

[Cite as *State v. Carr*, 2010-Ohio-2764.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090109
	:	TRIAL NO. B-0709795
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
HALLORAN CARR,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 18, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Derek W. Gustafson, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Halloran Carr appeals from her conviction, following a jury trial, for endangering children.¹ Carr had shaken her three-month-old baby, Destiny Concepcion, and had inflicted serious and lasting injuries on the child. The jury was unable to reach a verdict on a separate felonious-assault charge. The trial court dismissed that charge and ultimately imposed the maximum sentence of eight years' incarceration for endangering children. On appeal, Carr challenges the trial court's failure to suppress her confession, its failure to exclude testimony from qualified medical experts, and the weight of the evidence adduced to support her conviction. We affirm.

I. Destiny's Serious Brain Injuries

{¶2} In the early afternoon of November 20, 2007, Carr grabbed Destiny under her arms and shook the child because she would not stop crying. Ten hours later, Carr summoned emergency help for Destiny. Paramedics found the child unresponsive and breathing irregularly. She appeared tired and lethargic and was whimpering. One of her pupils was larger than the other. Carr informed the paramedics only that Destiny had hiccups and suffered from acid reflux.

{¶3} Destiny was treated in the pediatric intensive-care unit of the Cincinnati Children's Hospital Medical Center by Berkeley Bennett, M.D. Dr. Bennett found that Destiny had a subdural hematoma, bilateral retinal hemorrhages, lacerations of the liver and spleen, and a nondisplaced linear fracture of the right parietal skull. Many of these injuries commonly appear together when a young child is shaken violently. Clinicians refer to this grouping of injuries as inflicted head injury or shaken-baby syndrome.² Inflicted head injury is characterized by bleeding on the brain (subdural or subarachnoid

¹ See R.C. 2919.22(B)(1).

² See, e.g., *State v. Collins*, 1st Dist. No. C-030436, 2004-Ohio-2274; see, also, *State v. Butts*, 10th Dist. No. 03AP-495, 2004-Ohio-1136.

hematoma) and in the back of the eyes (retinal hemorrhaging), by swelling of the brain, and by the symptoms associated with these injuries, including irregular breathing, lethargy, heart problems, and seizures.

{¶4} At the hospital, Carr told a social worker that she had fallen while carrying Destiny. Carr described tripping and striking a wall while climbing a staircase. She told Dr. Bennett that she had fallen while climbing the stairs. But she could not describe for Dr. Bennett whether Destiny had been injured by being dropped on the stairs or by being crushed by Carr's weight when she had fallen. On the next day, Carr told a Hamilton County Sheriff's detective that she had tripped and might have dropped Destiny several feet onto the carpeted stairs. At a second interview with the detective, conducted five days later and after the seriousness of Destiny's injuries was clear, Carr admitted shaking Destiny until she had stopped crying.

{¶5} Carr filed pretrial motions to suppress her inculpatory statements and to exclude the testimony of the state's medical witnesses on whether Carr's shaking could have produced enough force to cause Destiny's extensive injuries. After holding hearings on these issues, the trial court denied the motions.

{¶6} At trial, the detective testified about the investigation into Destiny's injuries. During his testimony, the video recording of Carr's statement that she had shaken Destiny was played for the jury. The jury also heard the medical testimony of the state's four treating physicians. The essence of the state's medical evidence was that the bleeding on Destiny's brain and behind her eyes was the result of shaking, and that the injuries to her spleen and liver were a result of being held under the arms during the shaking.

{¶7} Dr. Bennet, a board-certified pediatrician and emergency-medicine physician who was also a member of the hospital's child-abuse team, testified about

Destiny's injuries. She stated that Destiny had been critically ill when she arrived at the hospital and that it appeared that the injuries were hours old. She described the injuries and testified that they were consistent with a diagnosis of inflicted head injury. Dr. Bennett described inflicted head injury as involving a constellation of abnormal findings present in very young children who have been shaken. When a baby is shaken, the baby's brain is injured by moving back and forth within the skull. Tearing and shearing of blood vessels and nerves compound the injuries.

