STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

APPELLANT

FINALBRIEF OF APPELLANT

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STATEMENT OF THE CASE

Wesley Smith, appellant, was indicted by the Horry County Grand Jury for homicide by child abuse. On April 14, 2008, appellant proceeded to trial before the Honorable Edward B. Cottingham and a jury. Upon the jury finding appellant guilty of aiding and abetting homicide by child abuse, Judge Cottingham sentenced him to incarceration for twenty years.

STATEMENT OF THE FACTS

The four month old child victim died as the result of an overdose of pseudoephedrine, a medication prescribed for congestion. The forensic pathologist, Dr. Collins, testified that the child was found to have a blood level of 1300 nanograms - - four times the adult therapeutic level. The doctor testified that this level would be toxic in a child. (R. p. 371). Dr. Collins testified that this drug is used more for congestion and not for a cough. (R. p. 374).

The child's treating physician, Dr. Cooper-Merchant testified that she had "in rare circumstances" prescribed pseudoephedrine for children as young as four months. (R. p. 149). However, the doctor testified that she did not prescribe pseudoephedrine for this particular child. Dr. Cooper-Merchant testified that she did write a prescription for Rondex-DM for this child, but that that medication did not contain pseudophedrine. (R. p. 149). The doctor further testified that the Rondex-DM prescription was written during the time the child was in foster care. (R. p. 149). When asked on cross-examination, "Your testimony today was that you never prescribed pseudoephedrine for the baby, correct?" Dr. Cooper Merchant responded, "I didn't say that." She explained, "I prescribed a cold medicine that contained a decongestant. . . " When asked if the medication she prescribed contained pseudoephedrine, the doctor answered, "I don't remember the formulation then but it, um, usually either that or phenylepherine. That was four years ago." (R. p. 163). The doctor agreed that it was possible that the prescription contained pseudoephedrine but that, from looking at past formulations, she thought that it contained phenlepherine now. (R. p. 163). Dr. Cooper-Merchant further testified that the child was prescribed a Ventolin inhaler but

that that inhaler did not contain pseudophedrine. (R. p. 150). However, the doctor agreed that the inhaler could have a dangerous interaction with pseudophedrine. (R. p. 155).

Dr. Cooper-Merchant testified that the foster parents were instructed to give the child .25 cc's of the medication four times a day and that they were warned to watch for side effects. (Tr. p. 168). The doctor testified that she would not prescribe this medication for longer than one week; however, the prescription did not limit it to one week. The doctor explained that the instructions as to how long to administer the medicine would have been given to the parents. However, she agreed that the child was with the foster parents at that time and that she never discussed this medication with either appellant or the child's mother and appellant's fiancé, Charlene Dandridge. (R. p. 170). At the close of her examination, when asked if she prescribed medicine for this child containing pseudoephedrine, Dr. Cooper-Merchant answered, "I don't remember. That was four years ago." (R. p. 171).

Pharmacist Renee Lamp testified that the medication prescribed by Dr. Cooper-Merchant did, in fact, contain pseudoephedrine. The pharmacist testified the medication prescribed for the child, Rondex-DM, was prescribed by Dr. Cooper Merchant. The pharmacist testified that the medication does contain pseudoephedrine. (R. p. 565). The ER doctor, Dr. Hayes, testified that he prescribed the inhaler which did not contain pseudoehedrine for the child on January 15, 2004. Dr. Hayes testified that pseudoephedrine is not recommended for children and that it had actually been taken off the market at the time of trial due to the dangerous effects on children and specifically infants. (R. p. 179).

Dr. Cooper-Merchant testified that she saw the child on December 9, 2003 for a well-baby examination. The doctor testified that the child's right thigh was very swollen and painful. Dr. Cooper-Merchant testified that the father, appellant, indicated that he had

no idea how the child's leg had been injured, although he eventually proposed incidents he knew of which he thought could conceivably have resulted in such an injury. (R. p. 146-149). Dr. Cooper-Merchant testified that the baby's mother explained that she had not sought treatment for the leg injury because she was afraid that she would be reported as a bad mom. (R. p. 147).

The doctor testified that x-rays showed a spiral fracture of the child's femur. Dr. Cooper-Merchant testified that, to her, a spiral fracture was an indication of child abuse. (R. p. 148, line 12). The doctor testified that the child's parents reported that when the mother worked, appellant kept the child and that when appellant worked, the mother kept the child. (R. p. 149). Dr. Cooper-Merchant could not remember making a statement to the social worker indicating that she thought that the father was covering up for the child's mother. (R. p. 164).

Hospital radiologist, Dr. Crane, testified that he took x-rays which showed that the child's right femur was fractured through the thigh bone. The radiologist testified that he could not date the femur fracture from the x-ray, but that it could have been over a month old. He confirmed that he did not know where the child was or who she was with at the time of the fracture. The radiologist testified that not all spiral fractures result from abuse and some result from accidents. (R. p. 187). The radiologist testified, "Statistically, over seventy percent of spiral fractures of the femur on children that aren't' walking are caused by abuse or non-accidental cause." (R. p. 188). The radiologist agreed that thirty percent of spiral fractures in a child of this age are caused by accident and not by abuse. (R. p. 189).

The radiologist further testified that he observed no rib fractures on the January 15, 2004, x-ray. (R. p. 185). However, Dr. Collins testified that the autopsy revealed that the

child had multiple rib fractures and multiple healing rib fractures. (R. p. 376). She testified that these fractures were anywhere from ten days to three weeks old. (R. p. 386). Dr. Collins testified that the fractures were squeezing type injuries. (R. p. 384). The pathologist further testified that there was new injury on top of older rib fractures that were healing. She testified that the new injury was about twenty-four hours old. (R. p. 386). When asked if she knew whether appellant had inflicted any of the injuries on the child, Dr. Collins testified, "I cannot tell from the autopsy. I know it was another individual besides this child that administered the medicine and inflicted the trauma but I cannot tell you who did it." (R. p. 417, lines 13-17).

The security guard at the apartment complex where appellant, his fiancé, her son, and their baby lived testified that on the day the child died, he was patrolling the property when he was flagged down and informed that there was an unresponsive child. Mr. Robertson testified that when he went to check on the child, there was a lady trying to do CPR on the couch. Mr. Robertson testified, "I moved the child to the floor and took over the CPR until EMS got there." (R. p. 191).

An ER doctor, Dr. Rahter, testified that she saw the child on February 14, 2004 in the emergency room in full cardio-pulmonary arrest with CPR in progress. (R. p. 195). Dr. Rahter testified that appellant told her everything he did that day, including feeding the baby, rocking the baby, and the baby coughing and him going to check on the baby, that he was the caretaker at the time. Dr. Rahter testified that both appellant and the child's mother used the inhaler once a day. (R. p. 203). Dr. Rahter testified, "[H]e told me that the child was coughing, slobbering at 5:35 in the afternoon, and he used the inhaler that he had. He then said that he fed the child, um, six ounces and rocked the baby to sleep at approximately

6:00 p.m. and put her in her crib. He stated that a little bit after 7:00 he heard coughing and thought it was the six year old child that was in the home. Ran up to check on that child at which time he realized that it was not that child and went in and found um, the child with secretions coming out of her nose and mouth. Ran to the neighbor's house. Called 911, and ah, EMS were notified at 7:28 p.m." (R. p. 197) Dr. Rahter testified that the child was pronounced dead at the ER at 7:53 p.m. (R. p. 196). Dr. Rahter agreed that appellant's various suggestions for how the child's leg could have been broken were not consistent with a spiral fracture. However, the doctor further agreed that it was certainly possible that these hindsight theories were inconsistent with the injury because appellant was not present and had no knowledge of how the fracture actually occurred. (R. p. 202).

