

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2008-0234
Plaintiff-Appellee : On Appeal from the Twelfth District
Court of Appeals for Clermont
County
vs. :
LIZ CARROLL : Court of Appeals
Case Number CA2007-02-030
Defendant-Appellant :

MEMORANDUM IN RESPONSE

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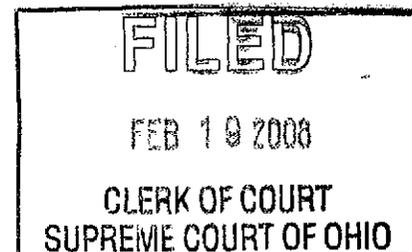


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The issues raised here involve allied offense claims, change of venue claims, and a suppression claim. All of these particular claims, as presented, involve matters that are well settled and require no further elaboration by this Court. Jurisdiction should be denied.

STATEMENT OF THE CASE AND FACTS

Procedural Posture:

On September 6, 2006, the Clermont County Grand Jury returned indictment number 2006-CR-00729, charging defendant Liz Carroll with seven offenses. Those charges were Count 1, murder [O.R.C. 2903.02(B)], Count 2: involuntary manslaughter [O.R.C. 2903.04(A)], Count 3, kidnapping [O.R.C. 2905.01(B)(2)], Count 4, felonious assault, [O.R.C.

2903.11(A)(1)], and three counts of child endangering, Count 5, 6, and 7. [O.R.C. 2919.22(A), (B)(1), and (B)(3)].

On January 3, 2007, the trial court denied defendant's motion to suppress her grand jury testimony. Jury selection began on February 12, 2007, and concluded on February 14, 2007. The defendant's motion for change of venue was denied at the conclusion of voir dire. (T.p. 321) Trial concluded on February 21, 2007, with guilty verdicts on all seven counts.

On December 28, 2007, the 12th District Court of Appeals affirmed State v. Carroll, No. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075. Defendant then filed the pending jurisdictional claim in this Court.

Statement of the Facts

During the summer of 2006, Liz and David Carroll were living in a single family home on Valleywood Drive in Clermont County. Also living in the home were the four young children of David and Liz Carroll, and an adult female, Amy Baker. Ms. Baker was a girlfriend of David Carroll's -- a fact known to and accepted by Liz Carroll. Amy Baker also sometimes stayed at other residences during this time period.

The Carrolls' were licensed foster parents and day care providers. In fact, providing these services was the Carrolls' sole source of income. The Carrolls were licensed by Lifeway for Youth agency to accept foster children placed from Butler County (T.p. 486 et

seq.), and they provided day care services for Clermont County. They were being paid by Clermont County to provide day care for Amy Baker's three children, who were thus often at the Valleywood home.

The Carrolls had two foster child placements in the summer of 2006. One of these children was three year old Marcus Fiesel, who was placed in May of 2006.¹ Lifeway fully informed the Carrolls that Marcus was a difficult child and that he should never be left unattended. (T.p. 494) The Carrolls were also specifically informed of Marcus' developmental deficiencies (T.p. 509, 510) and need for constant supervision. The Carrolls were further informed that if for some reason they needed to be away from Marcus, that "respite" care was available to relieve them. (T.p. 515) The Carrolls accepted Marcus' placement knowing all these things. It developed that, during his short time with the Carrolls, Marcus was very difficult to cope with. Lifeway's case workers visited each foster child placement once each week, and on August 3, 2006, a Lifeway case worker met with Liz Carroll and Marcus Fiesel. (T.p. 525) On the weekend of August 4th to 6th, 2006, Liz Carroll planned to take the family (herself, her husband, their children, as well as Amy Baker) to her family reunion in Williamstown, Kentucky. (T.p. 829 et seq.) Defendant Liz Carroll made it clear on August 3rd that she did not want Marcus along on the family reunion. (T.p. 831) She indicated that Marcus would "stay there at the house." (T.p. 831)

¹The other was a "respite" care placement who was with the Carrolls in mid-August.

