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ACTION.

Supreme Court of Kentucky

2013-SC-000766-MR

CHARLES TIMOTHY MORRIS

APPELLANT

V. ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
NO. 11-CR-00321

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Charles Timothy Morris, was convicted of wanton murder for the death of his three-year-old daughter, and was sentenced to thirty years in prison. He claims four errors on appeal: (1) that he was entitled to a mistrial when the Commonwealth displayed an autopsy photo of the victim's brain; (2) that the trial court abused its discretion in refusing to strike a juror for cause; (3) that the trial court erred in allowing a defense witness to be cross-examined about her relationship with another man who had been convicted of a homicide offense; and (4) that the trial court erred in admitting medical records of the victim's prior injuries as KRE 404(b) evidence of alleged prior acts of physical abuse by Morris.

Finding no reversible error, this Court affirms.

I. Background

On the morning of July 2, 2011, emergency dispatchers in Oak Grove, Kentucky, received a call from Charles Morris stating that his daughter,

Annie,¹ had lost consciousness and was unresponsive after falling and hitting her head in the bathtub. Annie was first taken to Blanchfield Army Community Hospital before being flown by helicopter to the Children's Hospital at Vanderbilt University Medical Center. She died the following morning from diffuse injuries resulting from severe brain trauma.

Dr. Deborah Lowen, a board-certified child-abuse pediatrics physician and the head of Vanderbilt's Child Abuse Response and Evaluation (CARE) Team, evaluated Annie before and after her death. Dr. Lowen determined that the brain injury in conjunction with severe retinal hemorrhages and multiple bruises of varying ages and locations on the body was "very suggestive of child abuse." Child services and police were notified and investigation ensued.

On July 29, 2011, a grand jury indictment charged Morris with murder. Following a four-day jury trial, Morris was found guilty of wanton murder for which the jury recommended a prison sentence of thirty years. The trial court sentenced him in accordance with the jury's recommendation, and he now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

Additional facts will be developed as necessary in the discussion below.

II. Analysis

A. Morris is not entitled to a mistrial for the jury being shown an autopsy photograph of the victim's brain.

Morris first claims that he was entitled to a mistrial when the Commonwealth displayed an autopsy photo of Annie's bloody brain during the

¹ Consistent with this Court's current practice, "Annie" is a pseudonym used to protect the identity of the minor victim.

testimony of its medical expert, Dr. Deborah Lowen, despite the trial court having earlier ruled the picture inadmissible.

During an in-chambers hearing on various motions, the trial court agreed with Morris that the autopsy photograph should be excluded from evidence. Specifically, the judge ruled, “If [the autopsy photo] is something that [Dr. Lowen] reviewed in the course of her practice, in the course of her treatment, in the course of her professional responsibilities in this case, then she can testify about it. I’m not going to let it into evidence, though, because I think it’s inflammatory if nothing else.” But during the direct examination of Dr. Lowen, the Commonwealth displayed the photograph on a television monitor for the jury to see while questioning Dr. Lowen about its contents. Defense counsel objected and a bench conference ensued. The judge sustained the objection and advised the prosecutor, “As I ruled previously, you can show [the photo] to [Dr. Lowen], let her testify about that, but we’re not going to show it to the jury.” The judge also added, “I don’t know how clear [the prior ruling] was,” and found that the Commonwealth’s Attorney had not “act[ed] in bad faith” but rather had “legitimately incorrectly misunderstood the court’s ruling.” Morris requested no additional relief.

Criminal Rule 9.22 requires a party to timely bring an error to the court’s attention and “make known to the court the action he desires the court to take.” *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989). And it has long been held that a party claiming entitlement to a mistrial must have made a timely request for such relief. *Jenkins v. Commonwealth*, 477 S.W.2d 795, 797-98 (Ky. 1972). A party’s failure to do so renders the error unpreserved and, at

best, subject to palpable error review under Criminal Rule 10.26. It is clear that the present claim is unpreserved because Morris did not ask the trial court to order a mistrial. Indeed, defense counsel mentioned but specifically chose *not* to request a mistrial.²

Accordingly, this Court will reverse on this unpreserved ground only if showing the jury the autopsy photo of the victim's brain was palpable error resulting in manifest injustice. RCr 10.26. In other words, this Court must be convinced that there is a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

As noted above, the trial court here ruled that the photograph at issue was "inflammatory" and therefore inadmissible under KRE 403. While it was certainly within its discretion to do so, the trial court was not necessarily required to exclude the photograph. *See, e.g., Dant v. Commonwealth*, 258 S.W.3d 12, 22–24 (Ky. 2008) (autopsy photos showing victim's brain were properly admitted as relevant proof of injuries that caused her death). The question, however, is whether the Commonwealth's showing the photograph to the jury after the trial court's ruling of inadmissibility was palpable error.

