THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTONCOUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2011-189886

State of South Carolina, Respondent,

v.

Lance Austin Williams, Appellant.

PETITION FOR REHEARING

Appellant Lance Austin Williams, by and through his undersigned attorneys, hereby petitions the Court for a rehearing, pursuant to Rule 221, SCACR, in State v. Williams, Op. No. 5161, Filed July 24, 2013. Appellant respectfully submits the Court overlooked or misapprehended the following facts and their legal implications in its opinion.

APPELLANT WAS NOT FREE TO LEAVE WHEN HE GAVE HIS FIRST INCRIMINATING RESPONSE

While the Court correctly recites the order of events in its summary of the facts, the Court's opinion overlooks two particularly salient facts: according to Detective Prestigiacomo, the chief investigator and the only witness called by the State at the Jackson v. Denno[1] hearing,

[1] 378 U.S. 368, 84 S.Ct. 1774 (1964).

Appellant was not free to leave the interrogation room once he gave an incriminating response. (R. p. 86, lines 4-10). Further, when he testified at the Jackson v. Denno hearing, Prestigiacomo testified that the interview room where the questioning took place was locked from the inside and Appellant could not get out. (R. p. 87, lines 3-9). These facts are uncontradicted in the record.

Appellant first gave an incriminating response after Detective Prestigiacomo challenged Appellant's claim that the child had fallen while playing in the yard. After being confronted by the detective and the photographs of the child's arm, Appellant admitted he had handled the child roughly while picking her up. Appellant said his mother told him he should not handle a child that way. (R. p. 67, line 24-p. 68, line 3). This answer arguably supported a criminal charge. But Appellant unquestionably incriminated himself after Prestigiacomo showed him more photos, this time of the child's head. This second set of photos depicted bruises on both of the child's ears. Again, as described by Prestigiacomo: "I showed him pictures of [child's] ears that had visible bruising on the rim of the ear and behind it, you know, which is common when somebody is slapped or punched in the ear, it will bruise behind the ear. He told me that she had misbehaved and that these injuries occurred during two occurrences. And the way he described them was that, one, she threw a temperature [sic] tantrum . . . and that he slapped her twice in one ear, on one side from behind, and then, the second time, she threw her bottle down and that caused him to get angry and slap her on the other side twice." (R. p. 68, lines 14-25).

While Prestigiacomo testified Appellant was free to leave at the outset of questioning, his testimony was unequivocal that Appellant was "absolutely not" free to leave once he gave an incriminating statement. An admission to slapping a child four times is clearly incriminating. Moreover, the tone and tenor of the questioning converted what may have started as a non-

custodial setting into a custodial interrogation, just like the Court condemned in State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003). The facts of this case are not legally distinguishable from those in Evans. Like Evans, Appellant denied any criminal conduct when police first confronted him in the interrogation room. Following his denial, the detective indicated he did not believe Appellant, and told Appellant he needed an "explanation", "an answer". The detective then produced photographs which, in the detective's opinion, indicated Appellant was not being truthful. Although he testified Appellant was not free to leave after he gave the first incriminating response, Prestigiacomo continued to question Appellant, and to challenge Appellant's responses, both verbally and by showing Appellant photographs to refute Appellant's answers, without informing Appellant of his Fifth Amendment right to silence.

Citing Evans, a majority of the Court concluded that the nature of questioning, particularly confronting a suspect with evidence that contradicts the suspect's prior statement, is crucial to the determination that the suspect is in custody. State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). The relevant facts described in Navy indicated the following:

> After [the respondent] gave this first [exculpatory] statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. **At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.**

Id. at 298, 688 S.E.2d at 840 (emphasis added).

These same factors are present here. Appellant admittedly volunteered to meet Prestigiacomo at the sheriff's department to answer questions. However, once Prestigiacomo confronted Appellant and challenged his statement, then sprang photos of the child on the

Appellant with the sole intention of eliciting an incriminating response from him, the nature of the interrogation changed from a voluntary encounter into a custodial interrogation. See Navy.

State v. Evans, supra, State v. Navy, supra, and Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004), all hold that the practices employed by Prestigiacomo in this case violate the constitution and that statements procured as a result should not be admitted at trial. The Court's opinion fails to draw any meaningful distinction between the facts of this case and the facts of Navy and Evans. Appellant respectfully asks the Court to rehear the matter and to rule in accordance with South Carolina Supreme Court, and the United States Supreme Court precedent.

WHEN APPELLANT INITIALLY DENIED INJURING THE CHILD, PRESTIGIACOMO CHALLENGED APPELLANT'S EXPLANATION AND CONFRONTED HIM WITH PHOTOGRAPHS

Despite Prestigiacomo's clear testimony, the Court found that "the officers were not confrontational with [Appellant]." State v. Williams, Op. No. 5161, at ___. This conclusion is not supported by the record. Prestigiacomo admittedly challenged Appellant's denial of wrongdoing. The Appellant initially denied doing harm to the child. According to Prestigiacomo, "[Appellant] told me he wasn't aware of those bruises either until I brought it to his attention by pictures." (R. p. 79, lines 23-25). Prestigiacomo refuted Appellant's denial and told Appellant he "needed an answer". As described in Prestigiacomo's own words: "We went into what happened to [child] and he . . . initially said that she had fallen. And I went on to explain to him that she had bruises on various parts of her body that needed to be explained or I needed an answer. And then I started to show him some pictures and I started out by showing him pictures of fingerprints on her arms." (R. p. 67, lines 4-11).

