[Cite as *State v. Rice*, 2010-Ohio-1638.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0034**
- vs -	:	
BRANDON J. RICE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 392.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor and *Shelly M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Patricia J. Smith, 114 Barrington Town Square, #188, Aurora, OH 44202 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Brandon J. Rice appeals his conviction by a jury in the Ashtabula County Court of Common Pleas for the murder of his infant son.

{¶2} Mr. Rice contends that the trial court committed prejudicial error in allowing statements made by the detectives during his taped police interview regarding the findings of medical personnel as to his son's cause of death to be played for the jury without a curative instruction; that his trial counsel was ineffective; and that the weight of the evidence does not support the jury's verdict.

{¶3} **Substantive and Procedural Facts**

{¶4} Mr. Rice was indicted on two counts of murder, in violation of R.C. 2903.02(A) and R.C. 2903.02(B), respectively, for the death of his infant son, Braydon.

{¶5} On the night of October 25, 2007, Mr. Rice was taking care of the infant who had just returned from a visit to the emergency room where he was diagnosed with a respiratory infection. Mr. Rice and his wife, Farin Rice, went to sleep several hours after putting Mrs. Rice's two other children to sleep at 9:30 p.m. Mr. Rice continued to wake up every 30 to 45 minutes to take care of Braydon. During his third visit attending Braydon, Mr. Rice decided to take the baby into the kitchen for a bottle of Gatorade. He testified that he tripped over Mrs. Rice's younger son's walker toy and fell on top of the baby.

{¶6} Mr. Rice further testified that after he tried to revive the baby, he woke Mrs. Rice who promptly called 911. When the ambulance arrived, Mrs. Rice was waiting with the baby, while Mr. Rice stayed in their apartment. After being taken to the Ashtabula County Medical Center ("ACMC") emergency room, the baby was life-flighted to Rainbow Babies and Children Hospital ("RB&C") in Cleveland, Ohio. Despite interventions, Braydon did not survive.

{¶7} The autopsy results revealed Braydon suffered from three separate skull fractures, retinal hemorrhaging, as well as a subdural hematoma or massive bleeding of the brain. The cause of death was listed as nonaccidental blunt force trauma, although the exact force could not be identified due to the lack of physical bruising.

{¶8} Children's Services alerted the police to a possible abuse case, and Detective John Bainton and Detective Sergeant Cellitti drove to RB&C, where they

interviewed both Mr. and Mrs. Rice. Their interview with Mr. Rice was interrupted twice during the night in order to allow Mr. Rice to be with the infant as he lay dying. Mr. Rice attempted to continue the interview after, but felt ill.

{¶9} Mr. Rice's statements to the police and his testimony as to what occurred before the fall are inconsistent. In his first and second interview, which occurred at the hospital, Mr. Rice denied he had any knowledge as to what could have caused Braydon to stop breathing. At his third police interview, voluntarily given at the station and after being advised of his Miranda rights, he confessed to being frustrated and hitting the baby prior to the fall. At trial, he testified that the shaking and smacking occurred only after the fall in his attempts to revive Braydon.

{¶10} At first Mr. Rice told the detectives that he found Braydon in his bassinet, not breathing and lifeless, and that he was merely trying to revive him. Mr. Rice then confessed that he smacked the baby out of frustration because he would not be quiet, and that he did not want him continually crying so he hit him in the head. Braydon started to cry, so Mr. Rice shook him and then, in his attempt to give the baby a bottle, Mr. Rice tripped and fell on top of him. Mr. Rice tried to revive Braydon by shaking and smacking him. He then squeezed Braydon for a minute and a half to two minutes. Mr. Rice told the police he did not initially confess because he did not want his family to hate him. At the conclusion of the interview, Mr. Rice was arrested.

{¶11} The taped interviews were the subject of a motion to suppress, which was denied after a hearing. The trial court found that the interviews were noncustodial settings in nature and that they were not transformed into custodial interrogations simply because Mr. Rice was read his rights. There was no evidence of police coercion and

any statements made by Mr. Rice were voluntary and thus, admissible. The detectives employed an interview technique, advising Mr. Rice that the doctors said the baby had been strangled or suffocated to see if this would elicit a response. Unedited tapes of these interviews were played for the jury.