This Court cannot discern a possibility of a different result had the photograph of the brain not been shown to the jury, nor did it threaten Morris's right to due process. While gory, the doctor testified to facts the photo showed, facts the jury was entitled to consider in reaching its verdict. Morris was able to

² Morris's counsel stated, "Judge, I don't know, I mean, at this point, I don't know if I want to necessarily ask for a mistrial, but this was something we discussed."

cross-examine the witness. Such evidence may be excluded because of its tendency to lead a jury to render an increased penalty due to its inflammatory nature, but given the photo depicted the true state of the child's brain, such evidence cannot give rise to a fundamentally unfair trial which requires a finding of palpable error, and Morris is not entitled to a mistrial.

B. Morris failed to preserve for appellate review the allegedly erroneous denial of his for-cause challenge to Juror 23.

Morris next claims that the trial court abused its discretion in refusing to strike Juror 23 for cause. He argues that this forced him to use one of his peremptory strikes on Juror 23, and that as a result he was deprived of his right to ensure a fair and impartial jury. Thus, he claims, reversal is required under *Shane v. Commonwealth*, 243 S.W3d 336 (Ky. 2007).

Although neither Morris nor the Commonwealth addressed it in their briefs, our decision here is nonetheless controlled by Morris's failure to comply with the preservation standard laid out in *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009). In *Gabbard*, this Court refined its holding in *Shane* and held that, "to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." *Id.* at 854. This, the Court explained, is required because if there are no jurors whom the defendant would have struck that actually sat on the jury then there is no prejudice, and thus no reversible error, because the defendant "received the jury he wanted, and any error is effectively cured." *Id.* (citation and internal quotation marks omitted).

Morris did not identify on his strike sheet any other jurors he would have struck. Nor did he do so orally, at voir dire or otherwise. *Cf. Sluss v. Commonwealth*, 450 S.W.3d 279, 284–85 (Ky. 2014) (holding that orally stating on the record additional jurors defendant would have struck was sufficient to preserve challenge). Therefore, this issue is not preserved for our review, and we decline to address the merits of the argument. *See Mackey v. Commonwealth*, 407 S.W.3d 554, 558 (Ky. 2013).

C. Admission of testimony from defense witness regarding her relationship with a convicted killer was harmless error.

Next, Morris contends that the trial court erred when it allowed the Commonwealth, over defense objection, to cross-examine defense witness Vicki Campbell about her friendship with a man who had previously been charged and convicted of a homicide offense that had nothing to do with this case. Specifically, Morris complains about the following line of questioning:

Prosecutor: Now this isn't the first time that you've been in this situation, right? Do you remember Mike Wheeler?

Campbell: Excuse me?

Prosecutor: Do you know Mike Wheeler?

Campbell: I've never been in a court situation with Mike Wheeler.

Prosecutor: That's not what I'm asking. Do you know Mike Wheeler?

Campbell: I do know Mike Wheeler—a Mike Wheeler—yes, ma'am, I do.

Prosecutor: Mike Wheeler was also convicted of a homicide offense, correct?

Campbell: Yes, he was.

...

Prosecutor: Ms. Campbell, Mr. Wheeler was charged and ultimately convicted of a homicide, is that correct?

Campbell: He was not my friend. He was my son's friend—stood at my son's wedding—I met him after that.

Prosecutor: Okay. But then after that you maintained contact with him?

Campbell: Yes, ma'am, I did.

Prosecutor: And you kind of championed him and stayed in contact and was basically a pen pal—

Campbell: I am still in contact with Mike Wheeler and his mother in Miami.

Prosecutor: And very supportive of him?

Campbell: He's—

Prosecutor: In light of the fact that he was convicted of a homicide?

Campbell: He served his time, ma'am, and he was set free.

Prosecutor: And you intend on doing the same for Charles Morris?

Campbell: Charles Morris is an innocent man, so I don't see any problem with maintaining the family environment that we share.

Morris claims this irrelevant and prejudicial line of questioning denied him his right to a fair trial and requires reversal. The Commonwealth concedes that the trial court erred in allowing this questioning—that it was improper impeachment on an irrelevant and collateral matter, citing *Commonwealth v. Jackson*, 281 S.W.2d 891, 894 (Ky. 1955), *overruled on other grounds by Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969)—but maintains that the error was harmless.

