STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONNA LYNN PHILLIPS,

APPELLANT

APPELLATE CASE NO. 2012-212663

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying appellant's motion for a directed verdict on the charge of homicide by child abuse when the state failed to present substantial circumstantial evidence that appellant acted with extreme indifference where the child died from an overdose of hydrocodone as allegedly found in the cough syrup, Tussionex?

STATEMENT OF THE CASE

On December 16, 2008, the Pickens County Grand Jury indicted Donna Lynn Phillips on the charge of homicide by child abuse of her grandson. R. p. Also indicted at that time was one of her co-defendants, her son Jamie Morris who was indicted for homicide by child abuse, aiding and abetting. R. p. On October 13, 2009, Co-defendant Latasha Honeycutt, the mother of the child, was indicted for homicide by child abuse. R. p. The three co-defendants proceeded to trial on July 23 – 27, 2012, before the Honorable D. Garrison Hill. Phillips was represented by James P. O'Connell; Morris was represented by John W. Dejong; and Honeycutt was represented by H. Chase Harbin. The state was represented by Doug Richardson, Esquire, and Jenny Barwick. Tr. 1.

Appellant and co-defendant Morris were found guilty as charged. Tr. July 26-27, p. 396, ll. 1 – 24. Co-defendant Honeycutt was found not guilty. Phillips was sentenced to twenty-five years, and Morris was sentenced to twelve years, suspended to eight years with two years' probation thereafter. Tr. July 26-27, p. 413, ll. 23, - p. 414, ll. 10. This appeal follows.

STATEMENT OF FACTS

Jamie Morris and Latasha Honeycutt had lived together for several years beginning when Honeycutt was seventeen. They had a son who was twenty-two months old at the time of this incident. After they separated, Honeycutt began living with Brandon Roper who was a mutual friend of both Morris and Honeycutt. The child lived with Honeycutt for a while and Morris for a while. July 26-27, 2012 Tr. 214, ll. 1 – Tr. 216, ll. 16; Tr. 151, ll. 3 – Tr. 155, ll. 23.

When this incident occurred in March 2008, the child had been in foster care for ten months in the custody of DSS. He was returned on Wednesday, March 12, 2008, just four days before his death, to live with his mother, Latasha Honeycutt, and her boyfriend, Brandon Roper, and their two month old daughter, Ava. Tr. 88, ll. 18 – Tr. 89, l. 9; July 26-27, 2008, Tr. 192, ll. 9 -17.

On Friday afternoon, March 14, 2008, Jamie Morris picked up his twenty-two month old male child from Honeycutt's mobile home and brought him over to the mobile home he lived in with his mother, Donna Phillips, for a weekend visit. Tr. 681, ll. 12 – Tr. 682, ll. 23.

During that weekend visit, there was celebration because the father and grandmother had not seen the child in ten months. Phillips bought a riding John Deere toy for him, Buzz Light Year pajamas, and clothes. They took him to visit relatives both Saturday and Sunday. The child slept with his father on the sofa. The child had a runny nose and cough during much of the weekend. July 26-27, 2012 Tr. 53, ll. 12 – Tr. 54, ll. 25; July 26-27, 2012 Tr. 58, ll. 13 – Tr. 88, ll. 25; Tr. 683, ll. 4 – Tr. 688, ll. 4.

On March 16, Morris and Phillips took the child back over to Honeycutt's house that Sunday evening. On the next Monday morning, March 17, Honeycutt went in to check on him around 8:00 a.m. and the child was asleep and she changed his diaper while he was sleeping. Around 10:00 – 10:30 a.m., Honeycutt went back into his room and found the child unresponsive. She called 911. Tr. 688, ll. 8 – 24; July 26-27, 2012 Tr. 217, ll. 22 – Tr. 233, ll. 16.

The first witness at trial was Patience Johnson, a supervisor involved with intake at the Department of Social Services (DSS) operations in Pickens County She received a report of the child's fatality on March 17 and she initiated an investigation. She said there was a voice mail from Morris on March 15 to DSS wanting a Medicaid card for the child because he was sick. Tr. p. 207, line 5 – p. 213, line 7.

