STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
The Honorable W. Jeffrey Young, Circuit Court Judge

Opinion No. 2013-UP-110 (S.C. Ct. App. filed March 13, 2013)
Appellate Case No. 2011-193927

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEMETRIUS GOODWIN,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals properly affirm the trial court's denial of Petitioner's motion for directed verdict because sufficient evidence was presented establishing Petitioner acted with extreme indifference, thereby satisfying that element of homicide by child abuse?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Petitioner for homicide by child abuse. (ROA p. 236-237) On March 13-18, 2011, Petitioner proceeded to trial before a jury. Kris Hines, Tracy Pinnock, and Nicole Singletary represented Petitioner, and Kathryn Luck Campbell, Joanna McDuffie, and Carter Potts represented the State. The jury found Petitioner guilty, and the Honorable W. Jeffrey Young sentenced Petitioner to twenty-five years' imprisonment. (ROA. p.193, p.196.) Petitioner filed a motion for a new trial and a motion to reconsider the sentence. The trial court held a hearing on May 9, 2011, and Judge Young issued an order denying the motions on June 13, 2011. A timely notice of appeal was served and filed.

On March 13, 2013, the South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. See State v. Goodwin, Op. No. 2013-UP-110 (S.C. Ct. App. filed 3/13/13). Petitioner's request for rehearing was denied on April 18, 2013. A Petition for Writ of Certiorari to the Court of Appeals was submitted on June 19, 2013, and this Return follows.

ARGUMENT

The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for directed verdict because sufficient evidence was presented establishing Petitioner acted with extreme indifference, thereby satisfying that element of homicide by child abuse.

Petitioner argued to the Court of Appeals that the trial court erred in denying the motion for a directed verdict because there was insufficient evidence he showed extreme indifference to human life. However, the evidence showed Petitioner squeezed Victim in a hard hug for approximately two minutes, thereby asphyxiating her and causing her death. This evidence was sufficient to demonstrate extreme indifference, and the Court of Appeals properly affirmed the trial court's denial of the motion for a directed verdict.

In reviewing the denial of a motion for a directed verdict, an appellate court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, it must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. Id. If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the jury. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 172 (2003); State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). The appellate court may reverse the trial court's denial of a motion for a directed verdict only if there is **no** evidence to support the trial court's ruling. State v. Lindsey, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003) (emphasis added).

Here, the State charged Petitioner with homicide by child abuse. A person is guilty of homicide by child abuse if the person "causes the death of a child under the age

of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." S.C. Code Ann. § 16-3-85(A)(1) (2003). "For purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting Jarrell, 350 S.C. at 98, 564 S.E.2d at 367). Our courts have equated it more to the reckless disregard of reckless homicide cases. William Shepard McAninch et al., The Criminal Law of South Carolina 96 (5th ed. 2007). Recklessness is:

> something more than mere negligence or carelessness which indicates inadvertence, which is the failure to exercise due care, sometimes called ordinary care, which means such care as a person of ordinary reason and prudence would exercise under the same circumstances. Recklessness denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.

McAninch et al., *supra* at 196 (quoting State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415 (1979)). See also Jarrell, 350 S.C. at 98, 564 S.E. 2d at 367 ("In this state, indifference 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.").

Petitioner argued the State did not prove intent because he said he did not mean to kill Victim. However, this is not what is required under South Carolina's recognized definition of extreme indifference. If the legislature had wanted to require that type of intent, it could have written the statute more like the murder statute, which requires malice aforethought. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "Malice is the wrongful

intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally and without just cause or excuse." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). In its section regarding the homicide by child abuse statute, South Carolina Jurisprudence specifically states, "Proof of malice aforethought is not required." 23 S.C. Jur. Homicide § 29 (1994). Petitioner confuses the intent required for extreme indifference and the intent required for malice. Extreme indifference only requires the actor has the intent to do a deliberate act, and that act culminates in death. Nothing in the definition of extreme indifference indicates the act itself must be wrongful or done with the intent to cause harm. On the other hand, malice requires the actor to have wrongful intent to injure another. Thus, in this case of homicide by child abuse, Petitioner's admission that he deliberately picked up Victim and squeezed her in a "really tight" hug for two minutes is sufficient to show the intent required for extreme indifference. (R. p.55 lines 5-13; R. p.60 lines 21-24.) The "really tight" hug was the deliberate act that caused the death.

