

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1995

FILED
April 23, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
v.)
)
KATHY MARTIN and)
MARCUS CARLOS WEST,)
)
Appellants.)

No. 03C01-9411-CR-00420
Jefferson County
Hon. Rex Henry Ogle, Judge
(Appellant Martin: Child Abuse)
(Appellant West: Aggravated Child Abuse)

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OPINION FILED: _____

REVERSED AND DISMISSED AS TO MARTIN; AFFIRMED AS TO WEST

Joseph M. Tipton
Judge

OPINION

The defendants, Kathy Martin and Marcus Carlos West, appeal from their jury convictions in the Jefferson County Circuit Court. Martin was convicted of child abuse, a Class A misdemeanor, and sentenced to eleven months and twenty-nine days to be served in the custody of the Jefferson County Jail, suspended after the service of five months. West was convicted of aggravated child abuse, a Class B felony, and sentenced to twelve years as a Range I, standard offender to be served in the custody of the Department of Correction. In this appeal as of right, the defendants contend that:

1. the evidence is insufficient to support their convictions,
2. the trial court erred in admitting evidence of the victim's past injuries,
3. the trial court erred in denying the defendants' motion for a mistrial when an expert testified that the victim's injuries were a result of an intentional act, and
4. the trial court erred in not allowing the defendants to present witnesses who would testify regarding particular relevant character traits.

We conclude that the evidence is insufficient to support Martin's conviction for child abuse and, accordingly, we reverse and dismiss her conviction. However, we conclude that no reversible error exists relative to West's allegations of error and affirm his conviction for aggravated child abuse.

The facts of this case involve the February 21, 1993, burning of the victim, thirteen-month-old Cassidy Martin, while West was babysitting the victim for Martin, who was running errands. Dr. Gerald Blossom, a pediatric emergency doctor with East Tennessee Children's Hospital, testified that, on March 1, 1993, the victim was brought to Children's Hospital by the Department of Human Services (DHS) for an examination as a suspected child abuse victim. He stated that the child had burns to her face and hands. He said that the burns were caused by contact with a very hot object and that the burns would be extremely painful. Dr. Blossom testified that a thirteen-month-old child could not operate a BIC lighter and that, even assuming the child could light the lighter, she would not have the dexterity to hold the lighter for a continuous length of

time. He said that the burns could not have been self-inflicted. He also testified regarding the child's prior injuries consisting of a spiral fracture to her right leg in February 1993, a skull fracture in December 1992 and an immersion burn to her left foot.

On cross-examination, Dr. Blossom testified that he never treated the victim but, rather, that she was brought to him by DHS for an evaluation to detect child abuse. He admitted that the x-rays of the child did not reveal any subtle signs of child abuse. He also admitted that it was possible that the child's leg fracture had occurred, as reported by the mother, from the child twisting her leg in her crib. He admitted that not every child with second degree burns requires medical attention and that ointments often make burns appear worse. However, he added that it was very unlikely that the victim's burns could have been caused by her falling onto a hot lighter.

Deanna Barbee of the Jefferson County DHS testified that she went to the West residence on February 27, 1993, to investigate a complaint received by Child Protective Services regarding the victim. She said that West answered the door and told her that Martin was not home. She asked West to have Martin call her when she returned but Martin never called. Ms. Barbee stated that she returned to the West residence after two or three hours and served the protective order on Martin. She and Martin then took the victim to the hospital where she was treated by Dr. Bill Ramsey. On cross-examination, Ms. Barbee testified that the victim was placed in foster care on February 27th. She also said that Martin cooperated with authorities.

Detective G.W. McCoig testified that he accompanied Ms. Barbee to the West residence on February 27th. He recalled asking West questions about the child's leg injury to which West responded that the child must have fallen in her crib. When asked about the burns, West explained that Martin was at the grocery store when the

power went out. West told Detective McCoig that he lit the BIC lighter for light and, when he saw that his parents' lights were on, he dropped the lighter on the couch and went to check his breaker box. Detective McCoig testified that West thought the child had picked up the hot lighter. He also said that he talked to Martin who said that she was at a friend's house when the victim was burned and also said that she had been treating the victim's burns with ointment. On cross-examination, Detective McCoig testified that West said that the lighter must have been lit fifteen minutes before he went to check the breaker box. He also said that both West and Martin were cooperative throughout the investigation and spoke with him freely.

