

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI,
RESPONDENT
vs.**

**JAVIER BARKER,
APPELLANT**

DOCKET NUMBER WD73856

DATE: JULY 30, 2013

Appeal from:

The Circuit Court of Cass County, Missouri
The Honorable Jacqueline Annette Cook, Judge

Appellate Judges:

Division Three: Victor C. Howard, P.J., Joseph M. Ellis and Anthony Rex Gabbert, JJ.

Attorneys:

Daniel N. McPherson, for Respondent

Cheryl A. Pilate, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI, RESPONDENT

v.

JAVIER BARKER, APPELLANT

WD73856

Cass County, Missouri

Before Division Three Judges: Victor C. Howard, P.J., Joseph M. Ellis and Anthony Rex Gabbert, JJ.

On the evening of December 26, 2008, Appellant Javier Barker agreed to watch his girlfriend's two children, three-year-old D.B. and then five-year-old J.B., while she was at work. In the early morning hours of December 27, 2008, Appellant's girlfriend arrived home from work and found three-year-old D.B. unresponsive with several injuries to the face, head, back, and leg. D.B. was pronounced dead the following day after doctors determined he was legally brain dead. Following D.B.'s death, Appellant was charged with one count of second-degree felony murder and one count of abuse of a child resulting in death.

Prior to trial, the State sought to introduce out-of-court statements made by J.B. to Sergeant Todd Burris and a Child Protection Center ("CPC") forensic interviewer, Kristin Le'Nae Gilmore. Appellant challenged the admission of these statements as well as J.B.'s competency to testify at trial. Following a pretrial hearing on the matter, the trial court determined that J.B. was competent to testify and that his CPC interview with Gilmore bore sufficient indicia of reliability to be admitted at trial. J.B.'s statements to Sgt. Burris, however, were excluded on the basis that Sgt. Burris used suggestive and leading questions during the interview.

At trial, J.B. testified that he, Appellant, and D.B. had been playing videogames when D.B. fell asleep. Appellant gave D.B. one more chance to stay awake, but D.B. again fell asleep and Appellant put him to bed. J.B. also explained that he and Appellant then began to watch a movie. While watching the movie, Appellant went back to D.B.'s room, and J.B. believed Appellant spanked D.B. because D.B. was crying. He further testified that he saw Appellant step on D.B.'s ankle. J.B.'s CPC interview also indicated that J.B. asked Appellant if he had been spanking D.B., but Appellant said he had not. Ultimately, the jury convicted Appellant of second-degree felony murder and abuse of a child resulting in death. Appellant raised five points on appeal.

AFFIRMED

Division One holds:

(1) The trial court did not abuse its discretion in determining that J.B. was competent to testify as a child witness because the totality of the evidence presented at the competency hearing established that J.B. had the capacity to receive just impressions and relate them truthfully at trial. The pretrial hearing established that J.B. understood the difference between a truth and a lie and that he had the ability to understand the concept of telling the truth when testifying. Likewise, J.B.'s testimony as to the events that occurred the night D.B. was injured, which were consistent with his account of the events prior to the Burris interview, demonstrated his capacity to remember and articulate the events about which his testimony was being sought. Furthermore, the record reflects that the trial court was aware of and considered Appellant's position and expert witness's opinion that the Burris interview irreversibly "tainted" J.B.'s memory in reaching its determination that J.B. was competent to testify. Accordingly, the trial court did not abuse its discretion in finding J.B. competent to testify.

(2) The trial court did not abuse its discretion in admitting J.B.'s CPC interview pursuant to § 491.075 because Gilmore was a highly trained and experienced forensic interviewer, the interview was conducted in a neutral environment, and Gilmore asked open-ended and non-suggestive questions during the interview. Furthermore, J.B.'s responses to Gilmore's questions were spontaneous and consistent with statements he had made to his mother prior to the interview with Sgt. Burris. Thus, the CPC interview bears the requisite indicia of reliability despite Appellant's contention that the CPC interview was tainted by the suggestive questions asked during the Burris interview.

(3) Appellant failed to properly preserve his argument that the trial court erred by failing to declare a mistrial or issue a curative instruction following statements made by the State during its closing argument that Appellant alleges impermissibly shifted the burden of proof and persuasion to him because Appellant raised the issue for the first time in his motion for new trial instead of immediately raising an objection and requesting a mistrial following the State's remarks during closing argument.

(4) The trial court did not plainly err in failing to *sua sponte* declare a mistrial or, alternatively, issue a curative instruction after the State made statements during its closing argument that Appellant believed impermissibly shifted the burden of proof because the record establishes that the trial court correctly instructed the jury as to the proper burden of proof and Appellant's trial counsel correctly informed the jury as to the proper burden of proof and told the jury that the burden of proof never shifts to the defendant during Appellant's closing argument.

(5) The trial court did not violate Appellant's right to be free from double jeopardy by failing to dismiss the charge of abuse of a child resulting in death because Appellant's contention that the abuse of a child charge should be merged with the second-degree felony murder charge is no longer a valid theory under Missouri's current felony murder statutory scheme. Under Missouri's current statutory scheme, the legislature intended punishment to be cumulative for any felony murder and the related underlying felony as

long as the underlying felony was not murder or manslaughter. Thus, the legislature intended cumulative punishments for second-degree felony murder and abuse of a child resulting in death. Accordingly, the trial court did not violate Appellant's double jeopardy rights by entering convictions against Appellant on both counts.

(6) The trial court did not err in entering judgments of conviction against Appellant for both second-degree felony murder and abuse of a child resulting in death because there was sufficient evidence from which a reasonable juror could have found Appellant guilty beyond a reasonable doubt of such offenses given that three-year-old D.B. was injury-free at the time his mother left for work; coworkers of D.B.'s mother did not see her leave the nursing home facilities during her scheduled shift; D.B. was left in the care of Appellant, who had been drinking; Appellant checked on D.B. several times throughout the night; J.B. saw Appellant step on D.B. and believed Appellant had spanked D.B.; D.B.'s injuries were consistent with abuse and his cause of death was blunt force trauma to the head; the doctors testified that five-year-old J.B. could not have inflicted such injuries on D.B.; one of D.B.'s injuries above his left ear resembled a ring that was consistent with a whisky bottle; and the bottle of whiskey Appellant received for Christmas was recovered from the scene empty.

Opinion by Joseph M. Ellis, Judge

Date: July 30, 2013

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