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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2022-001127

THE STATE,

Respondent,

v.

SHAKOYA ALEXIS DARBY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court correctly refused to grant a mistrial after sustaining Darby's objection to the solicitor's closing argument suggesting defense counsel might accuse the State of putting up "smoke and mirrors."

II. Whether the trial court correctly refused to grant a mistrial after sustaining Darby's objection to expert testimony where the jury never heard the objectionable testimony.

STATEMENT OF THE CASE

In April 2022, a Richland County grand jury indicted Appellant Shakoya Darby for Homicide by Child Abuse. Darby proceeded to jury trial before the Honorable Robert E. Hood on August 1–4, 2022. Darby was convicted as charged and sentenced to 40 years' incarceration. This direct appeal follows.

STATEMENT OF FACTS

On Christmas Day 2018, victim Princeton Adams was 18 months old. He lived with his mother, Appellant Shakoya Darby, and Darby's boyfriend Jarrell Weston. Shortly before 11 a.m., Darby went to her neighbor's house and said Princeton was unresponsive. (R.p.33). The neighbor went to Darby's house and found Princeton unresponsive on a bed. (R.p.35). His heartbeat was "very light" and his body was cold. (R.p.36). The neighbor tried to administer CPR but Princeton wouldn't wake up. (R.p.36). The neighbor told Darby to call 911. (R.p.36). An ambulance was dispatched at 10:49 a.m. (R.p.43). When EMS arrived, Princeton was in cardiac arrest and wasn't breathing. (R.p.44). Princeton was wearing only a pair of pants which were soaking wet. (R.p.44). There was a hematoma or "goose egg" on Princeton's forehead. (R.p.45). Paramedics were able to restart Princeton's heart and intubated him. (R.p.45–48). They placed a "c-collar" around Princeton's neck to stabilize his spine. (R.p.47). Darby said Princeton fell and hit his head on a toy truck. (R.p.46).

Princeton was admitted to Prisma Health Children's Hospital in Columbia, where doctors and nurses tried to save his life. (R.p.54–57). Doctors determined Princeton had suffered extreme head trauma. He had a brain edema and subdural hematoma, or large collection of blood underneath the skull. (R.p.106–07). Because of head trauma, Princeton's brain swelled so much that his body was unable to deliver oxygen to the brain. (R.p.109–110). Dr. Robert Hubbird, the Director of the Intensive Care Unit, testified serious brain damage can result just a

few minutes after severe head trauma. (R.p.110-11). He testified it was important to seek immediate medical help after head injury, and that "minutes and hours" could make a difference. (R.p.121). Princeton's temperature was less than 90 degrees when he arrived. (R.p.351). Dr. LaDonna Young testified that in cases of brain injury, the body may reduce bodily functions to maintain essential organ function. (R.p.352). She testified body temperature will drop approximately one degree per hour, but it could happen "a little bit quicker" in cases of severe brain injury. (R.p.353).

Princeton suffered a particularly severe injury to his corpus callosum, the tract of nerves that separate the two hemispheres of the brain. (R.p.350). This type of injury "requires such a high level of force that it really doesn't happen in isolation," and is usually associated with car accidents or "severe abusive head trauma." (R.p.350). This type of injury requires "excessive rotational forces, and so just blunt force trauma would not do that." (R.p.355). In child abuse cases, this typically results from a baby being shaken. (R.p.355). Princeton suffered severe permanent brain damage. (R.p.110-11). Shortly after arrival at the hospital, Princeton showed "cerebral silence." (R.p.112). Dr. Young testified Princeton's injuries were inconsistent with a fall.

Police and a DSS worker went to Darby's home and spoke with her and Weston. (R.p.66–71). The interaction was recorded on the officer's body-worn camera. (State's Exhibit #16). Darby claimed Princeton was climbing on a TV stand and she told him to stop. She went outside and when she returned Princeton

was lying on the floor next to the TV stand and wasn't breathing. She claimed she called an ambulance and performed CPR. DSS workers spoke with Darby's two other children. Darby appeared concerned about what the children were telling the DSS worker. (R.p.76; State's Exhibit #16). Darby tried to convince police she immediately called EMS and started performing CPR. Darby claimed her daughter told her Princeton fell and hit his head. (State's Exhibit #16). Police brought Weston and Darby to headquarters for interviews.