Dr. Bill Ramsey, a pediatrician in Jefferson City, testified that he was working at the emergency room on February 27th when Martin and Ms. Barbee brought the victim in for treatment. He said that the victim had fairly large second degree burns on her face and small burns to her chin, hands and fingers. He stated that the victim would not have had the manual dexterity to light the lighter and that it was impossible that the child would transfer the hot lighter from hand to hand, causing the burns she suffered. He said that the burns would cause extreme physical pain. On cross-examination, Dr. Ramsey testified that he believed that the victim was intentionally burned because the burns were too extensive to indicate an accidental touching. However, he admitted that, given the child's difficulty with the cast on her leg, she could have fallen on the lighter. He said that Martin had been treating the burns with Neosporin and that this treatment was sufficient. He also said that Martin was cooperative. On redirect examination, Dr. Ramsey stated that, had DHS not brought the child to him, he would have reported the injuries to DHS because the story of how the injuries occurred did not correlate to the severity of the injuries.

Dr. William J. Gutch testified for the defendants that he treated the victim for a fractured leg on February 17, 1993. He said that Martin brought the victim to him

as a follow-up visit from the Morristown-Hamblen County Hospital. He said that the victim suffered a spiral fracture consistent with the report of her leg being caught in her crib. On cross-examination, he admitted that a spiral fracture could also occur by grabbing and twisting the leg.

Kim West, the defendant's ex-wife, testified that she had known the defendant since she was sixteen years old and that they were married for ten years and had two children. The trial court sustained the state's objection to the admission of testimony regarding West's interaction with any children other than the victim. The defendants then made a stipulated offer of proof regarding the testimony of Kim West, Pansy Hannah and Dena Lemming that West had never mistreated their children while left in his care.

Audrey West, the defendant's mother, testified that West came to her house on February 21, 1993, and borrowed first aid ointment to treat the victim's burns. She said that she checked on the victim later that night and that the victim appeared happy. She said that Martin and her son were treating the burns and that they did not need medical attention. She confirmed that the power had been out because she remembered having to reset her microwave oven. Carlos West, the defendant's father, confirmed that the power was out on the 21st and recalled the storm causing a tree to fall on one of his outbuildings.

West testified that he and the victim had been watching television while Martin ran errands on the night of the 21st. He said that the power went out and he lit the lighter so he and the victim could play. After about fifteen minutes, he tossed the lighter on to the couch where the victim was seated and went to check the breaker box which was about twenty-five feet away. He said that the victim began to cry but that he thought she was scared because he had walked to the breaker box. He stated that

Martin returned home after the power came back on and asked why the victim had red marks on her face. At this point, both Martin and West realized that the child must have burned herself on the lighter. Martin testified that West borrowed medicine from his mother and that Martin treated the burns.

Lori Pollard, a friend of Martin's, testified that she visited Martin on the morning of the child's leg injury. She said that she and Martin thought the child had a cramp and she was very surprised to learn that her leg was fractured. She stated that she had seen the burns and that Martin was treating them herself and they were healing. Another of Martin's friends, Connie Ray Hurst, testified that Martin visited her for about forty-five minutes at around dusk on February 21st.

Martin testified that she discovered the child's leg injury on a Friday morning and treated it over the weekend. She said that when it did not improve, she made a doctor's appointment on Monday morning. Regarding the child's burns, she said that she treated them with ointment and that she did not feel it was necessary to take the child to the doctor because the burns were healing. She stated that the child was with Mary Eller when she received the head injury in December 1992. She also reported that the child had been in Ms. Eller's care for the past six months and had suffered a dislocated elbow recently. She stated that Ms. Eller is the child's great-grandmother. In rebuttal, the state presented the testimony of Ms. Eller who reported that she urged Martin to take the victim to the doctor for her burns but that Martin told her that she did not want to because DHS would get involved.