Admission of Campbell's testimony regarding her relationship with Wheeler was clearly harmless, and Morris is not entitled to relief. RCr 9.24. "A

non-constitutional evidentiary error may be deemed harmless ... if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). “The inquiry is ... ‘whether the error itself had substantial influence.’” *Id.* at 689 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Morris’s principal purpose for calling Campbell to the stand was to impeach the testimony of Jennifer Lambert—who had been Morris’s friend and Annie’s babysitter, and who testified against Morris—and to rebut the Commonwealth’s evidence of Morris’s alleged prior abuse of his daughter. In short, Campbell testified that most of Annie’s prior injuries had been sustained while she was in the babysitter’s care and that Lambert was the reason these allegedly false allegations had been leveled against Morris.

For example, Campbell testified that Lambert told her that she had been watching Annie when the child took a “header” off the Lamberts’ front porch, which she claimed resulted in the facial bruise seen in a picture from Halloween 2010 introduced by the Commonwealth; and that it was Lambert who told her that the left arm injury in June 2011 had happened while she was playing on the slip and slide (which, incidentally, had been purchased by Campbell) while Morris was at work. Campbell also testified: “Every time [she] observed a mark on [Annie], or even [the Lamberts’ own daughter], Jennifer explained it to me. And they sounded very plausible. I wasn’t alarmed in any way. She sounded like it could have happened that way.” In addition, Campbell testified that Jennifer Lambert and Morris had had a falling out—purportedly

as a result of Lambert's unrequited love for Morris—and that it was only after this falling out that Lambert had decided to change her story and testify against Morris.

By improperly associating Campbell with another person convicted of a homicide, the Commonwealth unquestionably cast some doubt on her credibility. This, in turn, likely had at least some effect on Morris's ability to discredit Jennifer Lambert's unfavorable testimony and to refute the evidence of his alleged history of physically abusing his daughter.

But we cannot say that this substantially swayed the jury's verdict. Annie's cause of death was the severe, diffuse brain trauma sustained while in her father's sole care. The notion that the true causes of Annie's prior injuries may be contrary to what Jennifer Lambert testified to is largely inconsequential given the undisputed fact that the last time Lambert saw Annie was more than two weeks before the child's death. At best, Campbell's testimony shored up the claim that the child was accident prone, which supported Morris's claim that the head injury was the result of an accident.

But the medical evidence of the extent of the victim's physical injuries at the time of her death, coupled with the credible expert testimony of Dr. Lowen—most notably, her unequivocal rejection of Morris's explanation that his daughter had slipped and hit the back of her head while taking a shower—offered a sufficient explanation whereby the jury could reject Campbell's testimony in its entirety as it related to the head injury. Even without the

expert's opinions, the objective medical evidence³ alone was devastating to Morris's accident defense. Thus the irrelevant questions about Campbell's relationship with another person convicted of a homicide, while they may have cast some doubt on her credibility, are harmless because her entire testimony taken without the improper questions could not have substantially affected the verdict, thus impeachment of that testimony could not have done so either.

In sum, the weight of the Commonwealth's case lay in the unrefuted timeline, overwhelming medical evidence, and convincing expert testimony. The ancillary evidence of the alleged prior abuse by Morris offered through Lawrence did not explain the injury that caused the child's death, and thus improper questions affecting the credibility of the witness that rebutted that proof was too collateral to have substantially affected the verdict. The admission of that testimony was harmless.

D. Admission of medical records showing victim's prior injuries allegedly caused by physical abuse is not reversible error.

Lastly, Morris complains about the admission of several medical records detailing Annie's past injuries and ailments. He claims the medical records were irrelevant and inadmissible because they contained no evidence that he had caused the prior injuries but there was evidence that the injuries were

³ At the time of her death, Annie's injuries included severe swelling throughout the brain; bleeding on top of her brain, below the skull; swelling of the scalp in the high right front area (but not in the back of the head, where Morris reported she hit her head in the bathtub); internal swelling of her bowel; diffuse retinal hemorrhaging (bleeding in the back of the sphere) in both eyes; and extensive bruising under her jaw line and beneath her chin, on the front of her neck, on her left and right cheeks, on and around her right ear, across her back, on the right side of her chest, on her right arm near the shoulder and around the elbow, in the lower left quadrant of her abdomen, and on her legs and hips. She was also wearing a hard cast for fractures to her left forearm sustained several weeks prior.

either accidental or else may have been inflicted by others. The Commonwealth maintains that the medical records showed prior instances of Morris's alleged physical abuse of the child and that they were properly admitted under KRE 404(b) to rebut his claim that the fatal injury was the result of an accidental slip and fall.

