STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
Honorable Larry B. Hyman, Jr. Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State, Respondent,

vs.

Robert Palmer, 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 his 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).

According to the testimony of Appellant and his co-defendant, Appellant was home the majority of the day alone with the toddler. Appellant's co-defendant merely looked in on the toddler in the morning and when she arrived home that evening. She did not go into the room or near the child. She testified he appeared to be sleeping, but she did not verify the condition of the child.

In the instant case, Dr. Abel and others testified the injury had to happen the day the toddler was taken to the emergency room. The doctors all testified the injury was severe and caused by blunt force trauma intentionally inflicted to the child. Further, they testified the child suffered fractures to the skull on both the left and right sides, as well as significant bleeding on the brain, and death of brain tissue.

Dr. Abel further testified if an observer did not see the force applied or the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). She testified it could be possible for an observer to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457). Further, she specifically testified:

> [T]he signs of head trauma are changing consciousness, sometime seizures, sometimes breathing abnormalities. They, they don't all happen at once, so a child could have a head injury and be quietly breathing and apparently sleeping but actually unconscious and it would not be possible for a person who didn't know that they had had the head injury to realize it until later, until something more started happening.

(T.559; R. 458).

As a result, the injury could have been inflicted by Appellant prior to Appellant's co-defendant getting home and, if the co-defendant did not notice anything wrong from the doorway when she looked in on the toddler, then she would not have known something happened to the child until she went to pick up the child. Appellant's co-defendant testified she did not enter the room, but instead merely observed the child appearing to be asleep. She testified when she went into the room to pick up the child was when she noticed something wrong. Prior to this time, Appellant was the only one home throughout the day with the child. Accordingly, the evidence when viewed in the light most favorable to the State provides substantial circumstantial evidence Appellant inflicted the harm to the toddler. The majority of this Court correctly affirmed the denial of Appellant's motion for directed verdict.

On the issue of the proffer agreement, the State submits no matter what the agreement is called or how it is construed, Appellant violated its terms by not being forthcoming with all the material information. As a result, the agreement became null and void.

Further, Appellant cannot demonstrate how he was prejudiced by or failed to receive the benefit of his bargain. The agreement only required the State to take into consideration his information and assistance when determining charges against Appellant. As the trial court found, the State had every right to charge Appellant as it deemed appropriate. There was absolutely no requirement the State charge Appellant only with a lesser included offense or that he not be tried as a codefendant with Gorman. The only requirement was for the State to consider his cooperation in reaching its decision. There is no evidence this was not done, especially in light of the State's belief

that Appellant was not entirely forthcoming regarding the time frame and the events leading up to the toddler's death. As a result, Appellant cannot demonstrate how he was prejudiced, or show any provision of the proffer agreement with which the State failed to fully comply.

Finally, Appellant has not demonstrated any relief to which he is entitled. As mentioned, the agreement did not entitle him to testify unless the State chose to call him. It did not entitle him to be charged with a specific crime or receive a specific sentence. Accordingly, even if the agreement was enforced, the State could still try Appellant for the same charges, using the same evidence, and ask for the same sentence considerations as it did in the instant case. As a result, if the agreement is enforced, there is no relief which Appellant can receive which he has not already received.

Accordingly, this Court properly found Appellant was not entitled to relief on this issue.

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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March 10, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr. Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State, Respondent,

vs.

Robert Palmer, Appellant.

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:

Robert M. Pachak, 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.

Sally Ellison

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ALAN WILSON
ATTORNEY GENERAL

March 10, 2014

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. Robert Palmer
Appellate Case Tracking No. 2011-203766

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. Blitch, Jr.
Assistant Attorney General

Enclosures
cc: Robert M. Pachak, Esquire
Victim Services