

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

MICHELLE ANN BARRY, )  
 )  
 Appellants, )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

Case No. F-2007-336  
NOT FOR PUBLICATION

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

SEP 25 2008

MICHAEL S. RICHIE  
CLERK

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

Michelle Ann Barry was tried by jury and convicted of First-Degree Murder, under 21 O.S.2001, § 701.7(C), in Latimer County, Case No. CF-2003-93. In accordance with the jury's recommendation, the Honorable Bill Welch sentenced Barry to imprisonment for life.<sup>1</sup> Barry appeals her conviction.

Barry raises the following propositions of error:

- I. THE WHOLLY CIRCUMSTANTIAL EVIDENCE OFFERED AGAINST APPELLANT IS INSUFFICIENT TO SUPPORT THE CONVICTION IN THAT IT FAILS TO EXCLUDE OTHER REASONABLE HYPOTHESES.
- II. BARRY'S CONVICTION WAS OBTAINED IN VIOLATION OF HER CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

In Proposition I, Barry contends that the evidence was insufficient to support her conviction because the State's "wholly circumstantial" case against her "failed to exclude other reasonable hypotheses" about who killed her infant daughter, Andrea Heath. In formulating Barry's first proposition of error in this way, her appellate counsel relies on a method of review that has been rejected by

this Court.<sup>2</sup> This Court has held that all sufficiency-of-the-evidence challenges are to be evaluated under the standard laid out by the Supreme Court in *Jackson v. Virginia*<sup>3</sup> and by this Court in *Spuehler v. State*.<sup>4</sup> Under this test we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.”<sup>5</sup>

Reviewing the evidence presented at Barry’s trial, this Court cannot conclude that the evidence presented against Barry was insufficient to convict her. Taking the evidence in the light most favorable to the State, as we must, this Court finds that the jury could have reasonably concluded that Barry must have been the one to kill her daughter—and that this killing must have been intentional, because of the “massive” force required—because the only other person in the house who was awake at the time Andrea was killed, *i.e.*, her brother, Andre Heath, was simply not physically capable of inflicting the injuries that killed her. This Court need not accept the State’s assertion that it

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<sup>1</sup> At Barry’s sentencing the Honorable Bill Welch also ordered her to pay a fine of \$1,000, along with other costs and fees.

<sup>2</sup> See *Easlick v. State*, 2004 OK CR 21, ¶¶ 4-15, 90 P.3d 556, 557-59 (abolishing the “reasonable hypothesis” test for evaluating sufficiency-of-the-evidence claims in cases where evidence against defendant was entirely circumstantial and finding that *Jackson/Spuehler* test for evidentiary sufficiency applies in all cases, regardless of the nature of the State’s evidence); see also *Dodd v. State*, 2004 OK CR 31, ¶ 80, 100 P.3d 1017, 1041 (“The law makes no distinction between direct and circumstantial evidence . . . . Regardless of the nature of the evidence, there is but one standard by which each element of the offense must be proven to obtain a conviction, and that is by proof beyond a reasonable doubt.”) (all citations omitted).

<sup>3</sup> 443 U.S. 307, 319-20, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

<sup>4</sup> 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04; see also *Easlick*, 2004 OK CR 21, ¶ 5, ¶15, 90 P.3d at 558, 559 (invoking *Jackson* and *Spuehler* as stating the proper sufficiency test).

<sup>5</sup> *Jackson*, 443 U.S. at 319-20, 99 S.Ct. at 2789 (emphasis in original); *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04 (quoting *Jackson*).

“conclusively” established that the fatal injuries inflicted upon Andrea Heath could not possibly have been inflicted by her five-year-old brother, in order to find that the evidence presented against Barry was sufficient to support her conviction.<sup>6</sup> Rather, we find that the State’s evidence was sufficient for the jury to choose to believe the State’s evidence in this regard and to convict Barry accordingly.<sup>7</sup>

In her second claim on appeal, Barry urges that her conviction was the result of the ineffective assistance of her trial counsel. In order to prevail on this claim, Barry must demonstrate that the performance of her counsel was deficient/unreasonable and that she was prejudiced thereby.<sup>8</sup> In order to establish prejudice, Barry must demonstrate that there is a “reasonable

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<sup>6</sup> In its brief on appeal, the State seriously misstates the nature of the trial court’s ruling regarding its decision not to instruct the jury on the crime of willfully failing to protect the child victim in this case. The State argues that the judge ruled that this alternative count had to be dismissed “since there was no credible evidence to indicate Andre had, or could have, committed the crime.” The brief continues: “The judge said that the State’s evidence ‘would be most likely to lead a reasonable juror to feel that the child was utterly incapable’ of performing the murderous act.” Quite to the contrary, the trial judge ruled, at the urging of defense counsel, that the jury would not be instructed on this alternative count (1) because “[t]here certainly has been no evidence that the defendant ever placed Andrea into the care of Andre”; and (2) “[t]here has also been no evidence presented that if the act was done by Andre that it was done in a willful or malicious manner.” The court added: “As a matter of fact, the testimony presented would be most likely to lead a reasonable juror to feel that the child [Andre] was utterly incapable, really, of forming any meaningful intent.” Hence the trial court’s rejection of this alternative count was *not* any kind of finding that there was no credible evidence to support Barry’s assertion that she was innocent and that her son could have killed Andrea.

