Circuit Court for Montgomery County
Case No. 128680C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2592

September Term, 2016

CRAIG WILLIAMS

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 23, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Montgomery County convicted Craig Williams, appellant, of first-degree child abuse. The court sentenced appellant to six years' incarceration. Appellant timely appealed and presents the following three issues for our review:

1. Did the [t]rial [c]ourt abuse its discretion in denying [a]ppellant's Motion for New Trial?

2. Did the [t]rial [c]ourt abuse its discretion in declining to give requested, non-pattern jury instructions on cruel or inhumane treatment and/or malicious acts?

3. Did the [t]rial [c]ourt abuse its discretion in permitting the "expert" opinion of Dr. Benjamin Martin, when the opinion was not rendered to a reasonable degree of medical probability?

We hold that the trial court did not abuse its discretion, and affirm appellant's conviction.

BACKGROUND

In October 2012, appellant obtained custody of his four-year-old child, I.W. When I.W. came to live with appellant, appellant noticed I.W. exhibit concerning behaviors such as tantrums, screaming, and violence toward appellant's other children. Additionally, I.W. would attempt to physically and sexually harass appellant's other children, and would hide feces throughout appellant's home.

In early 2013, appellant learned that I.W.'s biological mother had mistreated I.W. while I.W. was in her care and custody. I.W. told appellant that the mistreatment included both physical and sexual abuse. Appellant enrolled I.W. in therapy, but I.W.'s behaviors continued.

By late 2015, appellant was desperate to stop I.W. from smearing feces throughout the house, so one night, he and his wife wrapped I.W. in plastic wrap. I.W. managed to remove himself from the plastic wrap, so the following night, appellant decided to try zip-tying I.W.'s hands. Appellant made sure that the zip-ties were tight enough to secure I.W.'s hands, but checked with I.W. to make sure that the ties did not cause any pain. I.W. slept that night with his hands bound by zip-ties. The next day, appellant noticed that I.W.'s wrists were puffy and that I.W. was drooling and not talking. Appellant took I.W. to the hospital where Dr. Benjamin Martin diagnosed I.W. with compartment syndrome[1] and, with a colleague, immediately performed surgery on both of I.W.'s arms to prevent loss of blood flow. Unfortunately, I.W.'s arms were seriously damaged, and I.W. was diagnosed with Volkmann's Contracture. According to Dr. Martin, Volkmann's Contracture is a syndrome involving the tensing up of muscles. Once a person develops Volkmann's Contracture, normal muscle function is unlikely to be restored. Nearly a year after the incident, I.W.'s arm function was severely limited with a poor long-term prognosis.

Following a report from the hospital, Montgomery County Police officers investigated appellant for suspected child abuse. As stated *supra*, appellant was charged with and convicted of first-degree child abuse.

[1] According to Dr. Martin's testimony at appellant's trial, a compartment consists of muscles and nerves surrounded by a thick tissue called "fascia." Compartment syndrome occurs when the swelling in a compartment becomes so great that the fascia cannot expand, preventing blood flow to the muscles and nerves, and causing the muscles to collapse on themselves.

DISCUSSION

I. Motion for New Trial

During the jury instructions phase of appellant's trial, the trial court relied on Maryland Criminal Pattern Jury Instruction ("MPJI") 4:07.1 (2d ed., 2016 supp.) for first-degree child abuse. The court defined "severe physical injury" as follows: "Severe physical injury means physical injury that a) causes permanent or protracted serious disfigurement or b) causes loss or impairment or [sic] a member or organ of the body or its ability to function properly." Appellant lodged no objection to this definition.[2]

Following his conviction for first-degree child abuse, appellant realized that the definition of "severe physical injury" provided to the jury did not accurately reflect the definition in Md. Code (2002, 2012 Repl. Vol.) § 3-601(a)(5)(iii) of the Criminal Law Article ("CL"). That section, in relevant part, defines "severe physical injury" as a physical injury that

1. creates a substantial risk of death; or
2. causes permanent or protracted serious:
   A. disfigurement;
   B. loss of the function of any bodily member or organ; or
   C. impairment of the function of any bodily member or organ.

