

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAR 10 2014

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Tracking No. 2011-203707

SC Court of Appeals

The State,

Respondent,

vs.

Julia Gorman,

Appellant.

RETURN TO PETITION FOR REHEARING

On February 12, 2014, this Court properly affirmed Appellant's convictions and sentences for homicide by child abuse and unlawful conduct toward a child. State v. Palmer and Gorman, Op. No. 5198 (S.C.Ct. App. Filed February 12, 2014). Appellant has filed a Petition for Rehearing asserting this Court overlooked or misapprehended the relevant issues, case law, or facts of the case. This Court, however, properly concluded Appellant's issues were without merit and her convictions and sentences should be affirmed.

The facts of this case are thoroughly set out in the State's Final Brief of Respondent as well as in this Court's majority opinion. Appellant maintains this court erred in affirming the trial court's denial of her motion for directed verdict. The State contends substantial circumstantial evidence supports sending the case to the jury and supports the jury's verdict finding Appellant guilty of the charges. Further, the State submits State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), the case primarily relied

on by Appellant to argue the State failed to present substantial circumstantial evidence, is clearly distinguishable from the case at hand and was distinguished by the majority opinion in this case.

In Hepburn, the South Carolina Supreme Court explained: “There were only two people who could have killed the victim, either Appellant or her boyfriend of five months, co-defendant Brandon Lewis, as they were home with the victim on the night she sustained her fatal injuries.” Id. at ___, 753 S.E.2d at 403. The Court found, once the co-defendant’s testimony was excluded under an exception to the waiver rule, the State’s evidence only demonstrated: “(1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after [her co-defendant] retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself.” Id. at ___, 753 S.E.2d at 415-416. As a result, the Court distinguished State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

As the majority opinion found, the facts of this case are distinguishable from Hepburn and more in line with Smith. In Smith, this Court explained:

The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child’s physical health. Additionally, harm to a child’s health occurs when a person either inflicts, or allows to be inflicted physical injury upon a child. Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or

allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death.

Smith, 359 S.C. at 492, 597 S.E.2d at 894 (internal citations omitted).

The medical evidence in this case indicated the injury to the child was not accidental and was so significant either adult in this case would have known it happened. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. (T.358; R. 365). He testified the injury was not accidental. (T.362; R. 369). Dr. Roberts testified both sides of the toddler's skull were fractured by severe traumatic force. (T.409-410; R. 400-401). She indicated the fractures were caused by a force similar to falling out of a three story window or being involved in a motor vehicle accident.

The doctors all testified the injuries had to occur the day the child was taken to the hospital. As a result, Appellant's attempts to explain the injuries by blaming the dog for knocking the child down, or the fact the child's head felt "squishy" to Appellant when the child arrived with his mom are unavailing. Further, none of the events would explain the significant trauma experienced by the toddler leading to his death.

Significantly, Dr. Roberts testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 404-406). She testified a person with the type of injury sustained by the toddler would be **immediately and severely symptomatic**. She said the child would lose consciousness, have altered breathing, seizures, and would not be able to move or have other normal functions. (T.419; R. 410). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 411-412; 402-403).

Importantly, Appellant testified at approximately 4:30 when she arrived home, the toddler was sleeping normally and she heard him breathing fine. (T.984; 994; R. 856; 866). Dr. Roberts, however, testified she would expect symptoms of the injury to be seen, and, if the child was sleeping normally around 4:30 when checked on, then she expected the injuries occurred after that time. (T.427-428; R. 418-419). The only time either co-defendant was alone with the toddler after this time was when Appellant entered the room to get the toddler while her co-defendant was not present.

This case is clearly distinguishable from Hepburn because the State's evidence provided substantial circumstantial evidence Appellant committed the abuse resulting in the death of the toddler. In Hepburn, the only evidence indicated the defendant was asleep at the time the victim suffered the traumatic injury. Here, the testimony places Appellant alone at the child's bed with evidence indicating prior to that time the child was fine. Appellant's statement indicated when she checked on the child at 4:30 p.m., the child was fine and breathing normally. Her statement then indicated no one was with the child after that time until she entered the room alone, and exited with the dying child in her arms. As a result, the State presented substantial circumstantial evidence Appellant committed the homicide by child abuse.

Further, it is appropriate for this Court to consider the Appellant's attempts to deflect onto other incidents the cause of the trauma. See e.g., State v. Parker, 651 S.E.2d 377, 380 (N.C.App. 2007) ("Additionally, decisions from our Supreme Court have established 'that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to

reflect the mental processes of ‘a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].’”). As the majority opinion noted,

This evidence relates primarily to Gorman, and includes (1) evidence that Gorman was often frustrated and annoyed with the child's behavior because, as Gorman testified, he “crie[d] every day, [was] cranky every day, whine[d] every day;” (2) evidence that Gorman disliked the child, shown through comments she made to others; (3) testimony that Gorman and Palmer were “stressed about money” and concerned about how the child would affect their financial problems; (4) Gorman's testimony that she did not have a good relationship with the child's mother; (5) Gorman's testimony that she had never met the child before the child's mother left him with Gorman; and (6) Gorman's admission to shaking the child on a previous occasion.

This evidence is further circumstantial evidence of Appellant's guilt. Accordingly, the majority did not err in affirming Appellant's convictions and sentences.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 10, 2014

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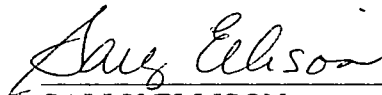
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

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

This 10th day of March, 2014.



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VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Julia Gorman
Appellate Case Tracking No. 2011-203707

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Return to Petition for Rehearing along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: Susan B. Hackett, Esquire
Victim Services