The parties stipulated that Dr. R.B. Baird, Jr., would testify that second degree burns do not need medical attention. He also would have stated that a second degree burn could be caused by a two to three second exposure to heat or a cigarette

lighter. He would have said that the burns in this case could have occurred by the child falling on the lighter.

I

The defendants contend that the evidence is insufficient to support their convictions. Martin argues that there is no proof that she knowingly inflicted injury to the victim. West argues that there is insufficient proof that he knowingly inflicted injury to the victim and that there is insufficient proof of serious bodily injury. The state concedes that the evidence is insufficient to support Martin's conviction for child abuse. However, the state argues that the evidence sufficiently shows serious bodily injury that was knowingly inflicted by West to support his conviction for aggravated child abuse.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "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." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Aggravated child abuse requires proof that the defendant "knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict serious bodily injury." T.C.A. §§ 39-15-401(a) and -402(a)(1). Serious bodily injury is defined, in pertinent part, as "bodily injury which involves extreme physical pain." T.C.A. § 39-11-106(33)(C). In the light most favorable to the state, the record shows that the victim suffered second degree burns inflicted from a

lighter while in the care of the defendant. Experts testified that the thirteen-month-old victim would have been unable to inflict the burns herself. Furthermore, experts also testified that the second degree burns would cause extreme physical pain. Thus, there is sufficient evidence of aggravated child abuse.

Therefore, we conclude that the evidence supports West's conviction for aggravated child abuse. However, the evidence is insufficient to support Martin's conviction for child abuse, and we reverse and dismiss her conviction. Because we have reversed and dismissed Martin's conviction, the remaining issues will be addressed with respect to West's contentions on appeal.

II

West contends that trial court erred in admitting evidence of the victim's past injuries. He argues that the evidence of prior injuries was irrelevant and prejudicial because there was no evidence linking him to the injuries. The state responds that this issue is waived by the defendant's failure to raise it prior to or during trial. In the alternative, the state argues that the evidence of the child's prior injuries was relevant to a determination of whether the burns were accidental and that any prejudice that the defendant might have suffered was minimal in light of the evidence of the defendant's guilt.

Relative to the state's claim that the defendant has waived this issue, the record reflects that the defendant filed a pretrial motion to suppress evidence of the victim's previous injuries because he could not be linked to the injuries and, therefore, proof of the injuries would be prejudicial. At the motion hearing, the trial court ruled that evidence of the previous injuries was admissible to show that the burns were not accidental. Although the defendant did not contemporaneously object to the admission of the evidence at trial, the trial court was apprised pretrial of his objection and made a

definitive ruling based upon the objection. The trial court was once again apprised of the objection at the motion for a new trial hearing. Under these circumstances, it would be manifestly unjust for this court to apply the waiver rule for defendant's failure to object at trial. State v. Goines, 572 S.W.2d 644, 648 (Tenn. 1978).

In this respect, while we acknowledge that the previous injuries were arguably relevant to show that the burns were not accidental with respect to Martin's culpability, there is no evidence in the record that attributes the cause of the previous injuries to West. In fact, the testimony shows that the victim injured her head while in the care of Ms. Eller and that she suffered the leg injury during the night while West was at work. Therefore, the victim's prior injuries were not relevant to the defendant's prosecution. However, because the proof eliminates West from any blame for the prior injuries and because the evidence regarding the burns implicates only West, we deem any error in the admission of the victim's previous injuries to be harmless. Tenn. R. Crim. P. 52(a).

