3-22-1976

Richard Earl Pilon v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0153

APPELLANT'S BRIEF

544 SW 2d 28

SUPREME COURT OF KENTUCKY

FILE NO. 76-153

RICHARD EARL PILON — APPELLANT

V

BRIEF OF APPELLANT

COMMONWEALTH OF KENTUCKY — APPELLEE

Appeal from the Jefferson Circuit Court
Criminal Branch, First Division
S. Rush Nicholson, Judge

Thomas R. Thomas
THOMAS R. THOMAS
ASSISTANT DISTRICT DEFENDER
OFFICE OF THE JEFFERSON DISTRICT
PUBLIC DEFENDER
1000 REPUBLIC BUILDING
LOUISVILLE, KENTUCKY 40202
584-1211
ATTORNEY FOR APPELLANT
RICHARD EARL PILON

Diane Fox
DIANE FOX
LEGAL INTERN

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
DEPUTY PUBLIC DEFENDER
OF COUNSEL

This is to certify that a copy of this brief has been served on:
Hon. S. Rush Nicholson, Judge
Hon. Robert Stephens, Attorney General
Hon. David L. Armstrong, Commonwealth Attorney
pursuant to RCr 1.250

Thomas R. Thomas
THOMAS R. THOMAS

TABLE OF CONTENTS AND AUTHORITIES

SUPREME COURT OF KENTUCKY

FILE NO.

RICHARD EARL PILON — APPELLANT

V

BRIEF OF APPELLANT

COMMONWEALTH OF KENTUCKY — APPELLEE

Appeal from the Jefferson Circuit Court
Criminal Branch, First Division
S. Rush Nicholson, Judge

STATEMENT OF QUESTIONS PRESENTED

I. WAS THE EVIDENCE AGAINST THE APPELLANT TOTALLY INSUFFICIENT TO SUPPORT HIS CONVICTION?

II. DID THE INFLAMMATORY TENDENCY OF THE NUMEROUS PHOTOGRAPHS OF THE DECEASED CHILD FAR OUTWEIGH ANY PROBATIVE VALUE WHICH THEY HAD, AND DID THEIR INTRODUCTION DEPRIVE THE APPELLANT OF A FAIR TRIAL?

III. WAS THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES PREJUDICIAL ERROR?

IV. DID THE DAMAGING TESTIMONY OF DR. KINCAID, IMPROPERLY ADMITTED AS EVIDENCE AND DISCOVERED BY HIM AFTER THE TRIAL TO BE INACCURATE, MISLEAD THE JURY AND REQUIRE A NEW TRIAL?

STATEMENT OF THE CASE

A. STATEMENT OF THE NATURE OF THE PROCEEDINGS

The appellant, Richard Earl Pilon (hereinafter referred to as appellant), was reindicted by the July, 1975 Term of the Jefferson Circuit Court, Criminal Division Grand Jury and charged under Indictment No. 154822 with first degree manslaughter in the death of Marvin Cole Marcum in violation of KRS 507.030 (Transcript of Record, p.2, hereinafter referred to as TR). On July 25, 1975, the appellant waived formal arraignment and entered a plea of not guilty (TR 3).

The appellant was previously indicted for second degree manslaughter under Indictment No. 154490 (TR 3). On August 18, 1975, the appellant filed a written motion with supporting affidavit for election and dismissal of indictment (TR 3). On September 4, 1975, the Commonwealth of Kentucky (hereinafter referred to as the Commonwealth) filed a written response whereby the Commonwealth elected to try Indictment No. 154822 (first degree manslaughter) rather than Indictment No. 154490 (second degree manslaughter) (TR 5).

On December 1, 1975, the appellant was brought into the Jefferson Circuit Court, Criminal Branch, First Division, the Hon. S. Rush Nicholson presiding. The jury was selected and sworn, and all evidence presented (TR 10). On December 2, 1975, instructions and arguments of counsel were presented, the jury returned a verdict of guilty and fixed the appellant's punishment at confinement in the penitentiary for ten (10) years (TR 11).

On December 12, 1975, the appellant by his counsel filed a motion for new trial with supporting affidavit. The court, being advised, overruled said motion (TR 12). Also, on December 12, 1975, the appellant filed motion and order to proceed in forma pauperis for the purpose of appeal. The court

ordered the office of the Public Defender be notified of its appointment (TR 13). In addition, the appellant filed a notice of appeal to the Kentucky Court of Appeals on December 12, 1975 (TR 18).

