

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHAEL DAMIAN PONTE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11558
Trial Court No. 3PA-10-1575 CR

MEMORANDUM OPINION

No. 6520 — August 30, 2017

Appeal from the Superior Court, Third Judicial District, Palmer,
Vanessa H. White, Judge.

Appearances: Elizabeth D. Friedman, Palmer, for the Appellant.
Nancy R. Simel, Assistant Attorney General, Office of Criminal
Appeals, Anchorage, and Michael C. Geraghty, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

Michael Damian Ponte was convicted of first-degree assault after a three-year-old child who was left in his care suffered brain trauma that led to permanent disabilities. The victim, K.S., was the three-year-old daughter of Ponte's then-girlfriend, Shannon Silook.

At Ponte's trial, several physicians who participated in the evaluation and treatment of K.S. testified about their efforts to diagnose the nature and origin of her

injuries — and about their ultimate conclusion that K.S.’s injuries were likely the result of physical abuse.

In this appeal, Ponte argues that the testimony of these physicians should have been excluded from his trial. More specifically, Ponte contends that the doctors’ diagnostic conclusions were based on faulty or unproven scientific assumptions, and that the doctors’ testimony therefore failed to meet the test for the admission of scientific evidence set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹

We reject Ponte’s contention because the record shows that, with one possible exception, K.S.’s several physicians based their diagnoses on valid scientific methodology — the same methodology advocated by Ponte’s medical expert. These doctors engaged in a process of differential diagnosis that entailed examining the entire range of K.S.’s injuries and symptoms, evaluating those injuries and symptoms in light of K.S.’s medical history, and running various tests to investigate potential causes of those injuries and symptoms. In their testimony, the doctors described how they considered and investigated many possible explanations for K.S.’s medical condition — and that they reached a diagnosis of physical abuse (“abusive head trauma”) only after they had affirmatively ruled out other potential explanations as being inconsistent with K.S.’s physical condition, her test results, and her medical history.

We therefore conclude that no reasonable judge would have excluded the doctors’ testimony under *Daubert*.

¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (adopting a new test for the admissibility of scientific evidence under the Federal Rules of Evidence), and *State v. Coon*, 974 P.2d 386, 395-98 (Alaska 1999) (adopting the *Daubert* test as the governing test for the admissibility of scientific evidence under Alaska law).

In a separate claim, Ponte asserts that the trial judge abused her discretion when she allowed the State to introduce evidence that Ponte physically assaulted Silook's sister, Brittany Pungowiyi, during a confrontation in which Silook accused Ponte of physically abusing K.S. For the reasons explained in this opinion, we conclude that the trial judge did not abuse her discretion in admitting this evidence.

Accordingly, we affirm Ponte's conviction.

Underlying facts

After Michael Ponte and Shannon Silook had dated for a time, Silook became pregnant with the couple's child. During Silook's pregnancy, starting in the summer of 2009, Ponte lived in Wasilla with Silook and her two other children — five-year-old I.S. and three-year-old K.S.

In July 2009, Silook took I.S. to visit family members in Savoonga. Silook left K.S. in the care of her parents (Silook's father and stepmother), who also lived in Wasilla.

But while Silook was still in Savoonga, Silook's parents returned K.S. to Ponte's care. Within hours after K.S. was returned to Ponte, Ponte called Silook to tell her that K.S. was "all bruised up". Silook assumed that K.S. had been injured while her parents were caring for her, so she telephoned her parents and confronted them. Silook's parents denied that K.S. had been injured while she was in their care.

In mid-July, after Silook returned from Savoonga, K.S. became sick, and Silook sought medical care for her. Then, on August 3, 2009, K.S. was admitted to the Alaska Native Medical Center in Anchorage because her eyes were involuntarily crossing.

The staff at the Native Medical Center ordered an MRI scan because it appeared that K.S. was suffering from a swelling of the optical disk in both of her eyes, and because this type of swelling is often associated with increased pressure within the cranium. The MRI revealed that K.S. was bleeding subdurally in the left rear portion of her brain.

By mid-September, the swelling of K.S.'s optical disk had resolved itself, and she had a normal eye exam.

In early November, Gordon Shepard (a friend of Ponte's) noticed that K.S. appeared to be suffering from a broken collar bone. K.S. cried when Shepard picked her up, and she said that her shoulder hurt. When Shepard put K.S. down again, he noticed that one of her shoulders was sagging. Shepard mentioned all of this to Silook.

A few days later, on November 12, 2009, Silook drove to Anchorage to run some errands and to visit her newborn daughter, who was in intensive care because of medical problems associated with her birth. While she was in Anchorage, Silook left I.S. and K.S. in Ponte's care.