{¶12} Over twenty witnesses, among them various friends and family members, testified as to Mr. Rice's good character with the children. Not one of them, not even his wife, was present to witness the incident. Mr. Rice testified on his own behalf. He admitted to falling on the baby and to shaking, squeezing, and attempting to revive him with CPR after the fall.

{¶13} The jury returned a not guilty verdict on the count of murder in violation of R.C. 2903.02(A), and a guilty verdict on the second count of murder in violation of R.C. 2903(B). Mr. Rice was subsequently sentenced to serve an indefinite term of incarceration of fifteen years to life.

{¶14} Mr. Rice now raises three assignments of error for our review:

{¶15} "[1.] The trial court erred when it failed to find that the statements made to the appellant by detectives regarding findings of medical personnel were unfairly prejudicial hearsay and unfairly prejudicially irrelevant. It was an abuse of discretion to fail to give a curative instruction to the jury after the jury heard the aforementioned statements.

{¶16} "[2.] The appellant was denied effective assistance of counsel where trial counsel failed to file a motion in limine to exclude unfairly prejudicial hearsay contained in a taped interrogation of the appellant and when counsel failed to request removal of

juror number 5 who slept during the defense case, misrepresented himself in voir dire, and expressed bias to possible defense witnesses to the court.

{¶17} "[3.] The weight of the evidence does not support a verdict of guilty of murder."

{¶18} **Statements of Medical Personnel**

{¶19} In his first assignment of error, Mr. Rice contends the trial court committed prejudicial error and abused its discretion in allowing the taped interviews containing the detectives' statements regarding what medical personnel had relayed to them as to the cause of Braydon's death. He contends the court again committed prejudicial error when it did not give a requested curative instruction to the jury following the publication of the tape. The detectives' statements regarding the cause of death as relayed by medical personnel, however, were not hearsay insofar as these statements were not admitted for the truth of the matter asserted, but rather as part of their interrogation of Mr. Rice, during which he voluntarily confessed to the crime.

{¶20} **Hearsay**

{¶21} "Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Evid.R. 801(C)." *In re Miller,* 11th Dist. No. 2006-A-0046, 2007-Ohio-2170, ¶30.

{¶22} "The Ohio Supreme Court has held that testimony is not hearsay, when it 'explains the actions of a witness to whom a statement was directed, such as to explain the witness' activities;' 'if an out-of court statement is offered to prove a statement was made and not for its truth;' 'to show a state of mind;' and 'to explain an action in

question.' *State v. Maurer* (1984), 15 Ohio St.3d 239, 262 (citations omitted). Accordingly, testimony offered to explain an individual or an agency's motivation for investigating a matter has not been considered hearsay and/or inadmissible. See *State v. Thomas* (1980), 61 Ohio St.2d 223, 232 ('[t]he testimony at issue was offered to explain the subsequent investigative activities of the witnesses' and 'was not offered to prove the truth of the matter asserted'); *Williams v. Franklin Cty. Bd. of Commrs.* (2001), 145 Ohio App.3d 530, 547 ('[t]he statements at issue were not offered by defendants to prove the truth of the matter asserted, but, rather, were offered to explain the actions of the [Franklin County Children's Services employees *** [;] [t]he statements were therefore not hearsay *** and they were relevant, as they pertained to the course of the investigation by [children's services]')." Id. at ¶31.

{¶23} The focus or purpose of playing the tape was to show Mr. Rice's voluntary confession. Thus, the statements made by the detectives were not intended to improperly interject medical "expert testimony" as to the cause of death as Mr. Rice contends. Rather, the statements were an interrogation technique employed to elicit a response from Mr. Rice.

{¶24} Moreover, even if we did find these statements to constitute hearsay, the error would be harmless as the jury learned firsthand of the cause of death through the testimony of the doctors, and the coroner -- testimony that was offered for the truth of the matter asserted, i.e., that the cause of death was from three skull fractures, cranial bleeding, as well as shaking, which resulted in retinal hemorrhaging.