CL § 3-601(a)(5)(iii). The statute requires that a "severe physical injury" be an injury where the disfigurement, loss of the function of a bodily member or organ, or impairment of the function of a bodily member or organ be permanent or protracted, but the trial court's

[2] As appellant notes in his brief, MPJI 4:07.1 has since been amended, specifically to address the error appellant complains of here.

instruction did not require that the loss of function or impairment of a bodily member or organ be permanent or protracted. Appellant moved for a new trial, arguing that this discrepancy lowered the State's burden of proof.

At the hearing on the motion, the court explained that it "went back and listened to parts of the trial" to review the defense's theory of the case, including opening statements and the testimony of Dr. Martin, I.W.'s treating physician. The court noted that in his opening statement, appellant did not dispute the extent of I.W.'s injuries, but instead sought to put the cause of those injuries into context. The court observed that, during his cross-examination of Dr. Martin, appellant only challenged whether the doctor's opinion was to a reasonable degree of medical probability, not whether I.W.'s injuries would be protracted or permanent. The trial court made clear that the medical evidence presented at trial only suggested permanent injury, stating:

> the opinion always was that there was Volkmann's [C]ontracture that the fact that the child was still being seen by one of Dr. Martin's colleagues as late as the fall, November of 2016, which was about 11 months after the injury, was indicative of the fact that the injury was permanent.

Additionally, the court explained that appellant did not request a second-degree child abuse jury instruction—a lesser included offense which does not require permanent injury. Because appellant did not request that instruction, the court determined that this "placed this case . . . in the sort of all or nothing posture, the sort of not guilty or permanent injury posture and nothing in between[.]" The court concluded that, even if it had given an incorrect jury instruction, the erroneous instruction did not impact appellant's theory of

the case. Because the defense's theory was not to contest the permanence of I.W.'s injuries, the court found that justice did not require a new trial, and denied the motion.

Appellant argues that the trial court abused its discretion in denying his motion. In his brief, appellant cites to *Wood v. State*, 436 Md. 276, 293 (2013) (quoting *Collins v. Nat'l R.R. Passenger Corp*., 417 Md. 217, 228 (2010)) for the proposition that "the onus is on the trial judge to discern and ensure that the jury instructions encompass the substantive law applicable to the case." In *Wood*, the Court of Appeals reviewed a trial judge's denial of a defense request for a proposed jury instruction for an abuse of discretion. *Id*. at 292. *Wood* is therefore inapplicable here where we are tasked with reviewing a trial judge's denial of a motion for a new trial.

Jackson v. State, 164 Md. App. 679 (2005), provides useful guidance to determine the appropriate review of the denial of a motion for a new trial. There, this Court explained the great deference appellate courts grant trial courts in the context of a motion for a new trial, explaining,

> New trial motions that must be filed within ten days, pursuant to subsection (a) [of Md. Rule 4-331], almost invariably (if not invariably) are based on events that happen in the course of the trial; such as, e.g., rulings on admissibility, potential trial error that may or may not be recognized at the time of the occurrence, *jury instructions*, jury behavior, etc. These events are of a type that will ordinarily happen under the direct eye of the trial judge. For that reason, subsection (a) expressly provides that the trial judge may order a new trial "in the interest of justice" for it is [she] who has [her] thumb on the pulse of the trial and is in a unique position to assess the significance of such events. In *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51, 57, 612 A.2d 1294 (1992), Judge McAuliffe stressed that *the range of the trial judge's discretion is accordingly at its broadest when it involves "the judge's evaluation" of "the core question of whether justice has been done*."

Id. at 699-700 (emphasis added).

Here, the trial court noted that appellant did not dispute the permanence of I.W.'s injuries. Because of the broad discretion afforded to trial courts in this context, and because the trial court reviewed the erroneous instruction in light of the defense's theory of the case and in conjunction with the evidence adduced at trial, we hold that the trial court did not abuse its discretion in determining that the interest of justice did not require granting appellant a new trial.

II. Requested Jury Instructions

Appellant next contends that the trial court erred in declining to give two requested supplemental jury instructions. The trial court, relying on MPJI 4.07.1 (2d ed., 2016 supp.), gave the following instruction:

> The [appellant] is charged with the crime of child abuse in the first degree. In order to convict the [appellant] of first degree child abuse, the State must prove: that the [appellant] caused physical injury to [I.W.] as a result of cruel or inhumane treatment or a malicious act; and that the [sic] time of conduct, [I.W.] was under 18 years of age; and that at the time of the conduct, the [appellant] was a parent of [I.W.]; and that as a result of the [appellant's] conduct, [I.W.'s] health or welfare was harmed or threatened; and that the [appellant's] conduct cause severe physical injury to I.W. . . .
>
> In addition, a parent may not use physical force that is inhumane or cruel. In determining whether the physical force used by a parent was reasonable, you should look at all the surrounding circumstances, including such factors as the age, physical and mental condition of the child, the behavior that led to the use of physical force, the extent and duration of the physical contact with the child, and the impact or injury to the child, if any, resulting from the use of force.

At trial, appellant argued that "cruel or inhumane treatment" and "malicious acts" required further definition. Relying on the definitions in David E. Aaronson, Maryland

Criminal Jury Instructions and Commentary § 5.30(B) (2016 ed.), appellant requested two supplemental instructions which sought to define the two terms.[3] The trial court declined to provide the requested non-pattern instructions, concluding that they did not accurately state the law and that the pattern jury instruction fairly covered the terms in question.

In *Derr v. State*, 434 Md. 88, 133 (2013) (quoting *Cost v. State*, 418 Md. 360, 368-69 (2010)), the Court of Appeals stated the appropriate standard of review for requested jury instructions:

> A trial court must give a requested jury instruction where (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given. We review a trial court's decision whether to grant a jury instruction under an abuse of discretion standard. On review, jury instructions [m]ust be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protected the defendant's rights and adequately covered the theory of the case.

We hold that the trial court did not abuse its discretion by declining to provide the requested jury instructions on "cruel or inhumane treatment" and "malicious acts."

A. Cruel or Inhumane Treatment

[3] According to his filing, appellant requested the definitions found in Aaronson's Maryland Criminal Jury Instructions and Commentary § 5.30(C). We note that although appellant cited to § 5.30(C) in his filing, based on the pagination and language requested, he actually requested the court to use the definitions provided in § 5.30(B). Section 5.30(B), however, addresses second-degree child abuse. Appellant should have cited to § 5.30(A), which covers first-degree child abuse—the crime for which appellant was actually charged. Notably, some of the language appellant requested regarding "cruel or inhumane treatment" appears in § 5.30(B), but not in § 5.30(A).

Appellant argues that the trial court should have provided the following definition for "cruel or inhumane treatment" at his trial: "Cruel or inhumane treatment means contact or force beyond that which is reasonable or appropriate for a child. Cruel or inhumane includes, but is not limited to, acts, conduct, or force designed to harm or threaten the child's health or welfare." The trial court's actual instruction provided:

> [A] parent may not use physical force that is inhumane or cruel. In determining whether the physical force used by a parent was reasonable, *you should look at all the surrounding circumstances, including such factors as the age, physical and mental condition of the child, the behavior that led to the use of physical force, the extent and duration of the physical contact with the child, and the impact or injury to the child, if any, resulting from the use of force*.

(Emphasis added).

The trial court's instruction fairly covers the first sentence of appellant's requested instruction, that "Cruel or inhumane treatment means contact or force beyond that which is reasonable or appropriate for a child." Both instruct the jury to consider the reasonableness of the physical force used based on the appropriateness of that force when considering the surrounding circumstances.

The second sentence in appellant's requested instruction, that "Cruel or inhumane includes, but is not limited to, acts, conduct, or force designed to harm or threaten the child's health or welfare[,]" is not an accurate statement of the law.[4] In *Fisher v. State*,

[4] We note that, as stated in footnote 3, *supra*, this language does not appear in the 2016 edition of Aaronson's Maryland Criminal Jury Instructions § 5.30(A)—the section for first-degree child abuse. Instead, this language appears in § 5.30(B), which covers second-degree child abuse.

367 Md. 218, 278 (2001), the Court of Appeals traced the legislative history of first-degree child abuse. There, the Court noted, "Child abuse is a general intent crime, and its mens rea requires only intentionally acting or failing to act under circumstances that objectively meet the statutory definition of abuse." *Id*. at 270. The *Fisher* Court explained, "A specific intent is not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." *Id*. at 274 (internal quotation marks omitted) (quoting *Shell v. State*, 307 Md. 46, 62-63 (1986)).

Appellant's proffered jury instruction required the jury to treat child abuse as a specific intent crime. Appellant's proffered language—"acts, conduct, or force *designed* to harm or threaten the child's health or welfare" (emphasis added)—goes beyond the immediate act, and addresses "the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." *Id*. Because appellant's requested instruction incorporated specific intent, and because child abuse is a general intent crime, the proffered instruction did not accurately state the law. Accordingly, the trial court did not abuse its discretion in declining to provide the requested instruction.

