

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Spartanburg County  
J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

TINA DOCKERY,

APPELLANT

APPELLATE CASE NO. 2011-183266

\_\_\_\_\_  
BRIEF OF APPELLANT  
\_\_\_\_\_

CARMEN V. GANJEHSANI  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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(1) such post-incident evidence was not relevant to whether Dockery had engaged in unlawful conduct towards a child resulting in the child’s injuries;

(2) if such evidence was relevant, the Trial Court failed to conduct the required on-the-record balancing test pursuant to Rule 403, SCRE to determine whether the probative value of such evidence was outweighed by the danger of unfair prejudice; and

(3) such evidence was extremely prejudicial and not harmless where culpability was highly disputed at trial and the admission of this evidence encouraged the jury to reach a verdict not by properly weighing the evidence, but upon a mother’s emotion or lack of emotion while attending to her injured child at the hospital.

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### STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in allowing the State and the co-defendant to introduce improper evidence alleging Appellant failed to show emotion and remorse for her infant baby's injuries where:

- (1) such post-incident evidence was not relevant to whether Dockery had engaged in unlawful conduct towards a child resulting in the child's injuries;
- (2) if such evidence was relevant, the Trial Court failed to conduct the required on-the-record balancing test pursuant to Rule 403, SCRE to determine whether the probative value of such evidence was outweighed by the danger of unfair prejudice; and
- (3) such evidence was extremely prejudicial and not harmless where culpability was highly disputed at trial and the admission of this evidence encouraged the jury to reach a verdict not by properly weighing the evidence, but upon a mother's emotion or lack of emotion while attending to her injured child at the hospital.

## STATEMENT OF THE CASE

On August 19, 2010, Appellant Tina Dockery was indicted by the Spartanburg County Grand Jury for (1) unlawful conduct towards a child and (2) child abuse with great bodily injury. R. 514 – 515.

On January 4, 2011, Dockery and her co-defendant, Leonard Scott Moore, proceeded to trial before the Honorable J. Derham Cole and a jury. R. 1. Dockery was represented by Andrea Price, her co-defendant was represented by Michael Rudasill, and the State was represented by Assistant Solicitors Jennifer Jordan and Susan Reese.

On January 7, 2011, the jury found Dockery (1) guilty of unlawful conduct towards a child and (2) not guilty of child abuse with great bodily injury. R. 504, l. 25 – 505, l. 9. Judge Cole then sentenced Dockery to ten years imprisonment suspended upon the service of one year imprisonment followed by three years probation. R. 510, l. 18 – 511, l. 10; 516.

Dockery filed and served her Notice of Appeal on January 14, 2011.

On October 26, 2012, former Appellate Defender Dayne C. Phillips filed an appellant's brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing that Dockery was denied her constitutional right to a fair trial where the Trial Court allowed the State and the co-defendant to introduce improper evidence alleging that Dockery failed to show emotion and remorse for her infant's injuries. Mr. Phillips also filed a motion to be relieved as counsel.

On June 19, 2013, this Court issued an order denying Mr. Phillips' motion to be relieved as counsel and directing the parties to brief the following issue:

Whether the trial court erred in finding testimony of Dockery's demeanor was relevant under the South Carolina Rules of Evidence, and, even if the testimony was relevant, whether the evidence should have been excluded because it prejudiced Dockery.

## STATEMENT OF FACTS

### **Background**

On October 25, 2005, Appellant Tina Dockery and her co-defendant, Scott Moore, brought their four month old infant to the hospital because the infant's head was swollen. R. 288, ll. 8-24. The infant suffered two skull fractures. R. 111, ll. 3-5.

Dockery and her co-defendant were both charged with inflicting great bodily injury upon their four-month-old baby and placing their infant baby "at an unreasonable risk of harm affecting the child's life, physical, or mental health and safety" causing injury to the infant's body. R. 71, ll. 13-23; R. 514 – 515. Co-defendant's counsel told the jury during his opening statement:

What I want you to listen for, as they tell you about the interrogation or the investigation of [co-defendant] and [Dockery], is I want you to listen for which one of those individuals showed love, or lack of love, for their child, concern, or lack of concern, for their child, or any emotion at all for their child.

