IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN EDWARD SCHOONOVER,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2001-936
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, John Edward Schoonover, was charged jointly with his wife, Gilda Marie Schoonover, by Information filed in the District Court of Mayes County, Case No. CF-1999-271, with First-Degree Child-Abuse Murder, 21 O.S.Supp.1998, § 701.7(C). Preliminary hearing was held April 5 and 11, 2000, before the Honorable Gary J. Dean, Special Judge. Jury trial for both defendants was held April 19-25, 2001, before the Honorable Terry H. McBride, Associate District Judge. The jury found both defendants guilty on the amended charge of Committing or Permitting Child-Abuse Murder, and recommended sentences of life imprisonment for each. On July 25, 2001, the trial court sentenced both defendants in accordance with the jury's recommendation. Appellant and his wife lodged separate appeals to this Court.[1]

Appellant raises the following propositions of error:

1. The trial court committed fundamental error by instructing the jury on the alternative theory of First-Degree Murder (Child Abuse) by its use of the "permitting" child abuse instruction.

---

[1] *See Gilda Marie Schoonover v. State*, Court of Criminal Appeals Case No. F-2001-916.

2. The trial court erred in allowing the State to amend the Information, following its case-in-chief, to include the alternative theory of First-Degree Murder by "permitting" child abuse.

3. The trial court erred in failing to declare a mistrial when the State's witnesses violated the Appellant's motion *in limine* and testified concerning Department of Human Services contacts with the Appellant.

4. The trial court erred in failing to strike the testimony of Shelly Young concerning complaints to DHS and not admonishing the jury to disregard this testimony.

5. The trial court erred in failing to grant a new trial on the ground that the State's case, based entirely upon circumstantial evidence, failed to exclude every reasonable hypothesis other than guilt.

6. The trial court erred in failing to grant Appellant's motion for new trial based on newly-discovered evidence of juror misconduct.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we **REVERSE AND REMAND FOR A NEW TRIAL**.

Appellant was charged jointly with his wife with inflicting unreasonable fatal force upon Benjamin Stanart Schoonover, a thirty-four-month-old relative whom they were in the process of adopting. The Schoonovers were at their rural home with the child when the fatal injury occurred. The State presented evidence that Appellant and his wife gave vague accounts concerning the child's behavior in the weeks preceding his death. Neither claimed to have actually witnessed the fatal injury itself. At trial, Gilda Schoonover testified that she was in another room, and her husband was outside the house, when she heard a thud and found the child lying on the tile floor; one of the State's own witnesses corroborated this claim, stating that she was talking to Mrs. Schoonover on the telephone at the time. The State also presented evidence that Appellant and his wife considered the child to have behavioral problems,

and had considered canceling the adoption process. In addition, the State presented evidence that while the child was in the hospital, Appellant handed his adult daughter a cassette tape and asked her to keep it for him because it would prove that "Gilda did it." Appellant's daughter testified that she eventually gave the tape back to her father. The whereabouts of the tape and its contents are unknown.[2]

At the close of the evidence, the trial court granted the State's request to amend the charge to include Permitting Child-Abuse Murder as an alternative theory of culpability as to both Appellant and his wife. The jury returned general verdicts finding both Appellant and his wife guilty of First-Degree Murder. In Propositions 1, 2, and 5, Appellant challenges the propriety of allowing the State to present this alternative theory for the jury's consideration.

The crime of *Committing* Child-Abuse Murder requires the State to prove the accused willfully or maliciously injured, tortured, maimed, or used unreasonable force against a child, causing the child's death. 21 O.S.Supp.1998, § 701-7(C); OUJI-CR (2nd) No. 4-65A. A person may be found guilty of *Permitting* Child-Abuse Murder if he or she willfully causes, procures or permits another to commit such acts on a child in his or her care. *Id.* The crime of Permitting Child-Abuse Murder requires the State to prove the accused (1) was legally responsible for the child's safety, and (2) allowed the child to be cared for by another while knowing, or having reason to know, that the child was at risk of being abused. *Id.*; *cf.* OUJI-CR (2nd) No. 4-36 (defining "permitting" in relation to the crime of child abuse under 10 O.S.Supp.2000, § 7115). By amending the charge after the evidence had been submitted, the

---

[2] Because of obvious Confrontation Clause problems, the trial court instructed the jury that this testimony was not to be used as evidence against Gilda Schoonover.

State presented the jury with at least four independent theories of guilt: (1) that Gilda Schoonover committed the fatal act; (2) that John Schoonover knowingly permitted his wife to commit the fatal act; (3) that John Schoonover committed the fatal act; and (4) that Gilda Schoonover knowingly permitted her husband to commit the fatal act.

We find the evidence presented at trial sufficient to support the jury's conclusion that the child's death was not accidental. However, the evidence presented does not, in our view, reasonably support the theory that Appellant knowingly permitted his wife to inflict unreasonable force on the child. Such a theory would require evidence that Appellant knew, or had reasonable cause to believe, that his wife would commit such abuse on the child. Such notice could be established, for example, by evidence that Appellant's wife committed the fatal act in his presence *and* under circumstances which gave him an opportunity to prevent it, or by evidence that Appellant was aware his wife had committed prior acts of abuse and yet allowed her to continue to care for the child.[3]

No such evidence was presented in this case. The fact that Appellant and his wife may have considered the child a discipline problem does not, without more, establish that either of them had actually committed child abuse

---

[3] Evidence of prior abuse may be relevant in a child-abuse murder prosecution to establish identity of the perpetrator, general intent to commit abuse, or absence of accident. *Abshier v. State*, 2001 OK CR 13, ¶ 122-127, 28 P.3d 579, 606, *cert. denied*, ___ U.S. ___, 122 S.Ct. 1548, ___ L.Ed.2d ___ (2002). In the case of a Permitting Child-Abuse theory, such evidence may be relevant to show that a person legally responsible for the child's safety was on notice that the child was at risk of such abuse by another. *See Gilson v. State*, 2000 OK CR 14, ¶¶ 77-89, 8 P.3d 883, 910-13 (eyewitness evidence supported conviction for Child-Abuse Murder under both committing and permitting theories), *cert. denied*, 532 U.S. 962, 121 S.Ct. 1496, 149 L.Ed.2d 381 (2001); *Johnson v. State*, 1988 OK CR 54, ¶ 8, 751 P.2d 1094, 1096 (mother's conviction for permitting child abuse was supported by evidence that she knew of son's prior injuries, knew they were inflicted by her husband, and defended her husband in the fact of prior accusations of abuse).

as a response. The fact that Appellant may have commented — after the fact — that his wife "did it" is not, by itself, sufficient to establish that Appellant knew or had reason to know she would commit such an act beforehand. The factual basis, if any, for Appellant's opinion is unknown. The uncertainty here is magnified by the fact that the jury was presented with alternative theories of guilt (committing or permitting child-abuse murder) for *both* Appellant *and* his wife. Conceivably, two co-defendants could both be found guilty of committing child-abuse murder under aiding and abetting principles. But it would be anomalous indeed to convict each of *permitting the other* to commit child abuse, at least under the facts presented here.

Under Oklahoma law, the jury may consider alternative theories of culpability, and need not be unanimous as to which theory supports the conviction, but only if the evidence is sufficient to support a conviction under each alternative theory. *McGregor v. State*, 1994 OK CR 71, ¶ 12 n. 19, 885 P.2d 1366, 1376 n. 19, *cert. denied*, 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995); *Tibbs v. State*, 1991 OK CR 115, ¶¶ 7-8, 819 P.2d 1372, 1375-76. Because of the general verdicts, it is impossible to determine whether the jury rested its decision on a theory sufficiently supported by the evidence, we must **REVERSE AND REMAND FOR A NEW TRIAL.**

DECISION

The Judgment and Sentence of the district court is **REVERSED AND REMANDED FOR A NEW TRIAL.**

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY
THE HONORABLE TERRY H. McBRIDE, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

GERALD L. HILSHER
BOONE, SMITH, DAVIS, HURST & DICKMAN
100 W. 5th STREET, SUITE 500
TULSA, OK 74103
ATTORNEY FOR DEFENDANT

CHARLES RAMSEY
RAY HASSELMAN
ASSISTANT DISTRICT ATTORNEYS
MAYES COUNTY COURTHOUSE
PRYOR, OK 74361
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

GERALD L. HILSHER
BOONE, SMITH, DAVIS, HURST & DICKMAN
100 W. 5th STREET, SUITE 500
TULSA, OK 74103
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PATRICK T. CRAWLEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY JOHNSON, V.P.J.

LUMPKIN, P.J.:	CONCURS
CHAPEL, J.:	CONCURS
STRUBHAR, J.:	CONCURS
LILE, J.:	CONCURS

RC