In the past, the Carrolls had left Marcus at home alone for short periods, wrapped in a blanket and tape (T.p. 830-831), while they ran errands or went to youth sporting events. Liz Carroll indicated she was going to do this over the weekend. (T.p. 833)

During the afternoon of August 4th, Amy Baker and Liz Carroll went shopping, purchasing groceries. At about 5:30 p.m. the Carrolls, their four children, the family dog, and Amy Baker left for the family reunion in Kentucky. Marcus Fiesel did not go along. David and Liz Carroll, at Liz Carroll's suggestion, wrapped Marcus in a blanket, secured the blanket with duct tape, placed Marcus in a play pen located in a second floor closet, and merrily went their way, leaving Marcus behind. (T.p. 835, et seq., T.p. 838) As Liz Carroll got into the car to leave, she advised David and Amy that Marcus was "freaking out." (T.p. 837) Temperatures over the weekend were as high as 88 degrees.

The Carrolls arrived at the reunion Friday evening and proceeded to enjoy themselves. (T.p. 1075, defense witness Donnie Simms.) In the early morning hours on Sunday, David Carroll began to feel ill-at-ease about Marcus and insisted that they go home. They arrived home around 6:00 a.m. and found Marcus dead in the closet. (T.p. 846) Rejecting Amy Baker's suggestion to call 9-1-1, the Carrolls determined to get rid of the body and conceal Marcus' death. (T.p. 846-848) The child's body was burned in a chimney in Brown County. David Carroll repeatedly poured gasoline on Marcus' body to

accomplish this. David Carroll and Amy Baker then drove onto the Maysville bridge and David threw the bagged-up remains into the Ohio river.

The Carrolls decided to cover up what had occurred, and they devised a plot to claim that Marcus had disappeared. They then waited for an opportunity to carry out their plan. On Thursday, August 10th, a Lifeway caseworker came to see Marcus. She was told by Liz Carroll that Marcus had been sick and was sleeping upstairs. As a result, the Lifeway caseworker did not see Marcus during this visit. (T.p. 520)

On August 15th, the Carrolls orchestrated the "disappearance" of Marcus. (T.p. 559 et seq.) Defendant Liz Carroll went to Juilfs Park in Anderson Township with three of the children. David Carroll and Amy Baker took the rest of the children to the YMCA across from the park. Liz then feigned passing out. Medical and police personnel responded. After Liz was "revived," she told Hamilton County Sheriff's Deputy Anthony Gardner that she had three children with her. (T.p. 621, line 6) Deputy Gardner verified that there were three children accounted for and he checked her car and saw three car seats so he felt all the children were present. (T.p. 627-628) Liz Carroll was then transported to a hospital. Gardner also was able to locate David Carroll and get him to the scene. When David Carroll arrived, he announced that Marcus should have been there, and that he was missing. (T.p. 630) Liz Carroll would later claim that she told Gardner that there were four children, and that Gardner was responsible for the loss of Marcus.

From this point forward a massive search was organized for the supposedly missing Marcus Fiesel. Liz Carroll regularly appeared in the media begging people to look for Marcus, all, of course, to no avail. (See Exhibit #46) Police, after a few days, became highly suspicious about the Carrolls' version of events. (T.p. 572-573) However, despite multiple interviews by police, the stories of Liz and David Carroll, as well as Amy Baker, remained consistent. (T.p. 573) On August 25th, Liz Carroll became upset with police (T.p. 576), and it was believed the Carrolls' cooperation was about to end.

