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EXPERT OPINION

A Claim of Material Variance Fails in a Child Fatality Case

Elisa Reiter and Daniel Pollack | July 7, 2022

In a recent article, American Enterprise Institute senior fellow Naomi Schaefer Riley writes, "There is something about the relationship between men and the children of other men in their home that can be quite volatile. Whether it is the constant reminder of another man's

previous relationship with the girlfriend or jealousy over the time those children take from a relationship or already present violent tendencies that are not stopped by the tender feelings one usually has toward one's own children, something goes wrong." On June 24, 2017, something went fatally wrong for R.W., a boy just shy of his second birthday.

In *Keating v. State,* 2022 Tex. App. LEXIS 3680, *1 (Tex. App. Houston 1st Dist. June 2, 2022), defendant Rajfik Dominique Keating was found guilty by a jury of felony murder, with the underlying felony of injury to a child. The trial court sentenced Keating to 50 years' imprisonment. In two issues on appeal, Keating contends:

(1) A fatal variance exists between the indictment and the proof at trial.

(2) The evidence is insufficient to establish that he committed an act dangerous to human life.

In affirming the jury's conviction, the appellate court reviewed the trial court's record. Keating spoke in his own defense at trial, testifying that he had long been friends with Rasheed Washington and Lynette Monique Gaspar. Washington and Gaspar had three children: L.W., R.W., and Baby L.W. Washington died in August 2016, when the middle child R.W. was just under 2 years old. Following Washington's death, Keating moved from California back to Houston, Texas, to "check on" Gaspar and her three children. Keating did not cohabit with Gaspar, nor did he visit her apartment every day, but he stopped by the apartment often. Keating confirmed that he disciplined the children when he was there, using his belt.

On the evening of June 24, 2017, Keating visited Gaspar's apartment. Upon his arrival, Gaspar "went into the back room." Keating then "rolled a joint," and he and the children's mother "talked for a while." The children, including R.W., were allegedly in their bedroom watching television. Keating testified that upon arrival at the apartment, he did not observe bruises on R.W.'s face or body, and that the R.W. appeared to be acting normal. Later, after getting a phone call from her mother, Gaspar left the apartment around 8 p.m. to get something to eat. Gaspar left the children alone with Keating. When Gaspar left the apartment, her three children were fine. Following Gaspar's departure, Keating testified that he went out of the apartment to "finish smoking" and "drink a little bit." Keating added that after a "good little time," while he was still outside, he heard a "thud." Keating testified that he went back into the apartment, entered the children's bedroom, and there observed R.W. lying on the floor. Keating described R.W. as conscious, not crying, and "looked like he wanted to keep watching TV." Keating testified that he picked R.W. up, changed his diaper, and brought him into the living room to eat. Keating noted that R.W. walked into the living room and sat in the chair. However, Keating testified that when he started back outside to continue smoking, he noted that R.W. "wasn't looking too good … [and] eventually ended up falling on the floor." R.W. threw up dark liquid, and Keating tried do CPR on the child. When his CPR labors were unsuccessful, Keating phoned his mother, who was a home health aide. Keating's mother advised him to contact Gaspar. He did so; Gaspar in turn purportedly told Keating to wait until she returned to the apartment before calling 911. Keating eventually called 911, and the dispatch operator instructed him how to perform CPR on a small child.

R.W. was taken to the hospital and pronounced dead. Keating admitted to physically disciplining the children (including R.W.) in the past, but he denied engaging in physical discipline of R.W. on the day R.W. died.

Travis McNall, a Houston Police Department officer, observed Houston Fire Department officers carrying a young boy out on a stretcher when McNall arrived at the scene. McNall saw the HFD responders attempting to perform CPR on the child. McNall saw that the child was unresponsive. The officer spoke with Gaspar, to confirm her information, and that the child was being taken to the hospital. The officer described the apartment as "dirty and smelling of marijuana," adding that he "immediately noticed a 'large black stain' on the rug on the apartment floor." McNall had a conversation with Keating, who told the officer that he had purportedly been in the master bedroom when he (Keating) heard a "loud thump" from the living room. Keating told McNall that he had entered the living room and saw R.W. on the floor. Keating stated that the child was crying, that he tried to comfort him, and that the child "always falls down." This was a bit different from what Keating later testified to at trial.