Investigator Ryan Galinski of the Richland County Sheriff's Department started working the case. He interviewed Weston and Darby in the early morning hours of December 26. (R.p.179). He interviewed Weston first, then Darby. Darby originally repeated the story that Princeton fell from a TV stand, but changed her story when Galinski confronted her with what he learned from Weston. (R.186–87). Darby told Galinski Weston was not Princeton's biological father, and he treated Princeton differently than the other children. (R.p.187). She said Weston had been abusive towards Princeton, that she and Weston had been in an argument, and that Princeton had been "knocked out." (R.p.187–88). She admitted she lied about Princeton hitting his head on the toy truck. (R.p.189). Galinski testified Darby showed no emotion throughout the interview. (R.p.189).

Galinski interviewed Weston again and arrested him. (R.p.190). Galinski interviewed Darby again on December 31. (R.p.192). Darby gave "a little more information" about the fight with Weston, giving "a more violent picture" of how Princeton was injured. (R.p.195–96). She said Weston was "shaking him, dropping

him, had grabbed him." (R.p.196). Darby said Weston was at home on Christmas morning, and that she called 911 "right away" after Weston abused him. (R.p.197–98). Galinski gave Darby a ride home, and she was concerned that Galinski thought she was a bad person. (R.p.200).

Galinski arranged a forensic interview with Darby's four-year-old daughter to find out what she saw. (R.p.201–06). Afterwards, he requested another interview with Darby. (R.p.202). This occurred on January 3. (R.p.203). Darby went into more detail about her argument with Weston, telling Galinski Weston had gotten violent with her on Christmas Eve. (R.p.212). She said she was holding Princeton when Weston choked her and Princeton was "knocked out." (R.p.213). She said Weston hit her and Princeton with a "large, black candlestick." (R.p.221). She claimed Weston left and she called 911 immediately as he was leaving. (R.p.213). When Galinski confronted her with medical information about the timing of Princeton's injuries, Darby changed her story again. (R.p.214). She eventually stated she waited 3–4 hours to call EMS. (R.p.215). She stated she "put Princeton in the sink and splashed water on him" because he was "knocked out." (R.p.223). She said she felt guilty for not getting Princeton immediate attention. (R.p.215). Galinski confronted Darby about scratches on Princeton's neck. She eventually admitted "she did have her hand on his neck." (R.p.216). Darby voluntarily gave Galinski her cell phones. (R.p.206–09).

Galinski brought Darby in for another interview on February 12. (R.p.236). Galinski asked Investigator Amy Green to sit in on the interview. Galinski began

interviewing Darby and eventually informed her she would be arrested. When Investigator Galinski left the room, Darby continued to speak with Investigator Amy Green. Darby was worried about going to jail. (R.p.163–66, 236–40; State's Exhibit #36). Investigator Green told Darby she should be truthful. Darby confessed to putting her hands around Princeton's neck. To Investigator Green, and then again to Investigator Gilinski, Darby explained in detail how and why she strangled her baby. She stated:

> The society we live in, they're not gonna understand anything a mother goes through. . . . I was diagnosed with postpartum depression. And that's really why I didn't want to have another baby because I already knew that I couldn't take care of another child, and I knew with everything going on that it just wasn't going to happen for me. . . .
>
> And when his daddy denied him and didn't want nothing to do with him I had to go through all of that . . . . the same day that I was attacked with the baby and everything, when I was trying to get him to respond, he didn't respond and I got aggravated and I got really really frustrated, and I did have my hand around his neck. Because I didn't get any type of reaction out of him and I was getting tired and I was getting aggravated and I was getting scared. I've been abused and I guess with me being abused I took it out on him. . . . I didn't mean to. . .
>
> I already knew what was gonna happen. . . . After a while I took my hand off his neck and I called EMS because I realized that was my child and that wasn't me and I'm not that type of parent. But I was so traumatized through all of the abuse and all of the lows and him calling me names. . . .
>
> I was frustrated because when he wasn't responding to me, I was just like oh my God, like wake up, move do something because if he don't wake up I'm going to jail. . . . I couldn't feel a heartbeat and I put my hands around his neck. . . . I didn't have my hands around his neck but for about two minutes maybe. . . .
>
> I don't know if Princeton really likes me, I don't know if he sees me as his mother. . . . When he looked at me he didn't have that sincere look on his face like 'I know that's my mother.' He didn't form a bond with

> me. . . . He was so distant. . . .He didn't want to go home with me because he didn't love me. . . .

(State's Exhibit #36).

Darby explained Princeton was gasping for breath before she tried to give him CPR, but then his breathing slowed. She then became frustrated, wondered why Princeton didn't "like" her, and put her hands around his neck. Darby admitted she was guilty of not getting Princeton immediate medical treatment after Weston injured him. (State's Exhibit #36).

The State introduced internet search history from Darby's phone from January 3, after her third interview. Darby searched:

> "Child abuse penalties and sentencing"
>
> "Cruel mother arrested for choking and abusing her own children"
>
> "What is the medical term for without oxygen"
>
> "Postpartum depression: symptoms, causes, risks, types, tests, profession, and self-care"
>
> "How do I get over the guilt of accidentally hurting my son"
>
> "What does the bible say about child abuse"
>
> "Eternal sin"

(R.p.255–57).

Princeton never regained consciousness. Doctors explained Princeton would never regain brain function, but Darby refused to remove him from life support. (R.p.118–19). Princeton lived in a vegetative state in foster care until October 15, 2021, when he died of his injuries. (R.p.361, 415).

STANDARD OF REVIEW

The granting of a mistrial is within the discretion of the trial judge, whose decision will not be overturned on appeal absent an abuse of discretion. State v. Jones, 325 S.C. 310, 317, 479 S.E.2d 517, 520 (Ct. App. 1996).

ARGUMENT

I. The trial court correctly refused to grant a mistrial after sustaining Darby's objection to the solicitor's closing argument suggesting defense counsel might accuse the State of putting up "smoke and mirrors."

The trial court correctly refused to grant a mistrial after sustaining Darby's objection to the solicitor's closing argument suggesting defense counsel might accuse the State of putting up "smoke and mirrors." This was not a due process violation and is not comparable to the facts of Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019). The State did not accuse the defense of being unethical or suggest the State had any moral advantage. The solicitor was merely arguing preemptively against any suggestion that the State's evidence was defective. Any prejudice was cured by the trial court sustaining defense counsel's objection and instructing the jury to disregard the comment. This Court should affirm.

After summarizing the evidence and stating the crux of the State's closing argument, the solicitor explained she would not get a reply argument, and so decided to "address some things that [defense counsel] might say." (R.p.401). She argued:

> I don't know what Mr. Sutherland is going to say. Your guess is as good as mine, but some of the things, ladies and gentleman—before I get into that, you know, the defense wants to say we want to put smoke and mirrors up by the government. The government's bad...Defense is good.

(R.p.401).

Defense counsel objected, asserting the solicitor committed a due process violation by "saying that defense attorneys do smoke and mirrors." (R.p.401). As the transcript shows, the solicitor did not say "defense attorneys do smoke and mirrors." She argued defense counsel might suggest *the State* "put up smoke and mirrors *by the government*." Thus defense counsel's argument was premised on an inaccurate assertion about what the solicitor said. Darby repeats this argument on appeal, inaccurately claiming the solicitor "asserted during her closing

argument that defense counsel was going to deceive the jury with 'smoke and mirrors' . . . ." Brief of Appellant at 6.