Silook returned to Wasilla around 9:00 p.m. that evening. The two children were already in bed, and Ponte was playing video games with his friend, Shepard. Ponte told Silook that he had given both children a bath before putting them to bed.

Silook herself went to bed a couple hours later, but she was awakened by the sound of K.S. crying and saying "Momma" repeatedly. Silook and Ponte went to K.S.'s bedroom and saw that she was making "jerking" motions. Ponte drove Silook and K.S. to the Mat-Su Regional Hospital's emergency room in the middle of the night. Silook later testified that Ponte told her to say that *she* (and not Ponte) had given the children a bath that evening, and that K.S. had been injured earlier in a sledding accident.

Dr. Jordan Greer, who was K.S.'s treating physician at Mat-Su Regional, described K.S. as having an "altered mental status". He noted that K.S. was not

responding normally to her family or to other people. Silook told Dr. Greer that K.S. had complained of a headache the evening before, and that K.S. had been smacking her lips that evening. Silook also told Dr. Greer about the cerebral contusion that had been diagnosed in early August. But neither Silook nor Ponte said that K.S. had suffered any recent trauma.

Dr. Greer ran a series of tests to rule out diabetes and meningitis. During one of these tests, Dr. Greer found blood in K.S.'s spinal fluid; this prompted Greer to perform a CT scan of K.S.'s brain. This scan revealed bleeding in the left front portion of K.S.'s brain.

Greer also ordered an X-ray of K.S.'s chest, which showed that K.S. had pneumonia in both lungs, as well as a collar bone fracture. The fracture appeared to be about two weeks old, and the X-ray suggested that K.S.'s collar bone might have been broken before.

Because of K.S.'s neurological impairment, Dr. Greer ordered K.S. transferred to the Alaska Native Medical Center in Anchorage.

Dr. Eric Noble, the admitting pediatrician at the Native Medical Center, testified that, by the time K.S. arrived at the hospital, she was non-responsive, she had hemorrhaging in her retinas, and she appeared to be blind. Based on K.S.'s cranial bleeding, her retinal hemorrhages, and the fact that Silook had observed K.S. smacking her lips (an indication of seizure), Dr. Noble tentatively concluded K.S. had suffered a head trauma.

Dr. Thomas Mader, the chief of ophthalmology at the Native Medical Center, treated K.S. during her hospital stay. Dr. Mader observed that K.S. had both retinal hemorrhages and pre-retinal hemorrhages (*i.e.*, hemorrhages in front of the retina) in both of her eyes, as well as edema of the optical disk. Because pre-retinal

hemorrhages are not a common occurrence, Dr. Mader concluded that K.S. had been subjected to severe trauma — likely an “acceleration/deceleration” injury to the head.

Dr. Roderick Smith, a pediatric neurologist, was called to examine K.S. a few days after she was admitted to the Native Medical Center. He also re-examined K.S.’s MRI test results from August. Dr. Smith thought that even though K.S.’s subdural brain injury from August was small, it “would [have] take[n] a pretty good amount of force to produce.” Dr. Smith later testified that K.S.’s new injury in November was “very worrisome”: the new areas of bleeding in K.S.’s head were consistent with a “strike and counterstrike” injury (or “coup and contra-coup” injury), where the brain hits one side of the skull, then rebounds and hits the other side, bouncing back and forth. In his testimony, Dr. Smith indicated that this was the type of injury that might occur if a child had fallen from a height of about ten feet.

After ruling out other potential explanations for K.S.’s condition, Dr. Smith tentatively diagnosed K.S. as suffering from “abusive head injury” — although, in his testimony at Ponte’s trial, Dr. Smith was careful to point out that he never wanted to categorically assert that a child had been physically abused, nor did he want to stop investigating other potential explanations for the child’s condition, “because the last thing we want is to falsely accuse families and to be ... any part of that kind of a process.”

K.S.’s doctors eventually informed Silook that K.S.’s head injury had probably been caused by “shaking”. Silook also took a closer look at the hill where, according to Ponte, K.S. had been injured while sledding, and Silook concluded that Ponte’s explanation was unlikely.

On November 27, 2009, Silook confronted Ponte about what had happened to K.S. Brittany Pungowiyi, Silook’s fifteen-year-old sister, was staying in their house at that time, and she testified that she woke up to Ponte’s screaming at Silook, “No, I didn’t do it. Shannon, you have to believe me, I didn’t do this.” According to

Pungowiyi, Silook repeatedly asked Ponte, “If you didn’t do this, then why are you acting this way?”