Julie Sailors testified that she was a paramedic who responded to Honeycutt's residence on March 17. She asked the mother, Honeycutt, questions about the child, but she thought Honeycutt was being evasive. Tr. p. 248, lines 13 – 21; tr. p. 267, lines 4 – 13. Ms. Sailors put the child in the ambulance and she and her partner took him to Palmetto Health Baptist Easley. The mother did not go to the hospital with them. Tr. 250, ll. 11-20.

Ms. Sailors said most parents are very hysterical, screaming, crying. They do not want to give up the child or they are jumping in the ambulance. Tr. p. 250, line 11 – p. 251, line 13. When Ms. Sailors and her partner had gone into the child's bedroom, the mother did not follow them in there and Ms. Sailors thought that was unusual. Tr. p. 266, lines 15 – 20. She said that in all twenty cases she had handled of this type, the caregivers were consistently agitated. This case, though, was unlike anything she had ever seen. Tr. p. 275, line 21 – p. 276, line 3.

Kathy Purdessy, the emergency room nurse, testified that when the child arrived, his heart was not beating. There was no parent there at the emergency room and that was not normal. The child was intubated and they were bagging him to breathe for him. He was lifeless. They took a urine sample. Tr. p. 279, line 15 – p. 280, line 21. She said when the mother did arrive at the hospital, she said the mother seemed to act inappropriate to her. The mother's answers were so vague. She wasn't crying. She was not even standing near her child. Tr. p. 282, line 2 – p. 283, line 19. Later, the nurse said a drug screening of the child's urine revealed that opiates were present. Tr. p. 285, line 25 – p. 286, line 4.

On cross-examination, the nurse said she had never seen a parent act the way the mother did. She seemed to be very detached from the child. She was emotionless. Tr. p. 293, lines 5 – 17.

Dr. James Mahanes, the coroner for Pickens County, testified that the child died from an overdose of hydrocodone contained in Tussionex. He explained that hydrocodone and chlorpheniramine were found and those were the ingredients in Tussionex. Tr. 462, ll. 2 – 19.

Detective Rita Burgess testified that she spoke to all of the defendants and took statements from them. She first talked to Latasha Honeycuttt, who told her that the child had been with Phillips and Morris from Friday, March 14 until Sunday, March 16 between 8:00 and 9:00 p.m. She said when the child got back, he was extremely sleepy and pitching a fit. She put him in his crib and closed the door. She checked on him later and he was still fussy. She put him to bed and he slept all night. Honeycutt said she woke up Monday morning around 8:30 or 9:00 and the child was still sleeping at that time. She went back to

bed and woke back up around 11:00 and checked on the child and he was unresponsive. She called Brandon for help and also called 911. Tr. p. 323, line 7 – p. 324, line 14.

On March 27, Honeycutt gave Detective Burgess a written statement. Tr. p. 325, lines 8 – 21. The written statement was not much different from the verbal statement, but she did add that when she checked on the child Monday morning around 8:00, she did change his diaper and he was still asleep. Tr. p. 331, line 1 – p. 334, line 3. She also told Burgess when Jamie dropped the child off on Sunday evening, he told her the child was sick and should go to the doctor because he was congested. He gave her the Medicaid card. Honeycutt told her the child did sound congested and he had a runny nose. Tr. p. 329, lines 2 – 10.

Detective Burgess also said when Honeycutt was in the emergency room with her child, she showed no emotion. Tr. p. 376, lines 12 – 17.

Detective Burgess said she talked to the grandmother, Donna Phillips, Monday evening at the hospital. She told her on Friday, they had trouble getting the child to sleep. She said the child would have "frightmares" during the night where he would wake up fighting and crying. On Sunday, she said the child was coughing and congested and Morris had given him some children's Tylenol. A couple of times she said she hoped the child did not get any of her Lortab. She also said her sister takes Lortab and she hoped the child did not get her sister's Lortab. Tr. p. 334, line 20 – p. 335, line 25.

Phillips said on Sunday, when she and Morris returned the child to Honeycutt, she told Honeycutt that the child was sick and needed to go to the doctor. Honeycutt just acted like he was having a temper tantrum, and put the child in the crib. When Phillips went to the hospital to see the child, someone said the child had opiates in his system. Phillips told

Brandon, Honeycutt's boyfriend, she had some Lortab, but she didn't think the child could have gotten it. Brandon told her he had been prescribed Lortab two weeks before, but they were all gone. Tr. p. 340, line 23 – p. 342, line 25. Phillips said at the funeral home, Brandon told her the child woke up four times during the night. Tr. p. 343, lines 3 – 4.