{¶25} "A constitutional error may be considered harmless where it can be said beyond a reasonable doubt that the error complained of did not contribute to the verdict

obtained." *State v. Jenkins,* 11th Dist. No. 2003-L-173, 2005-Ohio-3092, ¶37, citing *Coy v. Iowa* (1988), 487 U.S. 1012, 1021-1022.

{¶26} Thus, Mr. Rice's first assignment of error is without merit.

{¶27} **Ineffective Assistance of Counsel**

{¶28} In his second assignment of error, Mr. Rice contends his counsel was ineffective because he did not file a motion in limine to exclude the statements of medical personnel as relayed by the police to Mr. Rice during his third interview. Mr. Rice further argues his counsel was ineffective by failing to remove a juror for cause who allegedly engaged in numerous instances of juror misconduct. As noted in Mr. Rice's first assignment of error, the challenged statements are harmless error at best, and as none of the alleged instances could be determined as juror misconduct, Mr. Rice has failed to allege a valid claim of ineffectiveness of counsel. Thus, we find Mr. Rice's second assignment of error without merit.

{¶29} To establish his claim that his counsel provided ineffective assistance, Mr. Rice must demonstrate that (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Griffith*, 11th Dist. No. 2008-P-0089, 2010-Ohio-821, ¶46, citing *Strickland v. Washington* (1984), 466 U.S. 668.

{¶30} Thus, "[a] threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel." Id. at ¶47, citing *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. "In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant

bears the burden of proof." Id., citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. "To overcome this presumption, a defendant must demonstrate that 'the actions of his attorney did not fall within a range of reasonable assistance.'" Id., citing *State v. Henderson*, 11th Dist. No. 2001-T-0047, 2002-Ohio-6715, ¶14. "Counsel's performance will not be deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." Id., citing *State v. Iacona* (2001), 93 Ohio St.3d 83, 105.

{¶31} Furthermore, "decisions on strategy and trial tactics are generally granted a wide latitude of professional judgment and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers." Id. at ¶48, citing *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. "Debatable trial tactics and strategies do not constitute ineffective assistance of counsel." Id., citing *State v. Philips* (1995), 74 Ohio St.3d 72, 85.

{¶32} As we determined in Mr. Rice's first assignment of error, that the statements of the detectives regarding the cause of death is, at best, harmless error, we can hardly say Mr. Rice's counsel was ineffective in failing to file a motion in limine regarding those portions of the taped interview. Defense counsel did timely object to the playing of the unedited tapes during trial. The court admonished him for failing to file a motion in limine, and then overruled his objection.

{¶33} While we agree that raising this type of objection before trial is preferable, it cannot be said to rise to the level of ineffectiveness. Even if we were to find his counsel deficient in this manner, Mr. Rice cannot demonstrate that but for his counsel's

failure to file a motion in limine, there was a reasonable probability the result of trial would have been different. The statements made by the detectives regarding the medical personnel's identification of the cause of death were cumulative to the actual testimony of the doctors, including the coroner. The jury also had before it the actual autopsy report.

{¶34} Secondly, we fail to see how his counsel was ineffective for failing to seek the removal of a juror. Mr. Rice complains of three instances of alleged misconduct of juror number five. As to each instance, juror number five was questioned by the court and no bias was shown.

{¶35} "In *State v. Phillips* (1995), 74 Ohio St.3d 72, the Supreme Court of Ohio set forth the procedure and applicable law a court must follow when an allegation is made that an improper communication has occurred with one or more members of the jury. 'When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror.' Id. at 88, citing *Smith v. Phillips* (1982), 455 U.S. 209, 215-216." *Armstrong v. Brown*, 11th Dist. No. 2000-T-0125, 2002-Ohio-6916, ¶19.

{¶36} "The scope of a voir dire used to investigate allegations of improper communication with members of the jury is within the trial court's sound discretion." Id. at ¶20, citing *State v. Sanders* (2001), 92 Ohio St.3d 245, 252. "Furthermore, courts have broad discretion in determining whether to grant a mistrial or replace a juror when instances of improper communication with jurors are alleged." Id., citing *State v. Johnson* (2000), 88 Ohio St.3d 95, 107.

