requirement of RCr 7.24 includes the duty to disclose incriminating statements of codefendants. However, the Commonwealth's duty to disclose such oral statements pursuant to RCr 7.24(1) applies only to statements that are *incriminating*. The clear import of Allen's alleged statement to Black was that Allen was afraid that if she left Appellant now (meaning, shortly before the trial) she feared that he would try to place the blame for the baby's death upon her. We fail to see how Allen's concern in this regard, assuming that the jury believed Black's testimony, incriminated Appellant. At most, it intimates that Allen and Appellant had some sort of pact not to accuse the other in the tragic death of their baby. If anything, it suggests that Allen thought that Appellant was withholding some evidence indicative of her guilt that he might disclose if she left him. We do not agree with Appellant's argument that the statement suggests a mutual assent to a cover-up on the part of Appellant, and we do not believe that Appellant was prejudiced by the mid-trial disclosure of this statement.

Because Allen's oral statement was not incriminating with respect to Appellant, we cannot say that the Commonwealth's failure to disclose her statement to Appellant's counsel constitutes a violation of the discovery rules.[11]

C. The Commonwealth's Alleged Intimidation of a Defense Witness

Appellant contends that the trial court erred when it denied his motion for a mistrial, based upon his claim that the Commonwealth had intimidated a defense witness. We disagree.

Brenda Meade was Kaylee's babysitter. It became obvious from the defense counsel's opening statements that Meade would be portrayed as a likely alternate perpetrator. Meade would later reveal in avowal testimony that, after the opening statements, investigators for the Commonwealth came to her home and informed her that Allen and Appellant were implicating her in Kaylee's death and insinuating that while under Meade's care, Kaylee might have been dropped on Meade's concrete patio.[12] Meade further testified that the Commonwealth's investigators told her husband that she would become a suspect if Appellant and Allen were acquitted. Meade explained that these accusations frightened her and made her "leery that if for some reason the jury said that [Allen] and [Appellant] didn't do anything, that gee, if I'm already been said [sic], maybe I'm a suspect, then I'm going to be the next one they're going

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[11] We do not address the Commonwealth's failure to disclose Allen's statement to her counsel, as this is not the matter before us.

[12] Appellant's trial counsel asserted that the Commonwealth's conduct violated the separation of witness rule. However, Appellant does not put forth any argument with respect to the latter assertion, and thus the issue is not before us at this time.

to bring up to court and try to say, you know, that I dropped her out there on the patio."

Allen called Meade to testify as a defense witness. She testified that she babysat Kaylee for four days during the week preceding July 20, 2008, and that she never observed anything unusual about the baby. Specifically, Meade noted that there were no marks or bruises on Kaylee, that she "acted perfectly healthy," and that she was clean and well cared for.

Following Meade's testimony, defense counsel learned of Meade's contact with the Commonwealth's investigators. Appellant argues that these conversations were clearly intended to influence Meade and to dissuade her from testifying favorably for the defense. However, notwithstanding the fear that such information would naturally impart, Meade repeatedly indicated that her testimony was unaffected.

In *Hillard v. Commonwealth*, 158 S.W.3d 758, 765 (2005), we examined federal authority and agreed that "a judge or prosecutor who threatens or intimidates a defense witness who is otherwise willing to testify into refusing to testify thereby denies a defendant his or her constitutional rights to due process and compulsory process." (citations omitted). However, "[r]eversal is required only when the judge's or prosecutor's conduct interfered substantially with the witness's free and unhampered choice to testify." *Id.* at 766 (citation omitted). Accordingly, "if the witness did, in fact, testify favorably for the defendant, the threats are deemed harmless." *Id.* (citation omitted).

Based upon Meade's testimony and *Hillard*, we conclude that the Commonwealth's contact with her did not compel a mistrial and affords no grounds for reversal. Regardless of whether the Commonwealth's specific communication with this witness was proper, it is evident that it did not interfere with Meade's testimony. She did not invoke her right to refuse to testify. Moreover, short of the unlikely event of Meade confessing on the witness stand,[13] it is difficult to imagine how her testimony could have been more favorable for the defense. Because the Commonwealth's conduct did not interfere substantially with Meade's free and unhampered choice to testify, and we see nothing to indicate her testimony was altered by her conversations with the Commonwealth's investigators, the trial court did not err by denying Appellant's motion for a mistrial. *See Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002) (holding that the trial court did not abuse its discretion in denying a motion for mistrial because there was no manifest necessity to grant a mistrial.)

