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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5995

THE STATE,

RESPONDENT,

V.

KAYLA MARIE COOK,

APPELLANT

APPELLATE CASE NO. 2019-001417

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Appellant, Kayla Marie Cook, respectfully requests that this Court grant rehearing. On June 28, 2023, this Court affirmed Appellant's conviction for homicide by child abuse. State v. Cook, No. 2019-001417, 2023 WL 4219434 (S.C. Ct. App. June 28, 2023). In this trial for homicide by child abuse a majority of this Court found that the trial judge's instruction sufficiently cured the error of admitting hearsay testimony by an investigator as to what Appellant's five-year old daughter said to a forensic interviewer that reinforced to the investigator that Appellant caused the three-year old minor's death. Counsel respectfully submits that the majority opinion misapprehended the testimony by

characterizing it as nonspecific. The hearsay testimony specifically indicated that Appellant's own daughter thought her mother caused the death of the three-year old minor.

Additionally, counsel respectfully submits that the majority opinion, in finding overwhelming evidence showing that Appellant was the only person who could have "done it," overlooked the fact that, in addition to the conflicting expert testimony about whether the injuries were accidental or intentional, there was conflicting expert testimony about the time frame of when the fatal injuries occurred. The time frame was an important factor for the jury to consider in determining who caused the fatal injuries. The improper inadmissible hearsay testimony went to the critical question the jury had to decide as to who caused the injuries. The curative instruction was insufficient to remove the prejudice to Appellant. The error in admitting the hearsay testimony from the investigator that Appellant's daughter, who did not testify at trial, provided information that Appellant caused the fatal injuries to the three-year old was so grievous that the extreme measure of a mistrial was required to meet due process.

This Court additionally found that evidence of the three-year old minor's arm injury from two to four weeks earlier was admissible. First, counsel respectfully submits that this Court overlooked the fact that evidence and testimony about the prior arm injury was admitted for the limited purpose of proving the extreme indifference element of homicide by child abuse for failure to seek medical care. (R. p. 176, line 18 – p. 177, lines 1-22). The State did not prove that the failure to seek medical care for the arm injury was relevant as the State failed to show that the arm injury was intentional, failed to show who caused the arm injury and failed to show that Appellant should have sought medical care. The failure to seek medical care for the arm injury does not rise to the level of extreme indifference to human life, as required as an element of homicide by child abuse. The failure to seek medical care for the arm injury did not contribute

to the death of the three-year old. The State failed to prove that the prior arm injury was relevant.

If this Court finds that the State showed that the failure to seek medical care for the prior arm injury was a relevant prior bad act, the State failed to show the failure met an exception to Rule 404(b), SCRE. "Extreme indifference is in the nature of a culpable mental State ... and therefore is akin to intent." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). Again, the evidence and testimony about the prior arm injury was admitted for the limited purpose of proving the extreme indifference element of homicide by child abuse for failure to seek medical care. (R. p. 176, line 18 – p. 177, lines 1-22). The failure to seek medical care for the prior arm injury, however, does not establish intent to commit homicide by child abuse. The failure to seek medical care in the present case is clearly distinguished from the evidence of unquestionable prior abuse discussed in State v. Martucci, 380 S.C. 232, 252–53, 669 S.E.2d 598, 609 (Ct. App. 2008).

Second, counsel respectfully submits that this Court, in addition to overlooking the fact that the arm injury was generally inadmissible as irrelevant by not rising to the level of extreme indifference, and inadmissible as propensity evidence, also overlooked the fact that testimony of the neighbor, Miriam Myers, went further than the limited purpose of allowing the State to show failure to seek medical care. The trial judge erred in allowing the neighbor to testify that Appellant told her that the three-year old was saying Mommy caused the arm injury and pointing to Appellant when the arm injury was only allowed by the trial judge to show that Appellant failed to seek medical care. (R. p. 385, line 20 – p. 386, lines 1-11). The portion of the neighbor's testimony about what Appellant told her the minor said about who caused the arm

injury is inadmissible as both hearsay and propensity evidence that does not meet an exception of Rule 404(b). Counsel respectfully seeks rehearing.

1. **The trial judge erred by failing to grant a mistrial when the lead detective informed the jurors that Appellant's older child, who did not testify, provided evidence that "reinforced" that Appellant caused the death of Minor.**

At trial Agent Trista Baird, a lieutenant in the child fatality unit for the South Carolina Law Enforcement Division (SLED), testified that on December 18, 2017, she went to Springs Memorial Hospital in response to a call from the Lancaster Police Department seeking assistance related to Minor's death. (R. p. 592, lines 19-21). Agent Baird testified about her investigation including her interviews of Scotty Schroeder, the father of the deceased minor, Tracy Schroeder, the paternal grandmother, and Appellant. (R. 593, lines 4-12). Agent Baird attended the autopsy the next day on December 19, 2017. (R. p. 598, lines 4-6). The arrest warrant for Appellant was obtained the same day on December 19, 2017. (R. p. 896). Agent Baird testified that on December 28, 2017, she went to "the Palmetto citizens Against Sexual Assault Center and observed a forensic interview." (R. p. 601, lines 9-12). She explained that "[f]orensic interviewers are just trained interviewers that talk to children." (R. p. 601, lines 13-16).

The prosecutor began to question Agent Baird about information Appellant's five-year old daughter gave the forensic interviewer and the following took place:

> Q. And you can't say what she said, but was Phoebe [Appellant's older child] able to give the interviewer some information about this case?
>
> A. She was. The forensic in - -
>
> Mr. Burton: Objection, your Honor. None of what Phoebe said is admissible in this court under criminal.
>
> Solicitor Campbell: We agree.