The child's mother, Charlene Dandridge, testified that she and appellant were on the verge of marriage and that he was a loving father to their infant child. (R. p. 234; p. 249). Dandridge testified that she was facing prosecution related to the death of the child but that she had no deal with the State. She testified that she was facing thirty years if convicted of both charges she was facing. (R. p. 235). When asked, "Did you ever give any cough medicine or anything to the child other than the inhalant, Dandridge answered, "I - - I gave her - - I don't remember giving her drops. I don't." (R. p. 239). Dandridge recalled that when she took the child to a well-baby visit on February 12, 2004, they said she was fine.

Dandridge testified that she worked about twenty-five to thirty hours a week at Office Depot and that while she worked, appellant took care of the child. Dandridge agreed that when the child was returned home from foster care by DSS, she was instructed not to leave the child alone with appellant. However, Dandridge testified that she and appellant violated that order because he cared for the child while the mother was working. (R. p. 241).

Dandridge testified that she was off work on February 12th and 13th, 2004. She testified that on the day of the child's death, February 14, 2004, she went in to work at 10:00 in the morning and came home for lunch. (R. p. 242). Dandridge testified that she returned to work after lunch at 2:00 p.m. She denied that she gave the child any medication before she left. (R. p. 243). However, she testified that appellant told her that he gave the child medicine after lunch. (R. p. 246). Dandridge testified that she assumed that the last time she gave the child medicine would have been on her two days off, i.e., February 12th and 13th, 2004. (R. p. 256). Dandridge denied that she squeezed the child in the days immediately prior to her death. (R. p. 243). Dandridge further denied that she was actually the person who could not deal with the baby's crying. (R. p. 262). On cross-examination, Dandridge was asked, "And, in fact, the child never cried with Wesley, did she?" Dandridge answered, "In most cases, no." (R. p. 276).

Despite her testimony indicating that from January 15 to February 14, 2004, appellant was the sole caregiver to the child, Dandridge agreed that she cared for the child when she was not working. She testified that she worked all day and then cared for the baby at night. Dandridge further agreed that the preacher-lady from next door babysat for the child for three days in January after the child was returned home by DSS. However, Dandridge testified that that preacher-woman hurt herself trying to come down to see the baby and, thereafter, she decided that it was not a good idea for her to keep the child. (R. p. 278). Dandridge further agreed that she was aware that appellant's Aunt Lula, who lived across the street, watched the child. Dandridge did not recall Aunt Lula's telling her that she sometimes took the child to her house to care for her. (R. p. 267). Dandridge testified that

she told the police that people came to the house to watch the baby when appellant took a break; however, she testified that that statement was not true. (R. p. 271).

Former D.S.S. foster care social worker, Lasheka Walker, testified that she became involved with this family when the child was returned home in January 2004. Ms. Walker testified that she ran a background check on Patricia Wright, the next door neighbor who had agreed to serve as a babysitter. However, Ms. Walker testified that DSS did a background check on only one person despite the fact that two people live in the Wright home. (R. p. 440). Ms. Walker further testified that Ms. Wright had fallen and injured her leg so that she was unable to babysit. (R. p. 444).

The D.S.S. caseworker, Tara Phillips, testified that the night of the child's death appellant was very upset whereas the mother was quiet, uninterested, and focused on the television that was playing in the room. Ms. Phillips testified that the complaint as to the child's broken femur was determined by DSS to be founded against an unknown perpetrator for physical abuse because "we were unable to determine how the leg was broken or who was responsible." (R. p. 457). Ms. Phillips testified that Charlene Dandridge had told her that she bought generic cough medicine for that baby. (R. p. 457). Phillips further recalled that appellant told her that he was not good with measurements and that he could not recall whether he gave the child medicine more than once.

Isaac Collington is the maintenance supervisor at appellant's apartment complex. He testified that when someone moves out, he is responsible for cleaning out the apartment. Mr. Collington testified that he recalled that the house next door to appellant's apartment was occupied by ladies known as the preacher-women. Mr. Collington testified that the night appellant's child died, the preacher-women left. He testified that the women left in the

middle of the night on the night the baby died. He testified that he went to their apartment but that they were gone. (R. p. 461). Mr. Collington testified, "I know she left her apartment, you know, like the middle of the night. She left all her belongings in there, I mean, everything, all her clothes, um, everything in the refrigerator. She left the place in a mess and she never came back, you know. She never came back." (R. p. 465).

ARGUMENT

I. The trial judge committed reversible error in admitting evidence of a prior injury to the child victim, allegedly committed by appellant, where the evidence was not clear and convincing, where the evidence was not admissible under any Lyle exception or under Rule 404(B), and where the evidence was inadmissible under Rule 403, SCRE.

At the outset of appellant's trial which commenced on April 14, 2008, defense counsel moved to exclude from evidence any reference to the child victim's sustaining prior injuries, in particular a fractured femur. (R. p. 13). The State argued that the evidence was admissible under the rules of evidence and under State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct.App. 2005). The trial judge based his ruling on the Court of Appeals' Fletcher decision.

The jury had convicted Fletcher of homicide by child abuse. On appeal, the Court of Appeals affirmed, holding that prior bad acts testified to were properly admitted pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The Court of Appeals held the prior bad acts had been proved by clear and convincing evidence, and that the acts were admissible to demonstrate a) a common scheme or plan of child abuse or neglect, b) intent or the absence of mistake or accident, c) as part of the res gestae of crime of homicide by child abuse and d) that, in any event, any error in the admission of the testimony was harmless beyond a reasonable doubt given the overwhelming evidence of guilt in this case.

The Court of Appeals' decision was issued on January 31, 2005. State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct.App. 2005). The South Carolina Supreme Court granted certiorari on October 19, 2006. On August 8, 2008, the Supreme Court issued its decision

reversing the Court of Appeals' decision. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (S.C.,2008).

In this case, the four month old child died as the result of an overdose of pseudoephedrine. The State asserted that prior injuries consistent with a pattern of abuse to the child included a small fracture of the femur sustained in November of 2003, which was first examined and diagnosed by a doctor on December 9, 2003. The State indicated that the mother had taken the baby for a well-baby visit on December 9, 2003, and that during that visit, the baby's swollen leg was diagnosed as a small fracture to the femur. (R. p. 15). In response to the reported femur fracture, the child was taken out of the home by DSS and placed with foster parents. The child was returned home with a treatment plan in January 2004. The judge asked if there would be DSS testimony. The State indicated that it did not intend to present DSS testimony. (R. p. 20). Counsel for appellant indicated,

> What happened was they had a hearing and they found it unfounded. They found it that it was abuse of the femur but it was unfounded to the perpetrator. They weren't able to say that either Wesley or his wife Charlene had done it.