R. 77, ll. 1-6.

### **Motion to Exclude Reference to Appellant's Demeanor**

At trial, defense counsel moved "to preclude the State from referencing [Dockery's] demeanor at the hospital and in any subsequent interviews that she had." R. 159, ll. 15-18. Defense counsel noted that Detective Nikki Cantrell referenced Dockery's demeanor in her investigative report and argued "that this is absolutely irrelevant to the case at hand." R. 159, l. 19 – 160, l. 2. Co-defendant's counsel objected and maintained that evidence describing Dockery's demeanor after the infant was injured was relevant. R. 160, ll. 7-8. The State agreed with co-defendant's counsel and stated the following:

Your Honor, I believe it's completely relevant to this case . . . she is the mother - - a mother of [a] four-month-old who is at the hospital suffering from head injuries. And, at that point in time, what they had already seen or - - just the head swelling and everything, and *she sits there unemotional, unresponsive, with no concern at all.* I do believe it's - - it's very imperative. . . . And I think [Detective Cantrell's] observations are very important for the jury to get an idea and understanding of what was going on that day . . . .

R. 160, l. 14 – 161, l. 2 (emphasis added).

The trial court ultimately denied defense counsel's motion and found that evidence describing Appellant's demeanor was relevant. R. 161, ll. 8-10. Defense counsel then requested, "Please note my objection, Your Honor." In response, the trial court stated, "Note her objection. All right, what else?" R. 161, ll. 11-13.

The Trial Court never undertook any analysis of whether the admission of such evidence against Dockery would be prejudicial and whether the prejudicial nature of the evidence outweighed its probative value.

#### **Detective Nikki Cantrell**

The next witness to testify following the trial court's ruling was Detective Nikki Cantrell of the Spartanburg County Sheriff's Office. R. 163, ll. 10-17. The State asked Detective Cantrell, "[W]hat was the demeanor of both [co-defendant] and [Dockery]?" Detective Cantrell replied, "[Co-defendant] was trying to comfort the child . . . and [Dockery] was completely unemotional. [Dockery] wasn't even looking over at the baby while they were drawing blood." R. 164, ll. 23-25 (emphasis added). The State again asked Detective Cantrell, "Can you describe [Dockery's] physical appearance for the jury that night or that following morning hours?" In response, Detective Cantrell stated, "*When I was talking to her, again, she was still very unemotional. She wasn't crying.*" R. 168, ll. 10-14

(emphasis added). Detective Cantrell continued, "There were several times, when we would talk, that she would sniff and kind of put her head down like maybe she was crying. But she would look up and there were no tears. *And she was just, like I said, very - - just unemotional about the whole situation.*" R. 168, ll. 15-19 (emphasis added).

The State asked Detective Cantrell for the third time, "Can you describe to the jury again what [Dockery's] demeanor was when you finished speaking to her?" Detective Cantrell reiterated, "*Again, like I said, [Dockery] was completely unemotional. [Dockery] would sniff and rub her eyes, but tears never even fell from her eyes . . . it appeared to me she was faking being upset.*" R. 173, ll. 6-12 (emphasis added). For the fourth time on direct-examination, the State inquired, "Did you also have an - - an opportunity - - or describe for the jury, again, what [Dockery's] demeanor appeared to be like while you were walking through the house with her?" Same as her previous three answers, Detective Cantrell replied, "*Again, [Dockery] was still very unemotional; no crying, just very, very calm and unemotional...*" R. 186, ll. 9-14 (emphasis added).

Notably, the State also asked Detective Cantrell, "Could you describe [co-defendant's] demeanor to the jury that evening as you finished your . . . interview with him?" Detective Cantrell maintained, "In my interview with [co-defendant], he was - - he was crying. His nose was running. And he was trembling during the investigation. *He - - he appeared very remorseful.*" R. 178, ll. 12-17 (emphasis added).

Co-defendant's counsel also examined Detective Cantrell's about Dockery's demeanor: "And I believe you described, in that instance, when you were talking about Ms. Dockery in the - - I believe you said she was just void of any emotion at all. And I think the term you used in your report was it was as if she was ignoring what was taking place?"

Detective Cantrell responded, "Correct." Co-defendant's counsel then asked Detective Cantrell whether Dockery showed "any emotion at all that night when you were talking with her" to which Detective Cantrell replied, "No, sir." R. 202, ll. 11-19.

#### **Investigator Theodore Saar**

On cross-examination by co-defendant's counsel, Investigator Theodore Saar, of the Spartanburg County Sheriff's office, testified that Appellant showed "*a strong lack of emotion*" during her interview with Detective Cantrell. R. 227, ll. 3-25 (emphasis added).