{¶8} Over Carr's strenuous objections, Dr. Bennett testified that, based upon her experience and training, Destiny's injuries were consistent with the symptoms of inflicted head injury caused by shaking. She stated that Carr's explanation—that Destiny had fallen a few feet onto stairs—did not account for the constellation of injuries presented.

{¶9} Kristen Robert Wesselkamper, MD, a board-certified pediatric neurologist who treated Destiny in the pediatric intensive-care unit, described Destiny's brain injury. He testified that Destiny suffered from and would continue to suffer from developmental disabilities, seizures, blindness, cerebral palsy, and a shortened life expectancy. He described how Destiny had been on a ventilator for a 96-hour period, and how she had had to return to the hospital following a cardiac arrest. After reviewing Destiny's medical records from before the shaking and his treatment notes on Destiny, and based upon his training and experience, he stated that Destiny had received severe brain injuries as a result of the sudden acceleration and deceleration of her brain consistent with shaking. Carr timely objected to Dr. Wesselkamper's medical opinion.

{¶10} Constance West, MD, the hospital's director of pediatric ophthalmology, also treated Destiny. Dr. West testified that while Destiny had extensive hemorrhaging in her retinas, there was no evidence of direct trauma to her eyeballs or to the front of her eyes. Over Carr's objections, Dr. West testified that, based upon her training and

experience, Destiny's constellation of injuries "just isn't seen in anything else except" inflicted head injury. Dr. West also concluded that while Destiny's eyes functioned normally, their visual signals were not reaching the brain, which had resulted in blindness.

{¶11} In Carr's case, she called John Plunkett, M.D., a physician board-certified in anatomic pathology, clinical pathology, and forensic pathology. Dr. Plunkett had not treated Destiny. But he had reviewed her medical records except for the radiological studies. Dr. Plunkett testified that the force necessary to cause subdural hematomas in very young children could not be achieved by shaking alone. He declared that "[t]he amount of force required to cause subdural hematoma cannot be achieved by humanly possible shaking." Dr. Plunkett further stated that the application of the forces necessary to cause brain bleeding would also have resulted in damage to the child's neck. And Destiny had no substantial neck injuries. He also stated that Destiny's parietal skull fracture could have been caused by a two-foot fall and that injuries to her torso were consistent with a crush injury.

{¶12} In rebuttal, the state called Robert Shapiro, M.D., the medical director of the hospital's Mayerson Center for Safe and Healthy Children. The center's staff evaluated, treated, and prevented child maltreatment. Dr. Shapiro was board certified in pediatrics and pediatric emergency medicine and was also a professor of pediatrics at the University of Cincinnati College of Medicine. While Dr. Shapiro admitted that a controversy existed in the biomedical community over what level of force was required to cause inflicted head injuries, he testified that inflicted head injury was a medically accepted diagnosis. He refuted Dr. Plunkett's assertion that an infant with serious brain injuries like Destiny's would necessarily have had neck injuries. Dr. Shapiro also concluded, based on his training and experience, over Carr's objection, that Destiny's

injuries were consistent with an inflicted head injury and were not explainable by Carr's description of Destiny's minor fall onto stairs or of her having been crushed.

{¶13} The jury returned a verdict of guilty on the endangering-children charge. The trial court entered judgment on the verdict and imposed sentence after reviewing the presentence-investigation report. This appeal ensued.

II. An Equivocal Request for Counsel

{¶14} Carr first argues that the trial court erred in denying her motion to suppress inculpatory statements that she had made under police interrogation. In a video recording of her second interrogation by the sheriff's detective, Carr admitted that she had grabbed Destiny under her arms and had shaken her until she went limp. The statement was played for the jury.