(R. p. 21, lines 2-9). Defense counsel indicated, "We're here to present evidence today. We have a witness subpoenaed to testify that DSS found it unfounded and returned the baby." (R. p. 21). Counsel asserted, "[B]ased on her knowledge of the investigation that was brought to her she felt that it didn't warrant further charging Wesley. She felt he wasn't guilty of the crime." (R. p. 113). However, the trial judge responded, "No, I'm not going to listen to that today. I'm not going to listen to what DSS found." (R. p. 21).

In addition, the State asserted that evidence of the child's rib fractures was admissible against appellant. The State argued that when the child was examined on

January 15, 2004, at which time a chest x-ray was performed. The State argued that the x-ray showed no rib injuries whereas at the time of the child's death on February 14, 2004, there were eleven ribs fractured with various stages of healing. The State asserted that at least four hemorrhaging ribs could have occurred within forty-eight hours of the death of the child. (R. p. 17). The State maintained that the most recent rib injuries had been sustained as the result of the child's being squeezed. (R. p. 19).

Defense counsel argued that the fractured femur was inadmissible against appellant under the authority of the decision in State v. Northcut, . Counsel argued that Northcut was more recent and that the decision was directly on point for the issue of the fractured femur. (R. p. 22). Counsel argued that where in this case the fractured femur was found to be the result of abuse at the hands of an undetermined perpetrator the evidence of the fracture was not admissible against appellant. (R. p. 22).

The trial judge responded, "Let me tell right quick like how I distinguish Northcut from Fletcher. First this evidence was introduced in the sentencing phase of a death penalty case and the courts have said in that case and Jean dissented. In that case the doctors found that there was no child abuse in it and there's no finding anywhere that it was other than an accident and it stood solely as the single alleged incident of child abuse and former alleged child abuse was used to put in the death penalty which is different and I'll tell you how I distinguish it. In this case, if believed, there are at least three incidences of child abuse."

The judge noted the State's allegations of a broken femur, broken ribs, improper use of drugs, and probable child abuse within 48 hours of the child's death. The judge concluded, "So, if believed you've got four separate incidents of child abuse on a child four months old. Now I don't think that Northcut is appropriate to this case because, one, it was

one incident; two, there was never a finding that it could have been child abuse; thirdly, it was used in the sentencing phase to mpose a sentence of death upon that defendant. So, I would conclude that it is admissible under State v. Fletcher and that within the time frame it's not so far distance as to not have a probative value." (R. p. 24). Defense counsel pointed out that the victim did not die from broken ribs or a broken femur. Counsel argued, "But I still think we have the filter of the 403, the prejudicial and probative value." (R. p. 24).

The trial judge ruled, "Obviously its highly prejudicial, but given the fact that this baby only lived four months and given the fact that, if believed, there is a history f child abuse during the entire life of that child, I would conclude that the probative value of this evidence clearly outweighs the prejudicial effect and it will be admitted." (R. p. 25). Defense counsel pointed out, "DSS investigated the broken femur and specifically investigated our client. They never found he was the cause of the fractured femur." (R. p. 25). The trial judge responded, "That's why we going to have - - what interests me is even DHEC (sic) concluded that somebody had committed child abuse. They just didn't know who it was. So, I'm admitting it to show clearly that someone committed child abuse on this child. The jury can determine whether or not this defendant did it." (R. p. 26).

The trial judge ruled, "So, I've never seen a case more square for than the facts in this alleged fracture in this case as it applies to State v. Fletcher, and I understand your case of Northcut, but it's just simply not applicable in my view, respectfully , in this case." (R. p. 26). Counsel pointed out that in order to be admissible under Rule 404(B), there must be clear and convincing evidence that the prior bad act was committed by the accused. Counsel argued that, here, there was insufficient evidence to establish that appellant was the person who inflicted the prior injuries on the child. However, the trial judge found that,

from the State's review of the evidence, either appellant or his wife or both of them had to do it. Defense counsel argued that without evidence indicating that appellant in particular committed the prior bad acts of injury to the child, the State lacked clear and convincing evidence to admit the prior acts against appellant. (R. p. 27). Counsel further pointed out that although appellant was with the child at the time of death, the State was attempting to present in evidence prior injuries sustained when appellant was not present. Counsel further argued that although the State had argued and the trial judge made great note of the allegation that there were rib injuries sustained within 48 hours of the child's death, the State would not be able to prove that alleged timing.

Defense counsel pointed out that in Fletcher both co-defendants were tried together, whereas here, appellant was tried alone on the charge of homicide by child abuse. (R. p. 29). Counsel asserted that appellant, his fiancé, and others took care of the child and he argued that under these circumstances, the State was unable to meet the level of clear and convincing proof that appellant was the person who previously injured the child. (R. p. 29). However, the trial judge ruled in reliance on the Court of Appeals' decision in Fletcher that if the evidence showed that any person abused the child, evidence of that abuse was admissible against appellant whether he was the perpetrator or not. The judge ruled, ""I just clearly think that it's admissible under the context of this case where undisputedly all the experts going to say that child was abused for the entire four months of its life and we'll let the jury determine who, if anyone, is responsible for it." (R. pp. 29-30).

In excusing the defense-subpoenaed DSS witness from the proceedings, the judge further explained, "Well, when you tell me that even DSS found evidence of child abuse but couldn't identify the perpetrator, that helped me decide I didn't need her because the

question is whether or not there was a child abuse and whether or not there is a pattern of it." (R. p. 30). The judge concluded, "What interests me is even DHEC (sic) concluded that somebody had committed child abuse. They just didn't know who it was. So, I'm admitting it to show clearly that someone committed child abuse on this child. The jury can determine whether or not this defendant did it." (R. p. 30). The trial judge indicated that his ruling was made on the basis of the Court of Appeals' decision in Fletcher: "So, I've never seen a case more square for than the facts in this alleged fracture in this case as it applies to Fletcher and I understand your case of Northcut but it's just simply not applicable in my view." Defense counsel argued that even under the Court of Appeals' Fletcher decision, ". . . [I]t's my understanding that for a prior bad act to be admissible under rule 404b there must be clear and convincing evidence that the prior bad act was committed by the accused. Again I don't think there is enough evidence here to raise." The judge rejected this argument: "No, sir. Under clear, cogent, and convincing must be that there is sufficient evidence to show child abuse and I would think it, I don't know, but I'll listen but based on preliminary facts that I understand them to be, either he or his wife or both of them had to do it." (R. p. 30).

The trial judge plainly erred in admitting evidence of prior bad acts of injury to the child where there was no clear and convincing evidence that appellant committed those acts. The judge agreed that there was no way for him to tell if appellant committed the prior acts but he ruled that he need not find that appellant committed the acts in order to admit the acts in evidence against appellant. The judge's decision was error made in reliance on the Court of Appeals' decision which was reversed. The Supreme Court held:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (S.C.,2008). The Supreme Court rejected the Court of Appeals' finding of clear and convincing evidence that Fletcher committed the prior bad acts of injury to the child. The Supreme Court found instead, "On the present evidence, there is simply no evidence, let alone clear and convincing evidence that Fletcher was the perpetrator of the prior bad acts" against the child. The Supreme Court held that it is error to admit evidence of prior bad acts against the accused defendant without clear and convincing evidence that the accused committed the prior bad acts. Here, where the evidence plainly failed to establish clearly or convincingly that appellant inflicted the prior injuries, the trial judge erred in admitting the evidence.