The Court: I understand that, and to the extent she's going to say what she said I'd sustain it. But if she's just asking preliminary it's okay. So overruled.

Solicitor Campbell: We are. We're going directly from the case, your Honor.

Although the experienced prosecutor agreed that the Statements Appellant's daughter made to the forensic interviewer were inadmissible, she continued to elicit hearsay testimony by asking:

Q. Was she able - - you can't say what she said at all, okay? But was she able to give you information?

A. Yes. The forensic interview, along with all the other evidence in the case, reinforced the fact that [Appellant] did cause [Minor]'s death.

Mr. Burton: Objection, your Honor. This is ridiculous.

(R. p. 601, line 17 – p. 602, lines 1- 9). By asking the agent if Appellant's daughter was able to give her information the prosecutor knowingly elicited the highly prejudicial improper hearsay testimony that daughter provided information that reinforced to the investigator that Appellant caused the three-year old minor's death. Notably, trial counsel moved in limine to exclude the forensic interview of Phoebe, which was granted by the judge without opposition from the State. (R. p. 14, lines 15-22).

The judge heard argument outside the jury's presence. R. 602, ll. 10-11. Immediately, the judge admonished the prosecutor, "You can't do that. That's - - that's backdooring what was said all day long. You can't do that, you know that." R. 602, ll. 12-14. Apparently reading from an unnamed case, the solicitor defended Agent Baird's response: "Your Honor, in reading this it says that he based all his information, he did not directly relate any Statements made by the child so I had the opportunity to cross-examine and that ... to challenge the State's witness they said that they got information from the child and then took action, which was getting an arrest warrant. And they said that was okay." R. 602, ll. 15-23. The judge explained to the solicitor

that the question posed by the solicitor, and the answer given, violated the hearsay rule, which was the objection. R. 603, ll. 1-4. Thereafter, trial counsel moved for a mistrial, explaining, "I don't think we can come back from that." R. 603, ll. 8-11.

The trial judge denied the motion for mistrial ruling it was "not manifested necessarily at this juncture," and noted he would "give a curative instruction." (R. p. 603, lines. 15-22). The judge stated that he would "strike that answer from the record" and "tell the jury they're not to consider it." (R. p. 603, lines. 17-19). Trial counsel noted that "[i]n order to protect the record, [he] must accept [the judge's] curative instruction," but he objected that it was not enough. (R. p. 603, line 25 – p. 604, lines 1-2). When the jury re-entered, the judge informed the jurors as follows:

> Mr. Foreman, ladies and gentlemen of the jury, the witness's last response to the question posed to her is stricken from the record. You may not and shall not consider it at all in your deliberations, when you're told to begin your deliberations. And that's your job to make sure that's not part of the jury's deliberation, okay, sir?

(R. p. 607, lines. 6-12).

The trial judge correctly sustained trial counsel's objection to Agent Baird's testimony. The Statement Appellant's older child allegedly made during a forensic interview was impermissible hearsay evidence, and no exception applied. Although the judge struck the testimony and ordered the jurors to not consider it during deliberations, the instruction was insufficient in connection with the grave error. Based on the facts of this case, no instruction could cure the error, and a mistrial was required.

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). "While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a

mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced." State v. White, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006) (citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)).

Appellant's trial was a classic "whodunnit?" There was no question Minor was under eleven years old and died as a result of blunt force trauma. The question for the jury was who inflicted the fatal injury – Appellant or Scotty. While the State's expert witnesses narrowed the window of time for infliction of the injury to when Appellant was the only adult with Minor, the defense presented an expert in forensic pathology who broadened the window to include when Scotty was the only adult with Minor. Further, the evidence showed Scotty was physically violent with Appellant the day immediately preceding Minor's death and in the hours just before he was alone with Minor. This was not a case of overwhelming evidence of guilt. Further, the defense forensic pathologist testified that he was unable to say to a reasonable degree of medical certainty that Minor's abdominal injuries, which caused her death, were inflicted, rather than accidental. Therefore, the jury was confronted with the additional question of whether Minor's fatal injuries were inflicted by someone or the result of a terrible accident.

Through Agent Baird, the State presented an additional witness against Appellant – her own daughter. While the State chose not to call the daughter as a witness during the trial, the State elicited the damaging testimony from Agent Baird. Specifically, Agent Baird claimed what daughter said during her interview "reinforced the fact that [Appellant] did cause [Minor]'s death." Although the trial judge instructed the jurors to disregard the testimony, there was simply no way for any juror to do so. According to Agent Baird, Appellant's own daughter told the forensic interviewer about matters and conduct that "reinforced" that Appellant caused

Minor's death. The jurors simply could not ignore such powerful evidence in a case where the identity of the culprit was in dispute.

In affirming the conviction this Court found the trial judge properly sustained Appellant's objection to Agent Baird's hearsay testimony. A majority of this Court, however, found the judge's instruction cured the error writing:

> Here, we find the trial court's instruction sufficiently cured the error of Agent Baird's testimony. The trial court sternly instructed jurors not to consider the testimony and reinforced this admonition during its final instructions to the jury, stating, "[A]ny evidence that has been stricken from the record ... may not be considered by you in this case. You must treat it as if it was not presented at all." Agent Baird's testimony inferred that Cook's five-year-old daughter gave investigators reason to believe Cook harmed Minor, but the testimony was not specific and was not alluded to again during trial. Coupled with the curative instruction, we find the testimony does not rise to the extreme, urgent, and grievous level necessitating a mistrial. See State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (noting that to cure error, "the jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations"); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

State v. Cook, No. 2019-001417, 2023 WL 4219434, at *4 (S.C. Ct. App. June 28, 2023).

