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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Michael S. Holt, Circuit Court Judge

DEMETRIUS A. GOODWIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001205

PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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Did the PCR court err in finding trial counsel provided effective assistance where counsel failed to object to the trial court's confusing jury charge on the definition of extreme indifference in a homicide by child abuse trial?

STATEMENT OF THE CASE

On February 6, 2009, Petitioner ran into the emergency room of Palmetto Health Baptist Hospital in a panic. He was holding the lifeless body of his infant daughter, D.G., and asking for help as D.G. was not breathing. An ER nurse grabbed the child from Petitioner's arms, ran her to the back, and a team of medical professionals work to resuscitate D.G. App. 183-185; App. 191. Tragically, after thirty minutes of attempting to revive the child, D.G. was declared dead. App. 165, l. 10-App. 169, l. 12; App. 173, ll. 12-14.

Petitioner informed medical personnel and police that the prior evening D.G. had fallen down the stairs at a friend's home but seemed fine after the incident. Although he did not see injures to D.G. initially, he noticed some red marks on her forehead and chest while he gave her a bath later that night. Petitioner stated that after arriving home D.G. had an episode of brown vomit and loose bowels with symptoms of tarriness. He placed D.G. in her crib to go to sleep and left for work, returning to the home around eight thirty in the morning the day of D.G.'s death. The day of D.G.'s death she had another episode of brown vomit and, although whiney, appeared fine. He placed D.G. back in her crib and laid down to take a nap. When he woke up, he heard D.G. wheezing. As he picked her up, she let out a small cry as if she was in pain and her body was limp. Petitioner attempted CPR on D.G. before running to a friend's house for help. Petitioner stated that when he was trying to perform CPR, he noticed green mucus coming from D.G.'s nose and a yellowish substance coming from her mouth. Ultimately Petitioner's friend drove them to the hospital while Petitioner held D.G. in his arms. App. 138, l. 12-App. 140, l. 15; App. 171, ll. 5-16; App. 187, l. 7-App. 188, l. 14; App. 274, l. 24-App. 279, l. 13.

An autopsy was performed on February 7, 2009, by Dr. Bradley Marcus to determine D.G.'s cause and manner of death. App. 401, l. 24- App. 402, l. 5. During the autopsy Dr.

Marcus observed two areas of hemorrhaging on D.G.'s rib cage which, in his opinion, indicated a traumatic event that occurred prior to D.G.'s death. Further examination of the ribs showed two non-displaced fractures, one to a posterior left rib and one to a lateral right rib. App. 406, ll. 10-App. 409, l. 9; App. 456, ll. 10-14; App. 462, ll. 21-24. Based on the rib fractures Dr. Marcus opined that D.G. die from asphyxia due to chest compression. App. 428, l. 25-App. 431, l. 4. Outside of the rib fractures, the only other notable findings of the autopsy where areas of hemorrhage on the back of the head underneath the scalp that indicated blunt trauma to the head, some blunt trauma to the abdomen, and focal periadrenal gland hemorrhaging. App. 422, l. 14-App. 423, l. 14.

Following the determination of the cause of death, police went back to interview Petitioner again as "the injuries sustained by D.G. were inconsistent with a fall down the stairs" and he was the last person with D.G. before she passed. App. 283, ll. 7-25. Petitioner's second statement to law enforcement was consistent with his initial statement however he added that when he picked up D.G. he hugged her tight. He stated he did not mention the hug before because he did not want anyone to think he had killed D.G., but that he had held her in a tight hug for about two minutes. He stated he hugged D.G. to try and get a reaction from her. Petitioner, while crying and emotional, repeatedly stated that he had killed his daughter. He later added to his statement that he had not intended to harm D.G. and that he had hugged her for comfort. He stated that he loved D.G. and never meant to cause her any harm. App. 330, l. 14-App. 335, l. 21; App. 343, l. 18- App. 344, l. 17.

Petitioner was indicted during the April 2009 term of the Richland County grand jury for one count of homicide by child abuse. App. 858-859. On March 14, 2011, the State, represented by Kathryn "Luck" Campbell, Joanna McDuffie, and Carter Potts, called the case to trial before

the Honorable W. Jeffery Young and a jury. Petitioner was represented by Kris Hines, Nicole Singletary, and Tracy Pinnock. App. 1.

