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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACKLEEN ELIZABETH MULLEN,

APPELLANT

APPELLATE CASE NO. 2024-001302

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this trial where Appellant was indicted for murder, homicide by child abuse, and homicide by child abuse, aiding and abetting, for the death of one child, did the trial judge err in refusing to instruct the jury they can only find guilt on one of the three homicide indictments?

STATEMENT OF THE CASE

The York County Grand Jury indicted Appellant, Jackleen Elizabeth Mullen, for murder, homicide by child abuse, and homicide by child abuse, aiding and abetting, indictments #2022-GS-46-01905, #2022-GS-46-01928, and #2020-GS-46-03890. On October 31, 2023, Appellant proceeded to jury trial before the Honorable Eugene C. Griffith, Jr. Luke Shealey, Brian Shealey, and Julia Barrington represented Appellant at trial. John Anthony and Erin Joyner prosecuted the case. The trial continued to November 4, 2023, and then did not resume until November 13, 2023, due to the judge being sick. On November 14, 2023, the jury found Appellant not guilty of murder. The jury found Appellant guilty of both homicide by child abuse and homicide by child abuse, aiding and abetting. Judge Griffith sentenced Appellant to thirty (30) years for homicide by child abuse and ten (10) years concurrent for homicide by child abuse, aiding and abetting. (R. p. **). A timely motion for new trial was filed on November 30, 2023. (R. p. **). The State filed a response to the motion for new trial on December 8, 2023. (R. p. **). The judge denied the motion for new trial on July 25, 2024. (R. p. **). A timely notice of intent to appeal was served on August 6, 2024. This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

STATEMENT OF FACTS

The jury found Appellant guilty of homicide by child abuse and homicide by child abuse, aiding and abetting connected to the death of her four-year-old disabled daughter. At the time of her death, the child was living with her mother, Appellant, and Appellant's boyfriend and co-defendant, Audrevious Williams, at Williams' parents' house. Williams was not the father of the deceased child. Appellant also had two sons who lived with them at the time. Williams was the father of the youngest son.

At trial the deceased child's father, Antonio Martin, testified that on May 26, 2020, Appellant called him and told him their daughter was dead. (November 1-4 Tr. p. 370, line 4 – p. 371, lines 1-18). It was not clear to Martin what happened to their daughter. (Nov. 1-4 Tr. p. 372, lines 5-18). According to Martin, Appellant did not want to call the police. (Nov. 1-4 Tr. p. 374, lines 19-25). Martin contacted the police as soon as he returned home. (Nov. 1-4 Tr. p. 375, line 10 – p. 376, lines 1-10). When the police went to the Williams' home and asked about the child, Appellant and Williams told them she was with an aunt. (Nov. 1-4 Tr. p. 274, lines 1-23). The police eventually found the deceased child in a room shared by Audrevious Williams and Appellant. (Nov. 1-4 Tr. p. 131, line 12 – p. 132, lines 1-15). Both Appellant and Audrevious Williams were arrested and charged with homicide by child abuse. (Nov. 1-4, Tr. p. 129, lines 10-14; p. 133, lines 3-7, p. 134, line 24 – p. 135, lines 1-4).

The forensic pathologist, Dr. Ellen Riemer, testified that the cause of death was blunt force head injury. (Nov. 1-4 Tr. p. 638, lines 1-2). The doctor testified there was bleeding in the brain because of blunt force injury and this was responsible for her death. (Nov 1-4 Tr. p. 612, lines 3-13). Although the doctor could not be certain, she testified the brain bleeding started at least two days prior to death. (Nov. 1-4 Tr. p. 647, lines 1-14).