Respectfully, the majority opinion misapprehended the testimony by characterizing it as nonspecific. The hearsay Statement specifically indicated that Appellant's own daughter thought her mother caused the death of the three-year old minor. It is difficult to imagine testimony more specific and harmful than the hearsay testimony elicited by the prosecutor in this case.

The majority also wrote:

> The dissent characterizes this case as a classic "Whodunnit?" However, overwhelming evidence shows that Cook was the only person who could have "done it." There was testimony that Father left before Cook woke up at 6:30 a.m. Cook testified that Minor was "completely normal" that morning when Cook woke her up. Minor died at the hospital at 1:32 p.m. Dr. Janice Ross testified Minor's injuries would have caused her death within two hours. Dr. Susan Lamb

> testified the major contributors to Minor's death, the abdominal hemorrhage and the brain injury, were inflicted upon her no more than two hours before her death. Dr. Amy Durso testified Minor's injuries would have led to her death in one hour or less. Moreover, Sergeant Jodi Sims testified the police investigation showed that Cook was the only one in the house with Minor on the morning of her death and was "the only one that could have caused her death."
>
> Cook argues Dr. Batalis "was unable to say to a reasonable degree of medical certainty that Minor's abdominal injuries, which caused her death, were inflicted, rather than accidental. Therefore, the jury was confronted with the additional question of whether Minor's fatal injuries were inflicted by someone or the result of a terrible accident." While Dr. Batalis Stated the abdominal injury, if accidental, was the type that would have come from a high-speed car wreck or falling off a balcony, there was no evidence presented nor was there any allegation that Minor was in a high-speed car accident or fell off a balcony in the days before her death. Experts testified the injuries that caused Minor's death were not accidental. Dr. Ross testified Minor suffered a blunt force injury to her head that could not have been caused by a fall. Dr. Lamb testified the bruising around Minor's ears and eyes were caused by Minor being hit "upside the head." Dr. Durso Stated Minor's injuries could not have been caused by a dog, other children, or a fall.

State v. Cook, No. 2019-001417, 2023 WL 4219434, at *4–5 (S.C. Ct. App. June 28, 2023).

Respectfully, in finding overwhelming evidence showing that Appellant was the only person who could have "done it," the majority overlooked the fact that, in addition to the conflicting expert testimony about whether the injuries were accidental or intentional, there was also conflicting expert testimony about the time frame of when the fatal injuries occurred. The time frame was an important factor for the jury to consider in determining who caused the fatal injuries. The improper inadmissible hearsay testimony went to the critical question the jury had to decide as to who caused the injuries.

Respectfully, the dissent correctly noted:

> As highlighted in Cook's appellate brief, this is a classic case of "Whodunnit?". The facts presented showed Minor passed away as a result of blunt force trauma.

> One expert testified the injury occurred while Minor was in Cook's care, while another expert expanded the timeframe to include when Minor was with Father. Additionally, one of the experts was unable to say to a reasonable degree of medical certainty whether Minor's injuries were intentionally inflicted by someone or accidentally incurred. Therefore, the jury was confronted with the question as to whether Minor's injuries were inflicted by Cook, Father, or were accidental. To add to this question, the lead investigator interjected a statement from Cook's own daughter that she believed Cook committed this crime. Once it was clear the prosecution was attempting to produce information from the forensic interview that would be inadmissible hearsay, Cook objected. Though the prosecution ensured it was not delving into this territory, as too often happens in criminal cases, the prosecution's next question directly resulted in the inadmissible response. The trial court admonished the prosecution for seeking to "back-door" the daughter's interview. The lead investigator's statement was clearly inadmissible by all legal standards because it was blatant hearsay. To add even more prejudice to Cook, her daughter did not testify at trial and was not subject to cross-examination.

State v. Cook, No. 2019-001417, 2023 WL 4219434, at *6 (S.C. Ct. App. June 28, 2023)

The curative instruction was insufficient to remove the prejudice to Appellant. The error in admitting the hearsay testimony from the investigator that Appellant's daughter, who did not testify at trial, provided information that Appellant caused the fatal injuries to the three-year old was so grievous that the extreme measure of a mistrial was required to meet due process. As correctly noted by the dissent:

> In this case a mistrial, even though an extreme measure, was the only way to achieve due process. See State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) ("The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way."); see also State v. Nelson, 431 S.C. 287, 312-13, 847 S.E.2d 480, 494-95 (Ct. App. 2020) (standing for the proposition that a trial court should grant a mistrial motion when a defendant is prejudiced and his due process rights are violated). Accordingly, I would reverse and remand for a new trial.

State v. Cook, No. 2019-001417, 2023 WL 4219434, at *6 (S.C. Ct. App. June 28, 2023).

Respectfully, in determining that the instruction cured the error of Agent Bair's testimony, the majority misapprehended the grave implication of the testimony by characterizing it as "not specific." To the contrary, the improper hearsay testimony specifically indicated that Appellant's own daughter thought her mother caused the death of the three-year old minor. Respectfully, in finding overwhelming evidence that Appellant was the only person who could have "done it," the majority overlooked the fact that that there was conflicting expert testimony as to the timeframe of the injuries, creating a question for the jury as to who inflicted the injuries. Counsel respectfully seeks rehearing.

