UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 462

September Term, 2016

LAWRENCE JAMES SIMPSON, III

v.

STATE OF MARYLAND

Eyler, Deborah S.
Reed,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: May 8, 2017

The appellant, Lawrence James Simpson, III, was convicted in the Circuit Court for Baltimore County by a jury, presided over by Judge Kathleen G. Cox, of Second-Degree Assault and Second-Degree Child Abuse. On this appeal, he raises three contentions:

1. that Judge Cox erroneously refused to accept his proffered expert witness as an expert;

2. that Judge Cox did not permit the witness, as a dentist, to make an observation that, without an accompanying opinion, would have been irrelevant; and

3. that Judge Cox erroneously refused to postpone the conclusion of the trial so that he might obtain a substitute expert witness.

We note at the outset that all three contentions involve the exercise of discretion by a trial judge.

The Factual Context

The victim in this case, two-year-old J.L., was assaulted on the morning of July 13, 2014. The appellant was J.L.'s stepfather. They lived together in a townhouse at 3219 Vulcan Road, along with J.L.'s mother, who was the appellant's wife. On the morning of July 13, 2014, the mother had to leave early for work, leaving home at approximately 6 a.m. The baby-sitting arrangement had been that the mother would, on her way to work, drop J.L. off at the home of Jonathan Lorenz, J.L.'s natural father and the former husband of the mother. Because she was running late that morning, however, the mother was unable to drop J.L. off at the father's house and had to leave him instead in the custody of his stepfather, the appellant.

When the natural father noticed that J.L. had not been dropped off as planned, he made a phone call to the appellant and subsequently drove to Vulcan Road to pick up J.L.

When the father arrived, he noticed that J.L. had been crying and that he had a swollen lip. It was only after the father was in the car with J.L. that he first noticed that J.L.'s face was bruised. After calling his ex-wife on the phone, the father drove J.L. to the hospital.

After the medical personnel at the Bayview Medical Center examined J.L., they concluded that they were looking at a case of possible child abuse. There were bruises and other marks on J.L.'s head, shoulders, and arms. There were also what looked as if they could have been bite marks. The rest of the case against the appellant need not be detailed, because the contentions before us concern only the possible bite marks.

Odontology

Testifying for the State was Dr. Warren Tewes, who was qualified as an expert forensic Odontologist. Odontology is the study of bite marks. Dr. Tewes examined the photographs that had been taken of the marks on J.L.'s skin. He testified that while some of the marks lacked the characteristics of bite marks and that he could not analyze them because they lacked the necessary "definition," other marks on J.L. were "most likely" bite marks. He went on to testify that he was reasonably certain that the bite marks were human bite marks rather than animal bite marks, because they lacked the punctures that would normally be visible from animal cuspids. Dr. Tewes further testified that while the bite marks at first appeared to be bites from an adult, he could not state for certain whether the bite marks were from an adult or a child because they lacked "definition." He went on to explain that the lack of definition was a result of the fact that skin can stretch and distort.

He explained that if there is a lot of subcutaneous fat, it can be difficult to determine the exact nature of the bite marks.

Dr. Tewes offered the further observation that Odontologists are questioning the general scientific validity of bite mark identification. He pointed to a moratorium declared by the State of Texas disallowing bite mark evidence and to a 2015 Report of the American Board of Forensics Odontology, in which 38 experts could not agree on whether they were looking at a bite mark, disagreement which was causing a complete re-examination of the whole practice to determine if it was, indeed, a valid science.

Non-Qualification of Defense Expert

For the purpose of attempting to prove that the appellant could not have been the source of the possible bite marks on J.L., the defense sought to qualify Dr. Judy Yu as an expert in Odontology, the science of identifying bite marks. The State objected and Judge Cox conducted a hearing of Dr. Yu's status as a possible expert. At the end of the hearing, Judge Cox agreed with the State and Dr. Yu was not accepted as an expert in Odontology.

The determination of whether a witness will be accepted as an expert is one entrusted to the broad discretion of the trial judge. Maryland Rule 5-702; Massie v. State, 349 Md. 834, 850–51 (1999). See also Simmons v. State, 313 Md. 33, 41 (1988). Dr. Yu had a doctorate in dentistry and was fully qualified as a dentist. Dr. Yu freely admitted, however, that she was not a forensic Odontologist. She, indeed, was unaware that such a specialty existed. She did not practice Odontology. She acknowledged that she did not keep current in the field of Odontology. On examination, Dr. Yu was unable to answer any

questions regarding the relationship between the measurement of teeth for the purpose of cosmetic dentistry and the measurement of suspected bite marks on human skin or other substances.