B. STATEMENT OF THE FACTS

In this case, the appellant was convicted of intentionally killing his stepson. No witnesses actually saw the appellant strike the deceased, and the appellant testified emphatically that he did not strike the child. Testimony presented at trial showed that the appellant and two other individuals, namely Mrs. Pilon and the deceased's sister, Stacy, all had a substantial opportunity to injure the child. No testimony or circumstantial evidence was presented during the trial to show that the appellant intended any physical harm to the child, nor was any evidence introduced to show that the appellant intended to cause the death of the child. Despite this lack of intent, the trial court sustained a conviction of first degree manslaughter as defined in KRS 507.030.

Two neighbors, Mrs. Elizabeth George and Mrs. Ruth Eldridge, testified that they had observed the deceased child prior to the day in question and that he appeared to be normal, but perhaps a bit more quiet and clumsy than usual for a 17 month old child (Transcript of Evidence and Proceedings, hereinafter referred to as TE, pp. 39-47).

The primary witness by whom the Commonwealth attempted to establish the circumstances and happenings relating to the day in question was Nola Marcum, now Mrs. Pilon. Mrs. Pilon testified that she and/or the appellant was with the deceased at all times during the day of May 8, 1975. Mrs. Pilon stated the appellant had custody of the deceased for a period of about three hours after she left for work (TE 124-128). Mrs. Pilon testified that she did not see the deceased's sister hit him, nor did she see the appellant strike the

appellant strike the deceased (TE 125). She also stated she did not strike the deceased (TE 125).

Mrs. Pilon had previously been concerned about Marvin Marcum because of his clumsiness and falling. In September or October of 1974, Marvin had fallen and received a knot on his forehead. The built up of blood under the knot caused him to be very clumsy (TE 123-124). When she took Marvin to Pediatric Associates (Dr. Doyle's Office) on April 11, 1975, for a physical, she discussed Marvin's fall with the examining doctor (TE 122-123).

Mrs. Pilon testified Marvin had contracted the flu two or three days prior to his death. She said that she did not see any bruises on his body on the way to the hospital when pulling his pajama top up to check his breathing (TE 131-132).

Mrs. Pilon stated that Marvin and his sister Stacy were up and playing together when she got up around noon on May 8, 1975, and that Marvin was playing like a normal 17 month old (TE 121-122). She then proceeded to get her uniform ready for work at 3:00 p.m. and to fix the children's breakfast (TE 124). Mrs. Pilon testified that she, the appellant, Marvin and his sister stayed at their mobile home until it was time for her to go to work around 2:30 p.m. During this time, there was no one else present at the mobile home (TE 124-125).

On the way to take Mrs. Pilon to work, nothing eventful happened; that is, they did not run into any trees or anything (TE 125). When they arrived at her place of employment, Marvin became sick. Earlier in the day, Mrs. Pilon had given him an aspirin and orange juice (TE 126). After punching in, Mrs. Pilon came back out and cleaned up the mess. She thought Marvin had "the flu or virus, and he was vomiting an awful lot, and he had diarrhea, and had been sick" (TE 126-127). She was not concerned about leaving Marvin with the appellant. Her only concern was that Marvin wasn't feeling good (TE 127).

At approximately 5:00 p.m., the appellant called Mrs. Pilon to give her the results of a follow-up examination of the appellant's hand, which had been stitched a week or two previously. The appellant also told her that Marvin was playing with his sister in their room but was not as active as usual. Around 6:00 p.m., the appellant called again to say that Marvin was really sick. He wanted to get Mrs. Pilon and take Marvin to the hospital. Mrs. Pilon told him to come on (TE 127-128). At 6:30 p.m. Mrs. Pilon punched her time card and she, the appellant, Marvin, and Stacy drove straight to Norton-Childrens Hospital (TE 128). When they arrived, Mrs. Pilon jumped out of the car and told a doctor her baby was sick and she needed help fast. The doctor went out to the car, looked at Marvin, picked him up and ran in the hospital. Mrs. Pilon followed, but they would not let her go with them. She was required to sign some papers and wait while they did what they could (TE 130).

Mrs. Pilon testified that the appellant told her he had driven over to Ricky Childers' house with the two children and stayed only a few minutes, as Ricky was getting ready to leave. She stated that as far as she knew, no one else was around the children on the afternoon of May 8, 1975 (TE 129). This statement was made after she first said no one except the appellant was around the children that afternoon that she could remember (TE 129).