On Sunday, August 27th, police and prosecutors met and determined to subpoena Liz Carroll and Amy Baker to the Hamilton County Grand Jury the next day. When Amy Baker arrived, she was provided an attorney by the public defender who counseled with her. She then decided to cooperate, and in fact told authorities and the grand jury what had really happened to Marcus Fiesel. (T.p. 582-583)² Liz Carroll was then called to the grand jury, advised of her rights multiple times, and questioned. Initially she maintained her false story, but she admitted her involvement after realizing that the authorities now knew the truth. (See Exhibit #50) She told the grand jury that Marcus had been alive when they left for Kentucky, but dead on their return. (Exhibit #50) As a result, Liz Carroll was subsequently indicted in Clermont County on the seven charges previously described.

²Amy Baker was given a no-prosecution deal in return for her truthful cooperation. She was given no immunity if it developed that she was a hands-on participant in binding Marcus Fiesel.

At trial, the State introduced evidence as described above, including defendant's grand jury testimony. The parties entered into a stipulation that certain bones recovered from the chimney in Brown County were those of Marcus Fiesel. (T.p. 973) The deputy coroner testified, in response to a hypothetical question, that hyperthermia was a possible cause of death. His testimony about the onset of rigor mortis indicated that the death occurred after 6:00 a.m. on Saturday, August 6, 2006. The defendant did not take the stand and presented no evidence at all relating to the facts of the homicide and cover up. The only defense witness was an uncle of the defendant who testified about a minor collateral impeachment of Amy Baker.

At the conclusion of deliberations, the defendant was found guilty as charged, and sentenced as appears of record.

ARGUMENT

PROPOSITION OF LAW I: IN DETERMINING WHETHER OFFENSES ARE ALLIED OFFENSES OF SIMILAR IMPORT, THE ELEMENTS OF THOSE OFFENSES ARE COMPARED IN THE ABSTRACT, WITHOUT REFERENCE TO THE SPECIFIC FACTS OF THE OFFENSES. IF THE ELEMENTS, IN THE ABSTRACT, DO NOT CORRESPOND SO THAT THE COMMISSION OF ONE WILL RESULT IN THE COMMISSION OF THE OTHER, THE OFFENSES ARE NOT ALLIED OFFENSES, AND DO NOT MERGE.

Defendant argues here that her convictions for murder, felonious assault, kidnapping and child endangering are in contravention of R.C. 2945.25, Multiple counts, particularly section (A) dealing with allied offenses of similar import. Defendant argues

that several of the offenses that she was convicted of are allied offenses of similar import, and should therefore merge pursuant to O.R.C. 2941.25(A), Multiple counts (which deals with claims of multiple counts involving the same conduct). In making her legal argument, defendant misstates the applicable test. Defendant in essence argues that the resolution of this issue is controlled by the actual facts presented by the case.³ That is incorrect. The applicable law is found in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

In *Rance*, this Court specifically addressed this issue and held, “. . . under a R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared in the abstract.” (Emphasis in the original.) The appellate courts of Ohio have faithfully followed this bright-line test and continued to apply a *Rance* analysis to this issue as required by law. *State v. Wilson*, 2006-Ohio-2945 (12th Dist. C/A); *State v. Thomas*, 2006-Ohio-7029 (12th Dist. C/A). *State v. Walters*, 2007-Ohio-5554 at ¶ 87 *et seq.* (10th Dist. C/A); *State v. Hatfield*, 2007-Ohio-7130 (11th Dist. C/A); *State v. Sims*, 2007-Ohio-6821 at ¶ 40 (8th Dist. C/A); *State v. Nickelson*, 2007-Ohio-6367 at ¶ 61 (6th Dist. C/A).

Defendant in reality knows his legal position is untenable. He wants this Court to abandon the *Rance* test, which this Court established, and which works well. No change is needed.

³The defendant does not go into specific detail so the State has not. However, many of the underlying offenses at issue are based on separate acts.

PROPOSITION OF LAW II: A POTENTIAL DEFENDANT TESTIFYING IN THE GRAND JURY MUST BE ADVISED OF HER 5TH AMENDMENT RIGHT AGAINST COMPELLED SELF-INCRIMINATION.