At trial the defense called forensic pathologist Dr. Stan Kessler to testify regarding D.G.'s cause of death. Dr. Kessler first noted that the adrenal hemorrhaging would not have been caused by trauma unless it was massive trauma, such as that suffered in a train or airplane crash. He testified when there is adrenal hemorrhaging that the pathologist must rule out infection but noted a blood culture was never performed on D.G. He stated that the symptoms D.G. showed prior to her death of nausea, vomiting, collapsing or falling down the stairs, and yellow mucus and pus coming from her nose, were signs of infectious disease that should have been investigated. Dr. Kessler also testified that D.G. lacked the standard signs of asphyxia by chest compression as there were no anoxic changes in the brain, there was no evidence of cyanosis, no petechial hemorrhages, and no cerebral edema. Dr. Kessler reviewed the various tissue slides from the autopsy and identified evidence of infection. Dr. Kessler opined that D.G. died from Waterhouse-Friderichsen syndrome or adrenal shock due to hemorrhagic disruption and dissolution of the adrenal by a Gram-positive bacteria. He ultimately opined that D.G. died from natural causes. App. 570, l. 22-App. 610, l. 8.

Prior to the jury being charged defense counsel requested the trial court charge the definition of "extreme indifference" from State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). The State requested that the court only charge the statute. The court did not rule on the request on the record. The following morning the court announced it believed they had a charge that everyone agreed on and both parties did not object. App. 729, l. 20-App. 732, l. 10. The court subsequently charged the jury as follows,

> And the State must also prove beyond a reasonable doubt that the death occurred under circumstances showing an extreme indifference to human life.

> Extreme indifference to human life is the nature of a culpable mental state and therefore is akin to intent. **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.** Otherwise stated, a person acts under circumstances manifesting extreme indifference to the value of human life when he engages in deliberate conduct which culminates in the death of some person. **Conduct of the parent which evidences a settled, characterized or may -- conduct of the parent which evidences a settled purpose to forego parental duties may fairly be characterized as willful because it manifests a conscious indifference to the rights of a child to receive support and consortium from the parent.**

App. 806, ll. 3-21 (emphasis added).

An hour and forty-five minutes into deliberations the jury sent out three questions. The jury requested a transcript of the trial, inquired about the potential sentence Petitioner faced, and asked for the court to explain extreme indifference to human life. App. 808, l. 22-App. 809, l. 17. The court proceeded to recharge the jury with the same definition of extreme indifference that it had previously provided. App. 811, l. 14- App. 812, l. 7. The jury returned a guilty verdict at three thirty that afternoon. App. 812, l. 17-814, l. 20. Petitioner was ultimately sentenced to twenty-five years incarceration. App. 829, l. 19-App. 830, l. 3; App. 860.

Counsel Hines filed timely post-trial motions for a new trial and to reconsider Petitioner's sentence. App. 831-836. A hearing on the motions was convened on May 9, 2011. App. 837. At the hearing Counsel Hines argued that the State had not met the element of extreme indifference to human life and that the jury clearly had some confusion on that element. She stated that she should have objected to the definition of extreme indifference that was charged to the jury and that her failure to do so was not strategic. App. 850, l. 18-App. 851, l. 19. The motions for a new trial and reduced sentence were denied by a written order on June 1, 2011. App. 854-857.

Petitioner appealed his sentence and conviction. The Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. State v. Goodwin, No. 213-UP-110 (S.C. Ct. App. filed March 13, 2013). Petitioner filed a *pro se* application for post-conviction relief on April 23, 2015. App. 861-865. The State filed a return on September 9, 2015. App. 866-872. Appointed PCR Counsel, Jonathan Waller, filed an amended PCR application on July 14, 2021. App. 873-874. An evidentiary hearing was convened on July 14, 2021, before the Honorable Michael S. Holt. The State was represented by Michael Davis and Yasmeen Klein. Petitioner was represented by Counsel Waller. App. 875.

During the hearing two witnesses testified about the jury charge, former appellate counsel Lanelle Durant and Counsel Hines. Counsel Durant stated that she had mentioned the jury charge in her brief on the denial of the directed verdict motion because she felt the charge was conflicting. When asked if she had any issue with the jury charge as it was presented, she testified, "Well, I felt that was covered under the extreme indifference, denial of the directed verdict, because the jury charge was related to the judge's definition of extreme indifference, and I felt that it was covered by the main issue of not a directed verdict being granted." App. 947, l. 13-App. 948, 21.