2. **The trial judge erred by allowing the State to introduce evidence that Minor suffered an injury to her arm two-to-four weeks prior to her death where (1) the evidence was irrelevant, (2) the evidence was inadmissible character evidence, and (3) the probative value of the evidence was substantially outweighed by its prejudicial effect.**

During a pre-trial hearing, the trial judge expressed concern about evidence regarding Minor's broken arm. (R. p. 11, lines. 5-11). Although the State agreed Minor's broken arm did not contribute to Minor's death, the State argued the evidence was admissible because Appellant "was in the presence of the child" at the time of the arm breaking. (R. p.11, lines. 12-24). Further, the State claimed the "pediatric forensic pediatrician" "would say that could because all the injuries happened when [Appellant] [was] alone with the child, that that did come into play as to some of her findings." (R. p. 11, line 24 – p. 12, lines 1- 4). The State admitted it had no evidence to refute Appellant's Statement to police that Minor broke her arm by falling. (R. p. 12, lines 5-7). However, the State claimed a desire to present evidence that Appellant "did not take the child to get any treatment for the broken arm," which would have been painful according to the State's experts. (R. p. 12, lines. 7-10). The State also claimed Appellant lied to other people

about having sought treatment for Minor. (R. p. 12, lines. 11-13). The State alleged Appellant's failure to seek "the proper care for the child" was "relevant to this case as a pattern of abuse in the days" prior to her death. (R. p. 13, lines 5-11). The judge withheld ruling on the motion and instructed the solicitor to proffer the testimony before presenting it to the jury. (R. p. 14, lines. 2-13).

After State's witnesses Earlene Cochran, and Dr. Alexander Vinuya testified generally about the injury to the arm without a proffer, the State sought to proffer the testimony of Miriam Myers, Appellant's neighbor, because she had "information about the arm." (R. p. 149, lines 13-23). During the proffer, Myers claimed she saw Minor walking around while holding her arm and elbow. (R. p. 151, lines 9-14). Myers then claimed Appellant told her that Minor "had hurt it by falling off the bed, and that she was telling people Mommy did it, and pointing at [Appellant]." (R. p. 151, lines 14-16). Also, when Myers helped Minor use the bathroom, she accidentally hit Minor's arm, which caused Minor to say "ow, ow, ow, ow, ow!" (R. p. 151, lines 22-25). This occurred within "two or three weeks" of Minor's death. (R. p. 152, lines. 3-5).

Defense counsel moved to exclude the testimony, explaining that while it was uncontested that Minor's arm was broken, the State could not prove Appellant "had anything to do with the broken arm." (R. p. 152, lines. 9-14). Further, defense counsel objected to what Minor said because Appellant was not her biological mother. (R. p.152, lines. 14-18) .

The trial judge questioned the State about any exception to the prohibition on hearsay that would permit a witness to testify about what Minor said. (R. p. 152, lines. 19-22. Further, the judge questioned the State on the relevance of the testimony in light of statute requiring the death of the child to be caused by abuse. (R. p. 152, line 22 – p. 153, lines 1- 10). Finally, the judge

explained that it seemed to him "the probative value is gonna be outweighed by the prejudicial impact" of the testimony. (R. p. 153, lines. 11-15).

The solicitor argued evidence of Minor's broken arm was admissible as a prior bad act. (R. p. 154, lines 5-6). Further, the solicitor argued she was only required to prove by clear and convincing evidence that Minor's broken arm occurred in Appellant's presence. (R. p. 154, lines. 16-21). According to the solicitor, "part of the bad act [was] that she doesn't get treatment for them." (R. p. 154 lines. 22-23). The solicitor claimed Appellant's failure to supply Minor with medical care for the broken arm was "just like that day where she doesn't get help for her immediately" and Minor died. (R. p. 155, lines 15-17). The judge took the matter under advisement. R. 156, ll. 16-18.

Later, the solicitor informed the judge that Appellant discussed Minor's hurt arm during her four-hour police interrogation. (R. p. 176, lines. 12-17). While there was no mention of an actual break, Appellant discussed with police that Minor sprained her arm. (R. p. 176, lines. 12-17). The trial judge ruled that if the State sought to introduce the evidence to show "an ongoing pattern" of "extreme indifference," then he would admit the evidence with a limiting instruction. (R. p. 176, line 18 – p. 177, lines 1- 6). He noted the evidence was not being presented to show Appellant caused the break or that the break caused Minor's death. Instead, the evidence was presented "for the limited purpose of showing that there was an indifference to her care by her failure to give care." (R. p. 176, line 25 – R. p. 177, lines l-6. When defense counsel continued to object, the judge re-iterated that the evidence was admissible coupled with his limiting instruction. (R. p. 177, lines. 11-20).

The next witness, Dr. Janice Ross, the forensic pathologist, explained the autopsy revealed Minor suffered a fracture of her right upper arm, or the humerus. (R. p. 193, lines. 6-9).

The fracture was healing at the time of Minor's death. (R. p. 193, lines. 6-9). This was the only fracture Dr. Ross found. (R. p. 193, lines. 23-24). Finding it difficult to determine exactly when the injury to Minor's arm occurred, Dr. Ross estimated the fracture occurred "[a] few weeks" prior to her death. (R. p. 194, lines. 3-5). Ultimately, Dr. Ross found "two major areas of injury" to Minor – "[t]he swelling of the brain and the hemorrhage in the lower - - right-lower abdomen." (R. p. 211, lines. 13-16). According to Dr. Ross, the "two areas" that "contributed to her death" were the "cerebral edema, due to the beating - - due to the blunt force injury to the head; and this was contributed to by the hemorrhage to the abdomen." (R. p. 212, lines. 15-20). Regarding the head injury, Dr. Ross opined Minor may have been able to survive it if she had received medical treatment "soon enough." (R. p. 211, lines. 17-25). She estimated Minor died within two hours of receiving the injuries to her head and abdomen. (R. p. 212, lines. 7-14. There was no limiting instruction given before, during, or after Dr. Ross's testimony concerning Minor's broken arm.