Defendant contends that her grand jury testimony should have been suppressed because it was involuntary. Specifically, defendant states that: (1) she was interrogated in a custodial setting; (2) she was held in a locked room, (3) without counsel, (4) was emotionally devastated, (5) psychologically impaired, (6) heavily medicated, (7) vulnerable, (8) never told she was a target, and (9) had no reason to believe any invocation of rights would be honored. The only problem with this litany of woe is that, besides the fact that she did not have counsel (which she waived), none of the claims are true, nor were they even seriously mentioned at the motion to suppress hearing. The defendant did not testify. The only witnesses who did testify, a police officer and the court reporter, testified that Carroll appeared calm and composed (T.p. 17, 25-26), and that she was not badgered or browbeaten. (T.p. 29-30) In sum, there is no factual basis for defendant's claim of involuntariness, the only issue raised at the motion. (T.p. 6) The Court of Appeals found that none of these allegations were true. *State v. Carroll, supra*, 2007-Ohio-7075 at ¶15 *et seq.* The record, from the motion to suppress, quoted in the appellate decision is dispositive of this claim.

PROPOSITION OF LAW III: EXPOSURE OF JURORS TO PRE-TRIAL PUBLICITY DOES NOT REQUIRE A CHANGE OF VENUE WHERE ALL SEATED JURORS ARE ABLE TO SET ASIDE THE EXPOSURE AND ANY PRE-FORMED OPINIONS, AND SERVE IN AN IMPARTIAL FASHION.

Defense counsel argues that the change of venue motion should have been granted because of extensive pre-trial publicity, and because many jurors were aware of the case and had preconceived opinions. This, however, is not the legal basis for granting a change of venue. That jurors have been exposed to pre-trial publicity does not require a change of venue. *Dolbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290 (1977); *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031 (1975); *State v. Johnson*, 88 Ohio St.3d 95, 723 N.E.2d 1054 (2001).

Even if a juror has formed an opinion prior to trial, that juror is properly seated as long as the juror can set aside that opinion and serve in an impartial fashion. *State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001). *Dolbert, supra*; *Murphy, supra*.

As the Ohio Supreme Court has stated, "extensive voir dire helps eliminate any negative effect arising from pre-trial publicity." *State v. Roberts*, 110 Ohio St.3d 71, 850 N.E.2d 1168 (2006). That is what occurred here. The trial court held a special, individual voir dire, prior to the regular voir dire, on the publicity issue. During this process the defendant raised ten challenges for cause, eight of which were granted. (T.p. 65, 96, 104, 159, 186, 199, 242, 244) Two were denied as to jurors #1 and #55. The defendant later excused these two jurors with peremptory challenges during the regular voir dire. Both of these jurors, however, had indicated that they could be fair and impartial, thus, the

challenges for cause had been properly denied. At the conclusion of the special voir dire, defense counsel stated, “. . . I have a motion pending on change of venue. Obviously we have been able to seat a jury. I’ll submit my motion.” (T.p. 321) After the general voir dire, defendant raised only one challenge for cause, again on juror #1. The State submits that a fair and impartial jury was properly seated and that a change of venue was properly denied.

In rejecting this claim below the appellate court wrote: “Nothing in the record supports appellant’s allegation that she was denied a fair and impartial trial because of pre-trial publicity. *State v. Carroll, supra*, at ¶60. Further, it is interesting to note that the defendant has never assigned any claim of error to the trial court’s ruling on the challenges for cause.

PROPOSITION OF LAW IV: IN ORDER FOR AN OFFENSE TO BE A LESSER INCLUDED OFFENSE OF ANOTHER, EVERY ELEMENT OF THE LESSER OFFENSE MUST BE FOUND IN THE GREATER OFFENSE.