At the hospital, an emergency physician, Dr. Sergey Potepalov assessed and treated R.W. Potepalov testified that R.W. was 2 years and 7 months old at the time the child was presented at the hospital, and that R.W. had "evidence of multiple contusions," including "a severe contusion on the left side of [his] head," which, in Dr. Potepalov's expert opinion, "resolved in [R.W.'s] death." On arrival at the hospital, R.W. was "blue," "cold," and with "no signs of life of any kind."

Twelve minutes of attempts at a full spectrum of resuscitative methods later, Potepalov called a time of death for R.W. at 10:30 p.m. The ER physician testified that as part of his assessment, he noted many visible injuries, more than just the contusion on the left side of R.W.'s face. Those injuries included "contusions to his upper chest, upper and lower back, both arms, and bilateral inner thighs" that "were in multiple stages of healing." The ER physician described the contusion on the left side of R.W.'s face, which he described as resulting in "R.W.'s left eye being swollen shut, was fresh, and there were several other injuries that appeared to be from days ago based on the discoloration of the skin." Potepalov concluded that "R.W.'s injuries were consistent with child abuse."

Potepalov testified that Gaspar had shared with him that R.W. fell into a freezer, injuring his head, and then later fell off the bunk bed at about 8:45 that evening. Though Dr. Potepalov could not determine whether this summary "was truthful, he testified that the nature of R.W.'s injuries were not consistent with this version of events." Potepalov testified that:

"R.W. had suffered an intracranial hemorrhage that led to respiratory paralysis and cardiac arrest. Dr. Potepalov testified that, with an injury such as this, death would not occur immediately at the time of the injury. Instead, it would take about 20-30 minutes for the 'blood to flood the brain and cause herniation or collapse of the brain downward.' Dr. Potepalov further testified that although there would be a 'lucid period' after a child sustains such an injury, it would only be about five to ten minutes. And, according to Dr. Potepalov, a child would not be acting normal during this 'lucid period,' but instead would have a headache, vomit, and look pale or unwell. On cross-examination, Dr. Potepalov

admitted that he did not know who inflicted the injuries on R.W. However, he testified that he believed it was 'highly unlikely' that R.W.'s multiple contusions running 'from his head, chest, back, arms, [and] legs … were accidental.' '[R.W.] was beaten up.'"

Also present to opine as an expert at the trial was Dr. Dana Hopson, assistant medical examiner of the Harris County Institute of Forensic Sciences, who performed the autopsy on R.W. Hopson concluded that the cause of R.W.'s death to be "multiple blunt force injuries" and that the manner of death was homicide. "Dr. Hopson testified she observed bruises around R.W.'s left eye and 'many contusions or bruises on … both sides of his face, as well as beneath his chin.'" Hopson added that while she could not provide an exact timeframe, that R.W.'s "contusions and bruises appeared to have occurred '[a]t or around his time of death.'" She added that the child had suffered "a subdural hemorrhage, or bleeding in the brain, as well as some areas of bleeding on the surface of the brain itself." The injuries did not stop there; "there were additional injuries to his chest, abdomen, and back, with further internal bleeding in his chest, intestine, and spinal cord." Hopson concluded that all of the foregoing injuries were contributing factors in R.W.'s cause of death. The medical examiner added that "R.W.'s injuries were more consistent with more than one impact, based on the multiple bruises on multiple sides of R.W.'s body and face. She further testified that R.W. had a broken rib and bruising over 75 to 80 percent of his body." Rather than being consistent with one fall from a height, Hopson testified that in her professional opinion, R.W.'s injuries were consistent with "inflicted injuries, i.e., 'someone being struck with a blunt object.'" Two other expert witnesses opined that R.W.'s injuries were not consistent with the type of slip and fall one might normally expect of a toddler.