The child abuse pediatrician, Dr. Susan Lamb, informed the jurors that the fractured arm occurred "at least two weeks prior" to Minor's death and did not contribute to Minor's death. (R. p. 470, line 21 – p. 471, lines 1- 2). There was no limiting instruction given before, during, or after Dr. Lamb's testimony concerning Minor's arm. Additionally, the pediatrician never indicated Minor's fractured arm contributed to her analysis or assisted her in reaching any of her conclusions.

Through one of the lead investigators, Jodi Sims, the State played Appellant's interrogation for the jury. (R. p. 229, lines 2-13; R. p. 231, lines. 23-24; R. p. 237, lines. 23-24; R. p. 238, lines. 10-11; R. p. 238, lines. 20-21; R. p. 239, lines 20-22; State's Exhibit #36). During the interrogation, Appellant informed the police that Minor hurt her arm several weeks

prior to her death. State's Exhibit #36. There was no limiting instruction given before, during, or after Sims' testimony, which laid the foundation for Appellant's Statements made during interrogation concerning Minor's injured arm.

The State called Myers, the neighbor, to now testify before the jury. Myers claimed she saw last Minor "[p]robably the week before" her death. (R. p. 383, lines 22-24). At this point, the judge instructed the jury that the evidence it was about to hear regarding the right humerus was "to be received by [the jury] for the limited purpose, and the only purpose towards whether the State has met what the elements, the statute towards the elements, the statute requiring extreme indifference." (R. 384, lines 12-15). He promised to charge them "about that later, but any consideration of this testimony following in just a moment must be limited to that purpose and that purpose only." (R. p. 384, lines. 15-18). Defense counsel renewed his objection. (R. p. 384, lines. 21-22). Thereafter, Myers again informed the jury that she saw Minor "in the weeks prior" to her death, and that Minor complained when Myers hit Minor's arm. (R. p. 385, lines. 3-5; R. p. 385, lines 9-15). Myers claimed Appellant said Minor hurt her arm when she fell of the bed. R. 385, ll. 16-17. Further, Myers claimed Appellant told her that Minor "was saying that - - and she was saying Mommy did it, and pointing to [Appellant]." (R. p. 386, lines 1-4).

Tracy Schroeder was Minor's paternal grandmother. (R. p. 394, lines. 2-3. Due to Minor's biological mother's drug addiction, Minor was placed in Tracy's custody. (R. p. 395, line 17 – p. 396, l. 25. Shortly after the custody change, Tracy and her husband moved in with Tracy's father-in-law to care for him due to his failing health. (R. p. 397, linea 12-22). Tracy informed the Department of Social Services (DSS) that she would stay in the home of Appellant and Scotty from the hours of 10:00 p.m. until 4:00 a.m. where Minor would reside. (R. p. 399, lines. 1-3; R. p. 419, lines 1-3). She further informed DSS that Appellant would watch Minor

while Tracy worked. (R. p. 399, lines. 1-6) . However, Tracy never stayed a single night in that house. R. 402, ll. 5-6; R. 403, ll. 3-5. She actually claimed she was in the home the night before Minor died. (R. p. 414, line 17 – p. 415, lines 1-3; R. p. 419, lines. 10-13). Eventually, she told the police the truth. (R. p. 415, lines 4-6). In light of Tracy's failure to abide by her agreement with DSS, she was charged with neglect, which was pending at the time of Appellant's trial. (R. p. 416, lines. 2-7).

"Sometime around Thanksgiving," Tracy learned that Minor's arm was injured. (R. p. 405, lines. 2—25). According to Tracy, Appellant and Scotty informed her that "it was a sprain, and they were keeping it wrapped." (R. p. 406, lines 1-5). When trial counsel renewed his objection, the judge instructed the jury as follows:

> Mr. Foreman, ladies and gentleman of the jury, let me remind you, any testimony with regard to the right humerus, or the right arm, is being received solely for the purpose of whether or not the State has presented any evidence with regard to the intent required under the statute for extremely [sic] indifference.
>
> I'll charge you further that you may not consider it as being - - this arm being caused by the defendant. That is not in the evidence towards that regard, and that - - and there's no evidence that that arm had anything to do with this child's ultimate death.

(R. p. 406, lines 11-22).

The State then sought to introduce a series of text messages allegedly between Tracy and Appellant regarding Minor's arm, and the judge overruled trial counsel's objection. (R. p. 409, lines. 3-11; R. p. 892). According to the messages, Appellant informed Tracy that Minor's arm was badly sprained. (R. p. 411, lines. 4-10; R. p. 892). Tracy was forced to admit she was unaware if Appellant or Scotty authored the text messages because it was undisputed the two used the same phone. (R. p. 420, lines. 2-16).

Kerrin Cook, Appellant's sister, saw Minor's arm the day before she died. (R. p. 499, lines. 21-24). She saw no "cause [for] an alarm." (R. p. 499, lines. 20-24). There was no limiting instruction given before, during, or after Kerrin's testimony.