The Supreme Court in Fletcher found that the error in admitting prior bad acts of injury to the deceased child could not be harmless. The Court held, "[G]iven that the identity of the perpetrator was the essential issue at trial, and given the dearth of evidence in the record, we simply cannot say that error in the admission of Jenkins' testimony was harmless beyond a reasonable doubt." The Court observed, "This case fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial. We find the only function of Jenkins' testimony in this case was to demonstrate Fletcher's bad character. Accordingly, admission of this testimony was both erroneous and prejudicial."

Likewise, here, admission of the testimony as to the child's prior injuries was erroneous and prejudicial where the State was unable to show that appellant committed those acts. Under these circumstances, the evidence functioned only to attack appellant's character and to unfairly prejudice him in the eyes of the jury. The probative value of the evidence was far outweighed by the unfairly prejudicial effect so that the evidence should have been exclude under Rule 403. Appellant's conviction and sentence should be reversed on this ground.

II. Did the trial judge err in charging the jury as to subsection (b) of the statute regarding aiding and abetting so as to violate appellant's right to notice and due process?

Appellant was indicted only for violating Section A of the homicide by child abuse statute. When the case was introduced to the jury, they were informed only that appellant was charged with homicide by child abuse under Section 16-3-85(A). However, after presenting its case, the State requested the judge to also charge the jury as to subsection B regarding aiding and abetting. Defense counsel objected to the charge as

to aiding and abetting where appellant was indicted only as a principal and where no one else was indicted as the principal role in the homicide.

Defense counsel argued that where the State tried him only on the charge of homicide by child abuse as a principal and had Dandridge testify against him, appellant was entitled to have the jury charged only on the indicted offense and not charged as to the law relevant to aiding and abetting. (Tr. p. 574). Counsel argued that the single indictment referenced only a violation of Section 16-3-85(A)(1) and that the indictment therefore failed to put appellant on notice that he would also be tried as an aider and abettor to an unindicted principal.

Counsel argued, "I would have done, your honor, my cross of Charlene differently. Don't want to redo it. I prepared for a year for that cross of her based on what he was charged with, nothing more, nothing less." (Tr. p. 585). Counsel stated, "I'm entitled to a fair trial and I was never put on notice for 16-3-85(A)(2) until yesterday." (Tr. p. 586). Counsel stressed that he was not prepared to defend against a newly brought aiding and abetting charge. Counsel pointed out that subsection B is not a lesser included offense of subsection A. He argued that appellant's jury should be charged only as to the indicted section, 16-3-85(A)(1). The trial judge ruled that even though the defense had objected, he would charge both sections.

In fact, the judge charged the jury that appellant had been charged with homicide by child abuse and that the State was bound to prove that he caused the death of the child while committing child abuse or neglect. The judge also charged, "the State may also prove homicide by child neglect by proving beyond a reasonable doubt that the defendant knowingly aided and abetted another person to commit child abuse or neglect. (Tr. p.

621). The jury returned a verdict of not guilty of homicide by child abuse but guilty of aiding and abetting under subsection (b). Therefore, appellant was prejudiced by the judge's erroneous charge on the law and his rights to due process and notice were violated.

III. The trial judge erred in restricting cross-examination of the testifying mother, Charlene Dandridge, by refusing to allow Counsel for Appellant to question her as to the length and nature of the sentences avoided through her cooperation with and testimony on behalf of the State.

Counsel for appellant attempted to question the child's mother on cross-examination as to the fact that she was charged only as an aider and abettor and not charged as the principal under the homicide by child abuse statute. Counsel argued that he should be allowed to cross-examine the mother as to her avoidance of a possible life sentence if she had been charged and convicted as a principal. However, the trial judge ruled that this inquiry was not permissible.

The trial judge's erroneous ruling served to interfere with appellant's right to the effective presentation of a defense as guaranteed by the Constitution. The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994).

In State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), the South Carolina Supreme Court agreed that the trial court should have permitted defense counsel to elicit

from State's witness the possible punishment he could receive if he were convicted of the charged crimes and that the trial judge's limitation was reversible error. In State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), the Supreme Court held that the Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. In Brown, the Court rejected the State's argument that inquiry into punishment was properly excluded because it would have allowed the jury to learn of appellant's own potential sentence if convicted. The Court ruled, "We conclude appellant's right to meaningful cross-examination outweighs the State's interest here." Thus, the limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced. Here, appellant was plainly prejudiced by the judge's limitation of his cross-examination of Dandridge for bias.

The trial judge erred reversibly in interfering with appellant's right to cross-examine the witness against him for bias.

IV. The trial judge erred reversibly in erroneously restricting the defense presentation of relevant evidence in violation of his Sixth Amendment rights.

Defense counsel proposed introducing the testimony of psychiatrist, Dr. Cross, as to appellant's borderline intelligence. Counsel argued that the testimony was not proposed for the purpose of arguing diminished capacity but for the purpose of responding to the State's charge that he gave the baby too much medicine. Counsel argued, "My position is that Wesley can't read, can't write, and we just have - - - " (Tr.p. 300). The trial judge ruled that if appellant did not testify, the evidence as to his I.Q. was inadmissible. The trial judge ruled, "If he does testify, depending on what he says I will then consider whether or not to let that doctor testify. I would have to listen to his

testimony first and hear what he says. Under no circumstances will that doctor or anybody else be permitted to testify as to his lessened capacity unless he says, "I did it." (Tr. p. 301). Counsel again indicated that he did not seek to prove lessened capacity. The judge responded, "Well whatever you going to his I.Q. is not at issue in this case unless he testified period." (Tr. p. 301). At the close of the case, defense counsel renewed his objection that the Court denied me the availability of putting up Dr. Cross to testify that Wesley's I.Q. was in the border range of 70 with mental retardation. Counsel argued, "I told the court specifically that I wanted to introduce that evidence not with diminished capacity but to introduce that evidence to show that Wesley was not aware of the dangers nor the mathematical level of grade two the reading level. . . " (Tr. p. 593). The trial judge again ruled that unless the accused took the stand, his limited intelligence would not be relevant. The judge ruled, "Until and unless he testified, it cannot reach any issue in the trial of this case." (Tr. p. 594).

The trial judge erred in refusing to allow appellant's counsel to present relevant evidence as to his mental capacity. As counsel argued, the State had alleged that appellant intentionally gave his child a fatal overdose of medication. Appellant's mental abilities or lack thereof was relevant to this charge. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

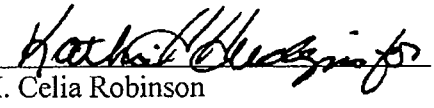
The trial judge's erroneous ruling served to interfere with appellant's right to the effective presentation of a defense as guaranteed by the Constitution. The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable

witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986); see also Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment). The Sixth Amendment essentially constitutionalizes" the right to present a defense in an adversary criminal trial. Schmidt, 288 S.C. at 303, 342 S.E.2d at 402; State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (S.C.App.,2004); State v. Frazier, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (S.C.,2004).

