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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2024-001302

State of South Carolina,

Respondent,

v.

Jackleen E. Mullen,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE PRESENTED

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.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

The circuit court properly refused to instruct the jury that it could not return a guilty verdict on both the charge of homicide by child abuse and the charge of aiding and abetting homicide by child abuse, where those charges cover two distinct offenses and were based on factually distinct acts of Appellant.

STANDARD OF REVIEW

"An appellate court will not reverse a trial court's decision regarding a jury instruction unless there is an abuse of discretion." *State v. Brooks*, 428 S.C. 618, 625, 837 S.E.2d 236, 239 (Ct. App. 2019). "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.* (quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007)).

ARGUMENT

The circuit court properly refused to instruct the jury that it could not return a guilty verdict on both the charge of homicide by child abuse and the charge of aiding and abetting homicide by child abuse, where those charges cover two distinct offenses and were based on two distinct courses of conduct.

This case arises out of the death of Appellant's four-month-old daughter ("Victim"). There was evidence that Victim received blunt force injuries to her head, which caused her to die from bleeding in the brain at least two days afterward. (R. pp.685–709). Forensic pathologist Dr. Ellen Riemer testified that Victim "most likely" would have lived if she had received medical care following her injuries. (R. p.710, lines 7–22).

Appellant was charged with murder, homicide by child abuse, and aiding and abetting homicide by child abuse. After the close of evidence, Appellant requested the jury be instructed that it can only find guilt on one of the three charges, if any, pursuant to the "one homicide, one homicide punishment" rule. (R. p.1028, line 19–p.1029, line 20). The State disagreed, arguing that the jury could properly find Appellant guilty of murder and homicide by child abuse. (R. p.1028, line 24–p.1031, line 6). The court ultimately ruled that it would instruct the jury it could find Appellant guilty of murder or homicide by child abuse or neither, but not both. (R. p.1034, line 18–p.1035, line 1).

Following closing arguments, but prior to jury instructions, the State acknowledged the trial court's earlier ruling that Appellant could not be found guilty of both murder and homicide by child abuse; however, the State argued that Appellant could still be found guilty of both homicide by child abuse *and* aiding and abetting homicide by child abuse. (R. p.1122, lines 3–24). The State reasoned that Appellant could be guilty of aiding and abetting homicide by child

abuse at the time Victim was fatally injured, while also being independently guilty of homicide by child abuse due to her own neglect in failing to obtain medical care during the days that followed. (R. p.1122, lines 10–15).

Appellant disagreed and argued to the trial court that the jury should be instructed that it could only find guilt on one of those three charges, or none of them. (R. p.1123, lines 15–22).

The trial court ruled that the offense of homicide by child abuse is distinct from the offense of aiding and abetting homicide by child abuse; accordingly, the court decided to charge the jury that it could find guilt on *either* murder *or* homicide by child abuse, but that it could consider the aiding and abetting charge independently. (R. p.1126, line 13–p.1127, line 23).

Appellant then argued that the jury should not be permitted to find guilt on both homicide by child abuse and aiding and abetting homicide by child abuse because those offenses were both defined within the same statute. The trial court replied that the jury could still find guilt on both charges because they were based on different alleged acts. (R. p.1129, lines 1–20).

Appellant now contends the trial court erred in making this determination. Appellant argues the trial court's decision was contrary to the holding of *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018), which adopted the "one homicide, one homicide punishment" rule. Appellant contends that, because there was only one homicide in this case, the jury could not properly return a guilty verdict on more than one homicide charge under *Greene*.

Appellant's argument is based on a misreading of the holding of *Greene*. In *Greene*, the defendant was convicted and sentenced for two offenses—involuntary manslaughter and homicide by child abuse—arising out of the *same conduct*: breastfeeding her infant daughter while consuming excessive amounts of morphine, which caused her daughter to die of morphine poisoning. *Id.* at 266, 814 S.E.2d at 498. The Supreme Court in *Greene* held that "principles

inherent in double jeopardy and due process preclude multiple punishments for the same offense." *Id.* at 279, 814 S.E.2d at 505. Consequently, the *Greene* court ruled that "absent legislative intent to the contrary, we follow the prevailing rule [that] one homicide is limited to one homicide punishment per defendant." *Id.* at 280, 814 S.E.2d at 505.

Applying that rule to the case before it, the *Greene* court noted that the State chose to prosecute Greene for two different homicide offenses—involuntary manslaughter and homicide by child abuse—based on a *single theory of liability*. *Id.* at 282, 814 S.E.2d at 506 (noting "the State ultimately elected to pursue a single theory of liability"; namely, the morphine-poisoning-via-breastmilk theory). The *Greene* court held that "varying homicide charges . . . as a matter of law could not be premised on one theory of liability." *Id.* Accordingly, the *Greene* court held that the jury in that case should have been instructed that it could find the defendant guilty of *either* involuntary manslaughter *or* homicide by child abuse, but not both.

Greene is distinguishable, therefore, from the present case. In this case, the State did not contend that Appellant could be guilty of homicide by child abuse *and* aiding and abetting homicide by child abuse *based on the same theory of liability*. Rather, the State argued that Appellant could be found guilty of aiding and abetting during the infliction of the fatal blunt force injuries to Victim's head and *also* be found guilty of homicide by child abuse due to her subsequent neglectful failure to pursue medical care for Victim. There was evidence to support a finding that *both* the affirmative abuse which caused Victim's blunt force injuries *and* the failure to seek medical care in the days that followed were responsible for Victim's death. (R. pp.685–710).

The relevant 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 eighteen 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 eighteen.

S.C. Code Ann. § 16-3-85. Our Supreme Court has held that "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." *State v. Smith*, 406 S.C. 215, 219, 750 S.E.2d 612, 614 (2013) (emphasis added).

The State presented evidence that Appellant committed two distinct courses of conduct: aiding and abetting the initial physical abuse of Victim that caused the fatal brain bleeding, and neglectfully failing to take Victim to the hospital during the subsequent period in which medical attention could have saved Victim's life. These two distinct courses of unlawful conduct constitute two distinct offenses, meriting independent convictions and punishments. This is not a case where the State sought "multiple punishments for the same offense." *Greene*, 423 S.C. at 279, 814 S.E.2d at 505. Accordingly, the trial court did not err by ruling that the "one homicide, one punishment" rule did not preclude the jury from properly finding Appellant guilty of both offenses. *See id.* at 283, 814 S.E.2d at 507 (In cases where a single homicide "would properly fall within multiple homicide statutes . . . a jury may properly return a guilty verdict on more than one homicide charge.").

Finally, Appellant argues that the trial court erred in its response to the jury's note asking for clarification concerning the charges. Appellant argues the trial court's response did not sufficiently make clear that the jury could find Appellant not guilty of aiding and abetting homicide by child abuse. Appellant, however, did not object on this ground at trial. On the contrary, the

trial court asked whether Appellant would "agree for me to respond by circling the bottom half of the note?" and Appellant replied, "Yes, sir." (R.p.1152, lines 21–23). While Appellant consistently objected to the trial court's refusal to instruct the jury not to return a guilty verdict on more than one charge, she never objected to the trial court's handling of the jury note on the ground that it "appeared to require a package deal of two charges." (Br. App. p.14). Therefore, this argument is not preserved for appellate review. *See, e.g.*, *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court). Regardless, this new argument is meritless, as the trial court quite clearly instructed the jury that it could return a not guilty verdict on all three charges. (R. p.1144, lines 22–23). In addition, Appellant herself acknowledges that the verdict form properly included a "not guilty" option. (Br. App. p.14 n.2).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the circuit court.

Respectfully submitted,

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