Scotty Schroeder, Minor's father, claimed that Appellant told him that Minor fell off the bed, onto possibly a toy, and sprained her arm. (R. p. 528, line 17 – p. 529, lines 1-9). Minor's arm was swollen with a small bruise "right at the elbow." (R. p. 529, lines. 10-13). "The bruise went away, and the swelling went down." (R. p. 563, line 5). He did not seek treatment for Minor. (R. p. 529, lines. 10-13; p. 530, lines 5-8). When he questioned Minor about her arm, she said, "I'm okay, Daddy." (R. p. 529, lines 14-16). Scotty looked at Minor's arm and found no reason to worry. (R. p. 530, lines 9-15). Minor's arm was moving, and she used it to play with toys. (R. p. 530, lines. 10-12). The few times she complained about her arm, Scotty simply kissed it, and she returned to playing. (R. p. 530, lines 13-15). There was no limiting instruction given before, during, or after Scotty's testimony.

Appellant's neighbor, Jennifer Cochran, recalled that at some unknown time, Minor's arm was swollen. (R. p. 583, line 24 – p. 584, lines 1- 2). There was no limiting instruction given before, during, or after Cochran's testimony.

SLED Agent Trista Baird told the jurors that Appellant said "that at some point before [Minor's] birthday that she had fallen off the bed" injuring her right arm. (R. p. 615, lines. 2-4). There was no limiting instruction given before, during, or after Baird's testimony.

Defense counsel called DSS worker Jennifer Adams as a witness. Adams met with Minor on December 7, 2017. (R. p. 626, lines. 8-12). When Adams hugged Minor, she noticed that Minor "kind of shied away when [she] touched her arm on the back." (R. p. 628, lines 18-21). Adams asked Minor what happened, and Minor responded that she was jumping on the bed.

(R. p. 628, lines 21-22; see also p. 635, lines 15-18 (on cross-examination by the State, Adams testifying that Appellant told her Minor fell of the bed causing injury to her arm). Minor did not cry or "holler out" when Adams touched her arm. (R. p. 629, lines 2-5). Adams attached no importance to the arm. (R. p. 629, lines 13-14). There was no limiting instruction given before, during, or after Adams' testimony.

Contrary to Scotty's claims, Appellant explained she and Scotty were present when Minor fell off the bed and hurt her arm. (R. p. 753, lines. 3-7). Minor's arm did not swell when she first hurt it. (R. p. 734, line. 25 – p. 735, line 1). Minor only complained about her arm when she played too hard or slept on her arm. (R. p. 735, lines. 9-13). There was no limiting instruction given before, during, or after Appellant's testimony.

The State's reply witness, Dr. Amy Durso, a forensic pathologist, also observed a fracture to Minor's right humerus. (R. p. 786, lines. 14-19). According to Dr. Durso, the fracture occurred two to four weeks prior to Minor's death. (R. p. 786, lines 14-22). There was no limiting instruction given before, during, or after Dr. Durso's testimony.

In her closing argument, the solicitor accused Appellant of lying to the police regarding Minor's broken arm. (R. p. 839, lines 9-21). She asked the jurors to recall the testimony indicating that Minor was "telling people Mommy did that." (R. p. 839, lines 12-15). Finally, the solicitor argued that the "time line of events" relevant for the jury's consideration started with Minor's fall from the bed when she broke her arm. (R. p. 851, lines 15-17). This fall occurred "[s]ometime before Thanksgiving." (R. p. 851, lines 15-17). She reminded the jurors that the doctors "testified how painful that would be" despite numerous witnesses testifying that Minor complained little of any pain from her injured arm. (R. p. 851, lines 17-18). During his charge on the law to the jurors, the trial judge failed to limit the jury's consideration of the prior

bad act evidence in any way. (R. p.855, line 24 – p. 871, lines 1- 20). The trial judge erred in admitting testimony and evidence about the prior arm injury.

The indictment alleges, "That Kayla Cook did in Lancaster County, South Carolina, on or about December 18, 2017, cause the death of Minor, a child under the age of eleven, while committing child abuse or neglect upon the child, and the child's death occurred from cerebral edema and/or hemmorage [sic] to the abdominal area, resulting in blunt force trauma to the head and/or abdomen, under circumstances manifesting the defendant's extreme indifference to human life in violation of §16-3-85(A)(1) of the Code of Laws of South Carolina, (1976), as amended." (R. p. 898.) Pursuant to the statute, "'child abuse or neglect' means an act or omission by any person which causes harm to the child's physical health or welfare." S.C. Code Ann. § 16-3-85(B)(1). The statute further provides:

> "harm" to a child's health or welfare occurs when a person: (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment; (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or (c) abandons the child resulting in the child's death.

S.C. Code Ann. § 16-3-85(B).

"Extreme indifference is in the nature of a culpable mental state ... and therefore is akin to intent." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). "[I]ndifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." Id. This Court held extreme indifference was "a mental State akin to intent characterized by a deliberate act culminating in death." Id. Under the statute, the State is not required to prove a defendant acted with the intent to harm; instead the State must prove the defendant performed a deliberate act that he or she knew

would create a risk of death to the child. State v. Phillips, 411 S.C. 124, 135, 767 S.E.2d 444, 449 (Ct. App. 2014) aff'd as modified 416 S.C. 184, 785 S.E.2d 448 (2016).

