

court's ruling. In appeals prosecuted pursuant to 22 O.S.Supp.2002, § 1053, this Court reviews the trial court's decision for an abuse of discretion. *See State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369.

In the present case, Appellee argued at the motion hearing and again on appeal that no such ambiguity existed as to who caused the fatal injuries to the child. At the hearing, the district court judge, who had also presided over Jonathan Trask's trial, reviewed the testimony presented at that trial, including the testimony of the forensic pathologist Dr. Chai Choi and of Dr. Stuemky as well as the prosecutor's closing argument. Evidence was presented at trial that around 4:00 p.m. on April 5, 2006, six month old Mackenzie Trask was at home with her mother, father and nineteen-month-old brother. Later that evening at around 7:00 p.m., Appellee left for work. She came home sometime after 7:00 and left the house for work again around 8:00 p.m. At 3:09 a.m. on April 6, 2006, Jonathan Trask called 911 and reported that Mackenzie was not breathing. When authorities arrived, the child was not conscious and showed no signs of life. Despite the fact that a pulse could not be detected, CPR was performed upon the child. She never gained consciousness was pronounced dead at 4:00 a.m. However, no one could say exactly when the child had died.

The evidence presented at trial was conclusive and unambiguous that although Mackenzie suffered multiple bruises on her head and body, she died from blunt force trauma to the head. Dr. Chai Choi testified that the child suffered acute subgaleal hemorrhages and a skull fracture. She estimated that while some bruises were older, the acute bruising had occurred within eight to

twelve hours before death. During her testimony Dr. Chai Choi added that she could adjust the time frame to longer or shorter and said that the most recent injury could have occurred less than eight to twelve hours before death. Dr. Stuemky agreed with the assessment by Dr. Chai Choi that the external bruising was acute and occurred eight to twelve hours before death and that some of the bruising could have occurred as little as four hours before death and some could have been longer. However, Dr. Stuemky added that the massive head injury would have rendered the child unconscious almost immediately although the dying process could have taken longer. He testified initially that it would have been medically impossible, in his opinion, for the fatal injury to have been inflicted before 8:00 p.m. On cross examination, however, Dr. Stuemky agreed that the fatal head injury could have been inflicted eight hours before Jonathan Trask called 911. On re-direct examination, Dr. Stuemky again agreed that the child's death could have occurred up to six to eight hours after the injuries to her head. While Dr. Stuemky acknowledged some flexibility in the time in which he believed the fatal injury could have occurred, he was unwavering in his testimony that the fatal head injury would have caused almost immediate unconsciousness. This, coupled with Jonathan Trask's testimony that Mackenzie was conscious and took a bottle between 11:00 p.m. and midnight on April 5 and that she was awake and rolling around in bed at around 2:30 a.m. on April 6, leaves no ambiguity as to the identity of the person who inflicted the fatal injuries upon the child. By his own admission, Jonathan Trask was the only person with

Mackenzie from the last time she was conscious until medical assistance was called and she was subsequently declared to be dead.

Where the evidence is less than conclusive as to the identity of the person who inflicted the fatal injuries, this Court has found it proper for the State to argue alternative theories of murder. See *Littlejohn v. State*, 1998 OK CR 75, 989 P.2d 901. Such was not the case here. In granting the Appellee's motion, the district judge found that the evidence supported the conclusion that Jonathan Trask inflicted the fatal injury. Because the issue of who actually inflicted the fatal injuries was conclusive, the district judge cannot be found to have abused his discretion in ruling that the state was precluded from arguing alternative theories of guilt. See *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369 (In appeals prosecuted pursuant to 22 O.S.Supp.2002, § 1053, this Court reviews the trial court's decision for an abuse of discretion.).

DECISION

The District Court's ruling precluding the State from arguing alternative theories of guilt at Appellee's trial is **AFFIRMED**.¹ Appellee's motion for an oral argument is **DENIED**. 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.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM A. LUCAS, DISTRICT JUDGE

¹ Prior to filing this appeal, Appellant filed with this Court, in Case No. PR-2009-434, an Emergency Application to Assume Original Jurisdiction and Petition for Writ of Prohibition or in the Alternative a Petition for Writ of Mandamus and Brief in Support. In light of this Court's ruling in the case at bar, this Application is dismissed as moot.

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OPINION BY C. JOHNSON, P.J.
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LUMPKIN, J.: CONCUR IN RESULTS
CHAPEL, J.: CONCUR
LEWIS, J.: CONCUR