Counsel Hines testified that the definition of extreme indifference was her issue at trial, and that she read every homicide by child abuse case in researching the issue. Regarding the jury charge she testified

> The way I remember it, we were in chambers. The judge's law clerk was sitting at the computer. And I had asked for -- I had wanted the language in Jarrell. And in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by deliberate act culminating in death. That is the holding in Jarrell. And that is what I wanted. And the State wanted the language from McKnight. And the judge's law clerk was typing. And what ended up happening is that the definition of State v. Jarrell got cut in half, and the language from McKnight got inserted in the middle of it. I should have objected

to that, and I didn't. That was a mistake on my part. But if you read the transcript, you'll see the first part of Jarrell where extreme indifference is a mental state akin to intent, and then you see the language from McKnight is in there, and then at the end of it, it ends with, characterized by a deliberate act culminating in death.

> Well, I think when you read Jarrell, that the mental state akin to intent, that you have to have it characterized by the deliberate act culminating in death. If that condition, the second part of that condition is the first part of that, so when you stick the language from McKnight right in the middle of that sentence and break up that sentence, I don't think that the definition of extreme indifference was clear. And I know I didn't object to it, and I should have. And I believe I was ineffective for not objecting to that.

App. 978, l. 24-980, l. 5

Counsel Hines clarified that at the time the judge charged the jury that she did not realize that the language had been changed. App. 980, ll. 11-13. She confirmed that she had no strategic reason for not objecting to the charged definition of extreme indifference. App. 982, ll. 12-14. On cross-examination she further testified about her issues with the jury charge stating,

> My issue with the jury charge that was given is that the holding from Jarrell was cut in half with the language from McKnight. So where you have -in Jarrell you have two clauses, one conditioned upon the other. In the jury charge as it was given, you have two clauses with all this other language in the middle of it, and you can't -there is no way for the jury to know that one of those clauses is conditioned upon the other, as Jarrell held, because there is all this other language in the middle of it.
>
> ...
>
> I believe everything is pulled from some case law, but if you pull language out of case law and reorganize it, it loses meaning. And so just because it is there doesn't mean it is accurate and correct and that the jury would know what extreme indifference is based on the way that you read if you reorder the words, they change meaning.

App. 1005, ll. 4-24. Counsel Hines stated that although the jury charge contained the right language, the way it was presented did not accurately reflect the law making the section on extreme indifference confusing to the jury. She reiterated that she should have objected to the language but failed to do so. App. 1008, l. 22-App. 1010, l. 7.

An order of dismissal was filed on July 13, 2023, finding that Petitioner had not met his burden of proving ineffective assistance of counsel. App. 1025-1063. Regarding Counsel Hines' failure to object to the definition of extreme indifference in the jury charge the PCR court held that counsel was not ineffective because there was no basis to object to the jury charge as it correctly and sufficiently covered the law. The PCR court further found that even if there was an objectionable issue with the jury charge that Counsel Durant had credibly testified "that the issue of the jury charge was covered by the main argument she submitted on appeal" and therefore Petitioner could not show deficient performance or prejudice.

ARGUMENT

The PCR court erred in finding trial counsel provided effective assistance where counsel failed to object to the trial court's confusing jury charge on the definition of extreme indifference in a homicide by child abuse trial.

While the correct definition of extreme indifference was charged to the jury, it was muddled with irrelevant and misleading language that did nothing more than confuse the jury. Counsel Hines did not object to the confusing language that was used and therefore failed to preserve the issue for direct appeal. There is no probative evidence in the record to support the finding that Counsel Hines was not ineffective for failing to object to the jury instructions.

In general, the trial judge is required to charge only the current and correct law of South Carolina, Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." Id.

In State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002), the Court of Appeals defined extreme indifference by holding "in the context of homicide by abuse statutes, **extreme indifference is a mental state akin to intent characterized by a deliberate act**

culminating in death." Id. In reaching the definition of extreme indifference the Court of Appeals relied on two cases from Arkansas defining "extreme indifference" and two South Carolina cases that defined "indifference" and "willful." The Court of Appeals wrote,

> Extreme indifference is in the nature of "a culpable mental state ... and therefore is akin to intent." State v. Vowell, 276 Ark. 258, 634 S.W.2d 118, 119 (1982) (citation omitted). 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. See State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); *see generally* Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as wilful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). At least one other jurisdiction with a similar statute has found that "[a] person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person." Davis v. State, 325 Ark. 96, 925 S.W.2d 768, 773 (1996).