Mr. Richard Childers, a friend and fellow employee of the appellant, testified that he saw the appellant and the deceased around 6:00 p.m. on May 8, 1975. The appellant had called Mr. Childers out to his car to determine if he thought the deceased looked "white as a ghost" but he did not see any bruises, cuts, scratches, or anything which would indicate violence (TE 49-50).

Officer Earl Droddy of the Evidence Technician Unit of the Louisville Police Department testified that he took pictures of the deceased after his death. The photographs were taken at Nortons-Childrens Hospital at approximately 8:15 p.m. on May 8, 1975. Defense counsel objected to the introduction of the

photographs as cumulative and inflammatory, but the court overruled defense counsel's objection (TE 56). These photographs were then introduced as the Commonwealth's Exhibits 1 through 9 (TE 54-58).

Detective Bobby Shanks of the Jefferson County Police Department, Homicide Section, testified and identified photographs which he took of the deceased at the post mortem and autopsy at Louisville General Hospital. Again, defense counsel objected to the introduction of photographs of the deceased because of duplicity and their inflammatory nature, but once again the court overruled the objection (TE 60). These photographs were taken on May 9 at 10:00 a.m. and introduced as the Commonwealth's Exhibits 10 through 16. Detective Shanks' comments indicated that much of the trauma exhibited in the photographs taken by him was identical to that in the photographs of Officer Droddy which were previously introduced into evidence (TE 59-66).

Dr. Harold Harrison, a pediatric resident at Nortons Childrens Hospital, testified that Marvin Cole Marcum was dead on arrival at Nortons-Childrens Hospital and that efforts made to revive the child were to no avail (TE 68-69). He placed the time of the child's arrival at the hospital at approximately 6:30 p.m. on May 8, 1975 (TE 75).

Dr. Harrison stated Exhibits 1 through 9 were as he saw the infant's body (TE 70), and that the photographs indicated bruising. He further stated "any type of trauma does leave some degree of trauma, that something has occurred, what degree, or force, it took to make those lesions I couldn't tell you. I will just say that there is evidence of trauma that is exemplified by the bruises." (TE 72). When asked "After having seen those if a person were to say he slapped a child with his hand, could you leave that kind of a bruise, an open hand?", Dr. Harrison replied, "Again, any type of trauma could, regardless how it was sustained, could lead to bruises as you see there to the infant." (TE 73).

Palpating (or touching) of the child's abdomen and

vital organs was done in addition to the injection of adrenalin directly into one of the cavities of the heart in a resuscitation effort (TE 76-77). The doctors involved also applied closed heart cardiac massage for approximately 20 minutes, by pressing on the chest of the child (TE 78).

Dr. Harrison stated his report indicated gross evidence of "ecchymosis" and that ecchymosis is synonomous with bruises and "a bruise is, as we said, a bruising under the skin. It can result from trauma to the skin. There are instances where certain illnesses can cause bleeding under the skin." (TE 80) In addition, "There are certain intraperitoneal hemorrhages that give certain signs of discoloration to the flank regions, that have certain names" and that the spleen is in this area, the upper left quadrant (TE 82). Dr. Harrison had no personal knowledge that any tests were performed nor records which would indicate that any tests had been performed on the blood of the deceased (TE 83-84).

Dr. Harrison stated it was possible for the spleen to rupture by itself, without any trauma whatsoever, and that spontaneous rupture results from certain diseases, such as sickle cell anemia, infectious mononucleosis, and some other diseases. "It could come up with other illnesses that can cause spleenic enlargment, and with that in mind anytime you have an organ that would be enlarged, it again stands a chance to be more susceptible to injury." (TE 85).

When asked, "You could not tell me than exactly what did cause the death, whether it was disease, or whether it was trauma, as is being contended. Is that correct?", Dr. Harrison replied, "From the information I had available to me, I could not give you an exact answer. The circumstances were such that an autopsy was needed to try to arrive at possible ideology."

Dr. Stuart Wolfson, a resident in pathology at General Hospital, testified for the Commonwealth that Marvin Cole Marcum died of a loss of blood, secondary to a laceration of the spleen, a laceration being a tear in the surface of the spleen.

He further testified there was evidence of trauma to the spleen and laceration of the spleen is caused by trauma (TE 110). To Dr. Wolfson, the spleen did not look infected and trauma was the apparent cause of the laceration, but he did not perform any tests or take blood samples or perform any lab work on the spleen other than looking, because he was not asked to perform this work (TE 115-116).

