COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1559-CR **Cir. Ct. No. 2007CF2381**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER HANCOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Jennifer Hancock appeals a judgment convicting her of one count of first-degree reckless homicide, contrary to WIS. STAT.

§ 940.02(1) (2009-10),[1] after a jury trial. We affirm the judgment of the circuit court.

BACKGROUND

¶2 Hancock was charged with first-degree reckless homicide for the death of a four-month-old infant. Hancock provided care to the infant in her home as part of an in-home childcare service she operated. One day while the infant was in her care, the infant became unresponsive, and Hancock called 911. The infant died four days later in the hospital after the decision was made to remove him from life support. The medical record stated that the cause of death was withdrawal of support following severe blunt head trauma and brain injury. Medical records also indicated that the infant had a broken femur.

¶3 The cause of death was the primary issue at trial. The State presented testimony from several medical experts who concluded that the infant's injuries were the result of a recent injury to the skull. The doctor who conducted the autopsy of the infant testified that the death was nonaccidental and, in his opinion, was a child abuse fatality. Hancock presented testimony from one expert, a clinical neurosurgeon named Dr. Ronald Uscinski. Uscinski testified that, in his opinion, the infant died as a result of a rebleed of a chronic subdural hematoma, reflecting unhealed birth trauma.

¶4 During cross-examination of Uscinski, the State presented articles from seven learned treatises to impeach Uscinski's testimony and credibility. Two

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

of the seven articles were withdrawn by the State after Uscinski testified that he was not familiar with them. Hancock's counsel made objections in two instances, after the State referenced the first and the fifth articles, and the court held a sidebar after each objection. The court did not make an explicit ruling on the first objection, but allowed the State to ask a foundational question to see if Uscinski was familiar with the article at issue. Uscinski testified that he was, and the State proceeded to question him about the article's conclusion. The court overruled the second objection and ruled that the State could use the articles to cross-examine Uscinski.

¶5 After the close of evidence, the jury found Hancock guilty of one count of first-degree reckless homicide as to the infant's death, and a judgment of conviction was entered. Hancock now appeals.

ISSUE

¶6 The sole issue on appeal is whether the circuit court erroneously exercised its discretion in allowing the State to cross-examine the defense's expert about articles from learned treatises authored by persons who were not present at trial.

DISCUSSION

¶7 Hancock argues that the circuit court improperly allowed the State to use articles from learned treatises for impeachment purposes on cross-examination of Uscinski, and that the error was not harmless. Hancock concedes that, under ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 50-51, 588 N.W.2d 321 (Ct. App. 1998), the use of learned treatises in cross-examination is allowed, even in cases where no forty-day advance notice was given under WIS.

STAT. § 908.03(18)(a), as long as a proper foundation is established that the writer of the treatise is an expert in the field. However, Hancock argues that the proper foundation was not laid in this case to establish that the authors of the articles used by the State were experts. Hancock further argues that the two objections made by her trial counsel during the State's cross-examination of Uscinski were specific enough to preserve her arguments as to all of the articles.

¶8 The State argues that it was permissible for the State to use the articles in its cross-examination of Uscinski because Hancock "opened the door" to impeachment by eliciting Uscinski's opinion that the State's experts were incorrect about the causation of the infant's injury and that no forensic controversies existed about rebleeding of a subdural hematoma. The State argues that, under the theory of curative admissibility, "a party who opens the door on a subject cannot complain if the opposing party offers evidence on the same subject to explain, counteract, or disprove the evidence." *See* ***State v. Harvey***, 2006 WI App 26, ¶40, 289 Wis. 2d 222, 710 N.W.2d 482. The State also argues that a witness need not acknowledge the authoritative nature of a work if the article or treatise is used during cross-examination, and that only when the work is used as substantive evidence must a foundation be laid establishing its reliability and authority. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE, § 803.18, at 667 & n.13. Additionally, the State asserts that Hancock's objections to the articles during Uscinski's cross-examination were not specific enough to preserve her arguments on appeal.

¶9 We need not decide the issue of whether Hancock's objections were sufficient to preserve her arguments, whether foundation was required, or whether Hancock opened the door to impeachment, because we conclude that any error made in allowing the State to question Uscinski about the articles was harmless.

We begin by noting that the second and fourth articles mentioned by the State were withdrawn after Uscinski stated that he was not familiar with them.[2] The State questioned Uscinski only about the title and authors of those articles, and did not explore the articles in any detail on cross-examination. Therefore, we conclude that there was no erroneous exercise of discretion on the part of the circuit court in its handling of the State's questions as to the second and the fourth articles mentioned in cross-examination of Uscinski.

¶10 We turn, then, to the five articles that were examined in more depth. The first article referenced by the State was a paper authored by Billmore and Meyers, concluding that accidental trauma rarely, if ever, causes intracranial injury in infants. After reviewing the article, Uscinski stated that he had seen the article at some point in the past. He also stated that he disagreed with the mechanisms by which the authors arrived at their conclusion and opined that it was not a very good study.