Relevance

The evidence and testimony in the present case about the prior arm injury was admitted for the limited purpose of proving the extreme indifference element of homicide by child abuse for failure to seek medical care. (R. p. 176, line 18 – p. 177, lines 1-22). The State, however, did not prove that the failure to seek medical care for the arm injury was relevant as the State failed to show that the arm injury was intentional, failed to show who caused the arm injury and failed to show that Appellant should have sought medical care. The failure to seek medical care for the arm injury does not rise to the level of extreme indifference to human life, as required as an element of homicide by child abuse. The failure to seek medical care for the arm injury did not contribute to the death of the three-year old. The State failed to prove that the prior arm injury was relevant.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004).

The evidence and testimony about the prior arm injury and the failure to seek medical care did not establish or make more or less probable some matter in issue in this trial for homicide by child abuse The State failed to show that the arm injury was intentional, failed to show who caused the arm injury and failed to show that Appellant should have sought medical care. The failure to seek medical care for the arm injury does not rise to the level of extreme indifference to human life, as required as an element of homicide by child abuse. The evidence should have been excluded as irrelevant.

Rule 404

If this Court finds that the State showed that the failure to seek medical care for the prior arm injury was a relevant prior bad act, the State did not prove that the failure met an exception to Rule 404(b), SCRE. "Extreme indifference is in the nature of a culpable mental state ... and therefore is akin to intent." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). Again, the evidence and testimony about the prior arm injury was admitted for the limited purpose of proving the extreme indifference element of homicide by child abuse for failure to seek medical care. (R. p. 176, line 18 – p. 177, lines 1-22). The failure to seek medical care for the prior arm injury, however, does not establish intent to commit homicide by child abuse. The failure to seek medical care in the present case is clearly distinguished from the evidence of unquestionable prior abuse discussed in State v. Martucci, 380 S.C. 232, 252–53, 669 S.E.2d 598, 609 (Ct. App. 2008).

In State v. Martucci, 380 S.C. 232, 252–53, 669 S.E.2d 598, 609 (Ct. App. 2008), this Court wrote:

> The prior abuse or neglect at issue was admissible as proof of intent and the absence of accident. The State contended Martucci killed Child while committing child abuse or neglect under circumstances manifesting an extreme indifference to human life. The prior abuse or neglect at issue in the weeks before the infliction

> of the fatal injuries was relevant to the material issue of Martucci's State of mind. Martucci's hostility, cruelty, and abuse toward Child could be established by evidence that, during the weeks before he died, Martucci abused Child by slapping his face, taping his mouth shut, and dunking his head in the bathtub until he choked to stop him from crying. The presence of bite marks and bruises, and the fact that Martucci kept Child's skin covered and rarely let him out of the house in the apparent attempt to conceal the abuse, is further evidence of Martucci's State of mind to inflict the fatal injuries. Because Martucci disputed the motive and intent to commit homicide by child abuse, evidence of the prior abuse or neglect was highly probative of his guilt on the homicide charge. The evidence was necessary to establish a material fact or element of the crime charged.

The failure to seek medical care for a prior arm injury in the present case is strikingly different from the slapping in the face, taping the mouth shut, and dunking the head in the bathtub testimony admitted in Martucci. In the present case there is no connection between the failure to seek medical care for the prior arm injury and the death of the Minor. If evidence about the prior arm injury and failure to seek medical care is a relevant prior bad act, the trial judge erred in admitting the evidence when the State failed to prove an exception to Rule 404b).

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). "In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity." Id. "Thus, evidence of a defendant's other crimes serves the prohibited purpose of showing he has a propensity to engage in criminal behavior." Id. In essence, evidence of other bad acts is not admissible to prove a person's guilt; however, such evidence may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine." Lyle, 125 S.C. at 406, 118 S.E. at 807. "The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be included." Id. "[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny." Id. Judges must resolve the question of admissibility "in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." Id. Therefore, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." Id.

The State failed to prove that the failure to seek medical care for the prior arm injury met an exception to Rule 404(b). The evidence failed to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. While the trial judge ruled that the evidence was admitted for the limited purpose of proving intent in the form of the extreme indifference element of homicide by child abuse for failure to seek medical care, the State did not prove that the failure to seek medical care was logically related to the homicide by child abuse. The trial judge erred in admitting the evidence.

In affirming the trial judge's admission of the prior arm injury and failure to seek medical care this Court wrote:

> This court has held that a defendant's alleged prior acts of abuse toward a minor victim were admissible under the "common scheme or plan" exception in a homicide by child abuse case. See Martucci, 380 S.C. at 256, 669 S.E.2d at 611.[1] "Prior bad act evidence is admissible where the evidence is of such a close

> similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect." *Id.* at 255, 669 S.E.2d at 610. The Martucci court noted when "the perpetrator is the parent or a person with exclusive custody and control over the victim, proving the abuse becomes extremely difficult." Id. at 256, 669 S.E.2d at 610–11. "As a result of the difficulties in proving child abuse, 'evidence which shows a pattern of abuse becomes even more probative than it might otherwise be.' " Id. (quoting State v. Pierce, 326 S.C. 176, 182, 485 S.E.2d 913, 916 (1997)).
>
> Evidence of prior bad acts that are not the subject of a conviction must be established by clear and convincing evidence. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The evidence admitted 'must logically relate to the crime with which the defendant has been charged.' " Id. (quoting State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

State v. Cook, No. 2019-001417, 2023 WL 4219434, at *5 (S.C. Ct. App. June 28, 2023).

