STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOBBIE JO BAYNARD,

APPELLANT

APPELLATE CASE NO. 2024-001941

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Where the State pled a higher mental state than normally required for murder in the indictment that it failed to prove, did the trial judge err in refusing to direct a verdict on appellant's murder charge?

2.

Did the trial court err in refusing to direct a verdict on the charge of infliction of great bodily injury because the state proved only neglect and the statute requires an affirmative act and intent?

STATEMENT OF THE CASE

Appellant Bobbie Jo Baynard was indicted in Cherokee County for murder, infliction of great bodily injury on a child, and unlawful conduct toward a child and on October 28, 2024, was tried before the Honorable R. Keith Kelly and a jury. Tr. 1. Appellant was tried along with her husband and son who were charged with the same crimes. Tr. 2. Barry Barnette and Jennifer Jordan represented the State. Tr. 2. Robin File represented appellant. Tr. 2. Tracy and Russ Racine represented appellant's husband. Tr. 2. Michael Morin, Abigail Gowdy, and Eva Waszak represented appellant's son. The jury convicted all three defendants. Tr. 511-12. Judge Kelly sentenced appellant to life imprisonment for murder, a consecutive twenty years' imprisonment for infliction of great bodily injury on a child, and a consecutive ten years' imprisonment for unlawful conduct toward a child. Tr. 527. This appeal follows.

STANDARD OF REVIEW

The issues on appeal involve a mixed standard of review. When the failure of a trial court to direct a verdict is challenged because of a lack of evidence, that decision is reviewed for the existence or nonexistence of evidence, not its weight, and the evidence and inferences are viewed in the light most favorable to the State. State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). This directed verdict appeal also involves the purely legal issues of construction of statutes and an indictment, which are reviewed de novo. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012).

ARGUMENT

1.

Where the State pled a higher mental state than normally required for murder in the indictment that it failed to prove, the trial judge erred in refusing to direct a verdict on appellant's murder charge.

The State indicted Appellant, her husband, and her son for three charges stemming from the death of appellant's fourteen-year old daughter, Minor: murder, infliction of great bodily injury upon a child, and unlawful conduct towards a child. R. ___ (Indictments). Minor died under horrific circumstances that were not contested at trial. Minor was a non-ambulatory special needs child who succumbed to sepsis after weeks of neglect. Tr. 337-44. All four members of the family lived in a house filled with trash, dogs, cats, used diapers, human and animal urine and feces, and insects. Tr. 143-60.

Appellant admitted to neglect during pre-trial arguments. Tr. 80. She admitted neglect in her opening statement to the jury. Tr. 104. She admitted to "an aggravated case of neglect" in her closing statement. Tr. 476. But appellant denied she had the requisite mental state for murder as it was indicted in this case. Tr. 475-76.

The solicitor admitted during pre-trial arguments that he thought the proper charge was homicide by child abuse, but because Minor was over eleven years old, he could not use that statute and instead indicted appellant for murder. Tr. 76-77. See S.C. Code Ann. § 16-3-85 (limiting homicide by child abuse to deaths of children under eleven). The language used by the State to indict appellant for murder in this case is pivotal. See State v. Dent, ___ S.C. ___, ___ S.E.2d ___, 2025 WL 1947806 (July 16, 2025) (holding variance existed between proof at trial and language of indictment). The indictment states in relevant part that appellant, "did in

Cherokee County at their home . . . on or about April 11, 2022, feloniously, **willfully**, and with malice aforethought, express or implied, cause the death of [Minor]. . . ." R. ___ (Murder Indictment).

Appellant joined her husband's arguments at directed verdict. Tr. 424-25. The directed verdict arguments regarding murder and infliction of bodily injury upon a child (raised in Issue Two) must be read together. Tr. 405-25. Appellant's trial counsel summarized their argument on murder: "And, and as far as the murder indictment, it does—the State is bound by the language of the indictments which requires a willful act and it'd be our argument that they have failed—the evidence, as presented by the State, has failed to prove those elements. . . ." Tr. 424-25. By pleading willfulness, the State imposed upon itself the duty to prove a higher mental state and specific intent. Tr. 405-25. Appellants both argued that the State's evidence only showed neglect. Tr. 405-25.

