STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2012-213571

THE STATE,

Respondent,

v.

DARON DUANE DAVIS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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III. The circuit court did not abuse its discretion in admitting photographs of Child in the hospital bed, and an autopsy photograph of Child's head injury.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In July, 2012, the Greenville County Grand Jury indicted Appellant Daron Duane Davis on one count of homicide by child abuse in connection with the death of Appellant's infant daughter ("Child") in January 2011. The matter was called for a jury trial on December 3, 2012, before the Honorable Edward W. Miller, Circuit Court Judge.

Prior to trial, Appellant moved to exclude autopsy photographs and photographs of Child in the hospital prior to her death, contending the photographs were more prejudicial than probative. The State submitted the autopsy photographs corroborated the medical examiner's testimony regarding the extent of Child's injury. The State argued the photographs of Child in the hospital showed there were no visible signs of injury to Child indicating she had suffered a very traumatic head injury, and they would corroborate the testimony of doctors who saw and/or treated Child on January 19, 2011. The State further argued the photographs would establish there was nothing in Child's appearance to alert her Mother of the injury. (Trial Transcript [TT], pp. 26-38; Record on Appeal [R.], pp. ____).

Dr. Susan Shelley testified she was the pediatrician who saw Child when the parents (Appellant and Mother) brought her to the office on the morning of January 19, 2011. The arrived at the office around 8:35 a.m., and Mother reported Child was "breathing funny." Dr. Shelley immediately noticed Child was not breathing, but she did have a pulse, and there were no external signs of injury. She started resuscitation efforts, and was able to get Child's oxygen level up through use of a ventilation bag. Her office called 911, and the emergency technicians assumed Child's care after they arrived. Dr. Shelley was primarily focused on caring for Child, and did not notice any unusual behavior by Appellant or Mother. (TT, pp. 102-112; R., pp. ____).

Sergeant Dar Shaw, with the Forensic Division of the Greenville Depart of Public Safety, testified a Greer Police Department detective contacted him to take pictures of Child at the hospital. When he arrived, he asked a nurse if there were any visible external injuries so he could make sure to photograph them, but was advised the injury was a skull fracture and there were no external injuries. The State submitted two photographs Sgt. Dar took of Child at the hospital, one of her face and one of the back of her head, which were entered into evidence over Appellant's objection. (TT, pp. 113-119, State's Exhibits 28 and 30 (Photographs); R., pp. ____).[1]

Dr. James Fulcher, qualified as an expert in forensic pathology, testified he performed an autopsy on Child on January 25, 2014. He did not observe any external injuries on Child's body or head, but discovered a very large skull fracture encompassing the majority of Child's skull, with a significant subdural hemorrhage protruding up from it. Dr. Fulcher opined the injury was intentionally inflicted rather than resulting from something accidental, and the cause of death was brain trauma associated with the fracture and subdural hemorrhage. He also found "a fairly extreme amount of hemorrhage in the retina," which "are normally found in non-accidental trauma due to extreme acceleration and deceleration injuries of the eye and traction on the eyes, the head's being jostled back and forth." (TT, pp. 130-143, State's Exhibit 27 (Autopsy Photograph); R., pp. _____).

Dr. Fulcher further testified his findings indicated a series of events occurred leading to Child's injuries. He opined that shaking caused the retinal hemorrhages. but the skull fracture was caused by "an impact with something soft enough not to cause

[1]State's Exhibits 27, 28, 29 (ID Only), 30, and Court's Exhibit 2 are photographs, and will be transported to the Court.

external damage but to fracture the skull," and the degree of force associated with the impact "would be significant." (TT, pp. 143-153; R., pp. ____).

Dr. Lynn Smith testified she was Child's pediatrician, and she saw Child five times prior to Child's death. Other than an early issue regarding Child's weight gain, which was quickly resolved, Child was progressing normally. (TT, pp. 159-171; R., pp. ____).