The argument was not objectionable. Even if the solicitor had accused the defense of "putting up smoke and mirrors," it would not have been an improper argument. See State v. Rudd, 355 S.C. 543, 547, 586 S.E.2d 153, 155 (Ct. App. 2003) (holding solicitor's argument that defense counsel's argument was like cotton candy, "a lot of sugar spun up with hot air," was not improper); United States v. Ruiz, 710 F.3d 1077, 1086 (9th Cir. 2013) (holding prosecutor's reference to defense argument as "smoke and mirrors" was not improper); United States v. Bennett, 75 F.3d 40, 46 (1st Cir. 1996) (explaining "summations in litigation often have a rough and tumble quality" and rejecting claim that prosecutor's comments were improper where prosecutor called "a defense argument a 'diversion' that does not 'pass the laugh test'"); United States v. Ollivierre, 378 F.3d 412, 421 (4th Cir. 2004) (explaining prosecutor's argument that defense counsel tried "to weave in distorted facts to try to make his argument" was not inappropriate). But as discussed above, the comment did not even reference defense counsel's argument. It was a preemptive argument against a possible defense characterization of the State's evidence.

This case is nothing like Fortune v. State. There, the prosecutor argued it was a prosecutor's job to present the truth and argued at length he would not present the case if he did not personally believe the defendant was guilty. Fortune, 428 S.C. at 551, 837 S.E.2d at 40. He personally attacked the defense attorney, arguing it was a defense attorney's job to "manipulate the truth" and "do whatever they have to—without regard for the truth—to get a not guilty verdict." Id. The South Carolina Supreme Court explained it was improper for a prosecutor "to

state that defense counsel, in general, act in underhanded and unethical ways . . . ." Id. at 555, 837 S.E.2d at 42 (quoting Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983)).

The solicitor did none of that in this case. She made no derogatory comment about defense counsel personally or defense attorneys in general. She did not argue it was the State's job to present the truth or that she would not present the case if she did not personally believe Darby was guilty. She merely argued preemptively that *the State's* case was not built on "smoke and mirrors." Fortune is inapposite.

Even if the comment was objectionable, Darby was not prejudiced. See Rudd, 355 S.C. at 550, 586 S.E.2d at 157 (explaining improper comments do not require reversal if they are not prejudicial to the defendant). The trial court instructed the jury to disregard the statement, curing any error. (R.p.401). State v. White, 391 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("Generally, a curative instruction is deemed to have cured any alleged error."). The solicitor immediately moved on with her argument, focusing on the evidence presented. Defense counsel then presented his closing argument, returning to the theme from his opening statement that the State's witnesses were on the government's "team" and "because they're the government, they can put on a show." (R.p.417, 427).

The solicitor's argument did not violate due process. Even if improper, it did not prejudice Darby and did not present the "manifest necessity" of a mistrial. See State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons."). This Court should affirm.

II. The trial court correctly refused to grant a mistrial after sustaining Darby's objection to expert testimony where the jury never heard the objectionable testimony.

The trial court correctly refused to declare a mistrial after the State asked the forensic pathologist whether he received any additional information since generating his report regarding the victim's cause of death. Defense counsel objected that the expert should not be allowed to testify to anything that was not in the report provided to defense counsel. The trial court sustained the objection, and the solicitor moved on. The expert never stated any additional findings not included in his report. There was no error and no prejudice. This Court should affirm.

Dr. Kyle Shaw performed Princeton's autopsy. He explained the cause of death was "complications of remote blunt head trauma." (R.p.327). Following this testimony, the solicitor asked whether he received "any information subsequent to [his] report[.]" He began to testify: "Only in the last two weeks I was informed . . . ." (R.p.327). Defense counsel objected and a bench conference was held. The solicitor asked, "based on receiving this information, would it change your report in any way?" (R.p.328). Dr. Shaw then testified: "Essentially yes. So, it depends on the, on the, on the details of that information. Basically if there was an additional incident that, that was reasonably supported, then yes, I would, I would have added that as a factor in the cause of death." (R.p.328). The following exchange occurred:

Q: And what is that? What was that factor that you looked at?