The solicitor's response is a catalogue of omissions and neglect by the defendants, but fails to point out any willful act or specific intent to cause Minor's death. Tr. 405-25. He referenced the "depraved heart" standard of malice from State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957). Tr. 412. The solicitor summed up his argument by saying, "And, Your Honor, they didn't do what they were required to as parents in this situation in taking care of that child as well as the caregiver of the brother in this case. " Tr. 413. Trial counsel for appellant's husband adroitly responded, "What the solicitor just said is that, essentially, they neglected her to death. But these facts, as bad as they are, they showed criminal negligence. They, they don't show intent." Tr. 414. The trial judge denied the directed verdict motion. Tr. 439-40.

South Carolina recognizes four levels of culpable mental states. State v. Jeffries, 316 S.C. 13, 17-18, 446 S.E.2d 427, 429-30 (1994) *compare* United States v. Clemons, 442 S.C. 670,

674, 901 S.E.2d 280, 282 (2024) ("South Carolina has not wholesale adopted the federal hierarchy of mental states, nor does South Carolina verbatim employ the definitions of purpose, knowledge, recklessness, or negligence found in [Borden v. United States, 593 U.S. 420 (2021).") The four states, ranked in order of difficulty of proof, are purpose, knowledge, recklessness, and negligence. Id. "'Purpose' is the highest level of *mens rea* known in criminal law. . . ." Id. By adding "willfully" to the indictment, the State pled itself into the highest level of *mens rea*.

Murder is normally a general intent crime, but the addition of "willfully" to the indictment transformed murder in this case into a specific intent crime. See State v. King, 422 S.C. 47, 54-64, 810 S.E.2d 18, 22-27 (2017) (defining attempted murder as a specific intent crime). The King Court described specific intent as the "highest possible mental state for criminal attempt." Id. While this case does not deal with an attempt crime, the recognition in King that specific intent is the highest possible mental state shows that by using "willfully" in the indictment, the State required itself to prove specific intent. Under King, specific intent means consciously intending a result. Id. "Willful" has been defined in the context of contempt as indicating a requirement of specific intent. State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006). Gross negligence and recklessness are lower mental states because the actor does not intend the result.

The solicitor's continued references to the homicide by child abuse statute is also instructive because it shows that a higher mental state must be required for murder. The mental state required for homicide by child abuse is "extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1). Murder—especially as pled in this case—must require a higher mental state than extreme indifference to human life. Extreme indifference "based on omission" has

only been found "in extraordinary circumstances" in South Carolina. Rivers v. State, 446 S.C. 1, 13, 916 S.E.2d 335, 342 (2025). If omissions and failure to act are only available in extraordinary circumstances under the lower mental state of extreme indifference, then omissions cannot form the basis of proof of the higher mental state of specific intent.

The solicitor relied on Mouzon malice both at the directed verdict stage and in his closing argument. Tr. 412. Tr. 469-70. He told the jury that malice "signifies a general, malignant, recklessness of lives and safety of others." Tr. 470. "Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life and I submit to you this is reckless disregard for the human life of [Minor] or a prudently person, man or person, would have known that, according to common experiences, that were the plain strong likely that death would of follow the contemplated act." Tr. 470. The solicitor's argument on the element of malice paraphrases and quotes from Mouzon. See Mouzon at 662-63, 99 S.E.2d 672, 675-76.

Mouzon was the first case in South Carolina dealing with a murder conviction arising from the operation of an automobile. Id. "The facts in a motor vehicle accident will rarely sustain a conviction of murder, since the element of malice is usually missing." Id. The defendant in Mouzon was intoxicated and driving at more then twice the speed limit when he struck and killed a pedestrian. Id. The Mouzon Court sustained the conviction and adopted the wanton and reckless disregard standard as a definition of malice. Id. The Court also noted that Mouzon's sentence of life imprisonment seemed "severe where there is no actual intent to kill or injure" but was required by the statute at the time. Id. at 663, 99 S.E.2d at 676.

