



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 15, 2017

LETTER OPINION

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RE: *Commonwealth v. Antwan Ray Green*
Case No. FE-2016-1048

Dear Counsel:

This cause came on for the third day of trial on the 15th day of November, 2017, in consideration of whether the Defendant's Motion to Strike should be granted as to the charge of aggravated malicious wounding causing the involuntary termination of a pregnancy, in violation of Virginia Code § 18.2-51.2(B). The Defendant maintains that in the absence of medical opinion testimony as to the direct and proximate cause of the demise of the fetus, the issue of his guilt may not be committed to the jury for decision.

OPINION LETTER

The Court concludes that this case embodies a set of facts such that the Jury may determine the cause within its common knowledge and experience. For the reasons as more fully stated herein, the Motion to Strike is thus denied.

FACTS

The Defendant stands accused of setting alight a townhouse which contained within it an individual woman, forty-two years in age, who was approximately five months pregnant. The woman testified she had not sought prenatal care during the five months of her pregnancy, that she had two other children, knew what to expect during pregnancy and took the proper vitamins. She described feeling the fetus roll and move within her womb prior to the fire incident. The occupant had a long history of drug and alcohol use, often to excess.

The woman awoke engulfed by flames on the second floor bedroom of her townhouse. The fire had several points of ignition with an accelerant, originating in the basement and on the first floor. For a period of time, the woman desperately searched for her children, whom she believed wrongly had returned to the home from the abode of their grandparents where they primarily resided. The woman thereafter exited the townhouse through a top floor window, held onto the sill by one hand, and jumped onto a patio, to avoid immolation. Upon impact with the ground she sustained significant traumatic injuries and immediate loss of consciousness.

The victim was transported to a hospital trauma center via helicopter where her injuries were documented. The injuries included but were not limited to damage to her airway from smoke inhalation, right wrist distal fracture, multiple facial fractures, bleeding

in the brain, multiple rib fractures, a lacerated liver, third degree burn blisters to her buttocks and back thighs. A voluminous medical chart was introduced, comprising hundreds of pages. Upon admission to the hospital, the woman victim of the fire was noted to have a blood ethanol level of .22, and was positive for cocaine, THC (active ingredient in marijuana) and amphetamine (possibly from prescription Adderall). Within a day after the victim was admitted to the hospital her fetus died.

Three physicians testified. The attending trauma doctor noted the heart of the fetus was beating when the victim was first admitted, but testified primarily to the extent of the woman's injuries and her permanent scarring. He noted burns to her lower extremities were third degree in nature, the most severe, meaning the skin was burned down to the body fat. The orthopedic trauma surgeon testified next, mostly about surgery conducted to repair the victim's wrist as well as to the nature of her facial fractures and likely mechanisms of injury.

An obstetrician was the final medical expert to testify. She treated the victim in relation to her pregnancy following some days after the fire. She noted the fetus had died days before her examination but because of the critical nature of the victim's injuries extraction was not deemed an earlier necessity until the victim stabilized. Because the victim developed a fever which could have been linked to infection caused by the deceased fetus, removal became a priority thereafter, and the doctor conducted the appropriate procedure to effect such result. The doctor noted the victim's pregnancy was "high risk" by virtue of her age and substance abuse. The physician related there was no evidence of either vaginal bleeding or separation of the placenta from the uterine wall.

The obstetrician could not state to a reasonable degree of medical probability the specific cause of the death of the fetus. There was no other medical opinion offered that specifically related the demise of the fetus as being due to the fire or the injuries sustained by the victim in consequence thereto.

ANALYSIS

In his Motion to Strike, Defendant maintained in part the charge of maliciously wounding the victim with the intent to cause the involuntary termination of her pregnancy, in violation of Virginia Code § 18.2-51.2, could not be entrusted to the jury for resolution, inasmuch as no medical causation opinion was adduced stating with specificity the cause for the death of the fetus. The relevant portions of the statute state the following:

B. If any person maliciously shoots, stabs, cuts or wounds any other woman who is pregnant, or by any other means causes bodily injury, with the intent to maim, disfigure, disable or kill the pregnant woman or to cause the involuntary termination of her pregnancy, he shall be guilty of a Class 2 felony if the victim is thereby severely injured and is caused to suffer permanent and significant physical impairment.

C. For purposes of this section, the involuntary termination of a woman's pregnancy shall be deemed a severe injury and a permanent and significant physical impairment. (1986, c. 460; 1991, c. 670; 1997, c. 709.)

Va. Code Ann. § 18.2-51.2.

Defense counsel expended a substantial amount of time attempting to establish the drug and alcohol abuse by the victim leading up to the date of her injuries. The implication for the jury from such effort was that the fetal demise was a consequence of drug and alcohol abuse and the pregnancy risk factor posed by the victim being forty-two years of age, but not because of the events of the fire. The Defendant further cited *Lane*

v. Commonwealth, 219 Va. 509 (1978), to sustain its claim the Commonwealth had failed to prove the *corpus delicti* in the absence of a medical opinion establishing the actual cause of the involuntary termination of the pregnancy. In *Lane*, a case involving an accusation of involuntary manslaughter, the baby's "death resulted from anoxia (lack of oxygen), but the expert medical witnesses were unable to state the cause of death." *Lane*, 219 Va. at 515. The Court went on to note that cause of death could not be inferred.