Detective Burgess spoke with Morris who said the child was fine all weekend until around 3:00 p.m. Sunday when he started crying and acting ill. Around 4:00 p.m., the child started wheezing and was congested. He was concerned. Around 3:45 p.m., he gave the child a dropper-full of infant Tylenol. Tr. p. 344, line 17 – p. 345, line 2.

Jamie Morris testified at trial that Tussionex was in his mother's house but the child never got any Tussionex. He did not give the child any and his mother did not give the child Tussionex to his knowledge. Tr. 688, ll. 25 – Tr. 689, ll. 14.

Later, on April 10, 2008, Donna Phillips met Detective Burgess at the station and gave a written statement. Tr. 336, ll.1 – Tr. 337, ll. 25. Phillips told Detective Burgess that she and Morris picked the child up from Honeycutt's home on March 14, 2008, and returned him the evening of March 16, 2008. Phillips said he had a runny nose and was beginning to get congested Sunday. When they returned him Sunday, Honeycutt put him in the crib sick and closed the door. They went to the hospital when they received the call about the child. Tr. 339, ll. 1 – Tr. 343, ll. 25.

Deputy Albrecht, a forensics investigator, went by Phillips' residence after March 17 and she gave him a bottle of Tussionex. Tr. p. 386, lines 8 – 24. Lt. Robinson said the Tussionex cough syrup is a prescription medicine. Tr. p. 397, lines 14 – 15. The medicine was prescribed to Phillips. Tr. p. 399, lines 2 – 5.

Jeff Hollifield with Micro Analytical, testified that he analyzed what was in the Tussionex bottle and found it contained hydrocodone and chlorpheniramine, which were consistent with the drug Tussionex. Tr. p. 425, lines 4 – 9.

William Gassman, the supervisor of chemistry and toxicology at the hospital testified that they analyzed the child's urine and found opiates in it. Tr. p. 444, line 11 – p. 447, line 21.

Michael Lark, an investigative consultant testified, as a state's witness, that he spoke with Morris and Morris told him his mom, Appellant Phillips, kept her Tussionex in a pumpkin in a hard-to-reach place in her closet. His mom got the medication down twice when the child was in the room, but he did not see the child get any of the medication. He said the tops were on the medication, but the child was playing with the bottles. He did not see any medication come out of the bottles because the tops were on them. Tr. p. 510, line 13 – p. 511, line 3.

Robert Foery, a consultant in forensic toxicology, analyzed the blood and urine samples taken from the child. He found hydrocodone was the opiate that was in the blood. He found hydrocodone, hydromorhone, and chlorpheniramine in the urine. Hydromorhone is a metabolite of hydrocodone. There was only enough in the blood specimen to confirm the presence of hydrocodone. The hydrocodone and chlorpheniramine are found in Tussionex and it was a time released formula. Tr. p. 547, line 1 – p. 550, line 10.

On cross-examination, Dr. Foery admitted that the blood report stated: "Insufficient specimen volume remaining to complete the testing for hydromorphone and for chlorpheniramine." He admitted that the report said negative for chlorpheniramine but said that it should not say that. It should say insufficient volume. Tr. 558, ll. 21 – Tr. 561, ll. 23.

The concentration of hydrocodone in the victim's blood was found to be 102 nanograms per milliliter. The therapeutic range for an adult would be 10 to 40 nanograms per milliliter. It would take 10 to 12 hours for the drug to be completely absorbed by the body. Tr. p. 551, line 1 – p. 552, line 8. The expert said that in his opinion, to a reasonable degree of medical certainty, the drug was given on Sunday, sometime between midnight on Sunday up until the time the child was found. By midnight on Sunday, he meant midnight Saturday going into Sunday. Tr. p. 553, lines 2 – 13. Because the drug was time-released, some effect would probably be felt in an hour. Tr. p. 566, lines 8 – 10.

Dr. Michael Ward, the Greenville County medical examiner, testified the high level of the drugs in the child would make him comatose. Tr. p. 600, lines 13 – 17. In his opinion, the child was comatose at 8:00 a.m. on Monday. Tr. p. 601, lines 20 – 21.