Co-defendant boyfriend, Audrevious Williams, was called as a witness by the State. In late April or early May of 2020, Williams, Appellant, and the three children moved in with Williams' parents. (Nov. 1-4 Tr. p. 258, line 14 – p. 259, lines 1-13). Williams did not have a job and cared for the children while Appellant was at work. (Nov 1-4 Tr. p. 259, line 17 – p. 260, line 1). Williams testified he went to orientation for a job on Friday, May 22, 2020, from approximately 8:00 AM - 1:00 PM. (Nov. 1-4 Tr. p. 261, line 21 – p. 262, lines 1-4). Appellant went to work shortly after Williams got home, leaving the children in his care. (Nov. 1-4 Tr. p. 324, line 22 – p. 325, lines 1-8). According to Williams, when he got home the child had bruises on her face, was not her normal self, and had labored breathing. (Nov 1-4 Tr. p. 262, line 8 – p. 263, lines 1-10). Willaims, however, never mentioned bruising, abnormal behavior, and labored breathing when he texted Appellant at work that afternoon. Instead, he texted Appellant about being bored, trying, unsuccessfully, to get money to buy drugs, getting a tattoo, and watching a movie. (Nov 1-4 Tr. pp. 326 – 331). The only text about the child was, "Changing [Child], and all that girl is is ribs." (Nov. 1-4 Tr. p. 328, lines 18-19.)

According to Williams, later that night Appellant did internet searches, first on Williams' phone and then on her phone, to try and figure out what was going on with the child. (Nov 1-4 Tr. p. 263, line 11 – p. 264, lines 1-23). Williams testified that the child's condition got worse over the weekend but also admitted that he and Appellant tried to buy drugs over the weekend. (Nov 1-4 Tr. p. 266, line 16 – p. 267, lines 1-20). Willaims agreed that on May 24, 2020, the child was declining, he and Appellant were arguing, and Appellant texted him, "You're going to jail and that's on my kids soul." (Nov 1-4 Tr. p. 306, lines 21 – p. 307, lines 1-2). Williams testified that when we they woke up Tuesday morning the child was deceased. (Nov 1-4 Tr. p. 269, lines 1-10).

Williams admitted lying to law enforcement. (Nov 1-4 Tr. p. 286, line 25 – p. 287, lines 1-11). Although Williams denied abusing Appellant, Antonio Martin testified that he observed signs of abuse by Williams in the form of Appellant having a "busted lip." (Nov 1-4 Tr. p. 391, lines 1-21). Appellant's grandmother, Alicia Campos, witnessed Williams choke and hit Appellant. (Nov 1-4 Tr. p. 671, line 8 – p. 672, lines 1-25). James Howerton, a friend of Appellant, testified in May of 2020, Appellant's older son had a "pump knot" or goose egg on his forehead. (Nov 1-4 Tr. p. 749, line 16 – p. 750, lines 1-12). When asked about the injury, the child told Howerton, "I was bad; Daddy spanked me." (Nov1-4 Tr. p. 750, lines 14-15). Howerton explained the child called Williams, ["Dre"] "dad," although Williams was not his biological father. (Nov 1-4 Tr. p. 750, lines 15-16). When Howerton confronted Williams about the injury, Williams took the child by the arm and then punched the wall. (Nov 1-4 Tr. p. 751, lines 1-14).

In closing argument, the prosecutor told the jury:

> So all those things the homicide by neglect. I want to just mention this lesser charge, the – the aiding and abetting homicide by child abuse. You'll have – that's – I'm – I'm going to speak about that because it all depends really on your view of the evidence. If you find that Ms. Mullen is guilty of murder or homicide by abuse, if you find that she inflicted the injuries on India – I don't normally tell a jury they need to find somebody not guilty, but you should find her not guilty of aiding and abetting homicide by child abuse because that would be – you would be saying, "Well, she inflicted these injuries" and you can't aid and abet yourself, you wouldn't find her guilty of both charges. So if you think she actually inflicted the injuries, you wouldn't say that she's guilty of murder or homicide by child abuse.
>
> On the other hand, if you think that she's guilty of the neglect part of this and you convict her of homicide by child abuse for being – just for being neglectful, well, at that point, if you – if you believe that this – these injuries weren't inflicted by her, she'd be guilty of aiding and abetting homicide by child abuse as well. But the key thing is she is guilty of homicide by child abuse regardless. Either way, whether you find she committed the actual assault itself that led to [Child's] injuries, or if you find that she was neglectful of [Child], she's guilty of homicide

> by child abuse, she did – she committed acts or she committed neglect that led to [Child's] death with an extreme indifference to human life.

(Nov 13-14 Tr. p. 326, line 18 – p. 327, lines 1-20).

The jury found Appellant not guilty of murder but guilty of both homicide by child abuse and aiding and abetting under S.C. Code §16-3-85(A)(1) and §16-3-85(A)(2). The verdict form for homicide by child abuse does not distinguish abuse from neglect for purposes of homicide by child abuse. (R. p. **).

ARGUMENT

In this trial where Appellant was indicted for murder, homicide by child abuse, and homicide by child abuse, aiding and abetting, for the death of one child, the trial judge erred in refusing to instruct the jury they can only find guilt on one of the three homicide indictments.

During discussions about jury instructions Appellant cited State v. Greene, 423 S.C. 263, 814 S.E. 2d 496 (2018), and argued, "But the basic rule is that in a case involving a homicide, that although multiple charges for a homicide such as manslaughter or homicide by child abuse as a principal – or homicide by child abuse as an aider or abettor, they can be submitted to the jury. But the jury has to be instructed that they can only select one if they're going to select any." (Nov. 13-14 Tr. p. 274, lines 1-7). The State agreed that only one punishment could be imposed but argued that the jury could find Appellant guilty of both murder and homicide by child abuse. (Nov. 13-14 Tr. p. 274, line 24 -p. 275, lines 1-13). The State argued, "I don't know why a jury couldn't, if they thought that she's the one that inflicted the fatal injuries, why they couldn't say, 'This is a malicious killing and this is a – a killing. This is abuse with extreme indifference to human life.' I mean, those are not inconsistent things." (Nov. 13-14 Tr. p. 279, lines 4-9). The judge ruled, "I'm going to instruct the jury that the State's presented facts and evidence there to consider and render findings. They can find her guilty of murder or homicide by child abuse or not guilty of both, so . . ." (Nov. 13-14 Tr p. 279, lines 20-23). While Appellant mentioned both homicide by child abuse as a principal and homicide by child abuse as an aider or abettor, the State only referenced homicide by child abuse generally.

In closing argument Appellant told the jury:

> Our principles of due process dictate and require that although you are sitting here considering three separate charges for this case, your options are this: You can choose one of them if you find evidence beyond a reasonable doubt, but you can't choose more than one. You can certainly choose none because she isn't guilty beyond a reasonable doubt of these particular charges. She's guilty of other

> things: being a bad mom, lying, any number of charges they could have presented to you. So you can choose one or none and that's just basic fundamental due process in our country that Judge will give you that.

(Nov 13 -14 Tr. p. 337, lines 1-11).

After closing arguments, court adjourned for the evening. The next morning, prior to the judge instructing the jury, the State sought to clarify that the earlier ruling the jury could not find Appellant guilty of murder and homicide by child abuse did not apply to the aiding and abetting charge. (Nov. 13- 14 Tr. p. 367, lines 3-24). Appellant was indicted for murder, and homicide by child abuse under both §16-3-85(A)(1) and §16-3-85(A)(2). The judge correctly commented that the prosecutor argued differently in front of the jury. (Nov 13-14 Tr. p. 367, line 25 – p. 368, lines 1-14). In closing the prosector told the jury if they believed Appellant inflicted the injury, they should find her not guilty of aiding and abetting. (Nov. 13-14 Tr. p. 326, line 18 – p. 327, lines 1-20). The jury ultimately found Appellant guilty of aiding and abetting implying the jury did not believe Appellant inflicted the injury. It follows that the finding of guilt on the homicide by child abuse came from conduct by Appellant other than inflicting the injury.

In response to the State's request for clarification, counsel for Appellant argued that the judge had already ruled. (Nov. 13-14 Tr. p. 369, lines 13-16). Based on defense counsel's closing argument, he believed the judge planned to instruct the jury they could only find guilt on one of the three homicide charges. The judge disagreed and did not think the homicide by child abuse, aiding and abetting had been addressed. (Nov 13- 14, Tr. p. 370, lines 17-23). The judge also referenced State v. Smith, 359 S.C. 481, 489, 597 S.E.2d 888, 892 (Ct. App. 2004). Counsel for Appellant correctly noted that Smith was a directed verdict case. (Nov. 13-14 Tr. p. 370, line 24 - p. 371, lines 1 – 2). Counsel continued to argue, pursuant to Greene, one homicide punishment for one homicide. (Nov. 13- 14 Tr. p. 370, line 24 - p. 371, line 1 - p. 372, lines 1-