{¶37} The first instance of alleged juror misconduct occurred during a break where the juror said hello to both a detective and the prosecutor. The juror asked Detective Cellitti how his father was. It was determined juror number five knew the detective's uncle. At that point, the bailiff instructed the juror to go to the jury room. Detective Cellitti testified that he did not remember the juror, but that the juror obviously remembered him. The prosecutor testified that the juror began a conversation with him in the bathroom. The juror asked him how he was and the prosecutor simply replied that he was good, making a remark about "wind blowing in his hair." Defense counsel requested this inquiry be put on the record, but did not make an objection or ask that the juror be removed.

{¶38} The second instance also occurred during a break when juror number five brought to the court's attention that he possibly knew one of the defense witnesses, a Mrs. Angel Falls. It was determined, however, that there was no witness by said name. Juror number five told the court "he has absolutely no use for these people," meaning the possible relation, and that he guaranteed it would not affect his decision. As there was no witness by the name of Mrs. Angel Falls, the juror was simply mistaken and no bias was demonstrated.

{¶39} Finally, the third instance occurred during the presentation of the defense witnesses. The court inquired of juror number five whether he was sleeping. Juror number five replied he was not, he was "listening." We cannot conclude that juror number five's behavior rose to the level of juror misconduct.

{¶40} Although it is odd for one juror to come to the court's attention so often, the court conducted an inquiry into each instance, and finding no misconduct or bias,

continued with trial. Juror number five greeted the prosecutor and the detective outside of the courtroom, but merely exchanged pleasantries. He then thought he knew a witness and brought it to the attention of the court, but in the end, he was just mistaken. And, lastly, when the court questioned his attentiveness, he reassured the court he was listening.

{¶41} Mr. Rice's second assignment of error is without merit.

{¶42} **Manifest Weight of the Evidence**

{¶43} Lastly, Mr. Rice contends the jury's verdict is against the manifest weight of the evidence as none of the doctors could identify the specific nonaccidental, blunt force trauma that caused Braydon's death. Mr. Rice also asserts there was no evidence to support a finding that he intentionally inflicted trauma sufficient to cause the infant's death.

{¶44} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, 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." *Griffith* at ¶34, quoting *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶45} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at ¶35, quoting *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶46} Further, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." Id. at ¶36, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "When examining witness credibility, 'the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.'" Id., quoting *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "A fact-finder is free to believe all, some, or none of the testimony of each witness appearing before it." Id., citing *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶47} Simply because the medical personnel could not identify the exact cause of the nonaccidental trauma does not change the fact that all of the experts who testified: Dr. Dirk McKnight, the ER physician from ACMC; Dr. Shenandoah Robinson, the pediatric neurosurgeon from RB&C's Pediatric Care Intensive Unit; and the coroner, Dr. Frank Miller; concluded Braydon died from nonaccidental, blunt force trauma.

{¶48} Further, the jury was free to believe the doctors' testimony, as opposed to Mr. Rice's denials that he did not intend to harm Braydon. Simply because Mr. Rice gave a different explanation of the events of that night does not mean the manifest weight of the evidence weighs in his favor. Rather, the jury had before it the testimony and evidence, including the autopsy report, a lengthy explanation as to diagnosis, pictures of Braydon taken upon his death, as well as Mr. Rice's taped confessions. The jury heard that Mr. Rice was on medication for depression, his electricity was turned off the day before, he received an eviction notice for failure to pay rent, his car was in continual need of repair, he was unemployed, and he was tired of watching Mrs. Rice

work two jobs, one as a dancer. There was more than enough evidence to support the theory that Mr. Rice acted out of frustration fueled by these difficulties and lack of sleep. Although over twenty witnesses testified as to his character around the children, none witnessed the incident.

{¶49} Further, Mr. Rice's explanations from the inception of the investigation were inconsistent. We must note the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact. The jury was entitled to reconcile inconsistencies in the testimony and free to believe all, some, or none of the testimony.

{¶50} There is, quite simply, nothing to suggest the jury lost its way or that such a manifest miscarriage of justice occurred that a new trial is warranted.

{¶51} Mr. Rice's third assignment of error is without merit.

{¶52} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.