In State v. McKnight, the Supreme Court affirmed the denial of McKnight's motion for a directed verdict on the issue of extreme indifference. 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003). McKnight was charged with homicide by child abuse after taking cocaine while she was pregnant and giving birth to a stillborn baby. Id. at 641-42, 576 S.E.2d at 171. "Given the fact that it is public knowledge that usage of cocaine is potentially fatal, [the court found] the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life." Id. at 646, 576 S.E.2d at 174. McKnight did not have to intend to kill her unborn child by taking cocaine; she recklessly disregarded the risk her conduct created. That act culminated in the death of her baby and was sufficient to

satisfy the intent required under the homicide by child abuse statute. In the case sub judice, it is reasonable to believe that it is public knowledge that squeezing a child tightly until she goes limp could be potentially fatal. Regardless of any intent to harm Victim, Petitioner recklessly disregarded the risk his conduct created and, thus, had the requisite intent to satisfy the homicide by child abuse statute when he deliberately squeezed Victim tightly and she died as a result.

Victim died of asphyxia from squeezing or chest compression. (R. p.29 lines 10-20; R. p.69 lines 19-22; R. p.70 lines 1-5.)) The State proved through Petitioner's statements that he gave Victim a really tight, hard hug that lasted approximately two minutes. (R. p.60 lines 21-24.) Testimony also showed the squeezing caused two of Victim's ribs to fracture. (R. p.73 lines 1-2; R. p.75 lines 1-13.) The medical experts testified the fractured ribs could not have been caused by CPR because one rib was fractured posteriorly rather than anteriorly. (R. p.74 lines 4-7; R. p.76 lines 23-25; R. p.77 lines 1-8.) Dr. Bradley Marcus ruled Victim's death a homicide. (R. p.67 lines 1-5.) He testified the death could not have been caused by Victim's alleged fall down the stairs the day before her death. (R. p.70 lines 22-25; R. p.71 lines 6-25.) Moreover, Petitioner's cousin testified Victim seemed fine when he got back from the store on February 5, 2009, she was not crying, and she was playing normally with his own children after the alleged fall. (R. p.22 lines 15-20.)

The evidence shows Petitioner gave inconsistent statements about what happened and initially attempted to cover up the fact that he squeezed Victim. When Petitioner first spoke to Investigator Dozier of the coroner's office, he reported he called 911 when he first noticed Victim was wheezing but cancelled the call and ran to his cousin's home instead. (R. p.5 lines 16-20.) However, no record of this alleged 911 call exists. (R. p.5

lines 21-25; R. p.6 lines 1-3.) Moreover, Petitioner told Investigator Mauldin he had no phone in the home and no cell phone and he had to ask his cousin to call 911. (R. p.40 lines 22-25; R. p.41 lines 1-13.) In his statement to Investigator Martin, Petitioner also told him he had no way to make contact. (R. p.59 lines 21-25; R. p.60 line 1.) Additionally, no witnesses could corroborate that Victim fell down the stairs the day before she died. Petitioner himself reported he did not see the fall but noticed her lying at the bottom of the stairs crying. (R. p.38 lines 2-10.) Investigator Martin attempted to interview the four-year-old child who was playing with Victim when the fall would have happened, but he was unable to respond to questioning. (R. p.44 lines 19-21; R. p.45 lines 7-20.) Dr. Bradley Marcus testified Victim's injuries were inconsistent with a fall down stairs. (R. p.70 lines 22-25; R. p.71 lines 6-25.) Petitioner also admitted in his statement to Investigator Martin that the day before Victim died, he grabbed her face for swearing and spanked her on her legs because she was spitting on people. (R. p.55 lines 19-23; R. p.56 lines 24-25.) When asked by Investigator Martin why Petitioner did not mention hugging Victim when Investigator Mauldin interviewed him on the day of the incident, Petitioner stated, "I didn't want anyone to think that I had killed her." (R. p.55 lines 24-25; R. p.56 line 1.)

