2018 IL App (2d) 150818-U
No. 2-15-0818
Order filed February 6, 2018



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>WILLIAM E. GIST,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Lake County.<br><br><br><br>No. 09-CF-1507<br><br>Honorable George D. Strickland, Judge, Presiding. |

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly denied defendant's motion to dismiss the indictment because of allegedly false or misleading testimony before the grand jury: to whatever extent that the testimony was false or misleading, the remaining evidence was such that the grand jury would have indicted defendant in any event.

¶ 2 Following a bench trial, defendant, William E. Gist, was convicted of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)) and sentenced to nine years' imprisonment. He appeals, contending that he was denied his right to due process of law when the prosecution presented false or misleading evidence to the grand jury. We affirm.

¶ 3 An indictment charged defendant with aggravated battery of his three-year-old son, W.G. Defendant moved to dismiss the indictment due to prosecutorial misconduct. The motion alleged that Detective Paul Warner had improperly conveyed to the grand jury that defendant had "changed his story and confessed." Moreover, Warner had falsely stated that defendant had said that he could not have his family finding out that he was responsible for W.G.'s injuries. The motion further alleged that Warner had improperly testified that a doctor had concluded that W.G. sustained "commotio cordis," where in fact the doctor's opinion was only that it was the most likely diagnosis.[1]

¶ 4 The trial court denied the motion, finding neither perjured testimony nor an intent to mislead the grand jury. The court did find that the grand jury was given inaccurate information, but that the information did not affect the decision to indict defendant.

¶ 5 The court addressed the specific statements referred to in defendant's motion. The court found that the assertion that defendant had changed his story was true, recounting at length the various statements defendant gave and noting the discrepancies. The court specifically noted that at least one version omitted any reference to W.G.'s having fallen off a bed. The court found that the assertion that defendant had confessed, while perhaps technically true, was misleading. Although defendant admitted striking the child in the chest with a closed fist, defendant stated that he did so in an attempt to perform CPR. The court further found that nothing in the discovery obtained to that point evinced defendant's making the statement that he could not have his family finding out that he was responsible for W.G.'s injuries.

¶ 6 Having found that the grand jury was presented with misleading information, the court considered whether the remaining evidence was sufficient to indict. The court found that it was.

[1] Defendant acknowledged, however, that this by itself was a "minor distinction."

It noted that defendant admitted to being alone with W.G. when he was injured, that defendant was admittedly "salty" with him and throwing him on the bed, and that defendant did change his story at various times. Thus, despite having "serious concerns" about how the case was presented to the grand jury, the court found that defendant had failed to show that the grand jury would not have handed down an indictment absent the contested evidence.

¶ 7 At trial, Angelita Navarro, W.G.'s mother and defendant's wife at the time of the offense, testified that on March 26, 2009, W.G. was three years old. He had difficulty saying his name properly, which irritated defendant. On that day, Navarro went into the bedroom where defendant was with W.G. Defendant was sitting on the bed, looking off to the side at the TV or a mirror. Defendant told Navarro, " '[t]here's something wrong with [W.G.].' " He explained that W.G. had been jumping on the bed and fell off.

¶ 8 Navarro saw W.G. lying on the bed next to defendant. He was "breathing funny," his eyes were rolled back in his head, and he had blood under his nostril. Navarro called W.G.'s name, but he did not respond. Defendant tried to perform CPR by pressing on W.G.'s chest with his hands open. Navarro and defendant took W.G. and had defendant's aunt drive them to the hospital.

¶ 9 At the hospital, Detective Lakesha Wilkerson heard defendant tell a nurse that W.G. might have hit a TV stand when he fell off the bed. Wilkerson spoke to defendant, who said that he was trying to get W.G. to say his name properly. When W.G. did not say his full name, defendant told him " 'forget it' " and threw him onto the bed. Defendant acknowledged that he was "salty" with W.G. Defendant did not pay attention to W.G. for awhile and, when defendant looked back, he noticed that W.G. was not breathing correctly and was bleeding from the nose. Defendant pounded on W.G.'s chest with a closed fist in an effort to perform CPR.

¶ 10 Detectives Warner and Wendell Russell later interviewed defendant at the hospital. According to Russell, defendant said that, a month or two earlier, W.G.'s older brother, Jaden, had choked W.G. to the point of passing out. On the day in question, defendant was in his bedroom with W.G., and he tried to get W.G. to say his name properly. When he did not, defendant got "salty" with W.G. and said "[g]et the fuck out of here." Defendant started grooming himself in front of a mirror on the floor while W.G. jumped on the bed behind him.

¶ 11 Defendant heard a loud "boom" and an " 'uh' " sound. When defendant turned around, W.G. was lying on the floor. Defendant told W.G., "I told you about fucking jumping on the bed," and then picked him up by his right arm and threw him onto the bed. Defendant went back to grooming himself. When he looked back at W.G., his eyes were rolled back and he was having trouble breathing.

