NO. 5-09-0282

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Edwards County.
	)	
v.	)	No. 08-CF-3
	)	
JEFFERY W. SMITH,	)	Honorable
	)	David K. Frankland,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Spomer concurred in the judgment.

R U L E 2 3 O R D E R

Held: The circuit court did not err in admitting an autopsy report as an exception to *Crawford*'s confrontation requirements, the court did not err in qualifying Dr. Santa Johnston as an expert in shaken-baby syndrome, and the court did not err in sentencing the defendant to a term within the prescribed range.

The defendant, Jeffery W. Smith, Sr., was convicted in the circuit court of Edwards County of two counts of first-degree murder and one count of aggravated battery of a child and was sentenced to 40 years' imprisonment. On appeal, the defendant argues that the circuit court erred in (1) admitting an autopsy report without requiring the pathologist to be subject to cross-examination, (2) qualifying Dr. Santa Johnston as an expert in shaken-baby syndrome, and (3) sentencing the defendant to 40 years' imprisonment in the Department of Corrections. For the reasons that follow, we affirm the defendant's conviction on one count of first-degree murder and his sentence.

Jeffery W. Smith, Jr. (Junior), was born on September 14, 2007, to Jeffery W. Smith, Sr. (Jeffery), and Erika Smith. Junior died on February 6, 2008. On February 11, 2008,

Jeffery was charged with two counts of first-degree murder, one count of aggravated battery of a child, and one count of aggravated domestic battery in the death of Junior. A bench trial was held in Edwards County on December 2 and 3, 2008, in which the following evidence was adduced.

Junior was born approximately two months premature and spent the first two months of his life in the hospital. He was discharged into his parents' care on December 22, 2007. On the morning of February 4, 2008, Erika woke up with Junior and fed, changed, and bathed him. Around 12:50 p.m., Erika departed for the library on foot and arrived there a few minutes after 1 p.m. At the time she left the apartment, Junior was asleep in his crib and the defendant was awake. Approximately 45 minutes after she arrived at the library, she received a phone call from the defendant on the library's land line. Erika testified that the defendant sounded panicked and told her that she needed to get home immediately because the baby was not breathing well. Erika testified that she dropped the phone, collected her belongings, and ran home. The librarian on duty that day testified that Erika received a telephone call but that the caller did not sound upset and that she did not recall Erika leaving the library in an unusual manner.

Erika arrived home approximately five minutes after she left the library. Junior was on his back in his crib, turning blue. Jeffery was standing by the crib holding the telephone. Erika placed Junior on the floor and began CPR. Junior started bleeding from his nose after the first breath, and Erika testified that Jeffery suctioned Junior's nose with a bulb syringe in order to remove the blood. After Erika began CPR, the defendant dialed 9-1-1.

At approximately 2:03 p.m., Officer Deborah Judge of the Edwards County sheriff's department responded to a 9-1-1 call of an unresponsive child at the defendant's residence. Upon entering the apartment, Officer Judge found Junior on his back on the floor, in a diaper, with his arms outstretched, unresponsive and blue in color. There was also a red substance,

which appeared to be blood, on Junior's face and head. Officer Judge immediately began CPR. She testified that the defendant was standing in the room, holding a blue bulb with a red substance on it, but appeared calm. The officer testified that Erika was also in the room and was making a "noise like sobbing" but that there were no tears on her face or in her eyes.

Officer Judge performed CPR until EMT Jason Beal arrived. Beal performed CPR at the scene for approximately one minute before moving Junior to an ambulance. Beal testified that he moved Junior by placing his left hand under Junior's neck and head and his right arm over Junior, cradling Junior to his chest. Both Beal and Judge testified that they were certified in infant CPR and that they did not feel any of Junior's ribs break while they were performing CPR.

Junior was transported by ambulance to Wabash General Hospital in Mt. Carmel. He was treated in the emergency room for approximately one hour before he was transported via Life Flight to St. Mary's Hospital in Evansville, Indiana.

At St. Mary's, Junior was treated by Dr. Santa Johnston. Dr. Johnston testified that she is a pediatric intensivist with 16 years' experience. She attended medical school at the Medical College of Pennsylvania and did her residency in pediatrics at the University of Maryland and her fellowship in critical care medicine at Cornell. She is licensed in nine states and board-certified in pediatrics and critical care. Dr. Johnston testified that she teaches pediatrics and pediatrics physiology at Eastern Virginia Medical School. She is qualified as an expert in pediatric intensive care in four states, including Illinois.

