

Infant deaths case tests pathologists' legal strategy

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Basing murder charges on the pathologist's "rule of three" — which tries to place blame when multiple infants die in one person's care for no apparent reason — is an accepted legal strategy nationwide, forensics and legal experts say.

But it may be quite a challenge for Davidson County prosecutors — without any physical evidence — to convict a young Nashville woman in the deaths of three small children. Such a conviction would be a legal first for Tennessee.

WARD

Prosecutors say charges such as the ones they have leveled against Vernica Shabree Ward have resulted in homicide convictions in several states. They say they should be allowed to present testimony from forensic pathologists who say that, while there is no solid evidence that Ward, 23, harmed any of the three children, all under 18 months of age, the odds are they could not all have died by chance.

Nashville lawyer and legal scholar David Raybin said, however, that that kind of testimony was too "speculative" to be presented to a jury.

Raybin also said it would amount to "propensity evidence," testimony about "apparently unrelated activity" that would make it seem more likely that a person committed a given crime, which is usually not admissible before a jury.

Raybin said the Metro medical examiner, Dr. Bruce Levy, "is making several leaps" when he says he believes Ward killed her son and daughter, when they were 17 months and 6 months old, and a friend's 4-month-old daughter, most likely by smothering.

"Once you start testifying about three separate, totally independent events, in order to say that they are consistent with homicide, I think you're getting beyond the scope of legitimate expert testimony," Raybin said.

"It might be helpful to the police to know that (for investigative purposes), like the results of polygraph tests. But should it be allowed to go to a jury? No."

Levy, who is also Tennessee's chief medical examiner, testified in a pretrial hearing Tuesday that none of the three infant deaths standing alone would justify homicide charges against Ward, but that the three of them together, combined with prior emergency-room visits by two of the children and "glaring inconsistencies" in the stories Ward has told about the third child's death, convinced him that she killed them.

Dr. Mary Case, chief medical examiner for St. Louis County, Mo., gave similar testimony in an earlier hearing in the Ward case, and Robert Hauser, a statistician from the University of Wisconsin, testified Wednesday that the odds were several billion to one against three infants dying for no apparent reason while they are under the care of a single person.

Raybin, who is not involved in the Ward case, said he was skeptical of Hauser's calculations.

Cases like Ward's "may be exceedingly rare, but that doesn't mean that she killed these children," Raybin said.

Dr. Vincent DiMaio, the longtime chief medical examiner for San Antonio, Texas, said Friday that the rule of three had been accepted by most forensic pathologists since the 1980s.

One case of sudden infant death syndrome, a catchall label for unexplained infant deaths, "is no problem," DiMaio said. "Two? It's very unlikely that two SIDS cases would occur in the same family. The third case, it's homicide."

The pathologist said he would make such a determination only after conducting autopsies and "ruling every other possibility out."

DiMaio said judges in other states had given prosecutors leeway in trying to prove infant murder charges because the victims cannot resist or call for help.

A child that small can easily be smothered without leaving any signs of force, said DiMaio, who edits the *American Journal of Forensic Medicine and Pathology*.

Davidson County Assistant District Attorney Brian Holmgren, who is prosecuting Ward, said he was aware of a half-dozen cases involving multiple instances of deaths initially labeled as SIDS that had resulted in homicide convictions in other states.

Ward's lawyers have asked Davidson County Criminal Court Judge Cheryl Blackburn to give their client separate trials on each of the three child-murder charges, and not to allow Levy or other expert witnesses to testify about their belief that the "pattern" of otherwise unexplained infant deaths associated with Ward means she must have caused them.

Metro Public Defender Ross Alderman and Assistant Public Defender Dawn Deaner have said in court documents that Levy's testimony "is based upon pure speculation," without any scientific basis. They also have cited the fact that 4-month-old Alexis Humphrey, the second child who died in Ward's care, was born prematurely, to a mother who used cocaine while she was pregnant.

Two of the children, Alexis and Ward's 17-month-old son Steven, died before Levy moved here to become Metro medical examiner. Their deaths, in 1996 and 1997, were initially blamed on sudden infant death syndrome because autopsies showed no signs of trauma or any other cause of death.

Levy re-examined those two deaths when Ward's 6-month-old daughter Stephanie died in June 1998, after Ward reported finding her unconscious with fluid coming out of her nose and mouth.

The medical examiner testified Tuesday that he did not automatically follow the rule of three, but that he had a "higher degree of suspicion" about Stephanie Ward's death because of the two earlier deaths associated with her mother.

Dr. Charles Harlan, a former Metro medical examiner, said in an interview Thursday that the rule of three was "a handy rule of thumb" for trying to understand multiple infant deaths in one household or involving one caretaker.

But, he said, "however many deaths there are, each case should be looked at on its own merits, in view of the entire medical history. ...

"We develop the best medical evidence that we can find and then let the judicial process take its course. ... Some things are ruled accidental deaths, and some things are ruled first-degree murder that are awful close."

Harlan, who is consulting pathologist for more than 50 Tennessee counties, has had no involvement in the Ward case.

The Tennessee Department of Children's Services has intervened to take temporary custody of Ward's two other sons, born since she became a suspect in the death of her daughter in 1998.

Ward is allowed to visit with those two children only under DCS supervision.

Attorney Thomas Miller, who represents Ward in the child custody case, said Friday that she had told him, "Once I'm found not guilty in Criminal Court, I want my kids back."

Miller said that, in other child-abuse cases he has handled, "once you know to start looking, there is usually lots of physical evidence. In this case there is nothing."

DCS spokeswoman Carla Aaron said Friday that the state agency was likely to remain involved with Ward's children even if she is not convicted of any crime in connection with the deaths of the three infants. "Risk factors" often determine whether DCS tries to take children away from a parent, Aaron said.

The murder charges against Ward have not been set for trial.

Blackburn is scheduled to hear arguments on pretrial issues in the case on Feb. 28.

Ward will remain at liberty under \$25,000 bond in the meantime. She spent more than 10 months in jail awaiting trial before prosecutors agreed in October to lower her bail bond.

Blackburn approved her release from custody on condition that she have no unsupervised contact with children and that she "not become pregnant" before she goes to trial.