Id. (emphasis added).

The definition of extreme indifference provided to the jury was unnecessarily confusing and misleading. It first provided the jury with the information that "extreme indifference" was the level of criminal intent[1] that the State was required to prove. Next, the court informed the jury of the basic definition of indifference, which was essentially the definition of negligence, *See* Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (negligence is the failure to use due care), followed by the definition of extreme indifference, and then concluded with the definition of "willful." In one paragraph the trial court defined extreme indifference in three ways: as negligent conduct, as willful conduct, and as deliberate conduct which culminates in death. Extreme indifference is not negligent conduct or willful conduct. It is a mental state akin to intent characterized by a deliberate act culminating in death.

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1 Notably, there was no other criminal intent charge given to the jury.

The definition of extreme indifference used in this case confused the jury as evidenced by the question the jury asked after deliberating for almost two hours. The trial court recharged the confusing definition of extreme indifference to the jury, which then continued deliberating for ninety minutes before ultimately finding Petitioner guilty. The question of extreme indifference was critical to Petitioner's case and the failure of counsel to object to the confusing definition was deficient performance that prejudiced Petitioner.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) quoting Strickland, 466 U.S. at 686. Pursuant to Strickland v. Washington, an applicant must show that counsel's performance was deficient and that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). It is well settled that failure to preserve an issue for appellate review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

The trial court's charge on extreme indifference was confusing and misleading as it placed before the jury irrelevant considerations. The jury did not need to be informed of the basic definition of "indifference" or "willful" that was used by the Court of Appeals to reach its

holding. The jury only needed to be informed that extreme indifference was a mental state akin to intent characterized by a deliberate act culminating in death. The other portions of the charge were superfluous, and Counsel Hines should have objected to the inclusion of the extraneous language. The failure to object was not reasonable under prevailing professional norms and was not excused by a valid trial strategy. The PCR court's finding that there was not an objectional issue was not supported by the record.

The PCR court also seemed to find that there could be no prejudice because former appellate counsel testified that she felt the issue of the jury charge was covered in the brief she filed on direct appeal. Importantly, the only issue raised to the Court of Appeals on direct appeal was whether the trial court erred in not directing a verdict of acquittal. While the jury charges were mentioned in the brief, the question of whether the charge was proper was never raised to or ruled upon by the trial court or the Court of Appeals. It is axiomatic than at issue must be raised to and ruled upon by the lower court for it to be considered on appeal. Further, any issues not explicitly raised are deemed waived on appeal. Therefore, it was impossible for Counsel Durant to have adequately addressed the issue regarding the jury charge in a brief solely focused on the denial of a directed verdict.

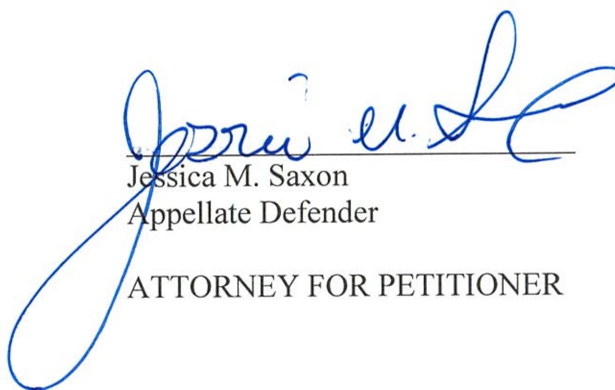
Petitioner was further prejudiced by the definition used because the jury was confused about the crucial element of extreme indifference. There was evidence at trial that Petitioner was not acting deliberately and that he was highly emotional and upset over G.D.'s death. The State even conceded in closing arguments that Petitioner did not act intentionally in causing G.D.'s death. The record contains evidence that Petitioner's mental state was not one manifesting extreme indifference under the standard definition. Therefore, it is reasonable that the jury could

have come to a different outcome on this key element had the simple, proper, definition of extreme indifference been provided.

Petitioner has shown both deficient performance and prejudice. The findings of the PCR court are not supported by probative evidence in the record. Counsel Hines was ineffective for failing to object to the confusing jury instruction on extreme indifference. Petitioner is entitled to a new trial on the charge of homicide by child abuse.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2024.