By importing recklessness into the definition of murder, Mouzon lowers the level of proof of mental state required for murder. But by adding "willfully" to the indictment, the State pled itself out of Mouzon malice. The *mens rea* required in this case has to be higher than the

extreme indifference that includes acts of omission and higher than Mouzon malice. The *mens rea* required here was specific intent to kill Minor. The State's proof was only of extreme neglect and indifference and did not rise to the level of specific intent. The State never proved a single overt act taken by appellant that caused Minor's death. The State only proved failure to act, which is indifference or recklessness, but not specific intent. The Court should direct a verdict of acquittal on murder. The case should then be remanded for a new trial on the lesser-included offense Judge Kelly charged to the jury: involuntary manslaughter. Tr. 501-02.

2.

The trial court erred in refusing to direct a verdict on the charge of infliction of great bodily injury because the state proved only neglect and the statute requires an affirmative act and intent.

The statute under which appellant was indicted is called "Infliction or allowing infliction of great bodily injury upon a child." S.C. Code Ann. § 16-3-95. The statute reads, "It is unlawful to inflict great bodily injury upon a child." S.C. Code Ann. § 16-3-95(A). Because the word "inflict" requires an affirmative physical act instead of omissions and neglect, the trial judge erred in not granting a directed verdict.

Appellant and her husband focused their directed verdict arguments on the verb "inflict." Tr. 404-10. Tr. 424-25. The verb "inflict" meant the statute required an intent to cause injury. Tr. 409. As argued in Issue One above, the State only proved neglect. Appellant was convicted of criminal neglect by the jury under the Unlawful Conduct Toward a Child charge, which is not contested in this appeal. Judge Kelly found that "inflict" could mean "to impose

anything unwelcomed" or "to force someone to experience something very unpleasant or to cause something very unpleasant to be endured." Tr. 439.

The trial judge erred in finding that the definition of "inflict" encompassed the neglect shown by the State. The State's proof failed because it did not show any affirmative act evidencing an intent to cause great bodily injury. In a case similar to Dent, the State used the term "inflicted" in an indictment for homicide by child abuse even though infliction is not required by the statute. Bailey v. State, 392 S.C. 422, 435-36, 709 S.E.2d 671, 678 (2011). Supplemental instructions given during deliberations allowed the jury to convict the defendant based on neglect. Id. The Court found this created a variance between the indictment and the proof because "the indictment apprised Bailey that he had to defend only against the allegation that he inflicted the physical injuries resulting in Victim's death." Id.

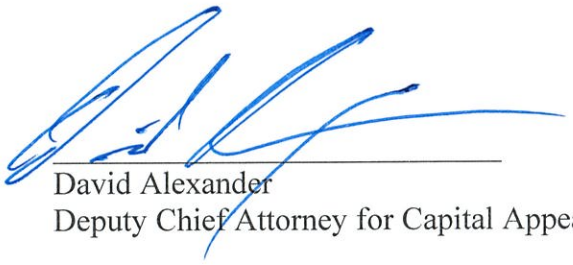
Bailey means that "inflict" cannot mean "neglect" in child abuse cases. The Sixth Circuit also rejected the broad dictionary definition of "inflict" used by the trial judge. United States v. Zabawa, 719 F.3d 555, 559-60 (6th Cir. 2013). In Zabawa, the court cited the Webster's definition used by the trial court of causing something unpleasant to be endured. Id. But the court rejected that definition, finding instead that "inflict" meant something more than "cause" and required direct physical causation of physical harm. Id.

The statutory scheme for child abuse also supports this strict interpretation. The Legislature's intent that "inflict" require intent and a physical act can also be seen by the separation of the child abuse into three statutes. Homicide by Child Abuse is the most severe, requiring "extreme indifference and carries a maximum penalty of life imprisonment. The least severe, Unlawful Conduct—the statute under which appellant was also convicted—encompasses neglect and carries a maximum penalty of ten years. The middle statute at issue here requires

something more than neglect or the amorphous "cause" and carries a maximum penalty of twenty years. S.C. Code Ann. § 16-3-95(A). The State proved neglect, but failed to prove active infliction of great bodily injury. This Court should reverse appellant's conviction on this count.

CONCLUSION

For the foregoing reasons, appellant's conviction for inflicting great bodily injury on a child should be reversed. Appellant's conviction for murder should be reversed and the case remanded for a new trial on the lesser-included offense.



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This 30th day of July, 2025.