When Pungowiyi went into the living room where Ponte and Silook were arguing, she saw Ponte choking Silook and holding her down on the couch. Pungowiyi began hitting Ponte (to protect Silook), and then Ponte came after Pungowiyi. According to Pungowiyi, Ponte picked her up and threw her down the stairs. Ponte then left the house. Silook followed after him and broke the front window of Ponte’s car as he drove away. Then the police were called.

K.S. was discharged from the Native Medical Center in early December 2009. At that time, she was still unable to see, but she had become responsive, and she was eating on her own. She then went to Seattle to undergo neurological rehabilitation — relearning to speak, and trying to recover her normal ability to walk.

In August of the following year (2010), after K.S. had completed her rehabilitative treatment and had regained her sight, she was interviewed by a police investigator. K.S. told the investigator that Ponte had choked her and had held her head underwater while he was giving her a bath. K.S. later told her grandfather that Ponte had choked her, and that he had spun her around.

Based on these events, Ponte was charged with first- and second-degree assault upon K.S.²

² AS 11.41.200(a)(3) and AS 11.41.210(a)(2), respectively.

The testimony presented at the Daubert hearing

The State's theory of this case was that K.S. suffered her injuries because Ponte assaulted her. Ponte's defense was that K.S.'s injuries were the result of accidents and poor medical care. In particular, Ponte's attorney argued at trial that, as a result of prior accidental injury, K.S. experienced subdural and retinal bleeding. According to the defense, this earlier injury made K.S. more susceptible to re-injury. Then, when K.S. was re-injured as a result of a sledding accident, her injuries were potentially compounded by poor medical care.

Based on the State's pre-trial discovery, Ponte's attorney anticipated that the State would rely on expert testimony that K.S. manifested a set of injuries and symptoms known collectively as "abusive head trauma" or "shaken baby syndrome" — *i.e.*, a set of injuries and symptoms indicating that K.S. was likely the victim of assault.

(A "syndrome" is a set of symptoms which, when they occur together, are regarded as identifying a particular disease or condition.³)

Ponte's attorney questioned whether there was a valid scientific basis for concluding, based solely on K.S.'s physical condition, that K.S. had been assaulted. So, to prevent the State from relying on such an inference, Ponte's attorney filed a pre-trial motion asking the superior court to prohibit the State from presenting any evidence of "abuse head trauma" or "shaken baby syndrome" unless the State established the scientific validity of this diagnosis at a *Daubert* hearing.

In response to the defense attorney's motion, the superior court held a *Daubert* hearing. At this hearing, the court heard testimony from Dr. Eric Noble (the admitting pediatrician at the Native Medical Center), Dr. Thomas Mader (the ophthal-

³ *Webster's New World College Dictionary* (Fourth Edition, 2004), p. 1452.

mologist who treated K.S. during her hospital stay), and Dr. John Rosenfeld (the pediatrician who was treating K.S. at the time she was discharged from the Native Medical Center and sent to Seattle for rehabilitative treatment).

These physicians described their observations of K.S.'s physical condition (the nature of her injuries and her symptoms), plus the information they received from K.S.'s parents, the information they gleaned from K.S.'s medical history, and the results of various tests that they ran. The doctors also told the court about the various diagnoses they had considered — *i.e.*, the various potential explanations for K.S.'s injuries and symptoms.

All three doctors concluded that the most likely explanation for K.S.'s injuries was non-accidental trauma. But none of the doctors asserted that K.S.'s physical condition, standing alone, proved that K.S. had been assaulted. Rather, each of the doctors discussed the other possible explanations for K.S.'s injuries and symptoms, and they explained why they ultimately rejected those other explanations as inconsistent with their observations of K.S.'s physical condition, her test results, and her medical history.

The superior court also heard testimony from Dr. Janice Ophoven, a pediatrician and forensic pathologist retained by the defense.

Dr. Ophoven testified about the origins of the diagnosis “shaken baby syndrome”. She explained that, originally, this term was developed to describe the injuries of small children who were obviously the victims of abuse — “children who were broken, ... punched, [or] burned”. But later, according to Dr. Ophoven, people began using this term to describe situations where “[a child] suddenly got sick and very ill, and/or died, and they didn’t have any evidence of abuse. ... [T]hey had no broken bones, they had no bruises, they had no fractures, they had no other [outward signs of maltreatment].”