The defense called Dr. William Brewer as an expert in forensic toxicology without objection from the state. Tr. 641, ll. 1 – tr. 643, ll. 16. He testified that testing the blood was the most important as urine levels were really irrelevant. He explained that the blood would give a time as to the most recent dose. He was skeptical of the toxicology results in this case because there was such a limited amount of blood that was tested. He said hydrocodone peaked at about four hours. He found it alarming that the vomit from the child, produced when CPR was performed, was never tested. The vomit would have given the most recent information. of stomach contents. Tr. 644, ll. 13 – Tr. 671, ll. 25.

Donna Phillips testified in her own defense. She freely said she had prescription Tussionex that was filled on January 4, 2008, four months before the child's death. She denied giving this medication to the child on March 15 or 16. July 26-27, 2012 Tr. 53, ll. 11 -24; July 26-27, 2008 Tr. 90, ll. 11 – Tr. 92, ll. 5. She testified that she would never give a

child any medicine not prescribed for them, and she would not give a child under two any medicine. She kept her medicine in a pumpkin on the top shelf of her closet. July 26-27, 2012 Tr. 69, ll. 1 – Tr. 72, ll. 24. Phillips said she loved that child.

Honeycutt's attorney called Kayla Roper, the sister of Brandon Roper, to testify. Kayla testified that while she was in the waiting room at the hospital, she over heard Phillips say to Morris that she had given the child cough medicine over the weekend, and "surely to God that's not what is wrong." July 26-27, 2012 Tr. 137, ll. 12 – 24; July 26-27, 2012, Tr. 144, ll. 9 – 23.

After the State rested its case, defense counsel for appellant moved for a directed verdict because there was no evidence that Phillips gave drugs to anybody. He argued that did not show extreme indifference to human life. Counsel argued that she had to have the intent to harm this child, and the state did not prove that. The judge ruled there was sufficient evidence for the case to go to the jury because there was a lethal dose of hydrocodone in the child's system. Tr. p. 620, ll.3 – Tr. 622, ll. 2.

At the close of the defense case and of the evidence, defense counsel renewed his motion for a directed verdict because the state did not prove by substantial circumstantial evidence that "anybody did anything in this case." The judge denied the motion as viewing the evidence in the light most favorable to the state. July 26-27, 2012 Tr. 296, ll. 18 – Tr. 297, ll. 24.

ARGUMENT

The trial court erred in denying appellant's motion for a directed verdict on the charge of homicide by child abuse when the state failed to present substantial circumstantial evidence that appellant acted with extreme indifference where the child died from an overdose of hydrocodone as allegedly found in the cough syrup Tussionex.

South Carolina Code Sect. 16-3-85 provides:

> (A) A person is guilty of homicide by child abuse if the person:
>
> > (1) 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.

In State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), the Court of Appeals defined extreme indifference as a mental state akin to **intent** characterized by a **deliberate act culminating in death.** The Court went on to say that in this state, the 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 failed to exercise ordinary or due care.

In State v. Jarrell, id., the Court affirmed the trial court's denial of Jarrell's directed verdict motion finding that Jarrell acted with extreme indifference because she knew when she left home the morning of the incident that her child would be killed by her husband. She did not protect her child as she had helped plan the child's murder.

In State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), the Supreme Court ruled that the homicide by child abuse statute applied to the stillbirth of a fetus caused by the ingestion of cocaine. The Court wrote that the issue of whether the defendant had requisite criminal intent to commit homicide by child abuse, that is, whether she acted with extreme

indifference to her unborn child's life, was for the jury, where it was public knowledge that maternal use of cocaine during pregnancy could cause serious harm to the viable unborn child, and there was evidence that the defendant took cocaine knowing she was pregnant.

This case is distinguishable because Appellant did not plan any harm to the child. First, the only evidence that Phillips may have given the child Tussionex was from Kayla, the sister of Brandon Roper, who said she overheard Phillips say this to Morris in the waiting room of the hospital. Phillips denied giving the medicine to the child who was sleeping with his father.

Even if Phillips gave the cough medicine to the child, she had no intent to harm the child. Her only intent was to help the child feel better. This was not acting with extreme indifference. McKnight's intent was for her pleasure.

In State v. Sterling, 723 S.E.2d 176 (2012), the Supreme Court held that knowledge or intent that his conduct violated the securities law is not required to convict a defendant of securities fraud, but the state must present evidence that the defendant made statements or committed acts in a severely reckless manner such that he knew presented a danger of misleading an investor.