We address each record in turn.

1. May 25, 2010.

The records from Blanchfield Army Community Hospital include a radiologist's report for x-ray images taken of Annie's face on May 25, 2010. According to the report, the x-rays showed only soft tissue swelling and no fractures. The listed reason for the diagnostic imaging was "2 yr old female left eye black and eye bloody." There were no other related records.

During pre-trial hearings on the admissibility of the medical records in question, defense counsel advised the trial court that a CPS investigation of the injuries mentioned in the May 25 record had determined that the incident had occurred while Annie was in the care of a babysitter and that there was no evidence of abuse. But rather than object to the record's admission on those grounds and ask that it be excluded, Morris requested permission to introduce the CPS report into evidence along with this medical record; and the court granted that request.

"[A] party cannot ask a trial court to do something and, when the court does it, complain on appeal that the court erred." *Tackett v. Commonwealth*, 445 S.W.3d 20, 29 (Ky. 2014). Thus, Morris waived any objection to the admission of the May 25, 2010 record.

2. June 13, 2011.

There are several pages of records from Gateway Medical Center dated June 13, 2011. The emergency record indicates that Annie presented with pain in her left forearm and elbow after falling on a slip and slide three days earlier. X-rays showed fractures of the ulna and radius (i.e., the bones of the forearm) near the elbow. The arm was put in a hard cast, and Annie was discharged the same day. Morris did not object to the admission of these records, so this issue is unpreserved and subject to reversal only for palpable error. RCr 10.26.

Evidence of other uncharged bad acts of the defendant is admissible under KRE 404(b) if offered for some “other purpose” than to show the defendant’s propensity to commit such acts. The three-part test for assessing the admissibility of prior bad acts evidence requires examining its relevance, probativeness, and prejudice. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). In child abuse cases, the relevancy of other bad acts evidence “to establish intent and an absence of mistake or accident is well established.” *United States v. Harris*, 661 F.2d 138, 142 (10th Cir. 1981); accord *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997) (holding that “evidence of prior injuries was relevant to demonstrate the animus of [the defendant] towards the child and to show absence of accident or mistake”). But “mere evidence that [the victim] had been physically abused without any proper evidence linking that abuse to the defendant is substantially more prejudicial than it is probative.” *Jarvis v. Commonwealth*, 960 S.W.2d 466, 470 (Ky. 1998); see also *United States v. Beechum*, 582 F.2d 898, 912–13 (5th Cir. 1978) (en banc) (“[A]s a predicate to a determination that the extrinsic offense is relevant,

the Government must offer proof demonstrating that the defendant committed the offense.”). And as this Court held in *Parker*, “the probative link between evidence of prior bad acts and a particular defendant does not have to be established by direct evidence,” so long as there is sufficient other evidence to allow the jury to “reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts.” 952 S.W.2d at 213–14 (citing *Huddleston v. United States*, 485 U.S. 681 (1988)). In other words, to introduce an abuse victim’s prior injuries as other-bad-acts evidence, there must be sufficient proof to support a reasonable inference both that the injuries were the result of physical abuse and that the defendant was the perpetrator of that abuse.

In this case, there was sufficient evidence from which the jury could reasonably infer that physical abuse by Morris—rather than a fall on a slip and slide—had caused the fractures to Annie’s left arm. Jennifer and Chris Lambert were watching Annie when the purported slip-and-slide accident happened, and both refuted Morris’s explanation for the injury. Jennifer Lambert testified that she had noticed nothing wrong with the child’s arm until later that day, after a period of time in which she had been alone with her father; and that Annie responded, “Daddy,” when asked how she had hurt her arm. Also, according to Lambert, Morris had initially been reluctant to seek medical treatment for his daughter, which is consistent with the history in the medical records of the injury occurring three days earlier. From this one could infer that Morris had been wary of drawing attention to the injury to avoid raising unwanted suspicions. And, finally, perhaps most significant was the expert medical testimony that this forearm injury was “distinctly unusual” for a child

that age and was not consistent with injuries typically seen in child accidents like the slip-and-slide incident reported by Morris.

In sum, the evidence was sufficient to support a reasonable inference that Annie's left arm injury in June 2011 was the result of abusive acts by Morris. And given that Morris's defense to the charged offense was that an accidental slip and fall had caused the fatal head injury, the evidence of the prior injury, also alleged to be a slip and fall by Morris, was certainly relevant to show that Morris used the "slip and fall" explanation in response to serious injuries to the child. And while the actual record indicated an accidental injury, as indicated to the hospital by Morris, the testimony substantially undermined that causation. The admission of these medical records was not error, palpable or otherwise.