¶ 12 In an attempt to get W.G. breathing properly, defendant punched him in the chest with his closed fist. At that point, Navarro came into the room and shouted at W.G. to wake up, but he did not respond. Navarro and defendant then took W.G. to the hospital.

¶ 13 An evidence technician measured the bed. He noted that it was merely a mattress on the floor and was 16 inches high.

¶ 14 Defendant was interviewed again on April 14, 2009, by Detective Kevin Harris, at which point he gave a written statement similar to what he told Russell. Defendant said that he noticed that W.G. "looked like he was passing out" and slapped him, but not "really hard." Navarro came into the room and defendant told her that something was wrong with W.G. Defendant then started hitting W.G. in the chest with a closed fist in an attempt to perform CPR, but it did not work. Navarro grabbed the child and they rushed him to the hospital. Defendant stated that he loves his children and would never do anything to hurt them.

¶ 15 During the interview, Harris told defendant that pounding on a child's chest was not the proper way to do CPR, to which defendant responded, " 'I guess that does look bad.' " Harris confronted defendant with the height of the bed and how a fall from that height would not have caused a severe injury. Defendant did not respond. When Harris said, " 'So you picked him up like a rag doll and threw him on the bed,' " defendant became very agitated and asked if Harris thought he was a bad father. Defendant refused to discuss the incident further.

¶ 16 Department of Children and Family Services investigator Obeckyo Quinn went to the house to speak with defendant the day after W.G. was hospitalized. Defendant told Quinn that he felt "salty" about W.G.'s inability to say his name and told the boy to " 'get the fuck away.' " While he was shaving, defendant noticed W.G. on the floor. He grabbed W.G. by the arm and threw him onto the bed. When defendant realized that W.G. was not making any noise, he went over to W.G. and saw that his eyes were rolled back. Defendant then slapped W.G. in the face and punched him in the chest with a closed fist.

¶ 17 Dr. Lynn Sheets testified that she is a pediatrician, professor, and medical director of child advocacy and protection services at Children's Hospital of Wisconsin. She treated W.G. after he was transferred there. She noted that W.G. had six bruises on his chest, as well as bruises on his thigh. The thigh bruises were "looped" injuries, suggesting that he was hit with a belt or similar object.

¶ 18 According to Sheets, W.G.'s heart stopped beating long enough to deprive his brain of oxygen and cause severe brain damage. He is currently a ward of the state and lives in a residential facility where he is unable to care for himself. His mental and physical capabilities are those of a four-month-old and he will never recover.

¶ 19 Sheets looked into causes for W.G.'s heart failure and ruled out drug overdose, poisoning, infection, and seizures. An echocardiogram (EKG) showed no structural defect, primary cardiomyopathy, or predisposing condition. Lacking any other medical explanation, Sheets said that the likely cause of W.G.'s heart failure was either commotio cordis or a "soft smothering" of the child, with commotio cordis the more likely cause.

¶ 20 Commotio cordis occurs when the silhouette of the heart receives a nonpenetrating blow at just the precise moment—a 10- to 30-millisecond window during the heart cycle—to cause the heart to stop. A child's entire heartbeat lasts 600 milliseconds. Commotio cordis is uncommon and typically occurs during baseball, softball, or hockey games, where the victim is hit in the chest with a ball or puck. Without quick resuscitation, the condition often leads to death.

¶ 21 Dr. James Fintel, a cardiologist, tested defendant and W.G. to see whether W.G. had some genetic heart condition that caused his symptoms. In Fintel's opinion, defendant did not have Brugada syndrome, one such genetic heart condition that can cause sudden death. According to Fintel, numerous EKGs done on W.G. showed that he also did not have Brugada syndrome. Fintel testified that an EKG done on defendant showed minor abnormalities, but those did not necessarily imply pathology with the heart.

¶ 22 Fintel further opined that a 16-inch fall from a bed could not have caused W.G.'s condition. He believed that the bruises on W.G.'s chest were consistent with commotio cordis or CPR and that commotio cordis adequately explained what happened to W.G.

¶ 23 Dr. Shaku Teas testified for the defense that she reviewed W.G.'s medical records and found that more testing was needed to find a definitive cause for what happened to him. She found no evidence of commotio cordis and said that W.G.'s heart could have stopped beating

because of a seizure, a viral infection, low potassium levels, Brugada syndrome, or another heart abnormality.

¶ 24 The court found defendant guilty. The court found that W.G.'s injuries were caused by commotio cordis and that defendant inflicted the injuries, either by hitting W.G. in the chest or by throwing him against something. The court later sentenced defendant to an extended term of nine years' imprisonment. Defendant timely appeals.