Dr. Wolfson testified that there will sometimes be a collection of blood in the skin which appears to be bruises if the body has lain overnight before an autopsy is performed (TE 117). In this case, approximately 14 hours had elapsed before Dr. Wolfson performed the autopsy (TE 114). At no time during his testimony did Dr. Wolfson state the bruises on the deceased's body were the result of trauma rather than a blood disorder or blood collection in the skin after death. Dr. Wolfson placed the time elapsed from receipt of the ruptured spleen to the death of the deceased as a maximum of seven, eight, or eight-and one-half hours, or between 10:00 a.m. and expiration at 6:30 p.m. (Te 118-119).

Dr. John Doyle, the deceased's pediatrician, testified that Marvin Cole Marcum had had a history of respiratory infections and a bronchial infection which showed up secondarily in the blood system (TE 100-104).

On April 11, 1975, Dr. Doyle examined the deceased and there was no particular physical problems except for toeing out or toeing in. He did not recall from memory and his records did not reflect any conversations with Mrs. Marcum concerning Marvin's falling, nor would he have been upset upon hearing of this when a child is first learning to walk (TE 104-105).

When asked to examine the Commonwealth's Exhibits 2,3,4,5 and 9, Dr. Doyle stated the bruises "would seem to be more than ususal" in an ordinary active child falling down. However, Dr. Doyle stated he did not ordinarily examine children that are deceased (TE 106-107).

At this stage of the proceedings the Commonwealth rested its case. Defense counsel moved for acquittal because the Commonwealth had failed to prove the corpus delecti of first degree manslaughter and there was absolutely no proof that the appellant struck the deceased. The court overruled defense counsel's motion (TE 133-134). Defense counsel also moved for a directed verdict of acquittal because the circumstantial evidence presented was as consistent with innocence as guilt. The court also overruled this motion (TE 134).

Mrs. Jane Risinger, Nola Marcum's mother and the deceased's grandmother, testified on behalf of the appellant that the deceased was clumsy and had fallen at her camp on Rough River the week before his death and that this accounted for some of the marks on his body. She also stated that on at least one prevous occasion Marvin Marcum had climbed out of his baby bed and fallen onto the chair located next to the bed and hurt himself. Mrs. Risinger explained the bruises on Marvin's spine as being the result of his sliding out of his high chair after finishing eating (TE 161-168).

The defense put Richard Earl Pilon (the appellant) on the stand. His testimony was substantially the same as Mrs. Pilon's regarding the events of May 7 and 8, 1975. He testified that Marvin had had the flu for two or three days prior to May 7, but on that day he seemed fine and all four of them (the deceased, the deceased's sister Stacy, Mrs. Pilon and the appellant) went fishing. Afterward they went to a drive-in movie, getting home around 4:00 a.m. in the morning. When the appellant and Mrs. Pilon got up on May 8 around noon, they discovered the children had already been up for a while. The appellant fixed breakfast for the children while Mrs. Pilon got her uniform ready for work. Around 2:30, all four of them drove to where Mrs. Pilon worked. After she punched in for work, Marvin became very sick, so Mrs. Pilon came back out to the car and cleaned up the mess and then returned to work (TE 138-141). She gave the appellant her medical assistance card and told him to

take Marvin to the hospital or to call her if he got worse. This was around 3:15 p.m. on May 8, 1975 (TE 141).

The appellant testified he drove directly to Dr. Kincaid's office after taking Nola Marcum Pilon to work, because he had stitches in his right hand as a result of surgery the week before to the tendons of the middle two fingers. He said he had approximately twenty-some stitches in each finger (TE 141-142). The appellant subsequently removed the stitches himself while he was in jail, sometime after May 29, 1975, the day he was incarcerated on the instant charge (TE 183). While at Dr. Kincaid's office, the doctor remarked that Marvin looked a little under the weather and asked if Marvin had been to see a doctor lately. The appellant told him that Marvin had been to Pediatrics Associates (TE 153). It was a little after 5:00 p.m. before the appellant left Dr. Kincaid's office (TE 142). The appellant drove to Richard Childers' house and, after staying a few minutes, went home (TE 143).

The appellant stated Marvin seemed to be getting weaker and weaker after they got home, so he put Marvin to bed and checked on him. Around six the appellant called Nola Marcum at work and told her Marvin was worse, so he picked her up at work and drove directly to the hospital (TE 144-145).

The appellant waited to call Nola instead of taking the child to the hospital because he was not the legal guardian and could not file the legal papers. Even though he had her medical assistance card, he feared that the hospital would not treat Marvin, and that using the card would only get Nola and her welfare worker into trouble (TE 145).