III

West contends that the trial court erred in denying his motion for a mistrial when Dr. Ramsey testified that the victim's injuries were the result of an intentional burning. He also argues that the state committed prosecutorial misconduct by failing to instruct Dr. Ramsey not to give an opinion that the child had been burned intentionally. The state concedes that Dr. Ramsey's statement was improper but argues that it was elicited during an aggressive cross-examination by the defendant. The state argues that although the defendant failed to request a curative instruction, the trial court admonished the doctor to answer the questions asked, rendering any error harmless. Further, the state argues that the trial court did not abuse its discretion in denying the motion for a mistrial.

At the pretrial motion hearing, the trial court ruled that the state's experts should not testify to any conclusions that the victim's injuries were intentionally inflicted. Nevertheless, Dr. Ramsey testified that he believed that the injuries were intentional. However, this testimony occurred during cross-examination by the defendant, and while the answer is unresponsive, the trial court immediately instructed Dr. Ramsey to answer the question as asked. The defendant requested a mistrial and the trial court denied it. The defendant did not make a request for a curative instruction.

The decision to grant a mistrial is within the discretion of the trial court and will not be disturbed on appeal absent finding an abuse of that discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Freeman, 669 S.W.2d 688, 692 (Tenn. Crim. App. 1983). Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977), cert. denied (Tenn. 1978). The trial court immediately instructed the witness to respond to the questions as asked. Given the circumstances reflected in the record, the trial court did not abuse its discretion in deciding that a mistrial was not warranted.

Relative to the defendant's claim of prosecutorial misconduct, during the direct examination of Dr. Ramsey, the state inquired into Dr. Ramsey's general experience in treating children who had been intentionally abused. The trial court sustained the defendant's objection, warning the state only to discuss a thirteen-month-old child's ability to self-inflict the injuries in this case and not whether the injuries were intentionally inflicted by someone else. The state complied and limited the direct examination accordingly. Then, during cross-examination, the defendant asked if the witness was assuming that the child had the lighter in her hand. Dr. Ramsey responded, "No. I think this child was intentionally burned. I'm not assuming anything." This improper answer cannot be attributed to the state. Therefore, we conclude that

the record does not support the defendant's claim of prosecutorial misconduct.

IV

West contends that the trial court erred in denying him the opportunity to present witnesses who would testify as to his interactions with children other than the victim. He argues that the evidence was admissible under Tenn. R. Evid. 404(a) as evidence of a pertinent character trait.¹ The state responds that evidence of a character trait is limited to reputation or opinion testimony and that the defendant's evidence is of specific instances of conduct, which is generally prohibited. Tenn. R. Evid. 405.

Character evidence is generally inadmissible due to the risk of confusion and prejudice associated with such evidence. One exception to this rule allows a defendant to present evidence of pertinent character traits to show that he or she is not the type of person who would commit the alleged crime. Tenn. R. Evid. 404(a). However, character evidence is limited to testimony as to the defendant's reputation or to testimony in the form of an opinion. Tenn. R. Evid. 405(a). Character can be proven through testimony of specific instances of conduct only when the character "is an essential element of the charge, claim, or defense." Tenn. R. Evid. 405(b). In this case, the defendant sought the admission of testimony regarding specific instances of conduct in which he had babysat and cared for other children who had not been harmed. Through this evidence, he sought to prove that he was not the type of person who would have intentionally abused the victim. The character of the defendant is not an essential element of the aggravated child abuse charge nor is it an essential element to any defense presented at trial. Under these circumstances, the testimony

¹ The defendant also contends that the trial court erred in not allowing him to make an offer of proof regarding this evidence. The state does not address this argument. However, the record reflects that the trial court, for the sake of brevity and to avoid a time-consuming jury-out hearing, allowed the defendant to make a stipulation as to what the witnesses would have testified to for the purpose of preserving the record. The parties agreed to the stipulation and we conclude that it was within the trial court's discretion to control the progression of the trial in this manner. See Tenn. R. Evid. 611(a).

into specific instances of conduct was inadmissible and the trial court properly excluded it.

In consideration of the foregoing and the record as a whole, Martin's judgment of conviction for child abuse is reversed and dismissed and West's judgment of conviction for aggravated child abuse is affirmed in all respects.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Judge

Cornelia A. Clark, Special Judge