14). The judge ruled, "I don't think that issue was presented to me whether aiding and abetting stood on its own or it was a – an exclusive, independent charge one, or charge two, or charge three. It's charge one: Murder, or charge two: Homicide by child abuse. And then without an and/or or the offense of aiding and abetting homicide by child abuse stands independently." (Nov. 13- 14 Tr. p. 372, lines 15-21).

Appellant renewed his objection, "And just for the record on this issue, your Honor, just looking literally at the homicide by child abuse statute. Homicide, the guilty number one, abuse and neglect or knowingly aiding and abetting, it's all contained with the same homicide statute and then it lists the homicide punishments. There's only one way to interpret that. So per Green, it's one or none." (Nov 14, Tr. p. 374, lines 1-7). The judge replied:

> All right. I understand you all's argument and Smith's case also quotes the exact law you just read to me, on page 491 of the (inaudible) reporter, and it carries on to page – on that page it says – or it quotes that exact law, but there was evidence submitted to be considered by the jury of Smith's conduct on both of those offenses. It's not one act; it's just days of acts, is what the jury's been presented. If something happened maybe on Friday or Friday afternoon, or lack of medical care on Saturday, there's a litany of facts testified as to what this child endured over a period of days that the jury could consider both of those. In my view, I think both of them go. I don't think Green overrules Smith, it overrules Easler.

(Nov 13- 14 Tr. p. 374, lines 8-20). The trial judge erred and his reliance on Smith is misplaced. The challenge in Smith was not whether Smith could be convicted of both homicide by child abuse and homicide by child abuse, aiding and abetting. Instead, the challenge in Smith was whether the State presented sufficient evidence to survive directed verdict.

The judge charged the jury on the law of murder and homicide by child abuse. (Nov 13-14 Tr. p. 386, line 12 – p. 387, 388, lines 1-11). The judge instructed the jury that they could only find Appellant guilty of either murder or homicide by child abuse but not both offenses. (Nov 13-14 Tr. p. 388, lines 2-11). The judge then instructed the jury on the law of homicide by

child abuse, aiding and abetting. (Nov 13-14 Tr. p. 388, line 12 – p. 389, lines 1-21). The judge instructed the jury, "Now, as I told you, the indictments stands independently, you can find not guilty on all three. The murder and the homicide by child abuse, one of the two or neither of the two. Aiding and abetting stands on its own. Consider it solely, and consider each one. The State must prove the elements beyond a reasonable doubt of all in order to sustain a conviction." (Nov 13- 14 Tr. p. 389, line 22- p. 390, lines 1-3). Counsel for Appellant renewed the objection. ((Nov 13- 14 Tr. p. 396, lines 12-19). The judge overruled the objection. (Nov 13-14 Tr. p. 396, lines 20-23).

Both the closing argument by the State and by the Defense were inconsistent with the instruction from the judge. Understandably, the jury had a question about "how we pick charges" and sent a note to the judge. (Nov 13-14 Tr. p. 397, lines 4-14). The note was marked as Court's exhibit #48. (R. p. **). The judge said, "And so the – the foreperson did a nice job of outlining the request and basically it's the verdict one of the three, which is what the defense proposed we sent, I declined to do that. Or version two is murder, homicide by child abuse and aiding and abetting. I believe the answer consistent with my ruling is the second version, the bottom half of the letter." (Nov 13- 14 Tr. p. 397, lines 6-11). The jury note reads, "Is it just one (1) charge that can be selected or is it: 1 or 2 & 3?" (R. p. **). The judge asked, "Would you all agree for me to respond by circling the bottom half of the note?" (Nov 13-14 Tr. p. 397, lines 21-22). The parties agreed. (Nov.13- 14 Tr. p. 397, line 23 – p. 398, lines 1-3). While the verdict form provides a not guilty option for homicide by child abuse aiding and abetting, the judge's answer to the jury's question does not. The judge erred in refusing to instruct the jury that they could only find guilt on one of the homicide charges.