Mother testified Appellant was Child's father, and he moved in with her, her two minor sons and Child in October, 2010, three months after Child was born. Child's bassinet was located in a bedroom shared by Mother and Appellant. Mother worked full-time, and Appellant, who was unemployed, took care of Children. Right before Christmas, 2010, Mother's work schedule changed from days (9:00 a.m. - 6:00 p.m.) to second shift (3:15 p.m. - 12:00 a.m.), which Appellant did not like. (TT, pp. 200-205, 213-215; R., pp. _____).

On January 18, 2011, Mother went to the grocery store with Appellant, Child, and Mother's two year old son, and they stopped by Mother's grandfather's house on the way home. Mother testified Child was "happy," and "her usual self." Mother's two year old son stayed at the grandfather's house, and Mother and Appellant went home with Child. Mother cooked a meal, played with Child a little while, gave her a bottle and laid her down in her bassinet. (TT, pp. 211-212, 216-217; R., pp. _____).

Mother left for work around 2:15 p.m., and called Appellant on her first break at 5:15 p.m. She heard Child crying in the background, and Appellant said Child was hungry and he was going to get her a bottle. (TT, pp. 216-217; R., pp. ____).

Mother did not have another opportunity to call Appellant before she got off work, but Appellant called her around 12:25 a.m., and asked if she was on her way home.

Mother told him she was, and when she arrived home, Appellant commented "oh, you didn't have enough time to call me tonight." Child and Mother's oldest son were already in bed, and Mother did not check on Child. (TT, pp. 218-219; R., pp. _____).

When Mother and Appellant entered the bedroom, Mother heard Child make a "little baby sound" seemingly acknowledging Mother's voice. Mother did not check on Child because she believed Child was sleeping, and had no reason to suspect anything was wrong. Mother took a shower while Appellant got in bed, and when Mother got in bed, Appellant started talking about their relationship, which he thought "wasn't where it used to be and [Mother] wasn't paying any attention to him," and he felt "it was ending." Mother assured him the relationship was fine, and she went to sleep around 2:00 a.m. (TT, pp. 219-221, 250; R., pp. _____).

Appellant woke Mother up the next morning, and told her he was going to drive the oldest son to the bus stop a few houses down, and then go to the store. Mother looked out the bedroom window, saw the car at the stop sign, and then went back to sleep. She heard Appellant come back in the house later, and asked him to turn off the light because she was still trying to sleep. Appellant turned the light off and went into the bathroom to take a shower, and Mother went back to sleep. (TT, pp. 222-224; R., pp. ____).

Mother's first contact with Child occurred sometime later when Appellant woke her up saying Child was not breathing right. At that time, Child was laying on the bed, and Mother asked Appellant if anything had happened. He said he did not know anything. Mother picked Child up and tried to get her to respond, but when Child remained unresponsive, they took her to the pediatrician's office. During the ride, Mother asked Appellant if anything had happened, and he told her Child had been "fine." (TT, pp. 224-226; R., pp. _____).

When the ambulance took Child from the pediatrician's office to the hospital, Appellant and Mother drove to the hospital. During the drive, Mother again asked Appellant if he knew anything about what happened, and he said Child vomited the night before, but had otherwise been "fine." (TT, pp. 228-229; R., pp. _____).

Eventually a doctor at the hospital showed Mother and Appellant CAT scans of Child's head showing fluid on her brain. Mother testified she was shocked when she realized the severity of Child's condition because Child looked fine. She stated Appellant seemed shocked. (TT, pp. 229-233; R., pp. _____).

Child was subsequently declared brain dead, and life support was removed on January 23, 2011. Mother testified she did not do anything to Child to cause her head injuries, or harm her in any way, between 2:15 p.m. on January 18th when she left for work, and when Appellant woke her up on January 19th about Child's breathing. (TT, pp. 233-236; R., pp. _____).

Lieutenant Eric Pressley of the Greer Police Department testified he drove Child's grandmother, who worked for the Police Department, to the hospital on January 19, 2011, after she received information Child had been taken there. When they arrived at the hospital, Lt. Pressley accompanied the grandmother to the pediatric area of the emergency room, and saw the Mother and Appellant standing in a room where medical personnel were attending to Child. He did not observe any visible injuries on Child. He testified the Mother was crying and very upset, but Appellant was "simply staring straight ahead," with "no outward signs of emotion." He subsequently heard Appellant tell medical personnel he took the six year old to the bus stop that morning, and when he returned "he picked [Child] up and laid her on his chest as he laid back down in the bed."

Appellant then said he put Child on the bed between him and the Mother, and noticed her breathing did not appear normal. (TT, pp. 278-285; R., pp. _____).

Lt. Pressley talked to the doctors treating Child, and initiated an investigation based on what they reported to him. He and another Police Department officer saw Appellant in the hospital parking lot, and asked him to go with them to the Greenville County Law Enforcement Center to talk about what happened to Child. Appellant agreed to go with the officers, waived his Miranda[2] rights, and then spoke to the officers for approximately two and a half hours. (TT, pp. 289-295, State's Exhibit 34 [Interview Transcript], R., pp. _____).[3] Lt. Pressley testified he intended to interview Mother, but the Greenville County Sheriff's Office took over the investigation because Child's grandmother worked for the Police Department. (TT, pp. 296-298; R., pp. _____).

Dr. Eric Berning, qualified as an expert in pediatric critical intensive care, testified he started treating Child when she was transferred from the emergency room to the Pediatric Intensive Care Unit. He saw no external injuries to Child, but her CAT scans showed significant brain trauma, she did not respond to pain and her pupils were completely dilated. In his initial neurological exam of Child, Dr. Berning found no evidence of brain function. (TT, pp. 315-321; R., pp. _____).

Based on the extent of the brain swelling and the amount of blood accumulated in and around the brain, Dr. Berning stated the injuries occurred **more** than three hours before the CAT scans were taken around 10:00 a.m., probably within an eight to twelve hour range, and opined they were intentionally inflicted. He testified babies with such

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

[3]The State introduced an audio CD and a typed transcript of Appellant's interview. (State's Exhibits 33 [CD] and 34 [Transcript]. Exhibit 33 will be transported to the Court for consideration. The substance of that interview is discussed in depth below in Issue I.

injuries frequently survive for eight to twelve hours, would appear to be sleeping to an untrained eye, would be able to make sounds and movements, and even appear to respond to voices, but eating would be very difficult. (TT, pp. 322-343, 352, State's Exhibits 18-24 [Photographs]; R., pp. _____).

After he examined Child, Dr. Berning met with Appellant and Mother. He told them about the extent of Child's injuries, and he believed they were the result of abuse. Mother started crying, but Appellant "didn't really say anything," even when Child's grandmother asked him what he did to Child. Dr. Berning described his demeanor during the entire meeting as "flat." (TT, pp. 337-339; R., pp. _____).

Investigator Chris Miller, of the Greenville County Sheriff's Department, testified he took over as lead investigator into the circumstances of Child's injuries on January 19, 2011. He went to the hospital around 4:00 p.m. that day, spoke with the Greer Police Department officers, and then interviewed Mother for approximately two hours. He testified Mother was "very upset" and "pretty stricken," but still cooperative. He contacted Appellant on January 20th to let him know he was now the lead investigator on the case and would like to talk to him. (TT, pp. 365-375, 380; R., pp. ____).

Dr. Anthony Johnson, qualified as an expert in pediatric ophthalmology, testified he examined Child's eyes on the afternoon of January 19, 2011, and observed massive hemorrhages throughout the retina in both eyes, and ischemic retina resulting from loss of blood supply. He opined that the extent of hemorrhaging and ischemic retina he saw "only happens with very extensive and disruptive injury," and could only be caused by "repetitive forceful back and forth motion to the head and torsional motion side to side repetitively." He further opined the injuries to Child's eyes were "clearly inflicted

injuries," which were separate from the impact that caused the skull fracture. (TT, pp. 386-397, 402-403; R., pp. _____).

Dr. Chris Troup, qualified as an expert in pediatric neurosurgery, testified he examined Child on January 22, 2011, and determined she had no brain stem function and was brain dead. He also examined the CAT scans taken on January 19th, and opined the amount of hemorrhage and brain damage reflected in the scans indicated the injuries "happened within the few hours to less than a few days" prior to the scans, and were intentionally inflicted. He further opined it "would be almost impossible for that much destruction of the brain to have happened" between 7:00 and 7:30 a.m. that morning." (TT, pp. 409-419; R., pp. _____).

Dr. Troup testified a Child may live for hours after such an injury, but Child would not be acting or responding normally. He stated that if the injuries were inflicted between 10:00 p.m. to midnight the evening before, Child might survive, but would be profoundly impaired by the next morning, and would not be able to eat or otherwise act normally. (TT, pp. 417-421; R., pp. _____).

At the close of the State's case, Appellant moved for a directed verdict, contending the State failed to present substantial circumstantial evidence of his guilt to warrant sending the case to the jury. The State argued Appellant's own statements during the police interview constituted direct evidence that he was Child's primary caretaker from 2:30 p.m. on January 18th until he took the son to the bus stop at 7:00 a.m. on the 19th, he was only out of the house until 7:30 a.m., and the medical evidence indicated the injuries could **not** have occurred during the thirty minutes Mother was alone with Child. Appellant's statements and Mother's testimony also indicated Mother did not have an opportunity prior to 7:00 a.m. on the 19th to injure Child, and she was asleep during the

thirty minutes Appellant was out of the house. Viewing the evidence in the light most favorable to the State, the circuit court denied the directed verdict motion. (TT, pp. 423-428; R., pp. ____).

Appellant requested a jury charge on mere presence, arguing the evidence established a substantial period of time that Appellant and Mother were both in the home with Child, and if the injuries were inflicted by either one during that period, a mere presence charge would be appropriate. The circuit court denied the request, finding Appellant specifically rejected the possibility he was present when Mother may have inflicted the injuries, and under the evidence presented, either he injured Child separately, or someone else did it separately. (TT, pp. 439-442; R., pp. _____).

The jury convicted Appellant of homicide by child abuse, and the circuit court sentenced him to life without parole based on proper notice, and Appellant's prior conviction for homicide by child abuse in Spartanburg County. (TT, pp. 505-511; R., pp. _____). This appeal followed.

ARGUMENT

I. The direct and circumstantial evidence amply supports the circuit court' denial of Appellant's directed verdict motion.

Appellant asserts the circuit court erred in denying his directed verdict motion because the State's evidence "falls woefully short" of substantial circumstantial evidence of guilt, and "merely raises a suspicion that [he] harmed the [Child]." This assertion woefully understates the evidence.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence rather than its weight, and must submit a case to the jury if there is any direct and/or substantial circumstantial evidence tending to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 408-409 (2013). Likewise, when reviewing the denial of a directed verdict motion, the appellate court is only concerned with the existence of the evidence, and must view the evidence and all reasonable inferences in the light most favorable to the State. If there is any direct and/or substantial circumstantial evidence tending to prove guilt, the appellate court must affirm the trial's court decision to submit the case to the jury. *Id.*; *see also* State v. Palmer, 2014 WL 551581, *1 (S.C. Ct. App. 2014) (same).

The State's evidence, including Mother's testimony, Appellant's police interview and the medical evidence, with inferences therefrom, established the following:

1) Appellant and Mother were the only two people who could have injured Child (Mother's testimony and Appellant's Interview);

2) Appellant had exclusive control and dominion over Child from 2:15 p.m. on January 18th to 12:45 a.m. on January 19th (Mother's testimony and Appellant's Interview);

3) Mother had no direct interaction with Child between 12:45 a.m. on January 19th after she returned from work, and approximately 8:00 a.m. that morning when Appellant woke her up about Child's breathing (Mother's testimony);

4) Mother was only alone in the house with Child between 7:00 a.m. and 7:30 a.m. that morning, and she was asleep during that time (Mother's testimony and Appellant's Interview);

5) medical evidence indicated Child's skull was fractured ten to twelve hours, and definitely more than three hours, prior to the CAT scans taken around 10:00 a.m. on January 19th (doctors' testimony);

6) Appellant told police he gave Child a bottle at 6:30 that morning, but medical evidence indicated she would not have been able to eat by that time given the extent of her injury (Appellant's Interview and doctors' testimony);

7) Appellant also told police he got Child out of the bassinet between 7:30 and 8:00 that morning and laid on the bed with her on his chest, and she was "fine," but medical evidence indicated she would have been "profoundly impaired" and "not normal" by that time (Appellant's Interview and doctors' testimony);

8) Child's head injury was caused by an impact with significant force (doctors' testimony);

9) Child's retinal hemorrhages were caused by shaking, which was a separate act from the blow that fractured her skull (doctors' testimony);

10) Appellant told police Mother did not injure Child in his presence (Appellant's Interview);

11) Appellant was upset because Mother only called him once while she was at work on January 18th, and she was late getting home on January 19th (Mother's testimony);

12) Appellant was concerned about the status of his relationship with Mother (Mother's testimony);

13) Appellant was frustrated because he thought Mother could do more to help with the children (Appellant's Interview); and

14) Mother was extremely distraught at the doctor's office and the hospital, but Appellant was completely unemotional at the hospital while personnel were working on Child, as well as when the doctor told him and Mother that Child would not survive, even when Child's grandmother starting yelling at him and asking what he did to Child (police officer testimony and doctors' testimony).

When considered in the light most favorable to the State, this evidence raises much more than a mere suspicion Appellant inflicted Child's injuries. Even though both Appellant and Mother were in the house from 12:45 a.m. until they took Child to the doctor's office around 8:30 a.m., Appellant's own statement to police corroborated Mother's testimony she did not interact with Child while Appellant was present during that time. Mother was alone with Child for at most a thirty minute period, during which she was asleep and the medical evidence indicated was well **after** Child was injured.

Appellant's reliance on Hepburn is misplaced. In Hepburn, the victim's mother and the mother's boyfriend were tried jointly and convicted of homicide by child abuse. The Supreme Court reversed the mother's conviction, finding all the evidence and

inferences from the State's case indicated the mother was asleep when the victim sustained the fatal injuries, she only woke up after the boyfriend got the unresponsive victim out of the crib, and the victim was acting normally when the mother put her to sleep and went to sleep herself. The medical evidence established the victim would not have appeared normal within a short period of time after the extensive injuries were inflicted. While the mother was clearly present at the scene (in the house), the Court found the only inference from the State's evidence was that one of the co-defendants inflicted the injuries, but not that the mother inflicted them, and the circuit court erred in denying her directed verdict motion. 753 S.E.2d at 415-416.

Initially, Hepburn is distinguishable because there is only one defendant in this case, rather than two co-defendants charged with the inflicting the same injuries. Mother was never charged, she testified for the State, and much of her testimony was corroborated by Appellant's statements to police and the medical evidence.

Further, and more significant, the evidence regarding Mother's involvement in this case is similar to the evidence in Hepburn, which the Supreme Court found was insufficient to establish the mother's guilt. As in Hepburn, the State's evidence indicated Mother was either absent or asleep when Child sustained her fatal injuries; Child was unharmed when Mother left for work on January 18th; when Mother got home from work, there was nothing in Child's outward appearance that would indicate Child was injured; the first time Mother knew anything was wrong was when Appellant woke her up the morning of January 19th; and Mother immediately called the doctor's office and got Child to the doctor soon thereafter.

Likewise, Appellant's reliance on State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), and State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), is misplaced. There is

one unavoidable, and critical, distinction between those cases and this case. In both Bostick and Odems, there was no evidence actually connecting the defendants with the crime scene when the crime was committed. Bostick, 708 S.E.2d at 778 (no evidence linked defendant to crime scene); Odems, 720 S.E.2d at 52 (no evidence defendant was at the crime scene). In this case, however, there is **direct** evidence, including Appellant's own statement, putting him with Child during the time the medical evidence indicated Child was injured. Thus, the circumstantial evidence analysis in Bostick and Odems does not apply.

There was direct and substantial circumstantial evidence from which the jury could reasonably find Appellant inflicted the injuries that caused Child's death. Therefore, the circuit court properly denied Appellant's directed verdict motion and submitted the case to the jury.

II. The evidence did not support Appellant's request for a mere presence jury charge.

Appellant contends the circuit court erred in denying his request for a mere presence jury charge because both he and Mother were with Child during the nine and a half hours between the time Mother got home from work and the time the CAT scans were taken, and there were multiple scenarios the jury could have considered which justified a mere presence charge. In support of this contention, Appellant submits an extremely truncated, and simplistic, rendition of the evidence, while ignoring significant portions of his own statement to police regarding the events of January 18th and 19th as viewed in light of the undisputed medical evidence.

The evidence presented at trial determines the law to be charged in a case. State v. Manning, 2014 WL 1805319, *5 (S.C. Ct App. 2014). A mere presence charge is warranted only if the evidence supports it. State v. Stokes, 339 S.C. 154, 528 S.E.2d 430, 434 (Ct. App. 2000); State v. Dennis, 321 S.C. 413, 468 S.E.2d 674, 678 (Ct. App. 1996). The mere presence charge is generally appropriate under two circumstances: 1) if there is doubt regarding whether the defendant is guilty as an accomplice to a crime; and 2) the defendant is charged with constructive possession of contraband as a result of being present where contraband was found. Stokes, 528 S.E. 2d at 434-435 (*citing* Dennis). This case does not involve possession of contraband, so a mere presence charge would only be warranted if the State alleged Appellant was guilty under an accomplice theory.

According to Mother's testimony, which was corroborated by Appellant's own statement to police on January 19th, other than hearing Child make a "baby sound" when Mother and Appellant walked into the bedroom after Mother got home from work, Mother did not have any interaction with Child until Appellant woke her up the next

morning expressing concern about Child's breathing. Appellant repeatedly stated to police he never saw Mother harm Child, but if anything happened, it had to happen when he was not present between 7:00 a.m. and 7:30 a.m. (TT, pp. 216-224, State's Exhibit 34, pp. 32-44, 62; R., pp. _____). As discussed above, however, the medical evidence indicated the injuries were inflicted prior to that thirty minute period of time.

Appellant also told police he got Child up around 6:30 a.m. on January 19th, and gave her a bottle before he took the son to the bus stop. After he returned and took a shower, he purportedly got Child out of her bassinet and laid down on the bed with her on his chest, but did not notice anything out of the ordinary. (State's Exhibit 34, pp. 48, 52, 60-61; R., pp. _____). According to the medical evidence, however, it would have been physically impossible for Child to eat by that time, and she would have been noticeably in distress. (TT, pp. 339-340, 352, 417-420; R., pp. _____).

As in Stokes, the State did not attempt to convict Appellant on any theory of accomplice liability in this case. Rather, the State contended Appellant, and only Appellant, inflicted Child's injuries while she was exclusively under his dominion and control before Mother got home from work at 12:35 a.m. on January 19th. The State did not seek a conviction on an aiding and abetting, or "hand of one is the hand of all" basis, and the jury was not charged on either theory. The State did not even contend Appellant allowed Mother to inflict Child's injuries by failing to intervene. Rather, based on the evidence presented, if the jury found Mother inflicted the injuries rather than Appellant, it had no choice but to acquit Appellant.

In denying Appellant's request for a mere presence charge, the circuit court noted there was no allegation or evidence Appellant and Mother acted together, "[s]o either [Appellant] did it separately or someone else did it separately." (TT, p. 439; R., p.

_____). In the absence of any contention or evidence indicating Appellant was guilty in any capacity other than a principal, the circuit court properly refused to give a mere presence charge.

III. The circuit court did not abuse its discretion in admitting photographs of Child in the hospital bed, and an autopsy photograph of Child's head injury.

Appellant asserts the circuit court erred in admitting photographs of Child in a hospital bed, and an autopsy photograph of Child's head injury. Contrary to Appellant's assertion, the photographs were directly relevant to issues in the case, and were not unduly prejudicial.

The admission or exclusion of evidence is an action within the trial court's sound discretion, and the trial court's ruling will not be disturbed on appeal absent an abuse of discretion. State v. Salley, 398 S.C. 160, 727 S.E.2d 740, 744 (2012). The trial court should exclude a photograph if it is calculated to arouse the sympathy or prejudice of the jury, or is irrelevant or unnecessary to substantiate facts, but there is no abuse of discretion if the offered photograph serves to corroborate testimony. *Id.* at 745; *see also* State v. Torres, 390 S.C. 618. 703 S.E.2d 226 (2010) (same). The trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence should only be reversed in exceptional circumstances, and the trial court is not required to exclude relevant evidence merely because it is unpleasant or offensive. State v. Martucci, 380 S.C. 232, 669 S.E.2d 598, 607 (Ct. App. 2008).

As discussed above, the State's theory of the case was Appellant injured Child sometime between 2:30 p.m. on January 18th and 12:45 a.m. on January 19th, while Mother was at work. Given the extent of Child's head injury, the hospital photographs were necessary to show the jury there were no external injuries to Child's head that Mother would have seen when she arrived home from work, and therefore, she would not have been alerted to a problem even if she visually checked on Child at that time. (TT, pp. 33-37, State's Exhibits 28 and 29; R., _____). While medical personnel did testify

Child had no visible external injuries, the photographs showed what a lay person, such as Mother, would have seen rather than a trained medical professional.

The hospital photographs were relevant in this case for the same reason a picture of the child victim in Salley was admissible. In Salley, the defendant objected to a professional photograph of the victim when she was alive and well, arguing it was irrelevant to proving guilt. The Supreme Court affirmed admission of the photograph, finding it substantiated the pathologist's testimony the victim, who had an undiagnosed sickle cell trait, was otherwise healthy and vibrant. 727 S.E.2d at 745. Likewise, the hospital photographs at issue in the instant case corroborated the testimony of Mother, the pathologist and other medical personnel, regarding the absence of any visible external injury to Child's head.

The one autopsy photograph at issue was also directly relevant. In Torres, the Supreme Court specifically held "autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant." 703 S.E.2d at 229. The Court explained:

> The doctor who performed the autopsy used the introduced photographs during his testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed. We do not suggest that these autopsy photographs are mild and easy to view: some of the photographs are close-ups of the victims' injuries and are graphic in nature. However, the purpose of the close-ups was to help identify the nature of each particular injury. The net effect of the photographs was to show what Torres did to the Emervs, which goes straight to circumstances of the crime.

Id. (emphasis added).

The autopsy photograph in this case substantiated the pathologist's testimony and other medical testimony regarding the extent of Child's skull fracture and resulting hemorrhages, and gave the jury some point of reference as

to the degree of force and level of physical ability necessary to inflict the extensive injury, which went directly to the issue of Appellant's guilt. While the photograph was undoubtedly distressing for family members sitting in the courtroom, Appellant's counsel conceded it was the least inflammatory of the available autopsy photographs. (TT, pp. 27-32, 136-145, 342-343State's Exhibit 27; R., pp. _____).

The mere fact someone in the courtroom becomes emotional when the State introduced photographs is not a basis for excluding the photograph. The issue is not whether the evidence will provoke an emotional response, it is whether it is calculated to provoke a verdict on an improper basis. The photographs at issue in this case were not unduly graphic, and they corroborated witness testimony. Accordingly, the circuit court did not abuse its discretion by admitting them.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent by depositing two copies in the United States mail, postage prepaid, addressed to:

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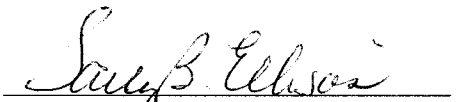
I further certify all parties required by Rule to be served have been served.

This 12th day of June, 2014.



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Re: The State v. Daron Duane Davis
Appellate Case No. 2012-213571

Counsel:

Enclosed are two copies (1 copy each) of the Initial Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 1 copy enclosed)
Victim Services (with enclosure)