CONCLUSION

For all the forgoing reasons, appellant's conviction should be reversed and a new trial ordered.

Respectfully submitted,



M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT.

This 27th day of August, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 27, 2009

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 27th day of August, 2009.

M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 27th day of August, 2009.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

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August 27, 2009

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Re: The State v. Wesley Smith

Dear Christina:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

M. Celia Robinson
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Enclosure

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August 27, 2009

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Bishopville, SC 29010

Re: Your appeal

Dear Mr. Smith:

Enclosed is a copy of the Final Brief of Appellant in your case, which I have filed with the South Carolina Court of Appeals.

Please contact me if you have any questions.

Sincerely,

M. Celia Robinson
Appellate Defender

MCR:lec

Enclosure

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

WESLEY SMITH,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted in May 2004 in Horry County for homicide by child abuse (R. p. 693-94). On April 14-17, 2008, he proceeded to trial before the Honorable Edward B. Cottingham and a jury. (See R. p. 1). Appellant was convicted of homicide by child abuse, under section (A)(2) of the statute regarding aiding and abetting, and was sentenced to twenty years. (R. p. 690, lines 4-5). A Notice of Appeal was timely served and filed.

ARGUMENT

I. The trial court properly admitted evidence of the victim's prior femur injury.

Overview of Relevant Facts

Appellant and Charlene Dandridge, the parents of the victim, lived together with the victim and the victim's older brother. (R. p. 234-38). The victim was born on October 7, 2003, and, during the four-month period of her life, Dandridge was working while Appellant stayed at home with the children. (See R. p. 127; p. 236-41; p. 245; p. 265). Appellant was the primary caretaker for the victim. (R. p. 241, lines 4-8; p. 490, lines 12-14; p. 500, lines 10-12). The first sign of child abuse and neglect surfaced in December 2003, about two months prior to the victim's death. (See R. p. 145-160). At a "well-baby" checkup, Dr. Cooper-Merchant noticed that the victim had a swollen and painful leg, which caused the victim to cry every time the leg was touched. (R. p. 145; p. 200). The doctor later determined that the victim had a spiral fracture of the femur. (R. p. 148). Such a fracture is generally considered an inflicted injury, non-accidental in nature, and is highly correlated with child abuse. (R. p. 148; p. 160; p. 186-88; p. 199-200).

Appellant initially told Dr. Cooper-Merchant that he had no idea how the injury happened, but he later stated that when he was caring for the child, the child fell somehow after the doorbell rang and injured her leg. (R. p. 147-49). Appellant told Dandridge that the injury occurred after he heard a loud knock at the door while he was napping in a chair with the baby on his chest. (R. p. 236-37). However, none of his stories were consistent with the medical findings regarding how the non-accidental injury occurred. (R. p. 146-49; p. 380, line 25 – p. 381, line 5). Dandridge and Appellant

believed that the leg was broken in late November, but instead of taking the victim to the hospital, Appellant placed a homemade splint on the baby's leg. (R. p. 237, lines 19-25). Dr. Collins testified that ignoring the femur injury constituted medical neglect, in addition to the physical abuse that occurred upon initial infliction of the injury. (R. p. 380, lines 19-24).

Following the well-baby checkup at which the femur injury was discovered, DSS temporarily removed the child from Dandridge and Appellant's home and placed her in foster care. (R. p. 453-54; p. 238-39). DSS found child abuse and neglect on behalf of both parents. (R. p. 455, line 24 – p. 456, line 1). Nevertheless, for reasons that are unclear, the child was returned in mid-January, after DSS determined that the injury was non-accidental in nature, but failed to determine how the injury occurred. (R. p. 239; p. 456-57). A court order was entered prohibiting Appellant from having the victim in his sole custody. (R. p. 455, line 4). However, Dandridge admitted that they violated this court order and that the victim was in Appellant's sole custody while she was at work. (R. p. 241, lines 4-22; p. 259, lines 8-10).

The victim died shortly thereafter, on February 14, 2004. (R. p. 367, lines 18-19). The two contributing causes of death were determined to be pseudoephedrine toxicity and blunt-force trauma to the chest. (R. p. 390-91). The manner of death was listed as homicide, associated with child abuse and neglect. (R. p. 391-92). The autopsy revealed that the infant had been given approximately 1300 nanograms of pseudoephedrine, four times a normal adult dose contained in over-the-counter medicines such as Sudafed. (R. 345, lines 20-23; p. 371, lines 15-21). The autopsy also revealed seventeen rib fractures, some of which occurred in the ten-to-twenty-one day period prior to death, and others

which occurred in the forty-eight hours prior to death.[1] (R. p. 376-389). The rib injuries were not present on January 15, 2004. (R. 185; p. 377-78; p. 381). Further, they were not caused by CPR administered prior to the victim's death. (R. p. 383, lines 4-5). Instead, these injuries were the result of child abuse – specifically, squeezing - and would have been very painful, causing the child to cry. (R. p. 377; p. 383-85; p. 389; p. 392).

Appellant admitted that he gave the victim "cough medicine" on the day of her death (R. p. 216, line 14 – p. 217, line 6; p. 246, lines 3-7; p. 455, lines 5-11), while Dandridge testified that she did not give medicine to the child on February 12, 13, or 14. (R. p. 279, line 14 – p. 280, line 10). The death occurred while Appellant was caring for the child and while Dandridge was at work. (See R. p. 241-46). Appellant did not mention that anyone else was present at the time of the child's death. (R. p. 196, lines 22-24). Further, although the child previously had a respiratory infection, there was nothing wrong with the child that would have required medicine at the time of her death. (R. p. 198; p. 261-62; p. 288; p. 375). In addition, although the child had a prescription for Rondec-DM, which contained a very small amount of pseudoephedrine, in January, Rondec-DM was not in the child's system at the time of her death. (R. p. 167-68; p. 211-12; p. 222-27).

The expert testimony indicated that over-the-counter drugs containing pseudoephedrine are often used to "chemically restrain" or "subdue" a child from excessive crying. (R. p. 213-14; p. 219, line 18 – p. 220, line 2; p. 226; p. 374, line 11 – p. 375, line 7). Dr. Collins, who had extensive experience with child abuse cases, testified that it was common for abusers, in attempting to deal with a child who

[1] Appellant did not challenge admission of the rib injuries, some of which were contributing causes of the victim's death. (See R. p. 13; p. 390-91).

continually cried, to either isolate the child, re-injure the child, or to give the child medication to make it go to sleep. (See R. p. 389, line 11 – p. 390, line 4). As noted above, the victim had been suffering from painful injuries that occurred within forty-eight hours of her death, and from the previously inflicted rib and femur injuries, all of which would have made the baby very irritable and would have caused her to cry. (R. p. 213-214; p. 389, lines 13-25). Dandridge testified that Appellant could not handle it when the child cried, and that he sometimes had to leave and take a walk. (R. p. 244, line 13 – p. 245, line 3). Finally, Dandridge testified that she never injured the victim, and she indicated that her other child did not injure the victim. (R. p. 238, lines 17-19; p. 243-47).