At this point, Dr. Ophoven declared, “the [medical] world split”. Dr. Ophoven explained that, for some medical practitioners, the fact that a child had a specified “triad” of symptoms — subdural bleeding, retinal hemorrhage, and brain damage — became convincing proof of physical abuse, and this led to unfounded criminal accusations:

Dr. Ophoven: Anyone who had custody of [a] child ... who had subdural [bleeding], retinal hemorrhage, and brain damage — in some people’s minds, this was enough to call it child abuse, or Shaken Baby Syndrome. And the “triad” — which is a commonly used term — the “triad” of retinal hemorrhage, subdural hematoma, and brain damage became enough for many, many people to call it shaking. Even though we still have no scientific evidence; no one studied it, and no one has any verification of any of the theories that went into this. So all you had to have was the “triad”, and a dead child or a seriously injured child, and you could charge [the caretaker with a crime], and have people come in and say, “The only thing this could be ... is Shaken Baby Syndrome”[,] attributable to the person who ... was with the child when they went south.

Dr. Ophoven then discussed why it was faulty science to diagnosis physical abuse simply from the fact that a child exhibits the “triad” of symptoms. She spoke of verified instances where small children suffered serious brain injury, accompanied by subdural and retinal bleeding, not as a result of physical abuse, but as a result of falling relatively short distances (slightly more than two feet) from play equipment or beds. She then told the court:

Dr. Ophoven: [My] whole point here is [that] no one disputes that children get hurt at the hands of their care givers. No one disputes that abusive head trauma is real.

What is in dispute is the theoretical concept [that these injuries can be attributed to] pure shaking in the absence of any other evidence of trauma.

. . .

The whole question is whether or not there is scientific validity in theorizing that a child who has brain damage in the presence of some kind of retinal hemorrhage and some kind of subdural, that in the absence of physical injury, bruises, impact, anything else, that you can just say, “It’s [the result of] shaking.” There’s no way. What is the evidence of shaking?

At the end of this *Daubert* hearing, the superior court ruled that the treating physicians could testify at Ponte’s trial and give their opinions that K.S.’s injuries were caused by non-accidental trauma (*i.e.*, assault).

Why we conclude that the State’s medical testimony satisfied the Daubert test for the admission of scientific evidence

On appeal, Ponte renews his argument that the diagnosis of “shaken baby syndrome” or “abusive head trauma” is not scientifically valid. Relying on Dr. Ophoven’s testimony, Ponte argues that the scientific community no longer believes that child abuse is proved whenever a child manifests the “triad” of symptoms — subdural hematoma, retinal hemorrhage, and brain damage.

But Dr. Ophoven did not assert that the diagnosis of “abusive head trauma” (or “shaken baby syndrome”) lacked any scientific validity. In fact, she said the opposite. Dr. Ophoven told the superior court:

No one disputes that children get hurt at the hands of their care givers. No one disputes that abusive head trauma is real. What is in dispute is the theoretical concept [that

these injuries can be attributed to] pure shaking in the absence of any other evidence of trauma.

In other words, Dr. Ophoven attacked the idea that a doctor could validly diagnose “abusive head trauma” or “shaken baby syndrome” based on a truncated inquiry that considered only the “triad” of symptoms — a diagnostic process that ignored the child’s medical history, that ignored the fact that there was no other evidence of trauma, and that failed to actively investigate other potential causes of the child’s injuries and symptoms.

Dr. Ophoven’s objection to this sort of truncated inquiry was likely well-taken. But that is not what happened in this case. The doctors who evaluated and treated K.S. engaged in a much more thorough diagnostic process.

Here, there *was* independent evidence suggesting that K.S. had been physically abused. As we explained early in this opinion, there was evidence that K.S. became “all bruised up” when her mother traveled to Savoonga in July 2009. Then, about a month later, K.S. became sick and was admitted to the Alaska Native Medical Center in Anchorage. In the hospital, an MRI scan revealed that K.S.’s optical disk was swollen and that she was bleeding subdurally in the left rear portion of her brain. These conditions cleared up within a few weeks — but then K.S. suffered a broken collar bone in early November, and there was also evidence that she had been burned with a curling iron.

But more importantly, four of the five doctors who testified for the State did not simply rely on the “triad” of symptoms (subdural hematoma, retinal hemorrhage, and brain damage) when they concluded that K.S. had been physically abused.

The government presented the testimony of five doctors at Ponte’s trial, and four of these doctors — Dr. Smith, Dr. Mader, Dr. Noble, and Dr. Greer — engaged in thoroughgoing diagnostic inquiries. These doctors did not assert that the “triad” of injuries, standing alone, served as conclusive proof (or even likely proof) that K.S. had

been assaulted. Rather, these doctors offered detailed descriptions of K.S.’s physical condition, and they described how they considered and investigated the various possible explanations for K.S.’s injuries and symptoms.