#### **Closing Arguments**

Co-defendant's counsel stated the following in his closing argument:

I asked you to pay close attention to the testimony you were going to hear, from the investigating officers, regarding [co-defendant's] demeanor, [Dockery's] demeanor; . . . specifically I said I wanted you to listen to whether you - - they observed love, by either of them for their children, concern by either of them for their children, or any emotion whatsoever, once they were made aware of the injuries to [the infant] and the extent of the injuries to [the infant]; whether they showed any emotion at all. . . . *But, throughout all of that contact, what came out consistently was this: [Dockery] showed no emotion whatsoever with regard to the extent, to the children, to what was taking place; no mention.*

R. 420, l. 4 - 421, l. 24 (emphasis added).

## ARGUMENT

The Trial Court erred in allowing the State and the co-defendant to introduce improper evidence alleging Appellant failed to show emotion and remorse for her infant baby's injuries where:

- (1) such post-incident evidence was not relevant to whether Dockery had engaged in unlawful conduct towards a child resulting in the child's injuries;
- (2) if such evidence was relevant, the Trial Court failed to conduct the required on-the-record balancing test pursuant to Rule 403, SCRE to determine whether the probative value of such evidence was outweighed by the danger of unfair prejudice; and
- (3) such evidence was extremely prejudicial and not harmless where culpability was highly disputed at trial and the admission of this evidence encouraged the jury to reach a verdict not by properly weighing the evidence, but upon a mother's emotion or lack of emotion while attending to her injured child at the hospital.

The references by the State and co-defendant's counsel to Dockery's demeanor at the hospital and in subsequent interviews was not relevant evidence, and even if such evidence was relevant, the evidence should have been excluded where its probative value was substantially outweighed by the danger of unfair prejudice.

While the trial court has broad discretion in ruling on questions regarding the relevancy of evidence, a trial court's decision will be reversed if there is a clear abuse of discretion. State v. Stokes, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000). Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. Id.; see also Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Evidence which is not relevant is inadmissible. Rule 402, SCRE.

Dockery's purported lack of emotion while she was in the hospital with her injured child and in subsequent investigative interviews was not relevant to whether she either (1) placed the child at an unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or (2) did or caused to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child was endangered or likely to be endangered. See S.C. CODE ANN. § 63-5-70. Whatever her emotional state may have been after her child was found injured is not relevant of her culpable conduct.

The way a person responds to traumatic events, tragedy, or stressful situations does not have any bearing upon whether that person engaged in any unlawful conduct. See Galloway v. State, 65 A.3d 564, 570 (Del. 2013) (holding that a YouTube video showing the defendant laughing, cursing, and engaging in a childish prank would not be material to demonstrate that he acted intentionally or recklessly months earlier with regard to the death of his infant daughter and would not be admissible during the State's case-in-chief).

In a case involving a homicide of the defendant's wife, the Supreme Court of Mississippi held that the opinion of the investigating officers that the defendant showed no signs of grief was improper and inadmissible. Harrelson v. State, 65 So.2d 237, 239 (Miss. 1953). In so holding, the court recognized the following:

The opinion of the officers, we assume, was based on the fact that the appellant was not visibly manifesting what the witnesses considered signs of grief. The reactions of a person to sorrow or grief vary with the individual. It is a matter of common knowledge that some people undergo sorrow or bereavement with composure. Opinions as to what constitute evidences of grief also vary with the individual.

Id.

Likewise, the opinions of Detectives Cantrell and Saar that Dockery was unemotional and that she faked being upset are not relevant to whether engaged in unlawful conduct towards a child. These detectives had no previous knowledge of Dockery's personality and how she responded to distressing circumstances and therefore had no basis for their opinions that Dockery was completely devoid of emotion and was faking being upset.

Similarly, the jury had no previous knowledge of Dockery's personality and behavioral traits and how she reacted to such circumstances. The jury could only speculate as to whether Dockery's post-incident behavior indicated that she was guilty of unlawful conduct towards a child. The jury had no idea if Dockery was the type of person who could calmly collect herself after a traumatic event or if she typically acted in the exact opposite manner. The evidence of Dockery's post-incident demeanor did not make it more or less probable that she acted unlawfully towards a child. The Trial Court erred in ruling that this evidence was relevant and admitting it in the trial of Dockery's case.

Even if the evidence was relevant, the Trial Court should have excluded it where it was highly prejudicial. Rule 403, SCRE provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Evidence should be excluded "if it is calculated to arouse the sympathy or prejudice of the jury . . ." Stokes, 339 S.C. at 159, 528 S.E.2d at 432 (internal citations omitted).

"[T]he dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." Jamison v. Ford Motor Co., 373 S.C.

248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007) (quoting Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000)).

