

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Laurens County
Honorable Robert Addy, Jr., Judge
Appellate Court No: 2011-187128

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SC Court of Appeals

THE STATE,

Respondent,

vs.

RICHARD BRANDON LEWIS,

Appellant.

PETITION FOR REHEARING

On May 15, 2013, this Court reversed Appellant conviction for aiding and abetting homicide by child abuse in a published opinion. State v. Richard Brandon Lewis, Op. No. 5132 (S.C. Ct. App. filed May 15, 2013). Pursuant to Rule 221 (a), SCACR, the State respectfully petitions for rehearing on the following points the State believes were possibly overlooked or misapprehended.

In its opinion reversing Appellant's conviction, this Court concluded there was no evidence to support the charge of aiding and abetting homicide by child abuse and that the trial court erred in failing to grant a directed verdict in Appellant's favor. Respondent respectfully submits that this Court overlooked or misapprehended the evidence before the trial court in reaching its conclusion. Respondent submits the record, when viewed in the light most favorable

to the State, contains substantial circumstantial evidence reasonably tending to prove Appellant's guilt of the statutory offense of aiding and abetting homicide by child abuse or from which guilt may be fairly and logically deduced, and that the trial court properly denied Appellant's motion for directed verdict. State v. Smith, 359 S.C. 481, 490 S.E.2d 888 (Ct. App. 2004).

For purposes of the pertinent provisions of the statutory offense, a person is guilty of homicide by child abuse if he or she knowingly aids and abets another person to commit child abuse or neglect and the child abuse or neglect results in the death of the child under the age of eleven. For purposes of the statutory offense, child abuse or neglect is defined as "an act or **omission** by any person which causes harm to the child's physical health or welfare." Section 16-3-85(B)(emphasis added). The statute in question also provides harm to a child's physical health or welfare is caused when a person inflicts or **allows physical injury to be inflicted** upon the child or when the person **fails to supply the child with health care** resulting in a physical injury or condition resulting in death. Id.

Respondent submits that this Court overlooked or misapprehended the evidence reasonably tending to prove that Appellant, through omission, allowed physical injury to be inflicted upon the child and failed to immediately respond to the child when he knew the child had been shaken but waited a period of time before taking any action to summon assistance or health care for her. Thereafter, through an act as well as omission, Appellant hid information about the injury and affirmatively misled health care responders and providers such that the victim failed to receive timely and adequate health care, all resulting in the victim's death.

The record before this Court reflects that EMS dispatcher Thompson received a 911 call at approximately 1:30 AM on October 13, 2009, reporting that the 16 month old victim was

breathing but unresponsive. Appellant was present in the room when the 911 call was made and could be heard in the background. (ROA p. 104 - 106; 127). Appellant provided information about finding the victim in her crib and the victim's condition at that time. (ROA p. 105 - 106). Paramedic Calvin Duckett testified that he responded to the scene at approximately 1:40 AM and, upon questioning the adult occupants of the home, was told the victim was breathing and had a pulse but was unresponsive. Duckett requested a medical history and asked about allergies. Duckett was told the victim was normal when put to bed but was later found unresponsive. This

Court might have overlooked the fact that Appellant was present during this exchange about the victim's condition and requests for information about the victim's history of injuries or illnesses for treatment purposes. Appellant stood silent while the responders were informed the victim was normal when put to bed and inexplicably found to be unresponsive without cause when Appellant later checked on her. The inquiry was obviously being made by EMS to determine the cause of the victim's condition and in order to provide appropriate medical care and treatment. Duckett administered Benadryl in case the victim was suffering from a possible allergic reaction. The victim was transported to the hospital in Greenwood. (ROA pp. 38 - 44)