Indeed, the entirety of Dr. Greer’s testimony was devoted to the various potential diagnoses that he considered and investigated. Dr. Greer never offered an opinion as to whether K.S. had been assaulted.

The other three doctors — Smith, Mader, and Noble — did testify that they ultimately concluded that K.S. had been physically abused. But each of these doctors explained (at length) why they rejected other potential explanations as being inconsistent with their observations of K.S.’s physical condition, her test results, and her medical history.

Similarly, during the State’s summation to the jury, the prosecutor focused on the lengthy diagnostic process described by these doctors. The prosecutor listed K.S.’s various injuries and symptoms, and he summarized the doctors’ efforts to find explanations for those injuries and symptoms.

In sum, the State’s medical experts did not rely on the truncated “triad of symptoms” inquiry that Dr. Ophoven attacked in her testimony. Rather, K.S.’s doctors engaged in a multi-faceted process of differential diagnosis: they considered and evaluated K.S.’s entire physical condition and her medical history, and they actively investigated other potential causes for K.S.’s injuries and symptoms before concluding that she had likely been injured by physical abuse.

Thus, even if Dr. Ophoven was correct when she asserted that there was no valid scientific basis for diagnosing abusive head trauma based solely on the “triad” of symptoms, that point is moot in Ponte’s case. The doctors who testified for the State engaged in a much more comprehensive diagnostic process — exactly the kind of broad

diagnostic process that Dr. Ophoven insisted was the only correct way to handle these situations.

To the extent that Ponte is now arguing that even this comprehensive diagnostic approach fails to satisfy the *Daubert* test, the record contains nothing to support Ponte’s argument. The kind of diagnostic approach employed by the doctors in this case could not reasonably be challenged under *Daubert*; it epitomizes the scientific method.

We therefore conclude that the trial judge in Ponte’s case did not abuse her discretion when she ruled that the doctors’ testimony was admissible under *Daubert*.⁴ We acknowledge that the trial judge did not engage in the same analysis that we have described here. But given the record in this case, no reasonable judge would have upheld a *Daubert* challenge to the doctors’ testimony.

Ponte’s claim that the trial judge committed error by allowing the State to present the testimony of Silook’s sister, Brittany Pungowiyi, about Ponte’s assault on her

As we explained earlier in this opinion, Silook confronted Ponte in late November 2009 about what had happened to K.S. At that time, Silook’s fifteen-year-old sister, Brittany Pungowiyi, was staying in their house, and Pungowiyi testified that she woke up to Ponte’s screaming at Silook. When Pungowiyi went into the living room where Ponte and Silook were arguing, she saw Ponte choking Silook and holding her

⁴ See *State v. Coon*, 974 P.2d 386, 398-99 (Alaska 1999) (holding that, under Alaska law, appellate courts must employ the “abuse of discretion” standard of review when they review trial judges’ rulings on the admissibility of scientific evidence). *But see State v. Alexander*, 364 P.3d 458, 466-67 (Alaska App. 2015) (asking the supreme court to revisit this issue).

down on the couch. To protect Silook, Pungowiyi began hitting Ponte. Ponte then assaulted Pungowiyi by picking her up and throwing her down the stairs.

On appeal, Ponte argues that this evidence was relevant only to establish Ponte's character for violence, and that Ponte's assault on Pungowiyi was so dissimilar to Ponte's physical abuse of K.S. that evidence of this assault lacked any significant probative value. Thus, according to Ponte, Pungowiyi's testimony should have been excluded under either Alaska Evidence Rule 404(b) or Alaska Evidence Rule 403.

We agree with the superior court that Ponte's assault on Pungowiyi was relevant, not because it was similar to the physical abuse of K.S., but because it could reasonably be viewed as evidence of Ponte's consciousness of guilt. The assault occurred when Silook accused Ponte of physically abusing K.S. In response, Ponte began choking Silook. When Pungowiyi intervened in an attempt to protect her sister, Ponte threw Pungowiyi down the stairs.

Given these circumstances, it was reasonable to infer that Ponte responded this way out of a consciousness of guilt. And given the entire factual context of this case, the superior court could reasonably conclude that this probative aspect of the evidence outweighed its potential for unfair prejudice. We therefore find that the superior court did not abuse its discretion when it allowed the State to introduce this evidence.⁵

Conclusion

The judgement of the superior court is AFFIRMED.

⁵ See *Elson v. State*, 659 P.2d 1195, 1200-01 (Alaska 1983) (holding that, under Evidence Rule 403, a judge can admit evidence that the defendant forcibly resisted a lawful search if the judge concludes that the defendant's resistance raises an inference of the defendant's consciousness of guilt.)