<sup>7</sup> I dissented to the majority’s decision in *Easlick* to abolish the “reasonable hypothesis” test for evaluating sufficiency challenges in cases involving wholly circumstantial evidence. See *Easlick*, 2004 OK CR 21, 90 P.3d 556, 560-63 (Chapel, J., dissenting). (Judge Strubhar likewise dissented to this decision. See *id.*, 2004 OK CR 21, 90 P.3d at 563 (Strubhar, J., dissenting)). I continue to believe that our pre-*Easlick* approach was superior, and I further believe that the current case is one where the standard makes all the difference. I, personally, would find that the State’s evidence failed to overcome the “reasonable hypothesis” that Andre Heath was the person responsible for the death of Andrea Heath. While the State’s evidence would be insufficient to establish this alternative possibility beyond a reasonable doubt, it was likewise insufficient, in my view, to establish, beyond a reasonable doubt, that Michelle Barry killed baby Andrea.

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>9</sup> Barry cites three specific areas in which her trial counsel's performance was ineffective: (1) trial counsel failed to object to improper character evidence at trial; (2) trial counsel failed to object to improper opinion testimony offered at trial; and (3) trial counsel failed to investigate and present a defense rebutting the State's claim that Andre Heath was incapable of inflicting the injuries that killed Andrea Heath.

Although Barry's trial counsel filed a motion in limine attempting to prevent the State from presenting evidence about Barry's drug use prior to the death of Andrea, after the trial court denied this motion, trial counsel failed to object to any of the drug evidence presented at Barry's trial. The State argues on appeal that the drug evidence was part of the *res gestae* of the crime charged. This Court finds that although use of certain drugs certainly could be relevant to a crime such as the current one, the State did not adequately establish the relevance of the drug evidence presented at Barry's trial.<sup>10</sup> And drug use, *per se*, is not generally accepted as part of the *res gestae* of such crimes. This Court finds that the performance of Barry's counsel was unreasonable in his failure to even attempt to limit the admission of this highly prejudicial evidence at trial,

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<sup>8</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

<sup>9</sup> *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. And a "reasonable probability" in this context "is a probability sufficient to undermine confidence in the outcome." *Id.*

<sup>10</sup> For example, there was no evidence presented that methamphetamine taken two days previously, followed by the use of alcohol and two different depressant pain medications a day or more later, would be likely to cause a person to be more violent and aggressive, as opposed to more sleepy.

particularly the evidence regarding methamphetamine use by Barry.<sup>11</sup>

In her second specific claim, Barry challenges her trial counsel's failure to object to the testimony of her neighbor, Mary Gideon, when she asserted that Barry was basically "putting on an act" regarding the death of her daughter and when Gideon offered the opinion that Andre was abused. Although this claim is not well developed in Barry's brief, defense counsel's failure to object or attempt to limit the testimony of Gideon in this regard—and the similar testimony of other witnesses regarding, essentially, what a bad mother Michelle Barry was—does seem noteworthy and unreasonable and was potentially highly prejudicial.

Finally, in her claim that her trial counsel failed to investigate and prepare an adequate defense on her behalf, Barry asserts as follows: "No experts were hired and no attempt was made to present expert testimony rebutting the State's position that Andre was incapable of hurting Andrea."<sup>12</sup> The State correctly notes that Barry's appellate counsel fails to substantiate this claim on appeal by demonstrating, for example, that such an expert actually exists. Nevertheless, a review of Barry's entire trial makes clear that trial counsel's failure to offer any rebuttal evidence, in response to the State's "expert testimony" that Andre was not physically capable of inflicting the injuries that killed his sister, was obviously a key factor in Barry's conviction.

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<sup>11</sup> In an undeveloped, alternative argument, the State also asserts that the drug evidence was also admissible as "other crimes evidence" because it showed "the absence of mistake or lack of patience that could have led to the unreasonable use of force." This claim makes no sense within the traditional *Burks* analysis. Barry made no attempt to claim that she killed her daughter by "accident" or "mistake"; and "lack of patience" is not a recognized exception under *Burks*.

This Court cannot ignore that Barry's first trial resulted in a hung jury, nor can this Court ignore the many obvious deficiencies in defense counsel's performance in her second trial. Trial counsel allowed the State to present a cascade of evidence, with nary an objection, about what a nasty, disgusting, infested home baby Andrea was found in, even though there was never any suggestion that any of these conditions, or any neglect of Andrea, had anything to do with the violent injuries that caused her death. In fact, trial counsel did almost nothing to limit the State's character attacks on Barry as a drinking, drug-using, incompetent, neglectful mother. While some of the evidence regarding the state of the Barry home was likely destined to come in, there is little doubt that the photograph of cockroaches in baby Andrea's bassinet was more prejudicial than probative. Most importantly, defense counsel simply did not offer any substantive evidence to rebut the State's "physical impossibility" claim that Andre Heath was not physically capable of inflicting the injuries that killed his sister.

We conclude that Barry has adequately established that her attorney's performance at trial was unreasonable and deficient and that there is a reasonable probability that she could have been acquitted if she had been adequately represented. This Court finds that in light of the entirety of the record in this case, including the circumstance of the hung jury in Barry's first trial, we cannot affirm her conviction in this case.

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<sup>12</sup> Barry likewise asserts that "[t]he failure to investigate the potential defenses associated with

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Barry's trial counsel was ineffective and that her conviction must be reversed.

### **Decision**

Michelle Barry's conviction for the first-degree murder of her daughter, Andrea Heath, is hereby **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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the behavioral problems suffered by Andre constitutes ineffective assistance of counsel."

**OPINION BY: CHAPEL, J.**

LUMPKIN, P.J.:	CONCUR IN RESULTS
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	DISSENT

**LEWIS, JUDGE, DISSENTS:**

I respectfully dissent from the majority opinion. I would affirm the conviction in this case.