3. May 17, 2010.⁴

Morris also challenges the admission of another radiologist's report from Blanchfield ACH. On May 17, 2010, x-rays were taken for a left-elbow injury. They showed no fractures or other injury. As with the other radiology report discussed above, there were no accompanying medical records related to this injury.

It is clear that this report should not have been admitted. In short, it is largely irrelevant and lacks probative value. Not only is there nothing linking Morris to this prior injury, there is no evidence whatsoever of what type of

⁴ Morris's brief (and the Commonwealth's pre-trial notice of its intent to introduce KRE 404(b) evidence) also mentions records from Blanchfield ACH dated May 15, 2010, which reportedly involved a left-arm injury as well. No such records were admitted at trial, however, so we do not address them further.

injury this was or its severity or any possible cause or mechanism of injury. Purported prior-bad-act evidence is irrelevant if the jury is unable to conclude that the act—here, physical abuse—even occurred. *See Huddleston*, 485 U.S. at 689. There is simply nothing to allow the jury to infer that the May 2010 left-arm injury was the result of physical abuse at all, much less abuse by Morris.

But because Morris failed to object to the admissibility of this evidence at trial, this issue is unpreserved and at best subject to palpable error review. We will therefore reverse only if we are convinced that the admission of this evidence was palpable error resulting in manifest injustice. It was not. The error in admitting the radiologist’s report—showing that Annie had an injured arm but not a fractured elbow on May 17, 2010—was not so fundamental as to threaten Morris’s entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). The complained of record was but one among 312 pages of medical records and reports admitted into evidence. We cannot say its admission was so “shocking or jurisprudentially intolerable” as to call into doubt the “fairness, integrity or public reputation of the judicial proceedings.” *Id.* at 4. There is no palpable error warranting reversal.

4. June 7 and June 23, 2010.

On June 7, 2010, Annie was seen at Gateway Medical Center for left-elbow pain and swelling after having reportedly fallen two to three feet off a friend’s porch. Other complaints included headaches, nausea, and vomiting. Physical findings also noted bruising to her left eye. And the emergency physician made note of Annie’s “normal interaction” with her father. Additionally, on June 23, 2010, Annie presented to Gateway with a fever. The

records noted “difficulty going to sleep,” “drinking less,” “crying and sleeping all day,” “unable to hold her head up and drooling,” “unable to walk,” and “vomited once last night.” Physical exam findings and lab results were normal. The clinical impression was fever and viral infection. Morris declined to have Annie admitted but agreed to bring her back “if she was not more alert in five hours.”

Like the previously discussed record, Morris has good cause to complain about the admission of these medical records. There was no evidence that these injuries and symptoms were the result of physical abuse by Morris, or anyone else for that matter. Indeed, the only other evidence presented came from Dr. Lowen, who testified that the symptoms reported in those records were consistent with abusive trauma, while conceding that they could have accidental or non-traumatic causes as well. This is insufficient to allow the jury to infer that the prior injuries were caused by physical abuse or that Morris was the abuser. As the saying goes, correlation does not necessarily imply causation; and this proof does not even rise to the level of correlation.

Unlike the previously discussed record, however, Morris did (somewhat) object to the admission of these records at trial. During pre-trial hearings, defense counsel stated she was “making a generalized relevancy argument” (without elaboration) while also objecting to the June 7 record (to the extent there was no way of knowing whether or not it evidenced the same injuries as the May 25 record) and the June 23 record because it did not involve physical injuries. But she later stated that she had no objection to the admission of the latter as part of the Commonwealth’s introduction of the child’s entire medical

record, and only objected to the Commonwealth arguing that it was evidence of prior abuse.

Whether this was sufficient for preservation purposes matters not in the end, however, because the admission of these records was harmless. The notion that Annie's injuries were caused by an accidental slip and fall in the shower was simply too incredible given the substantial medical evidence, which wholly refuted that claim, as well as the undisputed timeline of events, which implicated Morris and no one else. Since this Court can say with fair assurance that the evidence of the prior injuries did not substantially influence the jury's verdict, its admission was harmless.

III. Conclusion

For the reasons set forth above, the judgment of conviction and sentence of the Christian Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Paul Joseph Dickman
Dickman Law Offices, PSC
19 West Eleventh Street
Covington, Kentucky 41011

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

James Hays Lawson
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601