The appellant knew Marvin had two bruises on his face before going to the hospital, one of them from falling (TE 147). Marvin had scraped his legs on a seesaw two or three days before his death when he fell off. His sister received a black eye as a result of his fall. Marvin also bruised his spine when he slid out of his high chair (TE 148). The appellant testified that Marvin was clumsy, could not walk straight, and veered

off to the right. He stated that these tendencies had begun about a month or a month and a half after he had fallen and put a knot on his head, and that it had taken that long for Marvin to get up and try to walk again (TE 149).

The appellant testified he did not see Nola Marcum strike Marvin, nor did he see his sister Stacy strike him, and that he, the appellant, did not strike Marvin (TE 155-156).

Despite defense counsel's objection, the Commonwealth was then permitted to introduce Dr. Charles Kincaid as a rebuttal witness (TE 170). Dr. Kincaid stated the appellant did not have stitches in his right hand on May 8, 1975, as this was approximately two months after the surgery which had been done in March (TE 179). The doctor noted that the appellant could bend his finger with great difficulty on May 8, 1975, and he was treating the appellant to help him further bend his fingers (TE 179).

Dr. Kincaid testified that, after noting some bruises on Marvin's forehead and some of the exposed areas of the child, he had remarked to the appellant that the child appeared gravely ill and should see a physician (TE 175-179).

The appellant returned to the stand to rebut Dr. Kincaid's testimony, saying the operation was around May 1 and he, the appellant, took the stitches out of his hand while in jail, sometime after May 29, 1975 (TE 183). This concluded the evidence of both the Commonwealth and the appellant.

At the conclusion of the case, defense counsel renewed his motion for a directed verdict based on the Commonwealth's failure to prove the corpus delecti, asserting the circumstantial evidence was as consistent with innocence as guilt and the appellant should accordingly be granted a directed verdict of acquittal. The court overruled these motions (TE 185).

Defense counsel asked for instructions to the jury on reckless homicide, but the court refused to give these instructions. However, the court granted defense counsel's motion for instructions regarding intent to inflict harm or death as one of the elements of first degree manslaughter (TE 185-188). The court did not instruct the jury on any lesser degrees of the offense.

On December 2, 1975, the jury returned a verdict of guilty of first degree manslaughter and fixed the appellant's punishment at ten years in the penitentiary (TE 215-216).

On December 12, 1975, defense counsel filed an affidavit in support of a motion for a new trial, based in part on newly discovered evidence. In the affidavit, counsel stated he talked to Dr. Kincaid on December 11, 1975. On December 11, 1975, Dr. Kincaid had reviewed his records and stated he operated on the appellant's hand on April 27, 1975 (not in March as he testified under oath), and it was possible the appellant had stitches in his hand on May 8, 1975, because of the time involved between April 27 and May 8, but his records did not indicate the absence or presence of stitches (TR 15). On December 12, 1975, this motion was overruled, and judgment was entered in accordance with the verdict (TR 12-13). From that judgment, this appeal has been taken.

ARGUMENT

I. THE EVIDENCE AGAINST THE APPELLANT WAS TOTALLY INSUFFICIENT TO SUPPORT HIS CONVICTION.

As pointed out in Clouser v. Commonwealth, Ky., 504 S.W.2d 694 (1973), the term "corpus delecti" requires the prosecution in a homicide case to show: (1) a death, and (2) that the death resulted from the criminal agency of another. This expression delineates in general terms the elements required of the prosecution in a homicide case to show the "body of the crime" in sufficient fashion to allow submission of the case to the jury.

The prosecution in the case at bar fulfilled only the first requirement. It proved that a death had occurred. No proof was introduced to show that the death was the result of the criminal agency of the appellant. Evidence brought out at trial presented the inference that the decedent's death could have been the result of illness or accidental injury instead of criminal agency, since no blood tests or lab work had ever been performed on the ruptured spleen to determine the exact cause of the rupture.