D. Opinion on Ultimate Issue

Lastly, we consider Appellant's claim that the trial court erred by allowing an expert's opinion on an ultimate issue. Specifically, Appellant contends that Dr Kriss's testimony that a bucket handle injury could only be inflicted "by human hands" amounted to an opinion upon the ultimate issue, and should have been excluded under *Stringer v. Commonwealth*, 956 S.W.2d

[13] There was no reason to believe that Meade had anything to confess regarding Kaylee's injuries. There was no indication that Meade ever made an incriminating statement, nor have we been shown any incriminating evidence against Meade.

883 (Ky. 1997). *Stringer* states that, "The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* at 889. (citing KRE 702). However, because this testimony related solely to the criminal abuse charge, and as set forth above, we find the trial court should have directed a verdict for Appellant on that charge, further discussion of it here is unwarranted.

III. CONCLUSION

For the foregoing reasons, the Judgment of the Fleming Circuit Court convicting Appellant of first-degree manslaughter is affirmed. Judgment convicting Appellant of first-degree criminal abuse is reversed, and this case is remanded to the Fleming Circuit Court for entry of a Judgment consistent with this opinion.

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

SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART: I agree with the majority's analysis regarding the denial of the directed verdict on Appellant's murder charge, the admission of Appellant's co-defendant's statement, and the alleged intimidation of a defense witness. However, I strongly disagree with the majority's conclusion that the evidence was insufficient to sustain Appellant's conviction for first-degree criminal abuse. Accordingly, I must dissent from that part of its opinion.

The majority correctly recites that, in reviewing a trial court's denial of a directed verdict, our task is to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont v. Commonwealth,* 295 S.W. 3d 60, 68 (Ky. 2009) (*citing Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). However, the majority fails to recognize that "the Commonwealth may prove guilt by circumstantial evidence." *Schrimsher v. Commonwealth,* 190 S.W.3d 318, 328 (Ky. 2006) (citing *Varble v. Commonwealth,* 125 S.W.3d 246, 254–55 (Ky.2004); *Blades v. Commonwealth,* 957 S.W.2d 246, 250 (Ky. 1997)). As a result, it overlooks substantial circumstantial proof which supports the jury's finding that Appellant criminally abused his three-month-old daughter, Kaylee, by fracturing her tibia.

"Circumstantial evidence is evidence that makes the existence of a relevant fact 'more likely than not.'" *Rogers v. Commonwealth,* 315 S.W.3d 303, 311 (Ky. 2010) (quoting *Timmons v. Commonwealth,* 555 S.W.2d 234, 237–38 (Ky. 1977)). "Although circumstantial evidence 'must do more than point the finger of suspicion,'" *id.* (quoting *Davis v. Commonwealth,* 795 S.W.2d 942, 945 (Ky. 1990)), the Commonwealth need not "rule out every hypothesis except that of guilt beyond a reasonable doubt." *Jackson,* 443 U.S. at 326 (1979). The test of the sufficiency of the evidence on a motion for a directed verdict is the same for circumstantial evidence as for direct evidence. *Davis,* 795 S.W.2d at 945; *Commonwealth v. Sawhill,* 660 S.W.2d 3, 4 (Ky. 1983).

In order for the jury to find Appellant guilty of first-degree criminal abuse for inflicting a bucket handle fracture upon Kaylee, the Commonwealth had to prove three elements: (1) that the Kaylee was twelve years of age or younger; (2) that Appellant intentionally caused Kaylee's injury; and (3) that Kaylee suffered a *serious physical injury*. *See* KRS 508.100(1). There is no dispute as to the proof regarding the first element; therefore, Appellant's claim of error is based solely upon the final two elements.[14] Specifically, Appellant contends that there was insufficient evidence for the jury to find: (1) that *he* intentionally abused Kaylee; or (2) that a bucket handle fracture is a *serious physical injury*. I disagree.

1. Identity of Perpetrator

The majority agrees with Appellant's argument that there was insufficient proof that *he* caused the fracture of Kaylee's tibia. However, after reviewing the evidence presented at trial, I believe that it was reasonable for the jury to find that Appellant was the perpetrator.