{¶15} Carr claims that her statement should have been suppressed because the detective questioned her despite her request for counsel at the beginning of the interrogation. Under the rule of *Edwards v. Arizona*,³ "if a defendant invokes her right to counsel at any time during custodial interrogation, police questioning must cease."⁴ Statements made after a defendant has invoked her right to counsel are subject to suppression.⁵

{¶16} At the beginning of the second interrogation, the detective informed Carr of her right against self-incrimination. He then asked Carr whether she wanted an attorney to be present. Carr argues that her response, that she "would [have] prefer[ed] an attorney be present," was a clear request for counsel, and that all questioning should have ceased.⁶

³ (1981), 451 U.S. 477, 484-485, 101 S.Ct. 1880.

⁴ *Cincinnati v. Gill* (1996), 109 Ohio App.3d 580, 582, 672 N.E.2d 1019; see, also, *State v. Knuckles*, 65 Ohio St.3d 494, 1992-Ohio-64, 605 N.E.2d 54, paragraph one of the syllabus.

⁵ See id. at 496, 1992-Ohio-64, 605 N.E.2d 54.

⁶ See Appellant's Brief at 4.

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{¶17} We review a trial court’s ruling on a motion to suppress in a two-step process.⁷ First, we must accept the trial court’s findings of historical fact if they are supported by competent, credible evidence.⁸ Then this court must make an independent determination, as a matter of law, without deference to the trial court’s legal conclusions, if those facts meet the applicable constitutional standards.⁹

{¶18} A full review of Carr’s statement to the detective reveals that she had told him that “I would prefer a lawyer *but I want to talk to you now.*”¹⁰ The detective again asked Carr whether she wanted to speak with him. And she said yes. Carr signed a *Miranda*-rights waiver form. And the detective again told Carr that she could stop talking at any time and that she was free to stop talking until she had spoken with an attorney. But Carr proceeded to answer questions for at least 15 more minutes. And her answers included the incriminating statement that she had shaken Destiny.

{¶19} When a defendant invokes her right to counsel, the police must cease the interrogation.¹¹ But the police need not stop questioning a defendant if her request for counsel is ambiguous or equivocal.¹² A defendant “must articulate [her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”¹³

{¶20} “[T]he *likelihood* that a suspect would wish counsel to be present is not the test for [the] applicability of *Edwards*.”¹⁴ The defendant must unambiguously request

⁷ See *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307; 897 N.E.2d 629, ¶49 et seq.

⁸ See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

⁹ See *In re A.J.S.* at ¶50, citing *State v. Burnside* at ¶8; see, also, *State v. Karle* (2001), 144 Ohio App.3d 125, 129, 759 N.E.2d 815.

¹⁰ Emphasis added.

¹¹ *State v. Bell*, 1st Dist. Nos. C-050537 and C-050539, 2007-Ohio-310, ¶52.

¹² See *Davis v. United States* (1994), 512 U.S. 452, 459, 114 S.Ct. 2350; see, also, *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶18 (“[n]o cessation of questioning is required if the request is ambiguous”).

¹³ *Id.*

¹⁴ *Id.*, quoting *McNeil v. Wisconsin* (1991), 501 U.S. 171, 178, 111 S.Ct. 2204 (emphasis in the original).

counsel.¹⁵ A defendant's statements such as "I think I need a lawyer,"¹⁶ "[w]hen I talk to a lawyer,"¹⁷ or "[Am] I supposed to have a lawyer present"¹⁸ do not amount to the unambiguous or unequivocal invocation of the right to counsel required under *Edwards*. We hold that Carr's statement—"I would prefer a lawyer but I want to talk to you now"—similarly did not amount to an unambiguous or unequivocal request for counsel that would have required a reasonable police investigator to cease his questioning. Thus the trial court did not err in overruling Carr's motion to suppress her responses to that questioning. The first assignment of error is overruled.