In State v. Sterling, Id., the Supreme Court wrote:

> What is at issue here is not whether Sterling acted intentionally, but whether his mental state met the *mens rea* standard we created in Morris, that is, did he know, or was it so obvious that he must have known, that the information he disseminated presented a danger of misleading buyers or sellers.

The Supreme Court wrote that they were within their authority to determine the level of intent required for a violation of the securities stature because the legislature did not specify any *mens rea.*

The Supreme Court cited the case of State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994), where they held that recklessness is one level of criminal intent, as are knowledge and negligence. The Court wrote that under Jefferies, intentional connotes a higher sense of awareness than mere recklessness.

Extreme indifference is not the same as lack of due care or negligence as negligence is a less culpable *mens rea* than extreme indifference.

On appeal of a denial of a directed verdict of acquittal, the Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

A directed verdict motion should not be granted if there is direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. State v. Latimore, 397 S.C. 9, 723 S.E.2d 589 (2012). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. McCombs, 368 S.C. 489, 629 S.E.2d 361 (2006).

The evidence merely raised a suspicion that Phillips was guilty of homicide by child abuse. State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001); State v. Martin, 340 S.C. 597 533 S.E.2d 572 (2000). In a case with much stronger evidence of wrongdoing, the New York Court of Appeals found that the evidence at trial was insufficient as to a mother's mental state to convict her of second degree murder because it did not rise to the level of depraved indifference. People v. Matos, 19 N.Y.3d 470

(2012). In Matos, the defendant returned home to find that her partner had severely beaten her child. Id. at 473-74. The child's leg and ribs were broken and was bleeding internally. Id. The mother did nothing more than splint the child's leg.. Id. She only called EMS after seeing blood flowing from the child's rectum and first helping her partner attempt to cover up the crime. Id. The court stated, "While we concede that defendant's behavior fell egregiously short of what we would expect from an ordinary person, faced with a child in such distress, to say nothing of a mother of said child, it does not rise to the level of wickedness, evil, or inhumanity so as to render the actor as culpable as one whose conscious objective is to kill." Id. at 476. The court emphasized that the State failed to prove that the mother "did not care whether her son lived or died." Id.

Phillips conduct is far less culpable than the mother in Matos.

Dr. Brewer, the expert forensic toxicologist who was a witness for the defense, testified that the dose given to the child was a very small dose. He stated:

> I don't think that the child being so small received a very large dose. I think it was a very small dose. And I would venture to say----and I didn't hear the toxicologist before me, but that he would concur with that. Because that's important for the jury to realize too. We're not talking about a large dose. To me, looking at this, being completely unbiased, this is not an intent to cause harm to the child, you know. It's not a large dose.

(Tr. 652, ll. 14 – 22.)

The state only presented a mere suspicion that Phillips gave the child the cough medicine, and presented no evidence that she had any intent to harm the child. No evidence was presented that Phillips knew the cough medicine contained hydrocodone or the danger of hydrocodone.

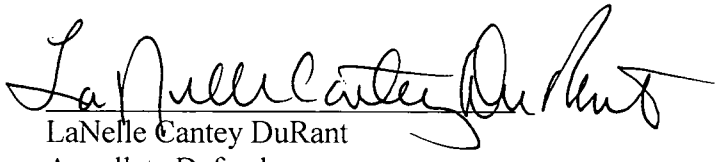
The investigation was sorely lacking as there was not enough blood to accurately test fro drugs. The child's vomit was not tested which would have given the most recent contents of the stomach and what he had been given. There was time and opportunity for other medication or substance that may have contained opiates to have been given to this child between the time he was returned to Honeycutt on Sunday night and when he was found unresponsive Monday morning.

The state did not prove that Donna Phillips acted with extreme indifference to this child's life and well being.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for the entry of a directed verdict.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
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THE STATE,

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DONNA LYNN PHILLIPS,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) July 23-25, 2012 Trial Transcript Pages 1-8, 84-101, 186 – 201, 207 – 213, 248 – 469, 494 – 616, 620-622, 640 – 729.
(3) July 26-27, 2012 Trial Transcript Pages 7-122, 137 – 269, 296 – 297, 300 – 400, 402-414.
(4) State's Exhibit 28

I certify that this designation contains no matter which is irrelevant to this appeal.

August 23rd, 2013

LaNelle Cantey DuRant
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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Donna Lynn Phillips #351805, Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, at this 23rd day of August, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.