Applicable Law and Standard of Review

Evidence of a defendant's prior bad acts is inadmissible to prove the defendant's guilt for the crime charged, except to establish: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator. State v. Martucci, 380 S.C. 232, 251-52, 669 S.E.2d 598, 608 (Ct. App. 2008) (citations omitted); Rule 404(b), SCRE. Proof of prior bad acts not the subject of a conviction must be clear and convincing. Id. at 252, 669 S.E.2d at 608. When considering whether there is clear and convincing evidence, the appellate court is bound by the trial judge's findings unless they are clearly erroneous. Id. The record must also support a logical relevance between the prior bad act and the crime for which the defendant is accused. Id. at 252, 669 S.E.2d at 609. Even where the evidence falls within a Lyle exception and is clear and convincing, it must be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice to the defendant. Id. However, if there is *any evidence* to support the admission of prior bad act, the trial judge's ruling cannot be disturbed on appeal. Id. (emphasis added).

Pre-Trial Hearing and Rulings

In a pre-trial motion, Appellant moved to suppress evidence of the femur fracture. (R. p. 13). He argued that under the case of State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), the injury should be excluded because, although DSS found that the injury was a result of child abuse, DSS did not make a finding that Appellant in particular inflicted the injury. (R. p. 22). Counsel argued that, consequently, there was no clear and convincing evidence that Appellant committed the injury. (R. p. 24-27). He also argued that evidence of the fractured femur was more prejudicial than probative and should be excluded under Rule 403, SCRE. (R. p. 24).

The court ruled that State v. Northcutt, a death penalty case, was distinguishable, and that State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005), was the more applicable case. (R. p. 23-24). The court observed that the femur injury was the first incidence in a continuing pattern of child abuse and neglect that occurred over the four-month period of the baby's life. (R. p. 23-25). The court found that the State planned to present expert testimony that all of the injuries, including the fracture, were the result of child abuse. (R. p. 15-20). The judge also stated that it was his understanding, from pre-trial meetings, that evidence would be presented that Appellant in fact committed this injury. (R. p. 27, lines 17-24; see also p. 18, lines 18-22; p. 15, lines 15-21). The court thus found that the femur injury was relevant to establish motive, absence of mistake or accident, and common scheme or plan. (R. p. 26). The court also found that the evidence

was clearly more probative than prejudicial, and that the time frame was not too distant considering the short life span of the infant. (R. p. 24-25). Accordingly, the court found that evidence of the fractured femur would be admissible. (R. p. 23-24; p. 30). Later, following the presentation of all the evidence in the case, the court reaffirmed its rulings as to admission of the femur fracture, including its finding regarding clear and convincing evidence. (R. p. 598, line 23 – p. 599, line 16).

Argument

Appellant argues that because State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005), has now been reversed, his case must also be reversed. However, although the trial court did place some reliance upon the Court of Appeals' decision in Fletcher, its reversal by the Supreme Court does not automatically require reversal of Appellant's case. Fletcher was reversed because there was no evidence "whatsoever" presented that the defendant committed the prior bad acts. State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). Further, there was no evidence that the prior incidents resulted in any injuries to the child or led to his death. Id. Instead, in Fletcher, the only purpose of the prior bad act evidence was to demonstrate the defendant's bad character. Id. at 26, 664 S.E.2d at 484.

Appellant's case is clearly distinguishable. First, in Appellant's case, the doctors all agreed that the child's prior femur injury was almost certainly the result of child abuse, as were the injuries that caused the child's death. (R. p. 148; p. 160; p. 186; p. 188; p. 199-200; 377-81; p. 389-92). Second, although he gave conflicting stories about how the child was hurt, Appellant admitted that the injury occurred while he was caring for the child. (R. p. 147-49; p. 236, line 15 – p. 237, line 19; p. 380, line 25 – p. 381, line

5). Moreover, in an effort to cover up the abuse, rather than taking the child to the hospital, Appellant placed a homemade "splint" on the leg. (R. p. 237, lines 20-25). His actions, beginning with the infliction and attempted concealment of the femur injury, illustrated his continuing intent to both abuse and neglect the victim, who was in his sole care while the mother worked. (See R. p. 380, lines 17-24).

Accordingly, evidence of the fractured femur was highly probative of Appellant's intent and state of mind, especially where he sought to blame the victim's mother. The femur injury was also probative of Appellant's motive, and of his absence of mistake or accident with respect to the final acts of abuse that caused the child's death. The evidence showed that the victim, who only lived for four months, died from extensive rib injuries and from being given an overdose of medicine containing pseudoephedrine. The child would have been crying continually and extensively because of her injuries, beginning at the time of the first known injury - the injury to the femur - and progressing with the subsequent injuries. In light of the testimony that Appellant could not "handle" the victim's crying, the femur injury was highly relevant to show Appellant's motive for re-injuring the child by squeezing the ribs, and for attempting to "chemically restrain" the child with medicine. (See R. p. 389, line 11 – p. 390, line 4). The femur evidence was thus critical to show that the overdose was not purely a mistake or accident. Further, it illustrated an escalating common course of conduct – with respect to the same helpless infant - to abuse the child and then conceal the abuse. See Martucci, supra, at 256, 669 S.E.2d at 610-11 (where the perpetrator is the person with custody and control over the victim, proving the abuse becomes extremely difficult, making evidence of an escalating pattern of abuse all the more probative).

The trial court's conclusion that the femur injury was sufficiently similar and close in time to the injuries that caused the victim's death must not be reversed, where this conclusion is supported by the evidence set forth above. See Martucci, supra, at 256, 669 S.E.2d at 611 (prior injury that occurred 1 ½ months prior to death not too remote, where child was two years old). Therefore, the trial court did not abuse its discretion in finding that there existed clear and convincing evidence of the prior bad act; in finding a logical relevance between the prior bad act to the same victim and the crime; and in finding that the probative value outweighed the prejudicial effect. (See R. p. 23-30). This is so even though the court placed some reliance upon the 2005 Fletcher decision, because the court made sufficient findings on all of the necessary issues independently of Fletcher. (See R. p. 13-30; see also p. 598, line 23 – p. 599, line 16).

Appellant emphasizes the fact that DSS did not find that Appellant caused the femur injury. However, the objectives of DSS proceedings are unrelated to the objectives of a criminal proceeding, and findings (or lack thereof) made by inexperienced DSS workers (R. p. 452, lines 13-24) are in no way binding in a subsequent criminal trial. DSS's failure in this case to determine the identity of the perpetrator does not preclude the trial court from finding clear and convincing evidence that Appellant committed the prior act. (See R. p. 20, lines 15-17; p. 21, lines 10-11; p. 452, lines 13-24). The testimony of Dandridge and Dr. Cooper-Merchant, in addition to the other evidence presented, established the clear and convincing evidence necessary to admit the evidence. Further, the court properly noted that the credibility of the evidence, and the final determination as to the perpetrator, was for the jury. (See R. p. 26, line 5; p. 29, lines 17-18; p. 30, line 1). See Martucci, supra, at 256, 669 S.E.2d at 611.