Although Petitioner's medical expert opined Victim died of Waterhouse-Friderichsen Syndrome, the State produced medical experts that contradicted this opinion and agreed with Dr. Bradley Marcus's findings of asphyxia by chest compression as the cause of death. Dr. Jacob Vandersteenhoven, a pathologist, examined the brain and the histological slides and testified no disease was present in the brain or eyes and no signs of cerebral edema existed. (R. p.78 lines 14-15; R. p.79 lines 2-8; R. p.79 lines 9-20; R. p.80 lines 12-14.) Moreover, Dr. Vandersteenhoven agreed that asphyxia was the cause

of death. (R. p.81 lines 15-17.) Additionally, Dr. Olga Rosa testified Victim did not die of Waterhouse-Friderichsen Syndrome based on her review of the autopsy, Victim's medical records, and the statements pertaining to Victim's condition before her death. (R. p.179 lines 1-15; R. p.183 lines 13-15.) Dr. Rosa opined that had Victim actually had the disease, she would have shown signs of fever, lethargy, and purple marks on her skin. (R. p.180 lines 1-13; R. p.182 lines 17-21.) Dr. Rosa pointed out children with this disease deteriorate over a period of time and would not just be playing one morning and then die the same day. (R. p.181 lines 12-17.) Dr. Rosa also agreed with the other medical experts that the cause of death was asphyxia by chest compression.

The State's theory was that Petitioner deliberately squeezed Victim's chest until she went limp. Petitioner's own statements show he deliberately picked up Victim when she was wheezing and hugged her tightly for approximately two minutes. Furthermore, he admitted he squeezed her hard enough to have broken her ribs. (R. p.56 lines 13-15.) Although he may not have intended his act to culminate in Victim's death, viewing the evidence in the light most favorable to the State, the State established Petitioner committed a deliberate act and the child died as a result of that act. That is sufficient to satisfy the extreme indifference element of the offense. The charge of homicide by child abuse was, therefore, properly submitted to the jury. The weight or credibility of the evidence was properly left for the jury as the fact-finders and not the trial court at the directed verdict stage. Thus, ample evidence supported the trial court's denial of the motion for a directed verdict.

The Court of Appeals held that Goodwin acted with extreme indifference, relying on State v. McKnight and State v. Jarrell. Petitioner cites Price v. State, 284 S.W.3d 462, 466 (Ark. 2008), for the proposition that extreme indifference requires actions that

evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim. However, the Supreme Court of Arkansas carefully clarified that "evidence of an actual intent to kill is not required to establish circumstances manifesting extreme indifference to the value of human life." Price, 284 S.W.3d at 468. The State submits the Court of Appeals was correct in determining the State provided sufficient evidence to demonstrate extreme indifference to human life, under both the current South Carolina definition: "a mental state akin to intent characterized by a deliberate act culminating in death[,]" McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting Jarrell, 350 S.C. at 98, 564 S.E.2d at 367), and the Arkansas standard defined in Price that the accused must engage in some life-threatening activity. Under either standard, squeezing a child tightly for approximately two minutes until she goes limp, thereby asphyxiating her, demonstrates extreme indifference to human life. Thus, the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for directed verdict.

CONCLUSION

Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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July 19, 2013

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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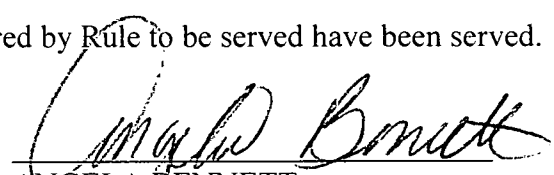
I further certify that all parties required by Rule to be served have been served.
This 19th day of July, 2013.



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