The Court acknowledges that "an officer's knowledge or beliefs may bear upon the issue of whether the person being questioned is in custody if they are conveyed by word or deed to the

person being questioned . . . ." Id. at __. However, the Court overlooks the undisputed fact that Prestigiacomo conveyed to Appellant the officer's belief that Appellant was not being truthful. The officer conveyed this both in words ("I needed an answer") and by deeds ("And then I started to show him some pictures . . . ."). Prestigiacomo unquestionably challenged the Appellant's initial statement and set about to disprove the statement with the photographs. Just like in Evans and Navy, both cited extensively in the Court's opinion, here the officer challenged the Appellant on the answers he gave and called into doubt his responses. To hold otherwise is to ignore the officer's own testimony. Appellant respectfully submits that the Court's opinion overlooks or misapprehends the totality of Prestigiacomo's testimony and the clear overlap between the practices employed in this interrogation and forbidden in Seibert, Evans and Navy.

APPELLANT WAS BABYSITTING THE CHILD ON THE DATE IN QUESTION AND A DIRECTED VERDICT WAS REQUIRED

The Court disposes of Appellant's argument that he was not a "person responsible for a child's welfare," as defined in S.C. Code Ann. § 63-7-20(16)[2] in a single paragraph, and essentially finds that because Appellant was romantically involved with the child's mother, he was somehow responsible for the child's welfare. The Court's analysis does not address Appellant's argument that the rule of lenity, recently affirmed in Berry v. State, requires all ambiguities in criminal statutes be construed in favor of the accused and against the State. 381 S.C. 630, 675 S.E.2d 425 (2009).

Respectfully, Appellant submits the record is devoid of any evidence that he had assumed the role of a parent or guardian to the child. In fact, it is uncontradicted that the date in question

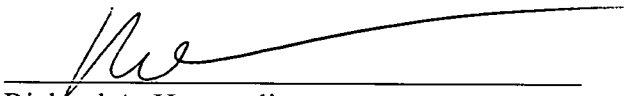
[2] This definitional statute provides, in relevant part, that "a person whose role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian."

was the one and only time he had ever babysat the child. Applying the rule of lenity, the Appellant was entitled to a directed verdict of not guilty on the charge of Unlawful Conduct Toward a Child (S.C. Code Ann. § 63-5-70). The Court overlooked the facts and misapprehended or failed to apply the rule of lenity and Appellant's conviction on this count should be vacated.

CONCLUSION

For the reasons set forth above, the Appellant respectfully asks the Court grant this petition for rehearing, pursuant to Rule 221, SCACR.

Respectfully submitted,



Richard A. Harpootlian
Graham L. Newman
M. David Scott
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Telephone (803) 252-4848
Facsimile (803) 252-4810

ATTORNEYS FOR APPELLANT

August 8, 2013

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CERTIFICATE OF SERVICE

I, Holli Langenburg, employee to the attorney for the Appellant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on August 8, 2013, served by U.S. Mail, the following document to the below mentioned person(s):

Document: **Petition for Rehearing**

Served: Harold Coombs, Assistant Deputy
Ben Aplin, Assistant Deputy
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

Holli Langenburg

Richard A. Harpootlian, P.A.

ATTORNEYS AT LAW
1410 LAUREL STREET
COLUMBIA, SOUTH CAROLINA 29201
WEBSITE: WWW.HARPOOTLIANLAW.COM

RICHARD A. HARPOOTLIAN
rah@harpootlianlaw.com

GRAHAM L. NEWMAN
gln@harpootlianlaw.com

M. DAVID SCOTT
mds@harpootlianlaw.com

JAMIE L. HARPOOTLIAN*
OF COUNSEL
*admitted in Louisiana

MAILING ADDRESS:
POST OFFICE BOX 1090
COLUMBIA, S.C. 29202

TELEPHONE (803) 252-4848
FACSIMILE (803) 252-4810
TOLL FREE (866) 706-3997

August 8, 2013
VIA HAND DELIVERY

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

In Re: State of South Carolina v. Lance Austin Williams

Dear Mrs. Kitchings:

Enclosed please find for filing the original and eight (8) copies of the Petition for Rehearing. If you would be so kind as to clock-in the original and copies and return the extra copies to my courier, I would be most appreciative.

By copy of this letter, I am providing counsel of record with a copy of the same.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian

/hal
Enclosures
cc: Harold Coombs, Assistant Deputy
Ben Aplin, Assistant Deputy