III. Reliable Medical Testimony on the Cause of Destiny's Injuries

{¶21} Carr next argues that the trial court erred in failing to hold a pretrial hearing to determine the scientific validity of the state's medical evidence. Carr had moved for a hearing to present the testimony of Dr. Plunkett and to cross-examine the state's medical experts on whether Carr's shaking could have produced enough force to cause Destiny's injuries. Carr claimed that the conclusions of the state's medical experts—that a short-distance fall could not have caused Destiny's injuries and that they must have been the result of Carr's shaking—were not based upon sound scientific principles and thus should be excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁹

{¶22} First, we note that the trial court did hold a hearing on Carr's motion on September 18, 2008, as memorialized in a 23-page transcript of the proceedings. Carr's assignment is more properly described as one challenging the trial court's ruling that it would not limit testimony on inflicted head injury because the medical basis of that

¹⁵ See *id.*; see, also, *State v. Jackson*, 107 Ohio St. 3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶93.

¹⁶ *State v. Henness*, 79 Ohio St.3d 53, 63, 1997-Ohio-405, 679 N.E.2d 686.

¹⁷ *State v. Jackson* at ¶95.

¹⁸ *State v. Brown* at ¶19.

¹⁹ (1993), 509 U.S. 579, 113 S.Ct. 2786; see, also, *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178, 687 N.E.2d 735.

testimony was well accepted in the medical community and in Ohio's judicial decisions, and was reliable and relevant.

{¶23} As this court explained in *State v. Finley*, “ [t]rial courts have broad discretion in determining the admissibility of expert testimony, subject to review for an abuse of discretion. * * * In general, courts should admit such testimony when material and relevant, in accordance with Evid.R. 702 * * *.’ Evid.R. 702 permits a witness to testify as an expert when (1) the witness’s testimony relates to matters beyond the knowledge or experience of a layperson, (2) the witness has specialized knowledge, skill, experience, training, or education regarding the subject matter of his or her testimony, and (3) the witness’s testimony is based on reliable scientific, technical, or specialized information. ‘When applying the third prong of Evid.R. 702, the court must act as a ‘gatekeeper’ to ensure that the proffered scientific, technical, or other specialized information is sufficiently reliable.’ Whether an expert’s opinion is admissible depends on whether the principles and methods employed by the expert to reach that opinion are reliable, and not ‘whether his conclusions are correct.’ The credibility to be afforded the expert’s conclusions remains a matter for the trier of fact.”²⁰

{¶24} First, it is beyond cavil in this case that the state’s four medical witnesses had the specialized knowledge, experience, training, and education to qualify them as experts on the causes, diagnoses, and treatment of pediatric injuries. There is also no dispute that their testimony related to matters beyond the knowledge and experience of laypersons.

{¶25} But Carr argues that Dr. Plunkett’s testimony, proffered at the hearing and ultimately provided to the jury, supported by biomedical evidence from studies on

²⁰ *State v. Finley*, 1st Dist. No. C-061052, 2008-Ohio-4904, ¶32, quoting *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶16-22; *Miller v. Bike Athletic Co.*, 80 Ohio St.3d at 611, 1998-Ohio-178, 687 N.E.2d 735; *State v. Rangel* (2000), 140 Ohio App.3d 291, 295, 747 N.E.2d 291; and *State v. Nemeth*, 82 Ohio St.3d 202, 211, 1998-Ohio-376, 694 N.E.2d 1332.

animals, undermined the scientific basis of the state's testimony. While these studies may, as Dr. Shapiro noted, be the cause of controversy in the medical community, the principles and methods employed by the state's medical witnesses to reach their opinions were based upon standard methods of diagnosis. That is the requirement for reliability under *Daubert*.

{¶26} Drs. Bennett, Kesselkamper, Wade, and Shapiro each testified to their experience in diagnosing and treating babies suffering from bleeding on the brain and bleeding behind the eyes. Each detailed the standard medical tests and procedures they employed to reach their diagnoses. Each related how Destiny's injuries were explained by the diagnosis of inflicted head injury. Based upon their experience and training, they delivered an opinion that shaking was sufficient to have caused Destiny's injuries. And each also ruled out a short-distance fall or crushing as a plausible explanation for Destiny's constellation of injuries.