Finally, the femur injury, along with Appellant's subsequent conduct in concealing the injury, was highly relevant to Appellant's state of mind, and to prove a pattern of continuous child abuse and neglect by Appellant. It was probative on the crucial issue of whether Appellant manifested an extreme indifference to human life at the time of the victim's death. See Martucci, supra, at 257-58, 669 S.E.2d at 611-12. The femur fracture was an integral part of the case and was necessary to aid the jury in understanding the context in which the crime occurred. Its admission was essential to a full and complete presentation of the case, and to show an accurate picture of the culminating impact of the progression of abuse and neglect upon the four-month old victim. (See supra, p. 11). Thus, the femur injury - independent of its admissibility under Rule 404(b), SCRE, and Lyle - was admissible in any event under the *res gestae* theory. See Martucci, supra, at 257-58; 669 S.E.2d at 611-12. Accordingly, for all of the reasons set forth above, the trial court did not abuse its discretion in admitting the evidence, and reversal is not warranted.

II. The trial court properly charged the jury regarding the homicide by child abuse statute.

Appellant was indicted for "HOMICIDE BY CHILD ABUSE." (See Indictment, Front and Back). Our Legislature has determined that a person can be found guilty of the offense of "homicide by child abuse" in two alternative ways: (1) if the person causes the death of a child while committing child abuse or neglect and the death occurs under circumstances manifesting an extreme indifference to human life; or, (2) if the person knowingly aids and abets another person to commit child abuse or neglect which results in the death of the child. S.C. Code Ann. § 16-3-85(A)(1) & (2); see State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002); State v. Martucci, 380 S.C. 232, 248-

49, 669 S.E.2d 598, 607 (2008). Under the definitions contained in section (B), "child abuse or neglect" includes an act *or* omission, and "harm to a child's health" includes physical injuries one "inflicts *or* allows to be inflicted" upon the child. See S.C. Code Ann. § 16-3-85 (B). Regardless of whether a person is convicted pursuant to section (A)(1) or section (A)(2), the person is still guilty of the crime of "homicide by child abuse." The only distinction between convictions under section (A)(1) versus (A)(2) comes at sentencing - under section (A)(1), a person must receive a penalty of twenty years to life, and under (A)(2), a person must receive a penalty of ten to twenty years. S.C. Code Ann. § 16-3-85(C).

Because the statute is of relatively recent "legislatorial vintage," having been promulgated in 1992, there is no longstanding body of law under which to analyze the offense. State v. Mitchell, 362 S.C. 289, 298-99, 608 S.E.2d 140, 145 (Ct. App. 2005) (opinion vacated in part by McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008)). Thus, the statute's wording and construction must be scrutinized to ascertain the intent of the legislature. See, e.g., State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 726 (2007) ("The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature.") (citation omitted). However, what is clear is that the homicide by child abuse statute "displays the legislature's intent to define and target a specific societal problem." State v. Mitchell, supra, at 297, 608 S.E.2d at 144; see also Greenville County Dept. of Social Services v. Bowes, 313 S.C. 188, 197-98, 437 S.E.2d 107, 112-13 (1993) (Toal, J., dissenting) (discussing the increasing rate of child deaths from abuse and neglect in South Carolina).

The dual nature of the homicide by child abuse statute, and the broad definitions contained in section (B), clearly evidence the legislature's intent to address the primary difficulties in cases of child abuse and neglect: that abuse almost always occurs in secret, and that it is often difficult to distinguish the relative culpabilities of two parents living in the home. See State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (2008); State v. Fletcher, 379 S.C. 17, 27-28, 664 S.E.2d 480, 484-85 (2008) (Toal, C.J., dissenting). Further, the statute addresses the fact that both parents are to blame for the death of the child because each disregarded his and her fundamental parental duties. See State v. Jarrell, supra, at 99, 564 S.E.2d at 367 ("A parent has a specific and nondelegable duty to serve the best interest of [his or] her child and should make every effort not to knowingly place [his or] her child in harm's way."). The homicide by child abuse statute is "grounded in the public policy that an adult is not only prohibited from physically abusing a child, but also is prohibited from deliberately sitting by and allowing a child's life to be threatened by the abuse of another." State v. Fletcher, supra, at 27-28, 664 S.E.2d at 485 (Toal, C.J., dissenting). The legislature did not intend for *either* culpable parent to escape liability for his or her child's death, whether the parent was the principal abuser or the facilitator of the abuse.

Accordingly, both sections (A)(1) and (A)(2) should be charged where there is evidence that, if believed, would support each section. Unquestionably, Appellant was charged with the crime of "HOMICIDE BY CHILD ABUSE," and a plain reading of the statute put him on notice that there are two ways in which a jury could reach a verdict of guilty. (See R. p. 586, lines 22-24; p. 683, lines 11-25). Although the State *sought* to prove that Appellant was guilty of the acts described in section (A)(1), the court properly

charged the statute in its entirety where there was some evidence that could support a conviction under (A)(2). (See R. p. 234-82; see also p. 689, line 16). Compare State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (the law to be charged is determined from the evidence presented at trial; if any evidence exists to support a charge, it should be given); see also State v. Batchelor, 377 S.C. 341, 344-45, 661 S.E.2d 58, 59-60 (2008) ("It is well-settled that an indictment charging the defendant as a principal will support a conviction based on accomplice liability.") (citations omitted). Further, contrary to Appellant's argument, the fact that the co-defendant, to be tried separately, was not charged under section (A)(1), has no bearing upon whether the court was required to charge the entirety of the homicide by child abuse statute in Appellant's case. (See R. p. 573, line 19 – p. 574, line 1). Accordingly, where there was some evidence – depending upon the jury's evaluation of credibility - supporting both sections, the judge properly charged the full homicide by child abuse statute. (See R. p. 587, line 16 – p. 588, line 24; p. 684, lines 11-13).

III. If the issue was preserved, the trial court did not commit reversible error with respect to defense counsel's cross-examination of the victim's mother regarding her potential bias.

During direct examination, Charlene Dandridge acknowledged that she was facing criminal charges. (R. p. 234, lines 15-19). She stated that she was facing thirty years in prison for two charges. (R. p. 235, lines 14-19). Dandridge also stated that she did not have any deals with the prosecutor regarding her testimony and the possible outcome of her charges. (R. p. 235, line 10 – p. 236, line 12). On cross-examination, Appellant's attorney stated, "I'm sure the Solicitor told you you could have been charged with homicide by child abuse." (R. p. 249, line 25 – p. 250, line 1). The solicitor

objected, stating that there was no indication that she could have been charged with homicide by child abuse. (R. p. 250, lines 2-4). The court sustained the objection, noting that the witness was not a lawyer and could not possibly answer the question. (R. p. 250, lines 8-10). Counsel then attempted to ask whether she was aware that the penalty for homicide by child abuse was greater, and the State again objected. (R. p. 250, lines 11-13). The court sustained the objection and told counsel he could ask her about the penalty for the charge for which she was actually indicted. (R. p. 250, lines 14-17). Dandridge then testified that she thought she was facing two charges, one carrying twenty years and the other carrying ten years. (R. p. 250, lines 22-25). At no time did defense counsel request a hearing outside the presence of the jury; instead, he continued with his examination of the witness. (R. p. 249-51).