[T]he death was caused by wrapping the child in a towel or placing it in the plastic bag. To hold that the child's death was caused by the criminal act or acts of the defendant would be contrary to the medical evidence and amount to pure speculation and surmise.

Id. The Defendant averred that the situation in *Lane* is similar to that in the instant case in the sense that the requisite evidence of causation is absent, and that even in the light most favorable to the Commonwealth, the Court is thus required to grant his Motion to Strike and dismiss the charge. The Defendant charged that to do otherwise would allow the jury to render a verdict, which is speculative in nature.

The Court notes that *Lane* involved a different offense than the one charged in this cause. *Lane* was decided in 1978, approximately eight years before the offense of which the Defendant is now charged came into existence under the Virginia Code. The applicability of the case is therefore somewhat attenuated even if the general principle cited remains relevant. The case does within its pages demarcate some limit to the need for expert testimony in a general context.

It is essential in every prosecution for the commission of a homicide that the Commonwealth prove the *corpus delicti*. In such cases there must be a showing of death and that death resulted from the criminal act or agency of another. Direct evidence is not essential to prove the *corpus delicti*. It may be proved by circumstantial evidence.

OPINION LETTER

Lane, 219 Va. at 514 (citations omitted). While in *Lane* the mechanism of death could not be inferred from circumstantial evidence, in the instant case the facts are of different application. In the case at bar the evidence is devoid of suggestion the fetus was experiencing any distress until the date of the fire. The victim denied drinking to excess during her pregnancy. There was, however, considerable countervailing evidence of the victim's history of drug and alcohol abuse. On the date of her injury, the victim was found to have a blood alcohol level of .22. At the same time she sustained grievous injuries both from the fire and from the trauma due of her fall as she jumped from the third floor window onto the patio.

The parties aver that in a criminal context, there is no precedent to guide the hand of this Court with certainty under the facts of this case, each taking the converse position as to the necessity of medical opinion to permit a jury to decide the charge. The Court is thus left to look to the well-developed body of civil law as a guide to determine when medical causation testimony is unnecessary in committing a decision such as this one to the jury as trier of fact.

The general rule in medical malpractice cases is that an expert is required to establish that the defendant "deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed." Code § 8.01-20.1. As we have noted, "[i]ssues involving medical malpractice often fall beyond the realm of common knowledge and experience of a lay jury." *Beverly Enterprises-Virginia, Inc. v. Nichols*, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994).

There is an exception to this rule, although its application is "rare." *Id.*; *Raines v. Lutz*, 231 Va. 110, 113, n.2, 341 S.E.2d 194, 196 n.2 (1986). Under this exception, "expert testimony is unnecessary [when] the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." *Beverly Enterprises-Virginia*, 247 Va. at 267,

OPINION LETTER

269, 441 S.E.2d at 3, 4 (no expert required to establish the standard of care because “whether a reasonably prudent nursing home would permit its employees to leave a tray of food with an unattended patient who had a history of choking and who was unable to eat without assistance is certainly within the common knowledge and experience of a jury”); *Webb v. Smith*, 276 Va. 305, 308, 661 S.E.2d 457, 459 (2008) (doctor agreed to perform two distinct operations at the same time but only performed one, requiring the plaintiff to undergo a second surgery; the issue of causation in that instance “was within the common knowledge of laymen”).

Summers v. Syptak, 293 Va. 606, 613 (2017).

In the instant case, the jury is presented with facts suggesting an uncomplicated pregnancy up to the date of the fire. Although the Defendant adduced evidence that the victim engaged in significant drug and alcohol abuse until the date when she was injured, this evidence is largely irrelevant to the issue of the viability of the pregnancy at the time of the fire. The fact the fetus survived for one day at the hospital as reflected in the medical chart, suggests the mechanism of death was not exclusively if at all, due to the use of drugs and alcohol by the victim prior to the fire. The most glaring change for the survival of this fetus was the catastrophic set of injuries to its victim-mother, injuries directly caused by the fire and subsequent fall. It is within the common knowledge of laypersons that continued survival of the fetus rests heavily with the health of the mother. It is thus for the Jury, in evaluation of the circumstantial evidence presented, to decide whether the Commonwealth has carried its burden beyond a reasonable doubt that all circumstances proved are “consistent with guilt and inconsistent with innocence” of the Defendant “to the exclusion of any other rational hypothesis.” *Commonwealth v. Moseley*, 293 Va. 455, 463 (2017) (internal quotation marks and citations omitted).

CONCLUSION

After full consideration of the relevant facts and law, in determination of the credibility of the witnesses, and for the reasons already stated herein and on the record, this Court holds that the Defendant's Motion to Strike is denied as to the charge of aggravated malicious wounding causing the involuntary termination of a pregnancy in violation of Virginia Code § 18.2-51(B). The Court concludes, despite the alleged dearth of medical opinion testimony as to the direct and proximate cause of the death of the fetus, that this case comprises a set of facts such that the Jury may determine the cause within its common knowledge and experience.

AND THIS CAUSE CONTINUES.

Sincerely,


David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER