

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Horry County
Hon. Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Number 2014-000954

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S.C. Supreme Court

Opinion No. 5198 (S.C. Ct. App. Filed February 12, 2014)

The State,

Respondent/Petitioner,

v.

Robert Palmer,

Petitioner/Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF RESPONDENT/PETITIONER**

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TABLE OF CONTENTS

CERTIFICATION OF COUNSEL..... 1

STATEMENT OF QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT..... 8

 I. Did the Court of Appeals err in finding Palmer was
 entitled to a directed verdict on the charge of aiding and
 abetting homicide by child abuse pursuant to section 16-3-
 85(A)(2) of the South Carolina Code?..... 8

CONCLUSION..... 12

CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on March 13, 2014. The Petition for Rehearing was denied by Order filed April 7, 2014.

STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals err in finding Palmer was entitled to a directed verdict on the charge of aiding and abetting homicide by child abuse pursuant to section 16-3-85(A)(2) of the South Carolina Code?

STATEMENT OF THE CASE

Procedural History

Palmer and his co-defendant Julia Gorman were indicted for homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct toward a child. On October 31, 2011, the Honorable Larry B. Hyman conducted a hearing on Gorman's motion to sever and to determine the admissibility of the Palmer's statement. The Court denied the motion and found the statement admissible.

The parties proceeded to trial from November 14-18, 2011. Both Palmer and Gorman were convicted as indicted. Both were sentenced to thirty-five years for homicide by child abuse, twenty years for aiding and abetting, and ten years for unlawful conduct.

Both parties appealed. The Court of Appeals consolidated the appeals at oral argument, which was held on October 9, 2013. On February 12, 2014, the majority of the Court of Appeals' panel issued its opinion affirming the convictions for homicide by child abuse and unlawful conduct, but reversing the convictions for aiding and abetting. The Honorable Daniel Pieper concurred in the reversal of the aiding and abetting convictions but dissented and would have reversed the other convictions. See State v. Palmer and Gorman, Op. No. 5198 (S.C. Ct. App. Filed February 12, 2014).

The State filed a petition for rehearing from the reversal of the aiding and abetting charges and Palmer filed a petition for rehearing from the affirmance of the other charges as well as the Court's finding regarding the denial of his motion to enforce a proffer agreement. The Court of Appeals denied both petitions for rehearing on April 7, 2014.

This petition for writ of certiorari follows.

Factual Background

Palmer and his co-defendant were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Palmer's co-defendant. Palmer and the victim's grandmother lived together for approximately four years. They came into custody of the child after the child's mother had to leave him with them in order to attend to business out of town prior to reuniting with the child's father.

Prior to the mother leaving, the child was taken to the doctor due to ant bites and congestion from allergies. He was given medication and was scheduled to return later for immunizations. The treating doctor indicated the toddler looked normal at the time of the examination and treatment.

On July 14, 2008, Palmer's co-defendant left for work before 6:00am and the child was sleeping and fine. The toddler remained in the care of Palmer throughout the day. Palmer fed the child at 9:30am and again around noon. Around 3:30pm, Palmer laid the victim down again for a nap.

Around 4-4:30pm Palmer's co-defendant arrived home from work and checked on the toddler who appeared to be sleeping. She did not touch the child or closely examine the child. Around 6:00pm, the parties finished dinner and Palmer's co-defendant went to wake the toddler. She found him limp, arms bowed, and frothy saliva coming from his mouth. She called 911 and the child was taken to Conway Medical.

Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call. He testified Palmer was holding the child on the couch when he arrived and he could tell the child was in grave condition. The child was given over to Erica Rosenthal a

paramedic that arrived. Rosenthal testified the child had a right sided gaze and appeared to be having a seizure.

The emergency room nurse and the doctor who saw the toddler, both testified his condition was critical. They both indicated he was posturing due to the head trauma. A CAT scan was done and revealed skull fractures and bleeding in the brain. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. She testified the injury was not accidental.

Dr. Roberts, a neuro-radiologist with the Medical University of South Carolina (MUSC), testified the toddler suffered blood around the brain, severe swelling of the brain, loss of the gray-white differentiation which indicated dead brain tissue, and severe fractures. (T.406; R. 332). She testified both sides of the skull were fractured by severe traumatic force. (T.409-410; R. 335-336). 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. (T.416-417; R. 342-343). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (T.411; R. 337).

Dr. Roberts also testified the injury was acute, or very recent. She testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 339-341). 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. 345). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 346-347; 360-361).

Dr. Abel, the Director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, testified she was called in to examine the toddler. She testified she took some background history from Palmer and Palmer's co-defendant. She testified she examined the child and his CT scans. She testified the fractures of the child's skull were similar to a cracked pot and indicated it appeared to be caused by severe forceful impact against a hard surface. She testified the blows were to both sides of the head. Dr. Abel indicated the degree of force used was "massive." (T.516; R. 417). Dr. Abel also testified to bruising on the child, including several suspicious bruises in locations it would be unlikely the toddler accidentally received the bruise. (T.519-522; R. 420-423). Dr. Abel testified anyone seeing the force being applied to the child would "perceive this was tremendous force." (T.534; R. 435).

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). Dr. Abel testified the injury to the child occurred sometime the day he presented to the emergency room. (T.553-554; R. 452-453). She testified it could be possible for an observer not to be able 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).

Dr. Schandl, a forensic pathologist with MUSC, testified the toddler had fractures on both sides of his skull. She testified the cause of death was inflicted blunt head trauma. (T.487; R. 393). She testified the manner of death was homicide. (T.488; R. 394).

Detective Troxell interviewed and took statement from both Palmer and Palmer's co-defendant. Both testified Palmer was alone with the toddler all day. Both testified Palmer's co-defendant woke up about 4:30am and left for work in the early morning to be there before 6:00am. Palmer's co-defendant testified she checked on the toddler and he appeared fine before she left. Palmer indicated he woke the child up about 9:30am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. Palmer's statement noted his co-defendant arrived home at about 4:15 pm.

Palmer indicated when his co-defendant arrived home they both checked on the toddler and decided not to wake him. (T.687; R.470). According to Palmer, they only walked to the edge of the door and not all the way into the room. (T.687; R. 567). Palmer testified they ate dinner before waking up the toddler. He testified she went into the room and found him having a seizure. (T.688; R. 568). Palmer admitted no one else comes over to assist him during the day when he is caring for the toddler. (T. 693; R. 573). According to Palmer, neither he nor his co-defendant did anything to the toddler.

Palmer's co-defendant also gave a statement in which she indicated that the toddler was in Palmer's care throughout the day. She testified she got up at 4:30am and left for work after checking on the child. She arrived home between 4:00 and 4:30pm and checked on him. He appeared to be sleeping. (T.737-739; R. 617-619). She confirmed they then ate dinner, and after dinner, she went into the toddler's room to wake him up. It was then she found him making strange noises with saliva running from his mouth. (T.739; R. 619). Palmer's co-defendant testified she never laid a hand on the toddler. (T.751; R. 631).

Palmer's co-defendant testified the only time she picked up the toddler the day he was admitted to the emergency room was when she picked him up after dinner. (T.798; R. 678). Both Palmer and his co-defendant claimed ignorance of what happened to the child.

At trial, Palmer's co-defendant testified similarly to how she testified in her statement. She gave similar details about leaving for the day. Her story, however, changed regarding the sequence of events upon arriving home. She testified, and presented a time card from her employer, indicated she left her job at 3:45pm. She testified it takes about 45-50 minutes to get home. (T.920; R. 790). She indicated when she arrived home, she checked on the toddler. She verified when she came home she only walked to the door and did not attempt to pick him up. (T.921-922; R. 791-792). She then testified she went to the IGA to get food for dinner and to the video store. She produced a check written to the IGA the day the toddler was admitted to the hospital. It indicated it was processed by IGA at 3:52pm, which she testified would be impossible because of the time it takes to get there from work. She indicated it made sense if the clock was off and should have been 4:52pm. (T.923-925; 927; R. 793-795). She testified when she arrived home from IGA she did not check on the child again. (T.929; R. 799). She confirmed after dinner she entered the child's room and found him "breathing funny" with "saliva hanging out of his mouth." (T.931; R. 801). She called for Palmer, who immediately took the child while she called 911. (T.931-932; R. 801-802).

ARGUMENT

I. **Did the Court of Appeals err in finding Palmer was entitled to a directed verdict on the charge of aiding and abetting homicide by child abuse pursuant to section 16-3-85(A)(2) of the South Carolina Code?**

The Court of Appeals erred in finding Palmer was entitled to a directed verdict on the charge of aiding and abetting homicide by child abuse. The Court utilized an incorrect standard in making the determination by not viewing the facts in the light most favorable to the State. Upon viewing all facts and expert opinions in the light most favorable to the State, there is evidence to support the trial court's decision to deny directed verdict and this Court should grant the petition for writ of certiorari to reverse the decision of the Court of Appeals.

“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.” Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

In relevant part, section 16-3-85 of the South Carolina Code provides:

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment. . . .

The Court of Appeals erred in viewing the facts not in the light most favorable to the State, but instead, in the light most favorable to Palmer. The Court relied on the fact the parties were apart at various times and on Dr. Abel's testimony that a person may not have realized the injuries if they did not see the abuse occur. Other evidence in the record indicated the parties were together when the abuse may have occurred and Dr. Roberts specifically testified the victim would be immediately and noticeably symptomatic. The Court erred in viewing the evidence in the light most favorable to Palmer instead of the light most favorable to the State.

First, there is no doubt the toddler died as a result of injuries inflicted upon him by either Palmer or Gorman. The parties were together during the time immediately after

Gorman arrived home and both admitted entering the child's room at that time. The testimony by Dr. Abel indicated the injuries to the child likely happened three or so hours before the child presented to the ER with his injuries. (R.530-531). The evidence indicated the parties were together at the time they checked on the child which occurred around 4:30, just a couple hours before 911 was called and approximately three hours before the child was presented to the ER. During this time, just as in State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004), the evidence supports a finding Gorman may have committed the abuse with Palmer present in the room and doing nothing to stop the harm from occurring. Based on the medical testimony from Dr. Roberts, he would have known of the abuse and of the injuries and allowed them to be inflicted without inflicting them himself. Additionally, he failed to render aid to the victim for approximately two hours when 911 was called. As a result, he was not merely present as the Court of Appeals found.

The Court of Appeals relies on this Court's discussion of Smith in State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013) in an attempt to distinguish this case from Smith. The Court of Appeals explained:

As it relates to aiding and abetting, the key facts in Smith were that the defendants were never separated during the time the medical evidence proved the injuries occurred, and "the medical testimony indicated that the victim['s] ... symptoms would have been severe and immediate, and importantly, obvious to both Smith and the victim's mother very soon after the injuries were inflicted."

State v. Palmer and Gorman, Op. 5198 (S.C. Ct. App. Filed Feb 12, 2014) (citing Hepburn, 406 S.C. at 441-442, 753 S.E.2d at 415-416). However, instead of distinguishing this case from Smith, when viewed in the light most favorable to the State,

the facts detailed above show this case is remarkably similar to Smith. The two co-defendants were together after 4:30 during the time in which Dr. Abel indicated the abuse may have occurred. The parties agreed the child was fine at 4:30 when checked on and so any abuse then occurred while they were together. Given the severity of the injuries and the medical testimony it is clear one co-defendant would have known of the abuse by the other. There are certainly more similarities to Smith than differences and the Court of Appeals erred in viewing the evidence in the light most favorable to Palmer in an attempt to create the distinguishing characteristics of the case.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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June 5, 2014

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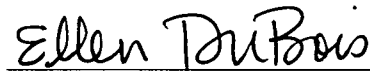
Petitioner/Respondent.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals of Respondent/Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 5th day of June, 2014.



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