Much later, after the State rested, Appellant argued that he should have been permitted to "go into the bias that she was never charged with homicide by child abuse, and now the Solicitor has her testifying." (R. p. 421, lines 18-20). Counsel now argued that he should have been permitted to point out to the jury that she could have faced twenty years to life for homicide by child abuse. (R. p. 421, line 24 – p. 422, line 13). The court ruled that it would permit counsel to ask that question if he wanted to bring the witness back to the stand. (R. p. 422, lines 4-5). The court overruled the State's objection, and, after further discussion, the State withdrew its objection. (R. p. 422, line 16 – p. 423, line 11; p. 425, line 18). However, Appellant thereafter elected to rest his case without re-calling Dandridge. (R. p. 580, line 3). The court reminded counsel that she was available if he wanted to call her, but counsel declined. (R. p. 578, lines 10-13; p. 585, lines 23-25). Nevertheless, in closing, counsel was permitted to argue that, "only

one person has been charged with homicide by child abuse . . . Charlene was not charged with that." (R. p. 624, lines 23-25).

Appellant waived and failed to preserve his argument on this issue when he failed to request a hearing outside the presence of the jury at the time of the cross-examination of Dandridge, *and* when he declined to re-call Dandridge after the court stated he would be permitted to ask the question. In any event, Appellant cites no authority supporting the proposition that a witness can be cross-examined regarding a charge with which he has *never* been indicted. All three cases cited by Appellant involve cases where the defendant was prevented from cross-examining a witness regarding a crime with which the witness had been actually charged. See State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991) (witness initially charged with trafficking in cocaine with mandatory 25-year sentence, pled to conspiracy with a maximum sentence of 7 ½ years); State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) (witness initially charged with murder, pled to eight years for accessory after the fact of murder); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) (witness charged with same crimes as the defendant – including first-degree burglary - and had no plea bargain with the State).

Here, Appellant was not prevented in any way from examining Dandridge about her pending charges. Further, the court properly sustained the State's objection to *possible* charges based upon the fact that the witness was not in a position to know what charges a solicitor could bring against a person. See State v. Whitner, 380 S.C. 513, 520, 670 S.E.2d 655, 659 (Ct. App. 2008) (the court may limit inappropriate cross-examination). Again, Appellant's counsel did not request a hearing outside the jury's

presence to clarify the court's ruling and did not attempt to ask a more appropriate question to elicit the information at the time of his cross-examination. (R. p. 249-51). More importantly, there was no proffer, and thus no evidence, that the witness was even aware of whether the solicitor could have charged her with homicide by child abuse, *and* no evidence that she knew of the possible penalty for this charge. See State v. Curry, 370 S.C. 674, 679, 636 S.E.2d 649, 652 (Ct. App. 2006) (issue regarding limitation of cross-examination not preserved where evidence was not proffered nor was there an attempt to proffer it).

Accordingly, the trial court committed no error. However, considering that the jury clearly knew that Dandridge was facing thirty years as charged; that the jury heard counsel's question to Dandridge obviously suggesting that the penalty was greater for homicide by child abuse; and that counsel was permitted to argue to the jury that Dandridge was never charged with homicide by child abuse, the jury was sufficiently made aware of Dandridge's potential bias. Thus, the court's initial limitation, if error, would have been harmless error. See State v. Whitner, supra, at 521, 670 S.E.2d at 660 (no reversible error where the limitation on cross-examination could not have reasonably affected the outcome of trial).

IV. If the issue was preserved, the trial court committed no reversible error with respect to Appellant's request to introduce evidence of his I.Q.

Prior to trial, the State moved to admit Appellant's competency evaluation results into evidence. (R. p. 38, lines 2-7). The solicitor stated that Appellant had been evaluated and found competent and criminally responsible. (R. p. 38, lines 5-6). Appellant's counsel agreed with the findings of the Department, and the Evaluation Report was admitted as a Court's Exhibit. (R. p. 38, line 10 – p. 39, line 2). The State

then moved to exclude any evidence of diminished capacity, including evidence of Appellant's I.Q. (R. p. 39, lines 4-20). Counsel for Appellant responded that, "if there has been testimony on [Appellant], his I.Q. can come out." (R. p. 39, lines 21-23). The court noted that it might be permitted to show he had no conception of giving the baby a dangerous medicine, but not to show diminished capacity. (R. p. 40, line 14 – p. 42, line 1). The court stated, "I don't know whether he's going to say he gave [cough medicine] to [the victim] or not," but "I'll just have to wait and see." (R. p. 41, lines 19-22).

Later, Appellant's counsel stated that he wanted to have Dr. Cross testify regarding Appellant's I.Q. (R. p. 300, lines 10-18). He stated that even if Appellant did not testify, his position was that Appellant could not read or write. (R. p. 300, lines 21-24). The judge indicated that such evidence would not be relevant unless Appellant testified that he did give the baby too much medicine, "through accident not knowing the severity of it," and stated that he would have to hear the testimony before deciding whether to let Dr. Cross testify. (R. p. 301, line 3 – p. 302, line 9; see also p. 679, line 25 – p. 680, line 2). However, ultimately, Appellant elected not to testify. (See R. p. 431-435). No mention of this issue was made again until after the conclusion of Appellant's case, and at no time did Appellant make a proffer of Dr. Cross's potential testimony (R. p. 593-94).

A proffer of testimony is required to preserve the issue of whether testimony was properly excluded. See State v. Santiago, 370 S.C. 156, 163, 634 S.E.2d 23, 29 (Ct. App. 2006). Since no proffer was made by Appellant, whether Dr. Cross's testimony was properly excluded is not preserved for appellate review. In any event, the court correctly ruled that the doctor's testimony would not be relevant unless Appellant testified. See

Santiago, supra, at 164, 634 S.E.2d at 29 (trial judge ruled that psychiatrist's testimony would be "premature" unless and until the defendant testified). Further, despite defense counsel's insistence otherwise, a doctor's testimony regarding Appellant's I.Q. would have, in fact, constituted impermissible "diminished capacity" testimony. See Santiago, supra, at 162-63, 634 S.E.2d at 28; Gill v. State, 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001) (diminished capacity doctrine, which is not recognized in South Carolina, allows a defendant to attempt to negate specific intent by introducing evidence of his mental condition).

In Gill v. State, the South Carolina Supreme Court held that the trial court properly excluded the testimony of a forensic psychiatrist who would have testified that Gill did not possess the requisite mental capacity for murder because of his low I.Q. Gill v. State, supra, at 220, 552 S.E.2d at 32. Similarly, in State v. Santiago, the defense attempted to introduce expert testimony on the defendant's "asperger's disorder" to show that he could not have formulated the requisite mental state. State v. Santiago, supra, at 162, 634 S.E.2d at 28. In Appellant's case, the asserted reason for Dr. Cross's testimony was indistinguishable from the reasons for the testimony sought in Gill and Santiago, and such testimony was equally impermissible. Accordingly, the trial court committed no error on this ground.

CONCLUSION

For all of the reasons discussed above, this Court should affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 26, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Edward B. Cottingham, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WESLEY SMITH,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **M. CELIA ROBINSON**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **26th day of August, 2009.**

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SWORN to before me this 26th day of August, 2009.

Jenna K. Breedlove

Notary Public for South Carolina.
My Commission Expires: 4/22/2018