The South Carolina homicide by child abuse statute 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; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;

(b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or

(c) abandons the child resulting in the child's death.

S.C. Code Ann. § 16-3-85.

In State v. Greene, 423 S.C. 263, 814 S.E. 2d 496 (2018), Greene was sentenced to concurrent sentences for homicide by child abuse, involuntary manslaughter, and unlawful conduct toward a child. The South Carolina Supreme Court vacated the involuntary manslaughter conviction writing:

> This issue is presented to us in an unusual posture. While both homicide charges were properly presented to the jury, the jury was not instructed in accordance with Appellant's proper request—Appellant could not be found guilty of both homicide by child abuse and involuntary manslaughter. In this situation, the jury should have been instructed that, depending on their view of the evidence, they could find Appellant not guilty of both homicide offenses, guilty of homicide by child

> abuse, or guilty of involuntary manslaughter—but may not find Appellant guilty of both homicide charges. The State erroneously contends both homicide convictions and punishments should stand.

Greene, 423 S.C. at 282, 814 S.E.2d at 506.

As in Greene, the jury in the present case should have been instructed that they could only find guilt on one of the three homicide charges. "Multiple offenses, including multiple homicide offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense." Greene, 423 S.C. at 279, 814 S.E.2d at 505. Under the specific facts of this case, the jury should have been given the choice of either finding Appellant guilty of homicide by child abuse pursuant to S.C. Code Ann. § 16-3-85 (A)(1)[1] **or** finding Appellant guilty of aiding and abetting Williams pursuant to S.C. Code Ann. § 16-3-85(A)(2). The use of the word "or" between (A)(1) and (A)(2) is critical and supports one homicide conviction for one homicide.

Homicide by child abuse, aiding and abetting is not a lesser included offense of homicide by child abuse. See State v. Smith, 406 S.C. 215, 220, 750 S.E.2d 612, 614 (2013). "We find the language of section 16–3–85 unambiguously signals the General Assembly's intent to codify two distinct crimes—homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to section (A)(2), each with distinct elements and sentencing ranges." Smith, 406 S.C. at 219, 750 S.E.2d at 614. While homicide by child abuse, aiding and abetting, is not a lesser included offense of homicide by child abuse, the jury should have been instructed to find guilt on only one of the charges pursuant to Greene. Under the facts of this case where Appellant and Williams shared in the care of the child, Appellant should not be held liable as both principal and for aiding and abetting.

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[1] As discussed above, based on the prosecutor's closing argument it appears the jury did not believe that Appellant inflicted the injury. (Tr. p. 326, line 18 – p. 327, lines 1-20).

The jury's question reflects their confusion about the charges. The judge's answer to their question erroneously implied that the jury must either find guilt on murder **and** homicide by child abuse, aiding and abetting or find guilt on homicide by child abuse **and** homicide by child abuse, aiding and abetting. The jury returned a not guilty verdict for murder. The judge's answer, however, prevented the jury from finding Appellant not guilty of either homicide by child abuse or homicide by child abuse, aiding and abetting. The answer appeared to require a package deal of two charges.[2] As a result, both convictions must be reversed and the case remanded for new trial. The State can then proceed on both § 16-3-85 (A)(1) and (A)(2) but the jury should be instructed to only find guilt on one of the two charges.

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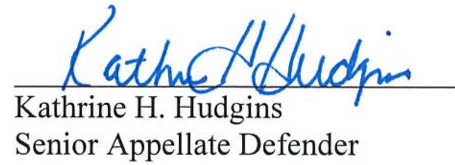
[2] See State v. Covert, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009) ("In this case, the jury was given a verdict form which tracked the provisions of the trafficking statute, but did not specifically allow the jury to return a 'not guilty' verdict. We agree with Judge Anderson that this was error and hold that henceforth, any verdict form given to a jury for use in a criminal case must specifically include as an option "not guilty." The verdict form in the present case included a "not guilty" option. The answer to the jury's question, however, did not.

CONCLUSION

Based on the above argument, this Court should reverse both convictions and remand for a new trial.



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This 13th day of January, 2026.