¶ 25 Defendant contends that he was deprived of due process when the grand jury was presented with false and misleading evidence. The State responds that only intentional misconduct by the prosecution should result in the dismissal of an indictment and that, in any event, the grand jury would have indicted defendant even without considering the challenged evidence. We agree with this latter contention.

¶ 26 The grand jury's role is to decide whether probable cause exists that a person has committed a crime, warranting a trial. *People v. DiVincenzo*, 183 Ill. 2d 239, 254 (1998). Prosecutors advise the grand jury by informing it of the proposed charges and pertinent law. *Id.* Generally, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury, but a defendant may challenge an indictment procured through prosecutorial misconduct. *Id.* at 255. To obtain the dismissal of an indictment, a defendant must show that the misconduct affected the grand jury's deliberations and rose to the level of a deprivation of due process or a miscarriage of justice. *Id.* at 257. "The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *Id.* A defendant must show that the denial of due process is "unequivocally clear" and resulted in prejudice that is "actual and substantial." *People v. Oliver*, 368 Ill. App. 3d 690, 695 (2006).

Prosecutorial misconduct resulting in a due process violation is actually and substantially prejudicial only if the grand jury would not have otherwise indicted the defendant. *Id.* at 696-97. Where, as here, the facts about what occurred at a grand jury proceeding are undisputed, we review *de novo* whether the State prejudicially denied the defendant due process. *People v. Legore*, 2013 IL App (2d) 111038, ¶ 23.

¶ 27 Here, the court, while expressing concern about the way the case was presented to the grand jury, concluded that the grand jury would still have indicted defendant if it had considered only the unchallenged evidence. That evidence showed that defendant admitted being alone in a room with W.G. when he was injured. Defendant was angry with the child and admitted throwing him down on the bed, which was inconsistent with earlier statements he made. Within a minute or two of doing so, defendant noticed that W.G. was unresponsive and was bleeding. Medical testimony established that the cause of W.G.'s injuries was blunt-force trauma. This evidence, albeit circumstantial, was more than sufficient for the grand jury to indict defendant. Thus, the court did not err by refusing to dismiss the indictment.

¶ 28 Defendant cites *Oliver*. There, a police officer testified, explicitly as to one count and implicitly as to another, that he witnessed the defendant engage in hand-to-hand transactions with another person. The officer testified that he believed that the defendant intended to distribute the cocaine he possessed. In fact, a different officer had witnessed the transactions, and that officer did not see what was exchanged. We noted that the officer's testimony was "doubly deceptive," in that it both concealed the hearsay nature of the testimony and falsely implied that the defendant was seen delivering cocaine. *Oliver*, 368 Ill. App. 3d at 697. Noting that an exchange of unidentified items does not support probable cause to believe that a drug

transaction has taken place (*id.* (citing *People v. Holliday*, 318 Ill. App. 3d 106, 111 (2001))), we affirmed the trial court's dismissal of the indictment.

¶ 29 In *Oliver*, the misleading testimony went directly to the issue of probable cause. Here, the disputed evidence was tangential to that issue. Here, whether defendant "changed his story" and "confessed" would provide additional evidence of his guilt, but was not essential to a finding of probable cause. As the trial court noted, the other unchallenged evidence was more than sufficient for that purpose.

¶ 30 It is unclear exactly how much of the testimony was misleading. The trial court found that defendant did in fact change his story. He initially told Navarro that W.G. had merely fallen off the bed. He later added that W.G. might have hit his head on something. He later admitted that he threw W.G. onto the bed and punched him in the chest, omitting any reference to falling off the bed. Later versions again included the reference to falling off the bed. Defendant asserts that his story remained consistent because he consistently maintained that W.G. fell off the bed. However, his first statement to Wilkerson at the hospital omitted any reference to falling off the bed. In any event, given the various details with which defendant embellished it, Warner was justified in stating that defendant changed his story.

¶ 31 The trial court did find that the statement that defendant "confessed" was misleading because, although defendant admitted punching W.G. in the chest, he claimed to have done so in an attempt to perform CPR. But defendant also admitted to throwing W.G. onto the bed, which apparently caused significant injuries, in that defendant then observed W.G. unresponsive and bleeding from the mouth. It was only after making these observations that he (allegedly) attempted to perform CPR. Defendant conceded that this series of events made him look bad. The issue of causation ultimately required expert medical testimony, so whether defendant's

statements could fairly be called a "confession" is debatable, but defendant clearly acknowledged that his rough handling of the child made him look guilty.

¶ 32 Finally, the trial court found that the statement that defendant had said that he could not have his family finding out that he was responsible for W.G.'s injuries was not mentioned in any of the police reports. However, this did not establish that Warner's testimony to that statement was false. We are confident that the grand jury was not misled into indicting defendant.

¶ 33 The judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 34 Affirmed.