The treating emergency room doctor, Michelle Curry, testified that the victim arrived at the hospital at approximately 2:00 AM. She described the victim as critically ill, limp and unresponsive with shallow and weak respirations but a good pulse and blood pressure. She spoke with the EMS personnel and learned EMS received very little information about the child other than it had been reported to EMS that there was no history of falls, trauma, or illness. EMS concluded the victim was possibly having an allergic reaction. Curry found that the victim did not have a fever but her pupils were unresponsive and her body was limp. She was also found to

have retinal hemorrhages and bruising of different ages to her abdomen, upper and lower back, left shoulder, legs, head, forehead, jaw line, and under her chin. The victim's jaw was tightly clinched. It was Dr. Curry's testimony that the retinal hemorrhages were consistent with non-accidental trauma and child abuse. Dr. Curry was informed the victim had not been ill and had no history of falls. A CAT scan revealed a subdural hematoma to the brain containing enough blood to push the brain across to the opposite side of the skull. (ROA pp. 52-59; 63; 87). Dr. Curry spoke with the victim's mother and Appellant and was told that the victim was in a normal state when put to bed and when checked at 10:30 PM but that Appellant later inexplicably found the victim with her head against the side of the crib and in a limp condition. Dr. Curry spoke with Appellant separately but the victim's mother entered the room during the exchange. Appellant specifically informed Dr. Curry that he was watching television while everyone else in the home slept and that he found the victim unresponsive when he checked on her. Neither Appellant nor the victim's mother offered an explanation for the victim's condition despite repeated inquiry. (ROA p. 65) Dr. Curry testified that the victim would have experienced **obvious** limpness and unresponsiveness. (ROA p. 79). This Court might have overlooked that, in the face of Dr. Curry's findings of non-accidental trauma and despite repeated questioning of Appellant and the mother, Appellant and the mother confirmed the account that the mother put the victim to bed at 10:30, that the victim's mother then went to bed, and that the victim was a little fussy but was otherwise normal at that time. They also affirmed that Appellant checked on the victim at 1:30 AM after watching television and found her limp and unresponsive and EMS was contacted. (ROA p. 83). This Court might have overlooked the fact that Appellant failed to report to Dr. Curry or any of the medical responders or treatment providers that he was aware the

mother was “stressed” because she did not get an anticipated job, that she reacted angrily and physically against Appellant and her other child earlier in the evening, or that he heard and felt the mother stomp angrily into the victim’s bedroom in response to the victim’s whimpering or that the victim began to cry louder and harder once the mother entered the room or that this was followed by loud, broken cries from the victim as though the victim was being shaken. (R. 872-76; 903; 909-12; 991; 944- 948; 997 - 998; SR 2-3; 991). This Court might have overlooked that, despite hearing and believing the mother was shaking the victim to the point that she stopped crying, Appellant did not intervene or immediately check on the victim but waited some ten to fifteen minutes before looking in on the victim. Appellant did nothing to prevent the infliction of physical harm. Despite what he heard and knew, Appellant did nothing to summon health care immediately after hearing the victim being shaken. This Court might have overlooked Appellant’s admission that did not timely tell the truth about what happened because he was in love with the mother and was trying to protect her. (ROA pp. 902 - 917). Along with the mother, Appellant affirmatively hid the truth even though he understood that it was important for medical personnel to know what he heard. (902 - 919). Appellant and the mother either tacitly or overtly agreed to keep this information about the mother’s actions from the medical team responding to and treating the victim. David Crumley confirmed, along with others that the only information Appellant provided from the outset was that he simply found the victim unresponsive in her crib and had no possible explanation for the victim’s condition despite being questioned at the Greenwood hospital about “shaken baby.” (State’s Exh. 30) .

This Court might have overlooked the testimony that Hospital Chaplain Brown testified that Appellant spoke first and was the “talker” about the victim. Appellant reported in the

mother's presence that he was the only person awake and found the victim unresponsive in her crib when he checked on her after watching television. Brown characterized the mother and Appellant as concerned, collected, and united on the "story." (ROA p. 149 - 150).

