

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County

Honorable Robert Addy, Jr., Judge
Opinion No. 27336 (S.C. Sup. Ct. filed December 11, 2013)

Appellate Court No: 2011-190695

RECEIVED

DEC 27 2013

S.C. Supreme Court

THE STATE,

Respondent,

vs.

ASHLEY N. HEPBURN,

Appellant.

PETITION FOR REHEARING

On December 11, 2013, this Court reversed Appellant's conviction for homicide by child abuse in a published opinion. State v. Ashley N. Hepburn, Op. No. 27336 (S.C. Sup. Ct. filed December 11, 2013). Pursuant to Rule 221 (a), SCACR, the State respectfully petitions for rehearing on the following points the State believes were possibly overlooked or misapprehended.

I.

First, the State respectfully submits that this Court should reconsider the issue of the waiver doctrine as presented by Appellant in her Final Reply Brief of Appellant and in the Amicus Brief, decline to rule on the waiver issue as raised, and affirm the conviction on the ground the issue was not properly preserved or presented for appellate review. As noted in its letter Return to the Petition for Leave to File an Amicus Curiae Brief, this Court might have

overlooked the fact that the issue of the waiver doctrine and its application to the facts of this case were not argued to the trial court and, therefore, were not properly preserved for appellate review. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also State v. Adams, 332 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 1998); State v. Thompson, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003). This Court might also have overlooked the fact that the application of the waiver doctrine was not argued until Appellant filed and served her reply brief. This Court should reconsider the matter, decline to rule on the issue as raised, and affirm the conviction on the additional ground that Appellant may not present a new theory or issue in reply. Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1991); State v. Wakefield, 323 S.C. 189, 473 S.E.2d 831 (Ct. App. 1996). Moreover, the amicus brief is limited to argument of the issues on appeal as properly presented by the parties. See Rule 213, SCACR.

II.

Second, in its opinion reversing Appellant's conviction, this Court concluded there was insufficient evidence presented during the State's case or during the presentation of Appellant's case to support the charge of homicide by child abuse and that the trial court erred in failing to grant a directed verdict in Appellant's favor. Respondent respectfully submits that this Court overlooked or misapprehended the reasonable inferences arising from the evidence presented during the State's case and during the case presented by Appellant in reaching this conclusion. Respondent submits the record, when viewed in the light most favorable to the State, contains substantial circumstantial evidence reasonably tending to prove Appellant's guilt of homicide by child abuse or from which guilt may be fairly and logically deduced, and that the trial court properly denied Appellant's motion for directed verdict. State v. Smith, 359 S.C. 481, 490 S.E.2d 888 (Ct. App. 2004).

"When a defendant chooses to testify, he runs the risk that if disbelieved "the jury might conclude the opposite of his testimony is true. U. S. v. Brown, 53 F.3d 312, 314 (11th Cir. 1995). "[A] defendant's 'falsehood' or 'fabrication' of evidence in the presentation of the defense case 'is receivable against him as an indication of his consciousness that his case is a weak or

unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit." Earle v. U.S., 612 A.2d 1258, 1268 (D.C. Ct. App. 1992). "The inference thus does not necessarily apply to any specific facts in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting [the defendant's] cause." Id. A "statement by a defendant, if disbelieved by the jury, may be considered as *substantive evidence* of the defendant's guilt" when there is some corroborative evidence of guilt for the charged offense. Id. A denial of guilt may establish, by itself, the elements of the offense. Id.

The evidence presented during the State's case and during the defense presented by Appellant reveals that only Appellant and co-defendant Richard Brandon Lewis were the possible perpetrators of the crime. Appellant maintained that she was asleep in her bedroom across from the victim's room when the injuries to the victim's occurred and that only her co-defendant Richard Brandon Lewis was awake when the victim was injured. Lewis denied harming the victim and maintained that he was in the living room other than checking on the victim and Appellant earlier in the evening and warming food in the kitchen. Lewis contended that he found the victim unresponsive when he checked on her a second time. Both Appellant and Lewis denied inflicting the victim's injuries. However, it is obvious that one of them was untruthful. The purpose of Appellant's testimony was to deny guilt and to point to Lewis as the perpetrator. The version of events as presented by Appellant and Lewis were inherently contradictory. The jury was not required to accept Appellant's explanation. State v. Kreuser, 280 N.W.2d 270, 272 (Wis. 1979). "[I]n some cases, the ultimate inference that is drawn from a person's self-serving lies is that he or she 'did it'". Earle v. U.S., 612 A.2d 1268; Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952). Respondent submits that when Appellant chose to testify she ran the risk that "if disbelieved, 'the jury might conclude the opposite of h[er] testimony is true.'" U. S. v. Brown, 53 F.3d 312, 314 (11th Cir. 1995). The rejection of Appellant's version of events and the fact that either Appellant or Lewis was being untruthful was sufficient to supply a reasonable inference that Appellant was the perpetrator. This along with the other corroborative evidence was sufficient to withstand the directed verdict motion.

Respondent submits the trial court properly concluded that it could be logically deduced from the circumstantial evidence presented that either Appellant or Lewis entered the victim's room and administered the injuries that caused the victim's death. A question of fact for the jury was presented and the trial court's ruling should be affirmed.

III.

Third, Respondent respectfully submits that this Court might have overlooked or misapprehended the distinction between the facts of Appellant's case and Cephus v. U.S., 324 F.2d 893 (D.C.Cir. 1963). The Cephus decision should not be applied to bar consideration of the evidence presented by codefendant Lewis in evaluating the trial court's denial of the directed verdict motion at the close of presentation of the defense. In Cephus, the co-defendant presented his defense **first** at the close of the State's case and implicated the defendant. The defendant thereafter responded to the co-defendant. The application of the waiver doctrine was questioned in Cephus "based upon the defendant's **response** to the damaging testimony of a co-defendant" 324 F.2d at 897. The court concluded:

[i]t is clear that if the defendant himself rests on the Government's evidence, the co-defendant's testimony does not waive the defendant's motion. It is also clear that the defendant's own evidence, introduced in response to the codefendant's testimony does not waive the motion if it adds nothing to the Government's case. The waiver question arises only where, as here, the defendant himself, in seeking to explain, impeach, or rebut the co-defendant's testimony, introduces evidence which overshoots that mark and tends to cure a deficiency in the Government's case. We think the waiver doctrine cannot fairly be applied in this situation. Id.

The court in Cephus determined that a defendant should be free to explain, impeach, and rebut a codefendant's testimony without risk of waiving his motion for directed verdict at the close of the State's case. Similarly, in U.S. v. Johnson, 952 F.2d 1407 (D.C. Cir. 1992), the co-defendant testified first and implicated the defendant as the culpable individual and the defendant thereafter

responded. The court, in Johnson, noted that the waiver rule was abrogated when a defendant testifies in response to the damaging testimony of a co-defendant.

The record before this Court reflects that Appellant presented her defense first at the close of the State's case, denying guilt and implicating Lewis. Thereafter Lewis responded with the testimony of himself and others. Lewis denied committing the acts that led to the victim's death. Lewis described feeling and hearing Appellant stomp into the victim's room and hearing the broken cries of the victim after Appellant entered the room. In this case, Lewis' testimony was presented in **rebuttal and response** to Appellant's testimony implicating him. Contrary to this Court's finding and except for her evidence specifically presented in reply after Lewis rested his case, Appellant's testimony was not offered to rebut or respond Lewis' testimony. Lewis did not implicate Appellant until after Appellant testified initially and pointed to Lewis as the only possible perpetrator. Consideration of Lewis' response to Appellant should not be excluded.

IV.

Lastly, Respondent respectfully submits that this Court misapprehended the State's letter in response to the "Petition of the South Carolina Public Defenders Association of Criminal Defense Lawyers to File an Amicus Curie Brief" as characterized in footnote 16 of the opinion respecting the State's failure to respond to the amicus brief. The State respectfully requests this Court to redact or amend the footnote.

Rule 213, SCACR, provides that a brief of amicus curiae may be filed only with leave of the appellate court and that if leave is granted, "the appellate court will specify the period in which a response to the brief may be filed." This Court's November 14, 2012 order granting the amicus leave to file an amicus brief, it did not specify any time period – consistent with Rule 213 – for the State to file a response to the amicus brief prior to oral argument on December 4, 2012.

The letter referenced in the footnote was submitted by the State as a Return to the Petition of the South Carolina Association of Criminal Defense Lawyers to file an amicus curiae brief. The amicus brief was conditionally filed with the petition on October 29, 2012. The letter Return submitted by the State noted for this Court that the Petition and Amicus Curiae brief were

submitted after the briefing cycles for the parties had ended. This Court issued an order on November 14, 2012, granting the Petition but not specify a briefing schedule for the State consistent with Rule 213. See for example, Anonymous v. State Bd. Of Medical Examiners, 321 S.C. 133, 567 S.E.2d 258 (Ct. App. 1996)(order of this Court granting motion to file amicus briefs and setting briefing schedule for Respondent's response to amicus briefs).

Further, Appellant's argument respecting the waiver doctrine was raised for the first time in the Final Reply Brief of Appellant after the State had completed its briefing. It was not presented in the Initial Brief of Appellant in any manner. Thus, the first opportunity for the State to address the issue was at the oral argument. Footnote 16 implicitly, if not directly, criticized the limited written response the State made to the waiver argument initiated in the Reply Brief of Appellant, but fails to recognize that under its own Rules the Respondent was not allowed to make changes between the Initial Brief of Respondent and the Final Brief of Respondent to argue or address the waiver argument created in the subsequent Reply Brief of Appellant.


IV.

WHEREFORE, in addition to the arguments raised in the Final Brief of Respondent and during oral argument, Respondent respectfully requests that this Court reconsider this matter, vacate the opinion and affirm Appellant's conviction.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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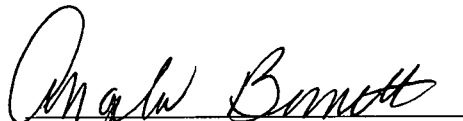
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served Petition for Rehearing on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Andrew A. Mathias, Esquire, P.O. Drawer 10648, Greenville, South Carolina 29603 and attorneys for Amicus Curie, E. Charles Grose, Esquire, 404 Main Street, Greenwood, South Carolina 29646 and James W. Bannister, Esquire, P.O. Box 10007, Greenville, South Carolina 29603

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

This 27th day of December, 2013.



ANGELA BENNETT
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