L.W., R.W.'s 7-year-old sister, presented testimony that Keating "whooped" her and her brother that day, only to later contradict that assertion when she added that she had not seen Keating beat her brother that day. L.W. testified that she did not see her brother fall out of bed, nor fall into the freezer on the day of his death.

On appeal, Keating contends that:

(1) There was a fatal variance between the indictment and the evidence offered at trial because the indictment failed to allege that he caused R.W.'s death.

(2) The evidence was legally insufficient to support his conviction for felony murder because there was insufficient evidence that he committed an act dangerous to human life.

An indictment is facially complete if it alleges all of the essential elements of a criminal offense. *Malik v. State*. What is a variance? The Houston appellate court explains that:

"A "variance" occurs when there is a discrepancy between the allegations in the charging instrument and the proof offered at trial. Byrd, 336 S.W.3d at 246 (citing *Gollihar*, 46 S.W.3d at 246)."

Tracing precedents, the Houston Court of Appeals notes that:

"A variance between the wording of a charging instrument and the evidence presented at trial is fatal only if it is material and prejudices the defendant's substantial rights. *Gollihar,* 46 S.W.3d at 257. … An indictment is facially complete if it alleges all of the essential elements of

a criminal offense. *Malik v. State,* 953 S.W.2d 234, 239 n.4 (Tex. Crim. App. 1997)."

Did Keating have sufficient notice of the charges against him in order to prepare an adequate defense at trial? Would any variance in the language of the indictment versus the jury charge subject Keating to the risk of being tried later for the same crime? Keating, as the defendant, bears the "burden of establishing surprise and prejudice." Keating contends that the state of Texas created a variance, as the indictment charged him with injury to a child, but offered proof of commission of a felony murder at trial. The appellate court disagrees, noting that:

"A variance occurs where the state has failed to prove an allegation in the indictment. For example, where the indictment alleges that the defendant killed one person, but the state proves at trial that the defendant killed a different person, '[t]hat is a big mistake. Murder may be murder, but killing one person is not the same offense as killing an entirely different person.'"

The appellate court held that defendant Keating should have made an allegation of a material variance before trial began, and before a jury was empaneled. By failing to do so, he waives such a claim. The appellate court nonetheless alludes to material variance analysis, concluding:

"There is no variance in this case, or if there is, it is immaterial. First, as noted, the sufficiency of the evidence must be viewed in light of a hypothetically correct jury charge. The hypothetical jury charge is one that 'accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily

restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.’ Here, even though the indictment failed to include the causation element of felony murder, a hypothetical jury charge would include all statutory elements, including the causation element omitted from this indictment.”

In addition, the appellate court notes Keating’s failure to plead and prove that if there was a variance, that the variance was material:

“Keating only argues that because the indictment charged him with injury to a child, but the proof offered at trial supported felony murder, this subjected him to a greater offense than pleaded in the indictment and was a fatal variance. This does not address the issue of whether he could be prosecuted again under the same facts, particularly where he recognizes that injury to a child (the offense the indictment charged) was a lesser included offense of felony murder, which he acknowledges the proof at trial supported.”

Viewing the evidence in a light most favorable to the verdict, sufficient evidence was presented at trial that Keating had committed an act dangerous to human life, and further, that Keating’s description of what happened to R.W. vacillated over time (impeaching his credibility). The appellate court held that:

“The jury would have been rationally justified in concluding that Keating caused the injury to R.W. as a basis for felony murder given the testimony that R.W.’s injuries were not consistent with a fall, that R.W. would have been ‘symptomatic almost immediately,’ and that Keating was the only adult in the house at the time R.W. sustained his injuries.”

Keating's lack of consistency created circumstantial evidence of guilt. The appellate court held there was sufficient evidence to support a guilty verdict for felony murder for injury to a child. The lesson for prosecutors is clear: Try to avoid a variance in your indictment and jury charge. The lesson for defense counsel is equally clear: If there is a variance in the indictment and jury charge, don't wait. Object to the variance prior to the start of trial and/or the empaneling of the jury panel.

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