This Court might have overlooked testimony from all of the medical treatment providers establishing that the trauma from the head injury was so severe that the victim would have exhibited symptoms immediately after the injury and the victim would not appear normal. (ROA pp. 79; 195-96; 211; 251-52; 355; 359-361; 372-373). CAT scans taken over a period of time to determine whether brain swelling was occurring revealed progressively greater swelling to the victim's brain which was ultimately cutting off the blood supply to the victim's brain. (ROA pp. 174 - 76). This Court also might have overlooked Dr. Seigler's testimony that while bleeding from the brain injury was bad, it was the swelling of the brain that was a matter of greater concern. (ROA p. 174-76). This Court might have overlooked Dr. Seigler's opinion that swelling of the brain arises from an injury to the brain **coupled with** a lack of adequate oxygen to the brain over a period of time. (176). Seigler explained when children receive brain injuries of the type suffered by the victim, they often do not receive immediate resuscitation. Dr. Seigler testified that the lack of resuscitation **near the time of the injury** causes the child to experience difficulty breathing leading to a reduction in the oxygen level in the brain and resulting in brain damage. (ROA p. 176) He described the condition as one involving the injury **combined with the lack of immediate resuscitation**. (176) In an effort to treat the brain injury, Seigler placed the victim on a breathing machine, administered blood pressure and anti-seizure medication, and used cooling blankets to protect the victim's brain. (193). However, his efforts were not successful. Seigler stated that the only medical history provided was that the victim was fine

when put to bed but was later inexplicably found with the symptoms described. (ROA p. 195).

The evidence establishes that Appellant was aware the victim's mother was angry about a number of events that occurred earlier that day and reacted in an uncharacteristically physical and violent manner toward Appellant and the other child in the home. He was also aware the victim was teething and fussy and that the mother's patience with the victim was wearing thin.

Appellant, who was sitting in a room adjoining the victim heard the mother stomp into the victim's bedroom in response to the victim's cries in such an angry manner that he could feel the vibration from the footsteps. This was not an injury committed in silence. Appellant heard the victim being shaken and injured and allowed the injury to be inflicted. Appellant then did not immediately respond to the aid of the victim but allowed her to languish in her crib for a period of time when health care was crucial despite what he heard transpire. Appellant also acknowledged that he failed to tell the first medical responders as well as the medical providers what happened even though the injuries the victim suffered were obvious and severe. Appellant knew the victim was gravely ill and despite his acknowledgment that it was important for the medical care providers to have information about the victim's history for treatment purposes. Along with the mother, Appellant affirmatively misled everyone during the critical time when resuscitation could have been provided to the victim and did so with the intent to protect the mother from being charged with the crime. The victim died as a result of the injury and lack of timely resuscitation. Appellant and the mother were interlocked from the beginning in covering up the truth about what occurred to the victim thereby thwarting efforts to provide the victim with adequate and timely medical treatment, advancing the crime, and ultimately causing the victim's death.

The statute in question makes it clear that child abuse can be committed by either an act or omission. State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (2004). It also makes clear that harm may occur when a person commits physical injury or allows physical injury to occur. It further makes clear that harm may occur when a person fails to provide health care to the child and the failure causes physical injury or condition resulting in death. The State submits that just as in Smith, Appellant and the mother were the only two individuals in proximity to the victim at the time the injury. Both Appellant and the mother reported to medical care providers that the victim had not fallen or hit her head and that they were not aware of what would have caused the victim's condition. Just as in the Smith case, the severity of the victim's injury was immediately and readily apparent. Just as in Smith, Appellant and the mother engaged in a cover-up of what occurred to the victim by repeatedly denying they knew what would have caused the victim's condition, ultimately resulting in the inability of first responders and treatment providers to provide the proper health care treatment leading to the child's death. Additionally, in this case, Appellant failed to respond to the child after he was aware the injury had been inflicted such that timely health care was not summoned for her.

Respondent also submits that this Court improperly rejected the evidence of flight and suicide. Both matters were tied to the crime and were proper for consideration as evidence of consciousness of guilt. State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011).

In regard to this Court's finding that the State failed to present evidence of the requisite mental state for aiding and abetting, the State submits that, consistent with the dissent in this case, the circumstantial evidence presented at trial was sufficient to deny the directed verdict motion. It has been recognized that the State will rarely have proof of intent by direct proof but

will necessarily rely on facts and circumstances from which intent must be inferred. See State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001).

Accordingly, coupled with the arguments raised in the Final Brief of Respondent and during oral argument, Respondent respectfully requests that the panel reconsider this matter, vacate the opinion and affirm Appellant's conviction.

Respectfully submitted,

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PROOF OF SERVICE

I, Angela Bennett certify that I have served the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, C. Rauch Wise, Esquire, 305 Main Street, Greenwood, South Carolina 29646.

I further certify that all parties required by Rule to be served have been served.

This 30th day of May, 2013.



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