Appellant was jointly tried for Kaylee's death and her abuse. As a result, the jury heard evidence suggesting that Kaylee suffered blunt force trauma to the head eight to ten days after her tibia was fractured. Kaylee was under Appellant's supervision when she suffered the fatal blow to her head. From this evidence, the jury could have reasonably inferred that, if Appellant caused

[14] The majority declines to address Appellant's argument as to the third element, that a bucket handle injury to a three-month-old is not a *serious physical injury*, because it reverses on the second element. However, because I would affirm Appellant's conviction on this charge, I address the adequacy of the proof on both elements.

Kaylee's head injury, it was more likely than not that he caused her leg injury as well. Furthermore, the jury also heard evidence suggesting that Appellant and his co-defendant, Kaylee's mother, were the child's primary caregivers and that Kaylee's leg injury would have been extremely painful. However, neither Appellant nor his co-defendant sought medical treatment for Kaylee's fractured tibia. Kaylee's injury was only discovered eight to ten days later, after she was rushed to the hospital in critical condition with the head injury from which she later died. Based on these facts, the jury could have reasonably inferred that Appellant and his co-defendant failed to seek medical treatment for Kaylee's fractured tibia because Appellant inflicted the injury and they feared the consequences Appellant would face if it was discovered.

I acknowledge that the evidence presented by the Commonwealth does not directly prove that Appellant fractured the child's leg; however, such proof is unlikely to exist where the victim is a three-month-old infant and there are no eyewitnesses to the abuse. I also acknowledge that, had Appellant not been jointly tried for Kaylee's death and abuse, I may have agreed with the majority. However, drawing all fair and reasonable inferences in favor of the Commonwealth, I believe that there was adequate evidence to allow the jury to find that Appellant perpetrated the leg injury upon Kaylee.

2. Serious Physical Injury

Appellant also argues that there was insufficient proof that the bucket handle fracture to Kaylee's tibia was a *serious physical injury*. I disagree.

A *serious physical injury* is an injury which: (1) creates a substantial risk of death; or (2) causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ. KRS 500.080(15). "The seriousness of a physical injury depends upon the nature of the injury as well as the victim's characteristics." *Schrimsher*, 190 S.W.3d at 329.

In *Schrimsher*, we considered this identical question with respect to fractures to a six-month-old infant's tibia and fibula. In that case, we concluded that there was sufficient evidence that the infant's leg fractures constituted a serious physical injury because the doctor testified that the "injury would take up to two months to heal" and "would have been very painful when sustained." We noted that "an impairment of health must be 'prolonged' in order to constitute a 'serious physical injury,'" however, "a reasonable jury could conclude that two months of healing time is 'prolonged' with respect to the young life of a six-month-old infant." *See also Mason v. Commonwealth*, 331 S.W.3d 610, 617 (Ky. 2011) (finding sufficient evidence to prove *serious physical injury* where a child under the age of three suffered a broken right leg that "would require a cast for four to six weeks and would take one year to heal completely."); *Clift v. Commonwealth*, 105 S.W.3d 467, 471-472 (Ky. App. 2003) (finding sufficient evidence to prove *serious physical injury* where an eleven–month–old child had a complete fracture of the humerus, which took approximately four to six weeks to heal).

Here, Dr. Kriss, the pediatric radiologist, testified that Kaylee suffered a bucket handle fracture to her tibia, which would be extremely painful upon impact and with movement. Dr. Turner, the attending physician at UK, also testified that Kaylee had a leg fracture. Dr. Craig, who conducted an autopsy on Kaylee confirmed that the child had an injury between her fibula and tibia. None of the doctors testified regarding the length of time it would have taken Kaylee's leg to heal—presumably because she died from a head injury several days after her leg was fractured. However, Dr. Kriss testified that Kaylee could have diminished her pain if she immobilized her leg.

Considering the medical evidence presented in light of the holdings of *Schrimsher*, *Clift*, and *Mason*, I believe the Commonwealth produced sufficient proof for the jury to find that Kaylee suffered a *serious physical injury*. Bearing in mind the nature of the injury and the characteristics of the victim, it was reasonable for the jury to conclude that a three-month-old infant who suffers a fractured leg bone would experience a prolonged impairment of her health and thus, a *serious physical injury*.[15]

Based on the foregoing, I would affirm Appellant's conviction for first-degree criminal abuse. Therefore, I respectfully dissent on this issue.

Schroder, J. joins.

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[15] I would not be inclined to reward Appellant because Kaylee, unlike the children in *Schrimsher*, *Mason*, and *Clift*, died several days after her leg was fractured and, as a result, did not actually suffer for a prolonged period of time from that injury.

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