The entire proof offered by the Commonwealth left in serious doubt whether a crime had been committed and whether the appellant had participated in any criminal activity. Not only the appellant, but also the deceased's sister and her mother Nola Marcum Pilon, were with the deceased during most of the critical time period in which the deceased's ruptured spleen occurred. The evidence failed to prove beyond a reasonable doubt the appellant caused the death of the deceased. And, as it has long been settled, the accused must be proven guilty beyond a reasonable doubt:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Consequently, since more than a reasonable doubt existed that a crime had been committed and more than reasonable doubt existed that the appellant was the prepetrator of the crime, the appellant should have received a directed verdict of acquittal instead of submission of the case to the jury for conviction

Marcum v. Commonwealth, Ky., 496 S.W.2d 346 (1973), contains many similarities to the case at bar. In Marcum, there were two individuals who could have caused the death of the victim. Both of the appellants had the motive to kill the victim in addition to opportunity and presence at the scene of the crime when it occurred. There was no evidence to identify either of them as the killer. Furthermore, if one of them in fact committed the offense, there was no evidence of any complicity on the part of the other. Thus, the Kentucky Court of Appeals reversed the conviction of both appellants, holding that the evidence was insufficient to support the conviction of either. The court stated that,"even though it may be certain that one of two persons committed a crime, unless the guilt of one can be established both must go free. Any other result would place the burden of proof on the innocent party."

In the case at bar, if the deceased's death was the result of criminal agency, it could have been the result of either the appellant's or Mrs. Pilon's striking the deceased. Both were with the deceased during the crucial time period relating to his death, and motive could be as easily inferred to Mrs. Pilon as to the appellant. Both deny having personally struck the child or having seen the other one strike the child. The evidence produced at trial was merely circumstantial and did not point to the guilt of one to the exclusion of the other, nor was there any evidence of complicity between the two individuals. Consequently, both the appellant and Mrs. Pilon must go free. "Any other result would place the burden of proof on the innocent party," which is violative of the due process clause of the

fourteenth amendment to the United States Constitution and in direct contravention of the holding in Marcum. Accordingly, in the case at bar, the judgment of the trial court must be reversed.

Also, in the case at bar, the Commonwealth failed to prove the element of intent as required by KRS 507.030. This statute requires the Commonwealth to show, as one of the elements of first degree manslaughter, that the accused had the intent to cause either serious physical injury to another person or the intent to cause the death of another person and death resulted. Nowhere in its case did the Commonwealth produce direct testimony or evidence that the appellant intended any physical harm to the deceased, nor did it prove that the appellant intended to cause the death of the deceased. "A conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process" as required by the fourteenth amendment. Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974).

As in the case at bar, the evidence in Vachon failed to prove the intent required by the state statute. Consequently, the Supreme Court reversed the judgment, holding the conviction was in violation of the due process clause of the fourteenth amendment, since the crucial element of intent was never proven. Accordingly, the judgment in the case at bar should be reversed because of the lack of proof of the element intent which is necessary to sustain a conviction for first degree manslaughter.

The circumstantial evidence presented by the Commonwealth may be viewed as creating the inference of intent to cause serious physical harm. However, it will not sustain a conviction. In Fugate v. Commonwealth, Ky., 445 S.W.2d 675 (1969), the court held that "no defendant may be convicted on such evidence if it is as consistent with innocence as with guilt." Again, in Rose v. Commonwealth, Ky., 385 S.W.2d 202, 204 (1964), the court held conviction may be had upon circumstantial evidence, but

the circumstances shown must be so unequivocal and incriminating in character as to exclude every reasonable hypothesis of the innocence of the accused." This principle was again reaffirmed in Clouser v. Commonwealth, Ky., 504 S.W.2d 694 (1973).

The Commonwealth failed to meet the standard required of it by law. It has hypothesized that the deceased was beaten by the appellant and died as a result of the beating. However, the circumstantial evidence presented by the Commonwealth is just as consistent with death as a result of disease, accidental injury, or some other cause. The Commonwealth's evidence merely hinted at the commission of the crime by the appellant, and "suspicion alone is not enough." Hodges v. Commonwealth, Ky., 473 S.W.2d 811 (1971). Thus, under the rule of Mullins v. Commonwealth, 276 Ky. 555, 124 S.W.2d 788, 790 (1939), the "accused is entitled to a peremptory instruction." The trial court should have directed a verdict of acquittal. Its failure to do so was fatal error.

II. THE INFLAMMATORY TENDENCY OF THE NUMEROUS PHOTOGRAPHS OF THE DECEASED CHILD FAR OUTWEIGHED ANY PROBATIVE VALUE WHICH THEY HAD, AND THEIR INTRODUCTION DEPRIVED THE APPELLANT OF A FAIR TRIAL.

In Carson v. Commonwealth, Ky., 382 S.W.2d 85, 90 (1964), the following principle of admissibility of photographs was stated; "photographs of a victim should not be received in evidence unless some useful purpose is served thereby." In a prior case, Poe v. Commonwealth, Ky., 301 S.W.2d 900 (1957), the Commonwealth introduced photographs even though all of the facts to be deduced from the photographs were stipulated to by the defendants. The Kentucky Court of Appeals did not specifically rule that this was prejudicial error but cautioned the Commonwealth's Attorney to be more careful of introducing possibly inflammatory photographs, unless the need is more pressing than was shown in the record, when the case was retried.