Defendant’s request for a charge on reckless homicide was rejected by the Court for two reasons. First, the Court found that reckless homicide was not a lesser offense of felony murder [R.C. 2903.02(B)], and second, even if it was a lesser offense, the facts of this case did not justify giving the charge. (T.p. 1093-1094)

In *State v. Bowles*, 2001 Ohio App. LEXIS 2145, Lake App. No. 99-L-075, the Eleventh District Court of Appeals ruled that felony murder requires the State to prove that

the death was the “proximate result” of the offender committing the specified underlying felony. While the underlying felony has a culpable mental state, the felony murder does not. The Twelfth District specifically adopted the rationale of *Bowles* in *State v. Sutton*, 145 Ohio App.3d 408, 763 N.E.2d 222 (2001), *i.e.*, the State has no burden to prove a culpable mental state. To the contrary, however, reckless homicide requires proof of a culpable mental state, recklessness. Thus, under *Bowles* and *Sutton*, reckless homicide cannot be a lesser offense of felony murder because it requires proof of an element that felony murder does not, *i.e.*, a culpable mental state. See *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, (1988) (to be a lesser included offense all elements of the lesser offense must be contained in the elements of the greater offense). Thus, the trial court correctly refused to charge on reckless homicide.

The Court also correctly noted that the evidence would not justify a charge on reckless homicide. *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), holds that a charge on a lesser included offense is only required where the evidence would support an acquittal on the greater offense and a conviction on the lesser.

The evidence is undisputed that Marcus Fiesel died as a result of the commission of the underlying felonies. The defendant did not contest this with any contrary facts. Defendant’s grand jury testimony was before the jury. (Exhibit #50, T.p. 1019, *et seq.*) In it defendant admitted that the victim was wrapped in a blanket and left alone in the closet.

She admitted that the victim was alive when she left and dead when she returned. She also admitted that she declined to return when David Carroll raised the issue. (T.p. 1046) In his closing, defense counsel argued that his client's conduct was not reckless. (T.p. 1134, 1138) He argued that his client was innocent, a complete defense (T.p. 1138-1139), which is also a bar to a charge on a lesser offense. The trial court's refusal to charge on reckless homicide was correct.

Defendant also argues that the trial court erred in not giving a charge on "accomplice testimony" as to Amy Baker. In *State v. Wickline*, 50 Ohio St.3d 114, 552 N.E.2d 913 (1990), the Ohio Supreme Court held that the term "accomplice" refers to someone actually indicted. Amy Baker was not indicted and thus no such charge was required.

PROPOSITION OF LAW V: IN DETERMINING WHETHER A CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THE COURT, REVIEWING THE ENTIRE RECORD, WEIGHS THE EVIDENCE AND ALL REASONABLE INFERENCES, CONSIDERS THE CREDIBILITY OF WITNESSES AND DETERMINES WHETHER IN RESOLVING CONFLICTS IN EVIDENCE, THE TRIER OF FACT CLEARLY LOST ITS WAY AND CREATED SUCH A MANIFEST MISCARRIAGE OF JUSTICE THAT THE CONVICTION MUST BE REVERSED AND A NEW TRIAL ORDERED.

Defendant argues that the State failed to prove the element of "knowingly" regarding all offenses where knowingly was an element. (R.C. 2901.22(B); T.p. 1155) Knowingly is defined as "regardless of purpose" being aware that her "conduct will

probably cause a certain result." Knowingly does not require the specific intent to commit the crime. *State v. Sutton, supra*. Defendant Carroll admitted to virtually all the physical acts involved in these crimes in her grand jury testimony. It is beyond credulity to believe she did not know that these actions could result in death to a three year-old child. Further, as the Court pointed out in *Sutton*, the State need not prove the defendant "knowingly," caused the death of the victim. Appellee submits this claim of error is devoid of merit.

CONCLUSION

The State submits that jurisdiction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2008, I have sent a copy of the foregoing Memorandum in Response, by regular United States mail, addressed to counsel for Defendant-Appellant, Elizabeth E. Agar, 0002766, 1208 Sycamore Street, Olde Sycamore Square, Cincinnati, Ohio 45210.

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