In his own testimony as an expert, Dr. Tewes had explained that forensic Odontology is not dentistry. While both involve teeth, the similarities end there. He explained that "we usually think of dentistry as treatment whereas Odontology is chiefly observation." He testified that to become an Odontologist, one must first be a dentist, but that there is then a "steep mountain" of training and practical experience that must be undergone before becoming an Odontologist. The fact that Dr. Yu had attended a one-week course in forensic Odontology offered by the Walter Reed Army Medical Center in 1999 did not significantly alter that balance.

Although two closely related rulings were intermixed, Judge Cox's ruling that Dr. Yu was not an expert in Odontology qualified to render expert opinions on the possible bite marks in this case was clear.

> I agree that she can't testify to opinions. I don't think she has the requisite training or experience. She took one course in '99, has never been asked to do it before, and in a field where by the testimony this morning there's some question about the reliability of comparison overall, she hasn't stayed apprised.
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> She hasn't stayed current. I don't think she qualifies as an expert. So she is not going to be permitted to render opinions.

(Emphasis supplied). We see no abuse of discretion in that ruling.

An Irrelevancy Standing Alone

Although Dr. Yu did not qualify as an expert in Odontology, everyone agreed that she was fully qualified, as a cosmetic dentist, to take molds or other measurements of people's teeth. Seizing upon this lesser qualification, the appellant sought to do indirectly what he could not do directly. Lacking an expert Odontologist, he would turn the jurors loose as 12 amateur Odontologists.

The appellant sought to have Dr. Yu present into evidence a mold or other measurement of the appellant's teeth. Such a measurement, absent an accompanying expert opinion, would be irrelevant. To be relevant, an item of evidence must tend to prove some material issue. The appellant was offering the measurement of his teeth to prove that he could not have been the source of the possible bite marks by having the jurors make that judgment for themselves.

As Dr. Tewes had pointed out, even an expert Odontologist could not say that the bite marks were even human in origin. Because of the lack of "definition," moreover, even a trained Odontologist could not meaningfully compare a bite mark with a mold of human teeth. What the appellant was attempting to do would have been confusing and counterproductive in the extreme. What the appellant had failed to do with an expert, he was attempting to do without an expert. One might as readily have turned the jurors loose to make their own fingerprint comparison or to look at autopsy pictures and from them determine the cause of death. We fully agree with Judge Cox's conclusion.

> [T]he lay impression of something may be completely wrong because of -- you have to have -- I mean, you know, what kind of an impression a tooth mark will leave in skin and how you measure it and what those measurements

> do or don't imply are things on which you require some expertise and some training.
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> So to put a piece of that in front of a jury and ask them to then without any expertise, training, or guidance reach some sort of reliable conclusion, I think is just misleading. It's a question of relevance. What is the relevance of the fact -- the relevance of that fact without some expertise to put it in a context?

(Emphasis supplied).

Judge Cox ruled that the jurors would not be turned loose to do without the benefit of a guiding expert opinion what would only be permitted with the guidance of an expert opinion.

> [Y]our information is only relevant if a jury can do something with it that would enable them to reach some opinion or conclusion. That information is only relevant if you have an expert who then guides you on how to use that information to make some conclusion that's not just complete mere speculation or frankly misguided.

(Emphasis supplied).

Once again, we see no remote abuse of discretion.

A Mid-Trial Continuance

When Dr. Yu was not accepted as an expert witness in bite mark identification, the appellant asked that the trial be suspended for one week so that the defense could find another possible expert witness. Judge Cox reminded the appellant that the jury trial was already at or beyond its midpoint and that the State had already finished its case. She then denied the motion.

In claiming error, all of the caselaw cited by the appellant deals with postponing the start of trial. It does not contemplate stopping a jury trial in mid-passage and sending the

jurors home for a week. Who knows what unforeseen problems such a procedure might cause. The defense could not predict whether a qualified expert could even be found or exactly how long it might take or whether anyone could ever be found to testify in the way the appellant wished. The jurors, moreover, had already adjusted their personal schedules in order to serve on the jury. There was, moreover, a pervading sense that the appellant, groping for a straw, was giving a vastly overrated significance to what may well turn out to be little more than a bogus science. It was hardly something worth putting an ongoing jury trial into a state of suspended animation for a week or longer.

In any event, for any number of possible reasons, we hold that Judge Cox did not abuse her discretion in ruling that the trial should go forward to an expeditious conclusion.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.