In the case at bar, the Commonwealth introduced photographs despite defense counsel's objections. There was no clear need for the photographs to be introduced, because of the statements made by the doctors involved, about bruising and possible causes of death, and the statements made by the appellant of bruises on the deceased as a result of the deceased's sliding out of his high chair and falling off of a slide.

In addition, Exhibits 10 through 16 should not have been introduced because they demonstrated nothing new or different from Exhibits 1 through 9 and were not necessary to prove any contested relevant fact. The inflammatory and prejudicial nature of Exhibits 10 through 16 far outweighed their probative value as cumulative evidence. Therefore, their admission was prejudicial error. Poe v. Commonwealth, Ky., 301 S.W.2d 900, 902 (1957) and Carson v. Commonwealth, Ky., 382 S.W.2d 85, 90 (1964).

Also applicable to the case at bar is Milam v. Commonwealth, Ky., 275 S.W.2d 921 (1955). In Milam, a prosecution for murder, the admission into evidence of photographs of deceased's body served no useful purpose and was error because the mortician testified. However, the photographs were not gruesome and the case was not a close one, so the error was not prejudicial. "Were this a close case or had the pictures been ghastly, as the ones in the Craft case, we would have more serious question and one which more likely would cause a reversal."

In the case at bar, the pictures served no useful purpose and their admission was error. The case was a very close one, in which many inferences could be drawn by the jury. Consequently, the jury fixed the punishment at the minimum permissible. Thus, if it had not been for the introduction of the inflammatory pictures which served no useful purpose, the jury might well not have convicted the appellant.

III. THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES WAS PREJUDICIAL ERROR.

The appellant requested instructions on the lesser included offense of reckless homicide as defined in KRS 507.050 be given to the jury. The trial court refused to give the instructions and thus committed prejudicial error.

As early as 1947, in Marcum v. Commonwealth, 305 Ky. 92, 202 S.W.2d 1012 (1947), the court recognized the principle that, "where there is evidence of a struggle or other unusual circumstances from which a jury might infer a lesser degree of the crime or an exoneration of it, the instructions must give the whole law of the case including voluntary manslaughter, involuntary manslaughter and self-defense." In Marcum, there were two deaths by radically different means, and the only death prosecuted was that of the wife of the defendant. The evidence was entirely circumstantial, and the defendant had a contested alibi. The trial court refused to instruct the jury on voluntary manslaughter, involuntary manslaughter and self-defense. Consequently, the Kentucky Court of Appeals reversed the conviction of murder.

In the case at bar, there were unusual circumstances surrounding the death of Marvin Cole Marcum, from which the jury might have inferred the lesser crime of reckless homicide if given the proper instructions by the court. This the court failed to do and consequently, committed a reversible error. In Pennington v. Commonwealth, Ky., 344 S.W.2d 407 (1961), the court stated: "If a reasonable inference can be drawn from the evidence that the defendant in a homicide case is guilty of a lesser crime than murder, then proper instructions should be given on such lesser crime." This language was quoted with approval in Moore v. Commonwealth, Ky., 489 S.W.2d 516 (1972).

In Shanks v. Commonwealth, Ky., 390 S.W.2d 888, 891 (1965), the court stated, after refusing to give the requested instruction

on the lesser included offense of involuntary manslaughter: "Had the penalty been fixed at the minimum for voluntary manslaughter, then there would be reason to say that had the jury been authorized to fix a lesser penalty, they might have done so." In the case at bar, the jury did convict the appellant of first degree manslaughter and fixed the punishment at the minimum punishment permitted. It is reasonable to infer that, if the jury had been instructed on the lesser crime of reckless homicide, it might well have found the appellant guilty of the lesser crime. Accordingly, the failure to give instructions on the lesser crime and conviction on the lesser crime if doubt existed in the jury's mind as to the degree of the crime committed, as requested by defense counsel in his tendered Instructions Numbered 3, 4, and 6 (Inside back cover of Volume II of the Transcript of Evidence and Proceedings), was reversible error.