{¶27} The process of isolating the cause of a patient's injuries through the methodical elimination of other potential causes, called differential diagnosis, is a standard scientific method for determining causation.²¹ Since the state's medical witnesses described potential causes of inflicted head injury that were well-known in the medical community and well accepted in Ohio's courts,²² the use of differential diagnosis was appropriate.²³

{¶28} We hold that the trial court correctly determined that the diagnosis of inflicted head injury was based upon standard medical procedures and was thus reliable. This was not the type of junk science that lacked the intellectual rigor required for the

²¹ See *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶22.

²² See, generally, *State v. Woodson*, 8th Dist. No. 85727, 2005-Ohio-5691, ¶49; see, also, *State v. Weeks* (1989), 64 Ohio App.3d 595, 582 N.E.2d 614; *State v. Butts*, 2004-Ohio-1136; *State v. Collins*, 2004-Ohio-2274.

²³ See *Valentine v. Conrad* at ¶22; see, also, *In the Matter of Leah Marie S.*, 6th Dist. No. H-06-037, 2008-Ohio-360, ¶23.

admission of expert opinion. That was the trial court's sole inquiry under *Daubert*. Whether the conclusions of the state's medical witnesses were correct was a matter that *Daubert* and the Ohio Rules of Evidence consigned to the trier of fact.²⁴ Since the trial court's ruling was supported by a sound reasoning process, the second assignment of error is overruled.²⁵

IV. The Weight of the Evidence

{¶29} In her final assignment of error, Carr challenges the manifest weight of the evidence adduced to support her conviction for endangering children, in violation of R.C. 2919.22(B)(1), punishable as a second-degree felony. The endangering-children statute prohibits the reckless abuse of a minor that results in serious physical harm.²⁶ Carr asserts that the record contains equally persuasive evidence that Destiny's injuries were caused by an accidental fall rather than by Carr's abusive shaking and, therefore, that the jury's verdict was against the manifest weight of the evidence.

{¶30} A review of the record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.²⁷ The jury was entitled to reject Carr's theory of the case. The state adduced ample evidence that Carr had recklessly shaken Destiny to stop her from crying, and that the shaking had caused serious and permanent injuries to her brain, as well as serious injuries to other internal organs. Four experienced and highly trained physicians, engaged daily in the diagnosis and treatment of abused children, provided

²⁴ See *Miller v. Bike Athletic Co.*, 80 Ohio St.3d at 611, 1998-Ohio-178, 687 N.E.2d 735; *State v. Nemeth*, 82 Ohio St.3d at 211, 1998-Ohio-376, 694 N.E.2d 1332.

²⁵ See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

²⁶ See *State v. Smith*, 1st Dist. No. C-080126, 2009-Ohio-3727, ¶31; see, also, *State v. Craycraft*, 2nd Dist. Nos. CA2009-02-013 and CA2009-02-014, 2010-Ohio-596, ¶106.

²⁷ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

reliable expert medical testimony that Destiny's injuries had been caused by shaking. Each offered the opinion that a fall of a few feet was unlikely to have caused such extensive injuries.

{¶31} And the state played for the jury Carr's confession that she had grabbed Destiny under the arms and had shaken her. This was not the problematic case where there were no other signs of abuse and where a baby's suffering from bleeding on the brain and bleeding behind the eyes—the key factors in a diagnosis of inflicted head injury caused by shaking—was the only evidence of abuse.²⁸

{¶32} While Carr presented her own expert medical testimony to undercut the state's explanations of Destiny's injuries and thoroughly cross-examined the state's experts to highlight weaknesses in their testimony, the weight to be given the evidence in this case, whether direct or circumstantial, and the credibility of the witnesses were for the jury, sitting as the trier of fact, to determine.²⁹ In resolving conflicts and limitations in the testimony, the jury could have found that Carr had recklessly shaken Destiny and caused serious and lasting injuries to her child. The third assignment of error is overruled.

{¶33} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN and HENDON, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

²⁸ Note, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept* (2003), 2003 Utah L.Rev. 1109.

²⁹ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.