¶11 The third article proffered by the State was a work by Shugerman, Paez, Grossman, Feldman, and Grady, entitled "Epidural Hemorrhage: Is it abuse?" Uscinski stated that he had seen the article, but was not very familiar with it. After reviewing the article on the stand, he stated that he disagreed with the authors' conclusion.

[2] The second article mentioned by the State on cross-examination was entitled "Subdural Hematomas in Children Under Two Years, Accidental or Inflicted, a 10-Year Experience," authored by Zume and Oates. The fourth article mentioned by the State was entitled "The Cause of Infant and Toddler Subdural Hemorrhage: A Prospective Study," by Shugerman, Paez, Grossman, Feldman, and Grady.

¶12 The fifth article mentioned by the State during Uscinski's cross-examination was an article entitled "Head Injury in Very Young Children: Mechanisms, Injury Types, and Ophthalmologic Findings in 100 Hospitalized Patients Younger Than 2 Years of Age," by Duhaime, Alario, Lewander, Schut, Sutton, Seidl, Nudelman, Budenz, Hertle, Tsiaras, and Loporchio. Again, Uscinski stated that he thought he had seen the paper in the past. Uscinski acknowledged that the article concluded that, among the one hundred children it studied, inflicted injury was the most common cause of mortality among patients who had subdural hematomas. He stated that he had cited other works by Duhaime in his own testimony in other cases.

¶13 The sixth article on which the State questioned Uscinski during cross-examination was entitled "Nonaccidental Head Injury in Infants, The So-Called Shaken Baby Syndrome," by Duhaime, Christian, Rorke, and Zimmerman. Uscinski stated that he had seen the paper before and that he was familiar with the authors. He acknowledged that one of the article's findings was that abuse was the most common cause of subdural hematoma in infants, but he opined that the article was focused on a somewhat different issue.

¶14 The final article referenced by the State was Andrew Parent's "Pediatric Chronic Subdural Hematoma: A Retrospective Comparative Analysis." Uscinski admitted he had seen the paper in the past, and agreed that one of the conclusions of the paper was that, of the forty-three patients studied, birth trauma accounted for only a few cases of subdural hematoma.

¶15 Turning to the issue of what effect, if any, the use of the articles had on the outcome of the case, we note that WIS. STAT. § 805.18, made applicable to criminal cases by WIS. STAT. § 972.11(1), prohibits reversal for error not affecting

a party's substantial rights. ***State v. Kleser***, 2010 WI 88, ¶94, 328 Wis. 2d 42, 786 N.W.2d 144. We have held that learned treatise evidence improperly admitted did not affect a substantial right of the party, where the expert only partially relied on the treatise for his opinions, the evidence was cumulative, and the treatise was not given to the jury. ***Jones v. Dane County***, 195 Wis. 2d 892, 937-38, 537 N.W.2d 74 (Ct. App. 1995).

¶16 In this case, as in ***Ansani***, portions of the articles were read aloud, but the articles themselves were never given to the jury. *See* ***Ansani***, 223 Wis. 2d at 51. In its closing argument, the State did not mention any of the authors or the specific conclusions of the articles, but referred simply to "the literature" and "the research" in Uscinski's field. In addition, the content of the articles was cumulative of the State's other evidence, in that it comported with the testimony of the State's experts.

¶17 The State presented extensive expert testimony at trial in support of its argument that the infant's death was caused by an acute, subdural hematoma that was the result of nonaccidental injury to the skull. Dr. Michael Anthony Stier, who performed the autopsy on the infant in this case, testified that he believed the cause of death was nonaccidental physical injury. He testified that, in forensic pathology and clinical pediatric medicine, a pattern of acute subdural hemorrhage, like the one he observed in this case, is a marker for a recent, nonaccidental injury.

¶18 Several other experts viewed the autopsy report and photographs and testified about their conclusions. Dr. Jeffrey Jentzen, a forensic pathologist, opined that the infant's subdural hemorrhage was recent and was consistent with nonaccidental head trauma. Dr. Wilber Smith, a pediatric radiologist, testified that, in his opinion, a subacute or old injury did not contribute to the infant's

death, but that the death was caused by a recent injury to the skull. Dr. Lucy Rorke-Adams, a pediatric neuropathologist, opined that the vast majority of individuals who have the type of subdural hemorrhage that was shown in the infant's autopsy photographs have been subjected to some kind of severe trauma. Dr. Carole Jenny, a pediatrician specializing in abuse and neglect cases, opined that the infant's behavior and symptoms in this case were not consistent with a rebleed of an old injury.

¶19 The testimony of the State's experts, taken in sum, largely supported the State's theory that acute subdural hemorrhage is most likely caused by recent head trauma, as opposed to rebleed of an old injury. The articles referenced by the State during Uscinski's cross-examination were cumulative on that point. Accordingly, we conclude, as did the circuit court, that any error in allowing the State to question Uscinski about articles from learned treatises was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.