In Mullaney v. Wilbur, ___ U.S. ___, 95 S.Ct. 1881, ___L.Ed.2d ___ (1975), the Main court erred in its interpretation of the law in its instructions. The instructions given shifted the burden of proof to the defendant to prove his mental state at the time of the commission of the crime in order for the jury to determine whether he was guilty of murder or manslaughter. The Supreme Court of the United States held this violative of the due process clause of the fourteenth amendment, which requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The case at bar is even aggravated. Not only did the Commonwealth fail to prove the requisite intent to sustain a conviction, but the court also refused to instruct the jury on the lesser crime of reckless homicide, which might possibly have formed the basis for a conviction of an offense not requiring that intent. Accordingly, the trial court's judgment should be reversed.

IV. THE DAMAGING TESTIMONY OF DR. KINCAID, WHICH WAS IMPROPERLY ADMITTED AS REBUTTAL EVIDENCE AND WHICH WAS DISCOVERED BY HIM AFTER THE TRIAL TO BE INACCURATE, MISLED THE JURY AND REQUIRES A NEW TRIAL.

In Archer v. Commonwealth, Ky., 473 S.W.2d 141 (1971), the Kentucky Court of Appeals held that it was improper for a trial court to permit the introduction of rebuttal evidence which could and should have been introduced in chief, if it appears likely that its introduction to the jury after the defense has rested will have a prejudicial effect on the defendant's case. In the case at bar, the trial court overruled the appellant's objection to the introduction of Dr. Kincaid as a rebuttal witness after the defense rested (TE 170-171).

The Commonwealth had ample opportunity to present Dr. Kincaid as a witness before the defense presented its case but failed to do so. Thus, the trial court should have excluded Dr. Kincaid and committed error in including his testimony. During his testimony, Dr. Kincaid testified the appellant did not have any stitches in his hand, since the corrective surgery to the tendons in the appellant's hand had been performed in March and not April. Dr. Kincaid stated he told the appellant Marvin was acutely ill and had asked the appellant about the bruises on Marvin's face, head and extremities. Dr. Kincaid further stated that, if the appellant made any statements contradicting this, the appellant was not telling the truth. (TE 176-177). At least part, if not all, of these statements were erroneous and were stated as being erroneous by Dr. Kincaid to defense counsel upon close review his records after the trial was completed. The surgery was actually performed on April 27. Because of the time involved between April 27 and May 8, there could very well have been stiches in the appellant's hand, although his records did not indicate whether there were or not (TR 15).

The statements of Dr. Kincaid to the jury were highly prejudicial. This erroneous testimony could well have left the

jury with the feeling that, if the appellant was lying about the stiches, then he might also be lying about everything else. In short, if this erroneous rebuttal testimony had never been introduced, the jury might conceivably have found the evidence as consistent with innocence as guilt. This is demonstrated by the fact that, although the jury did convict the appellant, it gave him the minimum sentence permissible under the law.

No amount of diligence on the part of defense counsel could have foretold that Dr. Kincaid would testify erroneously. At his first opportunity after trial, defense counsel ascertained from Dr. Kincaid the true facts surrounding the surgery and stiches. Thus, there could be no effective cross-examination of Dr. Kincaid at the time of the trial. The denial of effective cross-examination and the right to impeach a witness is a constitutional error which only a new trial can cure. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). False testimony was similarly condemned in Jones v. Commonwealth of Kentucky, 97 F.2d 335 (6th Cir. 1938). In Jones, the federal court ruled the state must afford corrective judicial process to a defendant, where the falsity of testimony used to obtain a conviction was discovered after trial. Thus, the trial court committed prejudicial error by its failure to grant a new trial on the basis of newly discovered evidence.

In the case at bar, the rebuttal witness' testimony contained highly contradictory statements which were clearly erroneous and prejudicial to the appellant. Accordingly, the appellant should be granted a new trial, since the introduction and use of this evidence operated to deprive the appellant of several of his basis constitutional rights, including the right to present evidence on his own behalf, and the right to due process of law, all in violation of the sixth and fourteenth amendments to the Constitution of the United States.

CONCLUSION

The conviction of the appellant was not supported by sufficient evidence, and he was deprived by the trial court of several important procedural safeguards. For these reasons, the judgment of conviction must be vacated.

Thomas R. Thomas
THOMAS R. THOMAS
ASSISTANT DISTRICT DEFENDER
OFFICE OF THE JEFFERSON DISTRICT
PUBLIC DEFENDER
1000 Republic Building
Louisville, Kentucky 40202
(502) 584-1211

Terrence R. FitzGerald
TERRENCE R. FITZGERALD
DEPUTY PUBLIC DEFENDER
OF COUNSEL

Diane Fox
DIANE FOX
LEGAL INTERN