The trial judge in the present case did not admit evidence of the prior arm injury and the failure to seek medical care under the common scheme or plan exception. As discussed above, the evidence was admitted for the limited purpose of proving the extreme indifference or intent element of homicide by child abuse for failure to seek medical care. (R. p. 176, line 18 – p. 177, lines 1-22). The evidence is not admissible to show intent or common scheme or plan because the State failed to establish a logical connection between the failure to seek medical care and the homicide by child abuse. The prior injury and failure to seek medical care were wholly unconnected to the homicide by child abuse. The evidence was inadmissible propensity evidence and the State's attempt to improperly show Appellant in a bad light.

This Court wrote, "The evidence showed that Cook hid her failure to obtain medical treatment for Minor's arm injury." State v. Cook, No. 2019-001417, 2023 WL 4219434, at *5 (S.C. Ct. App. June 28, 2023). Any purported concealment about the failure to seek medical care for a prior arm injury still does not provide a logical connection to the homicide by child abuse.

The State presented no evidence of other injuries which might satisfy a pattern of abuse as discussed in Martucci.

Additionally, the specific testimony of the neighbor, Miriam Myers, went even further than the limited purpose of allowing the State to show failure to seek medical care. This evidence was highly prejudicial and the only evidence to indicate Appellant may have caused the injury to the arm.[1] The trial judge erred in allowing the neighbor to testify that Appellant told her that the three-year old was saying Mommy caused the arm injury and pointing to Appellant when the arm injury was only allowed by the trial judge to show that Appellant failed to seek medical care. (R. p. 385, line 20 – p. 386, lines 1-11). The portion of the neighbor's testimony about what Appellant told her the minor said about who caused the arm injury is inadmissible as both hearsay and propensity evidence that does not meet an exception of Rule 404(b).

Rule 403

Alternatively, and without conceding that the evidence of the prior arm injury and failure to seek medical care was inadmissible as irrelevant, and improper propensity evidence, the trial judge erred in admitting it when "its probative value was substantially outweighed by the danger of unfair prejudice." See Rule 403, SCRE. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). Minor's injured arm and

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[1] This Court relied on the testimony writing, "Further, there was clear and convincing testimony from Cook's neighbor that Minor identified Cook as having inflicted the arm injury." State v. Cook, No. 2019-001417, 2023 WL 4219434, at *5 (S.C. Ct. App. June 28, 2023). Respectfully, the issue is not whether Appellant caused the arm injury but whether she failed to seek medical care for the injury and whether that failure constitutes extreme indifference. Regardless, this one hearsay statement does not meet the clear and convincing standard for admissibility as to identity.

Appellant's decision to not seek professional medical treatment for the arm were of low probative value in the homicide by child abuse case. The evidence did not address any of the elements of the offense. Rather, the evidence posed a high danger of unfair prejudice as it was used to argue Appellant was of a bad character because she failed to realize Minor's arm was broken and seek professional medical treatment for it. The evidence posed the high danger of unfair prejudice that the jury would view Appellant's conduct related to Minor's arm as propensity evidence. The evidence posed the high danger of unfair prejudice that the jury would determine Appellant actually caused the injury to Minor's arm, especially in light of the State's closing argument asking the jurors to recall the testimony that Appellant told a neighbor that Minor said, "Mommy did it," in reference to her arm. Knowledge that Minor suffered a broken arm for two-to-four weeks prior to her death without professional medical intervention allowed the jury to render a verdict on an improper one – an emotional reaction to Minor's injury, not the evidence in the case.

Balancing the low probative value of Minor's injured arm against the extremely high danger of unfair prejudice required exclusion of the evidence. The danger of unfair prejudice substantially outweighed the probative value. The trial judge erred in allowing the jury to consider the evidence, which was presented by numerous witnesses over the multi-day trial. The jury did not hear about the injured arm once or twice. The jury heard about the injured arm repeatedly from almost every witness who testified. This was not an error that appeared once and likely disappeared in the recesses of the jurors' memories. Rather, this was an error that permeated the entirety of the trial and left an indelible impression upon the jurors.

Counsel respectfully requests rehearing and a finding that the trial judge erred in refusing to grant a mistrial based on the agent's highly prejudicial hearsay testimony and erred in

admitting evidence of a prior arm injury. Both errors require reversal remand for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
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Division of Appellate Defense
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Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 13th day of July, 2023.

RECEIVED
Jul 13 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

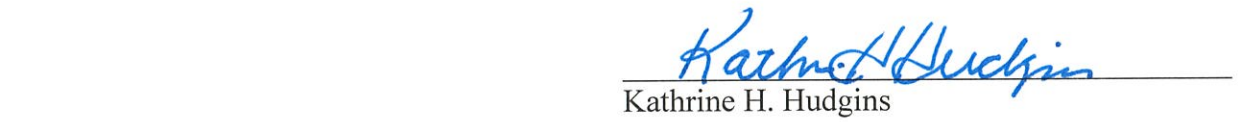
KAYLA MARIE COOK,

APPELLANT

APPELLATE CASE NO. 2019-001417

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Kayla Marie Cook, #381148, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 13th day of July, 2023.



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ATTORNEY FOR APPELLANT

From: Stock, Chris
To: Mark Farthing; Grace Sommer
Cc: Hudgins, Kathrine; Daniel J. Westbrook (dan.westbrook@nelsonmullins.com)
Subject: Kayla Marie Cook 2019-001417 Petition for Rehearing
Date: Thursday, July 13, 2023 4:54:00 PM
Attachments: Kayla Marie Cook 2019-001417 Petition for Rehearing.pdf
Kayla Marie Cook 2019-001417 Petition for Rehearing - AG Cover Letter.pdf

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Mr. Farthing,

Please find attached for service the Petition for Rehearing for Kayla Marie Cook's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330