Dr. Johnston further testified that she has treated approximately 10 to 15 children per year with shaken-baby syndrome (SBS), totaling between 160 and 240 children over her career. She defined SBS as follows: "[It is] a constellation of findings that include subdural, subarachnoid hemorrhage. So, bleeding around the brain, as well as bleeding in the eyes, [and] rib fractures." In addition, she testified that she has studied SBS extensively and has

attended courses on the subject. She noted, however, that she had not previously testified as an expert on SBS or taught any course on SBS. The court qualified Dr. Johnston as an expert in pediatric critical care and, over the defendant's objection, SBS.

Dr. Johnston testified she was Junior's sole caregiver at St. Mary's. Upon Junior's arrival at St. Mary's, he was in shock, had low blood pressure, and had to be resuscitated. Tests showed that Junior had retinal hemorrhaging, several rib fractures, and subdural and subarachnoid hemorrhaging.

Dr. Johnston testified that Junior's retinal hemorrhages appeared to be between several hours and 48 hours old. She testified that retinal hemorrhaging can be caused by a variety of factors, some of which are shaking and CPR, but that she did not believe CPR to be the cause of Junior's bleeding. Dr. Johnston further testified that subdural hemorrhaging can be caused by trauma to the head, whether by shaking or car accident or other force.

Dr. Johnston went on to explain that X rays she had taken of Junior showed that he had both "newer" rib fractures that were 24 to 48 hours old and "older" fractures that were 2 to 14 days old. In addition to her own treatment of Junior, Dr. Johnston reviewed Junior's autopsy and relied on it in testifying. The autopsy confirmed Junior's nine rib fractures. Dr. Johnston testified that Junior had been shaken at least twice over a period of several weeks in order to cause his injuries. She explained that broken ribs are consistent with shaking because the head is the heaviest part of a baby, so that one need not grip a baby very tightly when shaking it in order to break the ribs. She also noted that a radiologist would not have found broken ribs on a chest x ray for pneumonia because bone x rays require more radiation than chest x rays. A child with broken ribs would generally manifest its pain through fussiness. In light of both her treatment of Junior and the autopsy's findings, Dr. Johnston testified that Junior died from cerebral herniation associated with brain swelling as a result of shaking. She opined that, within a reasonable degree of medical certainty, Junior died

from SBS.

A certified copy of the autopsy was admitted over the defendant's objection. The court noted that the report was nontestimonial and was a business record and that, therefore, the creator of the report, Dr. Mark LeVaughn, need not testify.

Erika testified that she never shook Junior or lost her temper with him. She never saw the defendant get violent with Junior, either. There were a few times, however, when Erika found bruises on Junior after he had been left alone with the defendant. One time there was bruising on Junior's legs and the defendant said that it was from changing Junior's diaper and that he must have held on to the baby too tight. The second time there were bruises on Junior's right arm and wrist, and the defendant said that he turned the baby over when he started choking on formula.

Jeffery's sister, Yvonne Reid, testified that she saw the defendant and his family nearly every day. She further testified that both parents were loving to Junior and that she never saw anyone strike the baby but that she saw the same bruises on Junior as Erika did. Yvonne did say, however, that the defendant had a temper.

Dr. Christopher Ballard was Junior's doctor from birth onward. After Junior's discharge from the hospital on December 22, 2007, Dr. Ballard had three appointments with Junior, two of which involved chest x rays. One x ray was taken on December 29, 2007, and a second on January 21, 2008, both looking for signs of pneumonia. Dr. Ballard testified that neither he nor the radiologist saw any cracked bones or ribs on the x rays. Dr. Ballard's last appointment with Junior was on January 29, 2008, for an ear infection. Dr. Ballard testified that Junior appeared to be in good health for a premature baby.

Deidre Speith, a developmental therapist, testified that she had four visits with the Smith family. On her January 29, 2008, visit, she noted that Junior was irritable and cried more than he had on previous visits. She noted, however, that Junior was recovering from

a respiratory infection at the time of her last visit.

Detective Rick White of the Illinois State Police was assigned to Junior's case. On the night of February 4, 2008, White went to St. Mary's Hospital and spoke with doctors, the defendant's two sisters, Erika, and the defendant in order to determine what had happened to Junior. According to White, even before the defendant sat down, he began saying that he could not vouch for his wife and that he could not be certain that she did not hurt the baby. The defendant said that after Erika left for the library, he checked on Junior and the baby was more limp than usual and his breathing was slow. The defendant told White that he started CPR and called Erika and then 9-1-1. The defendant then changed his story and said that he did not do CPR but instead flicked Junior on his feet. The defendant said that he cleared Junior's mouth and nose of blood with a bulb syringe while Erika performed CPR and that he might have used too much force with the bulb syringe. Then the defendant stated that he did not think Erika could have hurt Junior. In his testimony, White emphasized that the defendant changed his story numerous times during the course of the conversation. The defendant mentioned his history of anger management issues but remained calm and talkative throughout his conversation with White.

White interviewed the defendant again on February 8, 2008, at the Knox County Detention Center. White and a fellow detective, Agent Harms, advised the defendant of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), which the defendant acknowledged he understood. The defendant signed a written waiver of his constitutional rights prior to the interrogation. The interview was recorded, but the audio quality of the recording is so poor in places that it is difficult, if not impossible, to determine what is being said.

White testified that, during this interview, the defendant denied hurting Junior and said that he no longer believed that Erika could have hurt Junior. Instead, the defendant told

White that he believed that the EMT who picked up Junior did not support the baby's head and that caused Junior's injuries. Then the defendant changed his story and said that on February 4, 2008, he had been sleeping but Junior kept crying. The defendant got up and told Junior to shut up. The defendant then said that he shook Junior once. The defendant demonstrated the action on a soda bottle in the interview room. The defendant said that the shaking caused Junior's head to go all the way back and then all the way forward. The defendant said that after shaking Junior, his breathing slowed. The defendant apologized to Junior. The defendant called Erika once he realized how slow the baby's breathing had become. By the time Erika got home, Junior had stopped breathing. The defendant said that February 4 was the only time he had ever shaken Junior. The defendant did not testify at the trial.

The court found the defendant guilty of both counts of first-degree murder and one count of aggravated battery of a child. A sentencing hearing was held on January 16, 2009. At the sentencing hearing, the defendant's half-sister, Jennifer Ralston, testified that the defendant was a good parent to his children. She had never seen the defendant lose his temper with children, and she trusted him with her own children. Another half-sister of the defendant, Yvonne Reid, testified that the defendant's problems are rooted in his own difficult childhood. She testified that he takes care of his children, even supporting a child that is not biologically his. Reid said that the defendant told her that he did not know what had happened to Junior. In his statement to the court, the defendant said he was sorry for what had happened and asked for mercy.

The court found no factors in mitigation and found the facts that the defendant was on probation at the time of this crime and that he had prior convictions to be factors in aggravation. The court also found deterrence to be a factor in the defendant's sentence. One of the convictions for first-degree murder and the conviction for aggravated battery of a child

were vacated, and the court imposed a sentence of 40 years' imprisonment on the remaining first-degree murder conviction.

The defendant filed a motion to reduce sentence on January 27, 2009, which was denied on May 1, 2009. The defendant filed a timely notice of appeal on May 5, 2009. On appeal, the defendant makes three arguments: (1) the circuit court erred in admitting an autopsy report without requiring the pathologist to be subject to cross-examination, (2) the court erred in qualifying Dr. Santa Johnston as an expert in SBS, and (3) the defendant's sentence of more than twice the minimum term was not justified.

First, the defendant argues that he was denied his right to confront a witness against him when the court allowed Dr. Johnston to testify at the trial regarding an autopsy performed by Dr. Mark LeVaughn. Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), the defendant claims that the autopsy report contained testimonial statements and that Dr. LeVaughn should have been subject to cross-examination. The defendant raised this issue in a pretrial hearing as well as at the trial. A ruling on the question of whether the defendant was denied the right to confront a witness against him is subject to *de novo* review. *People v. Sutton*, 375 Ill. App. 3d 889, 897 (2007), *aff'd*, 233 Ill. 2d 89 (2009).

In *Crawford*, the Supreme Court ruled that where testimonial hearsay is offered at a trial, the right of confrontation is required unless the witness is unavailable and the defendant had a previous opportunity to cross-examine him or her. 541 U.S. at 68. *Crawford*, however, did not articulate a comprehensive definition of "testimonial" statements. The Court did provide that business records are, and historically have been, nontestimonial. *Crawford*, 541 U.S. at 56.

Whether an autopsy is a business record, and therefore outside of the scope of *Crawford*, has been previously addressed by Illinois courts. In *People v. Moore*, 378 Ill. App. 3d 41 (2007), the court held that autopsy reports are business records and therefore do

not implicate *Crawford*. The *Moore* court looked to the statute governing the admissibility of the medical examiners' reports and noted that autopsy reports, kept in the ordinary course of business in the coroner's office, are admissible as "*prima facie* evidence of the facts, findings, opinions, diagnoses and conditions stated therein." *Moore*, 378 Ill. App. 3d at 50 (citing 725 ILCS 5/115-5.1 (West 2002)). Further, the *Moore* court noted that Illinois courts consistently held autopsy reports to be business records before *Crawford*. *Moore*, 378 Ill. App. 3d at 51. Thus, the court concluded that the autopsy report should be treated as a business record and that the defendant was not denied his sixth amendment right to confrontation. *Moore*, 378 Ill. App. 3d at 50-51.

A second Illinois case addressing the admissibility of autopsy reports in light of *Crawford* is *People v. Cortez*, 402 Ill. App. 3d 468 (2010). The defendant in *Cortez* relied on *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S. Ct. 2527 (2009). *Melendez-Diaz* held that drug analysis certificates were testimonial hearsay because they did "precisely what a witness does on direct examination." 557 U.S. at ____, 129 S. Ct. at 2532. Thus, the certificates implicated *Crawford* and required the author of the certificates to be subject to cross-examination. 557 U.S. at ____, 129 S. Ct. at 2532. In rejecting the defendant's argument that the *Melendez-Diaz* rule should be extended to autopsy reports, the *Cortez* court noted, "[T]his court has previously held that autopsy reports are business records and do not implicate *Crawford*." *Cortez*, 402 Ill. App. 3d at 474. The *Cortez* court went on to say that the autopsy report was created for the " 'administration of [the medical examiner's] affairs' " and was not prepared solely to establish an element of the offense for which the defendant was charged. *Cortez*, 402 Ill. App. 3d at 474 (quoting *Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2539-40). In light of *Cortez* and *Moore*, we also find the autopsy report in question to be a business record, because it was prepared in the normal course of the medical examiner's business and was not prepared solely for litigation. See 55 ILCS 5/3-3015 (West

2008) (stating that autopsies are to be performed any time a death is unexplained); see also 55 ILCS 5/3-3013 (stating that preliminary investigations are to be performed by a coroner when the decedent is not attended by a licensed physician).

It is also settled law that the prohibitions against the admission of hearsay do not apply when an expert testifies to facts and data that are not previously admitted into evidence for the purpose of explaining the basis of his or her opinion. *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009). In *Lovejoy*, a medical examiner testified about the contents of a toxicology report conducted by another toxicologist. 235 Ill. 2d at 141. The medical examiner testified that the contents of the toxicology report, when combined with his own observations from the autopsy, aided him in determining the decedent's cause of death. *Lovejoy*, 235 Ill. 2d at 141. In allowing the medical examiner to testify to the contents of the toxicology report, the court stated, " 'While the contents of reports relied upon by [testifying] experts would clearly be inadmissible as hearsay if offered for the truth of the matter asserted, an expert may disclose the underlying facts and conclusions for the limited purpose of explaining the basis for his opinion.' " *Lovejoy*, 235 Ill. 2d at 143 (quoting *People v. Pasch*, 152 Ill. 2d 133, 176 (1992)).

In the instant case, Dr. Johnston testified extensively regarding her own treatment of Junior and her findings and impressions from February 4 to 6, 2008. She testified regarding some of the findings present in the autopsy but did so in order to confirm her diagnosis. Because Dr. Johnston testified to substantial nonhearsay facts based on her own experiences with Junior and his treatment and because she relied on the autopsy report merely to confirm his cause of death, we find this factual situation to be analogous to that in *Lovejoy*. Therefore, even if the autopsy report is not exempt from *Crawford* as a business record, we find that Dr. Johnston's testimony regarding the autopsy report is not hearsay because it served as basis for her own opinion. Thus, the defendant was not denied his sixth

amendment right to confront a witness against him when Dr. Mark LeVaughn was not called as a witness.

The defendant's next argument on appeal is that the court erred in admitting Dr. Johnston as an expert in SBS because the prosecution did not lay an adequate foundation for Dr. Johnston's testimony on SBS nor did the prosecution lay an adequate scientific foundation that Junior's injuries were the result of SBS. The issue of the admission of expert testimony is a matter within the sound discretion of the circuit court. *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). The trial court's decision will not be disturbed absent an abuse of discretion. *People v. Thill*, 297 Ill. App. 3d 7, 11 (1998). An abuse of discretion occurs when no reasonable person would agree with the position adopted by the circuit court. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997).

A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons and his testimony will aid the trier of fact in reaching its conclusions. *People v. Novak*, 163 Ill. 2d 93, 104 (1994). There is no predetermined formula for how an expert obtains specialized knowledge or experience; the expert can gain it through practical experiences, scientific study, education, training, or research. *Novak*, 163 Ill. 2d at 104. " '[F]ormal academic training or specific degrees are not required to qualify a person as an expert; practical experience in a field may serve just as well to qualify him.' " *Thompson v. Gordon*, 221 Ill. 2d 414, 429 (2006) (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 459 (1992)). An expert need only have knowledge and experience beyond that of an average citizen. *Thompson*, 221 Ill. 2d at 429. "Expert testimony is admissible if the proferred expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence." *Snelson*, 204 Ill. 2d at 24.

The defendant argues that Dr. Johnston should not have been qualified as an expert

in SBS because her qualifications do not indicate her expertise in SBS, she has never testified as an expert on SBS, she did not testify to her own experiences treating SBS, and she did not testify to any scientific research or studies to support her testimony about the typical features of SBS. We disagree with the defendant's contention. Not only did Dr. Johnston have 16 years' experience treating critically ill children, she testified that she treated 10 to 15 SBS victims each year. Further, she is familiar with the syndrome, has read about it extensively, and has attended courses on it. The fact that Dr. Johnston had not testified previously as an expert on SBS is irrelevant; every expert has to testify for the first time at some point. Nor is it determinative that Dr. Johnston did not testify explicitly about her "own experiences treating the symptom." The defendant had ample opportunity to ask Dr. Johnston questions about her familiarity with SBS on cross-examination but did not. With her extensive experience, Dr. Johnston did not need to offer, of her own accord, specific experiences she has had treating other SBS victims. Also, Dr. Johnston's medical education at the Medical College of Pennsylvania, her residency at the University of Maryland, and her fellowship at Cornell indicate extensive education, and she testified that she continues to read studies and attend courses on subjects relevant to her specialty. As noted above, the standard for determining whether an expert should be qualified is whether she aids the trier of fact in understanding an issue they otherwise would not have comprehended. Here, we do not find that the circuit court abused its discretion, because Dr. Johnston's education, experience, and knowledge of SBS are not common to laypersons and would aid the trier of fact.

The defendant's third argument on appeal is that his sentence is improper because it is more than half of the maximum term of imprisonment provided for by the sentencing statute (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)). Under section 5-8-1(a)(1)(a) of the Unified Code of Corrections, first-degree murder is punishable by 20 to 60 years' incarceration. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). An individual convicted of first-degree murder is not

eligible to receive good-conduct credit and must serve 100% of his sentence. 730 ILCS 5/3-6-3 (West 2008).

Sentencing courts are vested with wide discretion regarding the penalty appropriate to the particular circumstances of each case. *People v. Hillenbrand*, 121 Ill. 2d 537, 566 (1988). This discretion, however, is not unfettered. *People v. O'Neal*, 125 Ill. 2d 291, 297 (1988). A reviewing court has the power and authority to reduce a sentence imposed by the circuit court where the circuit court's decision constitutes an abuse of discretion. *O'Neal*, 125 Ill. 2d at 297. A reviewing court will not substitute its judgment for that of the circuit court merely because it would have balanced the appropriate sentencing factors differently. *O'Neal*, 125 Ill. 2d at 297. The scope of the appellate court's examination of a sentence is limited to whether the record discloses that the trial court abused its discretion. *O'Neal*, 125 Ill. 2d at 297.

In sentencing the defendant, the circuit court stated that there were no factors in mitigation. In aggravation, the court noted the defendant's prior history of criminal activity, the need to deter others from committing the same crime, and the fact the defendant was convicted of this felony while on probation. Before sentencing him to 40 years' imprisonment, the court made further mention of the defendant's inability to support his children and the defendant's prior misconduct. On appeal, the defendant makes numerous arguments to support his claim that his sentence was an abuse of discretion, including the fact that the court should have considered the gravity of the offense and the surrounding circumstances in mitigation, the unlikelihood that this event would reoccur, his role as a good parent to his other children, his own difficult childhood, and the court's improper reliance on deterrence.

In affirming the sentence, we note that the sentence imposed is in the middle of the possible sentences. The defendant had a criminal history and was on probation at the time.

Moreover, the circumstances of this case are severe; the defendant broke his son's ribs in nine places, caused bleeding in the child's brain and eyes, and ultimately caused his death. Because of the nature of the defendant's current crime, his history of previous crimes, and his ongoing probation at the time this crime was committed, we do not find the sentence imposed by the circuit court to be an abuse of discretion.

For the foregoing reasons, the conviction and sentence imposed by the circuit court of Edwards County are hereby affirmed.

Affirmed.