B. Malicious Acts

Appellant also argues that the trial court should have provided a jury instruction defining "malicious acts" as follows: "Malicious acts are those acts, conduct of [sic] force done with the deliberate intention of causing physical injury to the child. The Defendant

must have intended to inflict the physical injury as a result of cruel and inhumane treatment." Again, this instruction does not accurately state the law regarding child abuse.

As explained *supra*, child abuse is a general intent crime. *Id*. at 270. The proffered instruction, however, treats child abuse as a specific intent crime by requiring the jury to consider whether appellant possessed the "deliberate intention of causing physical injury." This proffered instruction requires a jury to consider the specific intent of the "malicious act" in the context of child abuse—a notion the *Fisher* Court expressly rejected. *Id*. Accordingly, appellant's requested instruction was not an accurate statement of the law, and the trial court did not abuse its discretion in declining to provide it.

III. Permitting the Medical Expert's Testimony

Finally, appellant argues that the trial court erred in declining to strike Dr. Benjamin Martin's testimony, which, according to appellant, was not rendered to a reasonable degree of medical probability.

Dr. Martin, an orthopedic surgeon, treated I.W.'s swollen arms at Children's National Medical Center in Washington D.C. The State qualified Dr. Martin as an expert in pediatric orthopedics at appellant's trial. During direct examination, the following colloquy took place:

> [The State]: At this point, Doctor, have you been able to form an opinion about the long-term prognosis for the functioning of [I.W.'s] arms?
>
> [Dr. Martin]: I think it's a poor prognosis.
>
> [The State]: I'm just asking have you formed an opinion?

[Dr. Martin]: Yeah.

[The State]: What is that based on?

[Dr. Martin]: It's based on what I saw when I operated on [I.W.], but then also reading [I.W.'s] notes in follow up.

[The State]: When you say that prognosis is poor, what specifically do you mean by that?

[Dr. Martin]: I mean if they're working on trying to get a few degrees of motion here and there in [I.W.'s] wrist, the chance of ever having normal function of [I.W.'s] arms is *highly unlikely*.

(Emphasis added). Appellant's trial counsel objected that Dr. Martin's opinion was not provided to a reasonable degree of medical probability.[5] The trial court overruled the objection, noting that although the State did not ask Dr. Martin whether his opinions were to a reasonable degree of medical probability, Dr. Martin's testimony was not merely speculative.

"The admissibility of expert testimony is committed to the sound discretion of the trial court. The court's action in admitting or excluding such testimony seldom constitutes ground for reversal." *Bryant v. State*, 163 Md. App. 451, 472 (2005) (internal citations omitted).

Regarding the requirement that a medical expert testify to a reasonable degree of medical probability, our Court has explained, "While expert opinion must be based upon

[5] Both the trial court and appellant's trial counsel were careful not to use the phrase "reasonable degree of medical probability" when discussing appellant's objection so as not to alert the State to this issue. The trial court instead referred to Dr. Martin's testimony as meeting "the standard [appellant's trial counsel] had in mind[.]"

more than mere speculation, it need not be expressed with absolute certainty. We have required expert opinions to be established within a reasonable degree of probability." *Karl v. Davis*, 100 Md. App. 42, 51-52 (1994) (internal citation omitted). The Court of Appeals, relying on Black's Law Dictionary, has accepted the following definition of "probability": "[s]omething that is likely; what is likely[.]" *Rowhouses, Inc. v. Smith*, 446 Md. 611, 657 (2016).

Here, Dr. Martin explained I.W.'s prognosis as follows: "the chance of [I.W.] ever having normal function of [I.W.'s] arms is highly unlikely." Dr. Martin diagnosed I.W. as suffering from Volkmann's Contracture, which he explained is essentially a chronic condition. He testified that restoration of I.W.'s normal muscular function "is pretty much impossible." Viewing the concept of probability in the affirmative rather than in the negative, Dr. Martin's opinion was that it is "highly likely" that I.W. will never be restored to normal arm function. Because Dr. Martin opined as to the likelihood of I.W.'s medical prognosis, the trial court did not abuse its discretion in permitting this testimony based on its determination that "highly unlikely . . . exceeds the standard the law requires."

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.