The Trial Court in this case did not conduct the required on-the-record balancing test to determine whether the evidence was more prejudicial than probative and only ruled that the evidence was relevant. R. 161, ll. 8-10. See S.C. Dep't of Social Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct. App. 2008). Therefore, if this Court determines that the evidence was relevant, it should at a minimum reverse and remand to the Trial Court with instructions for the Trial Court to conduct an on-the-record balancing test to determine if the probative value of the demeanor testimony is substantially outweighed by the danger of unfair prejudice to Dockery. See State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013).

Should this Court determine that the Trial Court conducted the appropriate balancing test, the post-incident demeanor evidence should nevertheless be excluded because it was highly prejudicial to Dockery and the prejudicial effect outweighed any probative value of this evidence.

This type of evidence encouraged the jury to reach a verdict not by properly weighing the evidence, but upon a mother's emotion or lack of emotion while attending to her injured child at the hospital. The State portrayed Dockery as someone who did not care about her injured child, and that is the exact type of evidence that would inflame, excite or influence the resentment of the jurors and should therefore be excluded. See Stokes, 339 S.C. at 160-61, 528 S.E.2d at 433.

In addition, the Trial Court's admission of this prejudicial error was not harmless. In this case, guilt was hotly contested. Co-defendant Moore was alone with the child the

day of the hospitalization and the preceding day while Dockery was at the dentist on October 24, 2005 and at the emergency room for additional pain on October 25, 2005. R. 282, l. 23 – 288, l. 1. When she returned home, Dockery observed that the child's head was swollen and she had to "make" Moore get up to take the infant to the hospital. R. 288, ll. 8-24. Dockery testified that she asked Moore what had happened, and he responded that he did not know. When she asked him if he was sure about that, he replied, "You think I would do something to hurt my own kid?" R. 288, ll. 12-19.

Moore, however, had a previous incident with the infant where the child's foot was burned on the stove. Moore testified that he was making noodles on the stove while holding the infant, and while Moore was stirring the noodles, his child's leg dropped down and the child's foot touched the stove. R. 343, ll. 4-17. Moore initially hid the injury from Dockery and did not tell her what had happened. R.345, ll. 9-11; 362, ll. 5-24.

Because Moore had lied to Dockery about the previous foot injury, Dockery knew that Moore must have done something on the day the infant suffered a head injury. R. 288, ll. 17-19; 289, ll. 16-22.

Moore, on the other hand, tried to blame the infant's injuries on Dockery, alleging that the infant spent most of his time with Dockery because Moore was at work six days a week. R. 337, l. 17 – 338, l. 6; 339, ll. 15-18. Moore, however, was not working on October 24 and 25, 2005, the day preceding and the day the infant was taken to the hospital. R. 346, ll. 5-10; 348, l. 10 – 352, l. 18; 363, ll. 14-24.

Moore insisted that he had to convince Dockery that the child needed to go to the hospital after they noticed that the child's head was swelling. R. 354, ll. 1 – 14. Moore

also testified that Dockery took a long time to get the child and herself ready to go to the hospital. R. 372, l. 6 – 373, l. 12.


Where the State could not establish who had caused the injuries to the child and the two co-defendants blamed each other and either version of events could have been possible depending upon the credibility of Dockery and Moore, there was a real possibility that the State's focus on Dockery's lack of emotion at the hospital and in subsequent interviews interjected an improper influence on the jury affecting the outcome. The evidence of Dockery's guilt was not overwhelming. Accordingly, the error was not harmless and requires reversal. See Stokes, 339 S.C. at 161-62, 528 S.E.2d at 433-34.

**CONCLUSION**

Based upon the foregoing arguments, Appellant Tina Dockery requests that this Court reverse and remand her conviction and sentence to the Spartanburg County Court of General Sessions for a new trial.

In the alternative, Appellant requests that this Court remand to the Trial Court with instructions to conduct the on-the-record balancing test required by Rule 403, SCRE. If upon remand the Trial Court determines the probative value of the demeanor testimony is substantially outweighed by the danger of unfair prejudice to Dockery, the Trial Court should order a new trial. If the Trial Court determines the probative value of the demeanor testimony is not substantially outweighed by the danger of unfair prejudice, the conviction will be affirmed subject to the right of appellate review.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of July, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

TINA DOCKERY,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Tina Dockery, at 165 Clark Circle, Spartanburg, SC 29307, this 9th day of July, 2013.

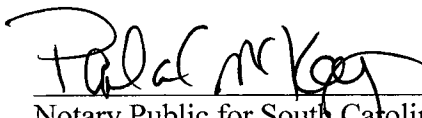


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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 9th day of July, 2013.



(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.