A: So, I was informed of an alleged asphyxia type event.

Q: What does asphyxia mean?

> A: Right. So getting into, into that a little bit more, asphyxia basically is a catchall or broad term—

(R.p.328). Defense counsel then objected again. (R.p.328). After an off-the-record discussion, the trial court sustained the objection, ruling the expert could not state any findings that were not included in the report provided to defense counsel in discovery. The court denied Darby's motion for mistrial. (R.p.329–32). The court instructed the jury to disregard the testimony regarding "any information he received in the past two weeks and asphyxia," telling the jurors "not to consider it in your deliberations at the end." (R.p.332).

The trial court correctly refused to grant a mistrial. The trial court sustained the objection and the expert never testified to any additional findings not included in his report. He merely stated that, "*if* there was an additional incident that, that was reasonably supported, then yes I *would have* added that as a factor in the cause of death." (R.p.328). He then stated he was "informed of an alleged asphyxia type event," but defense counsel objected before the expert stated any additional findings regarding asphyxiation. (R.p.328). Dr. Shaw stated twice more that the cause of death in this case was blunt force head trauma. (R.p.335–37). Defense counsel emphasized repeatedly in closing argument that blunt head trauma was the cause of death. (R.p.414–16). He specifically argued: "we know what the cause of death is from all this testimony," and that there was no medical testimony giving strangulation as the cause of death. (R.p.414–15).

The complained-of testimony did not "eviscerate" Darby's defense. Darby was well aware the State was alleging she strangled Princeton. This was the entire

focus of Darby's February interview. Defense counsel's opening statement focused on the fact that the State was alleging strangulation, but there was no evidence of strangulation in the medical records. The mere fact that Dr. Shaw was "told" about an "alleged asphyxiation event" did not equate to a finding, and he never stated any findings regarding strangulation. (R.p.328).

The testimony was not prejudicial to Darby. See State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of the trial."). It did not change the State's theory of the case or Darby's defense. Darby confessed to strangling Princeton. It is obvious from the evidence presented and defense counsel's opening statement he was aware of the nature of the allegations. The State argued Darby was guilty for two reasons: not only did she strangle Princeton, she failed to seek timely medical treatment when Princeton was seriously injured. Darby admitted to having her hands around Princeton's neck for about two minutes. (State's Exhibit #36). She also admitted she was guilty of not seeking immediate medical treatment. (State's Exhibit #36). Princeton suffered severe head trauma, which would have been obvious. (R.p.351). Based on Princeton's body temperature, the injuries likely occurred hours before Darby finally asked her neighbor to call 911. (R.p.351–53). Darby's voluminous lies to police and her internet search history show a profound consciousness of guilt. Not only was the alleged error in Dr. Shaw's testimony not prejudicial in its own right, it was insignificant in relation to the other evidence against Darby, which was overwhelming. See Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845

(2018) (explaining in some cases there may be evidence so strong, "such as a confession," that any error will necessarily be harmless). Again, the trial court gave a proper curative instruction, curing any error. White, 371 S.C. at 445, 639 S.E.2d at 163.

The trial court correctly refused to grant a mistrial based on Dr. Shaw's limited testimony regarding an "alleged asphyxiation event" where the trial court sustained an objection to the testimony and instructed the jury to disregard it. Darby was not prejudiced because the testimony was extremely limited and insignificant in relation to the other evidence in the case. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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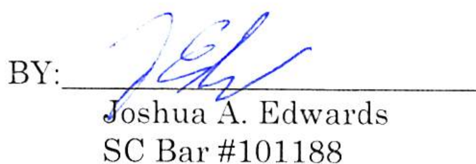
BY:

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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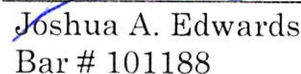
By: 
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v.

SHOKOYA ALEXIS DARBY, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Lara M. Caudy, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

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

This 20th day of February 2024.

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