STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW ANTWAIN JACKSON,

APPELLANT

APPELLATE CASE NO. 2013-001857

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to charge the lesser included offense of cruelty to children when the severity of the child's injuries was a question for the jury and the State's expert witness opined that the child's bruises could not have happened during a fall that the defendant testified was an accident?

STATEMENT OF THE CASE

On June 10, 2011, a Greenwood County grand jury indicted appellant for inflicting great bodily injury upon a child. On August 7, 2013, appellant was tried before the Honorable Frank R. Addy and a jury. Tr. 1. Elizabeth White and Aaron Taylor represented the State. Tr. 1. Janna Nelson and Meghan Flannery represented appellant. Tr. 1. The jury convicted appellant. Tr. 211, ll. 7 – 12. Judge Addy sentenced appellant to twenty years' imprisonment suspended upon the service of twelve years' imprisonment and five years' probation. Tr. 230, ll. 4 – 8. After timely filing and service of a notice of appeal, this appeal follows.

ARGUMENT

The trial court erred in refusing to charge the lesser included offense of cruelty to children when the severity of the child's injuries was a question for the jury and the State's expert witness opined that the child's bruises could not have happened during a fall that the defendant testified was an accident.

Introduction

Appellant's almost two-year old son ("Child") suffered a head injury that required emergency medical treatment and hospitalization. Doctors found bruises on other places on Child's body. Tr. 107, ll. 21 – 23. The State's expert witness said the bruises could not have arisen from the same event as the head injury. Tr. 121, l. 16 – 123, l. 1. The indictment charging appellant with inflicting great bodily injury upon a child contained a "to wit" listing both "head trauma" and "severe bruising" as Child's injuries. R. ___ (Indictment). Appellant testified that he unintentionally dropped Child on his head while playing with him. Tr. 154, l. 10 – 155, l. 22. Even though the trial judge recognized appellant had a defense to the head injury since he charged the jury on accident, he refused to charge the lesser included offense of cruelty to children which was warranted by the State's expert's testimony regarding Child's bruises.

Relevant Facts

Child's mother sent him to stay with his father, appellant Matthew Antwain Jackson ("Jackson"), for a long weekend. Tr. 50, l. 12 – 51, l. 4. Child was also going to stay with Jackson's mother, Undrea Segar ("Segar"). Tr. 50, l. 12 – 51, l. 11. Segar testified for the State. Tr. 58, ll. 2 – 8. She used to work as a certified nursing assistant. Tr. 61, ll. 20 – 23. Child would visit with Segar and Jackson once or twice a month. Tr. 58, l. 20 – 59, l. 3.

Child would "bounce back and forth" between Jackson's house and Segar's house during these visits. Tr. 59, ll. 7 – 10.

On the weekend of Child's head injury, Segar kept him the first night of his visit. Tr. 59, l. 11 – 60, l. 3. Segar took Child to Jackson's house the next afternoon. Tr. 60, ll. 2 – 3. Segar planned to leave for Delaware the next day, Thursday, January 20, 2011. Tr. 60, ll. 14 – 16. Instead of leaving for Delaware, Segar received a frantic telephone call from her son telling her that something was wrong and he needed her to come to his house. Tr. 60, ll. 14 – 25.

It only took Segar a couple of minutes to reach Jackson's house. Tr. 60, l. 17 – 61, l. 8. She saw a girl on her knees pressing on Child's chest. Tr. 61, ll. 9 – 19. Because of her medical training, Segar knew the girl did not know what she was doing and told her to stop. Tr. 61, ll. 9 – 19. Segar saw Child lift his arm up in response to her voice. Tr. 61, ll. 9 – 19. She only had time to call Child's name to her three times before EMS arrived. Tr. 61, ll. 9 – 19. Segar moved out of the way and let EMS work. Tr. 62, ll. 5 – 13.

EMS employee Rodney Free (the "EMT") responded to a 911 call for a pediatric fall. Tr. 66, ll. 14 – 20. He saw Jackson standing outside "with his hands on his head crying and screaming." Tr. 71, ll. 18 – 22. The EMT saw Child laying behind a couch being tended by "an adult female." Tr. 66, ll. 21 – 25. Child was "unresponsive with his eyes open, not breathing the best at the time." Tr. 66, l. 21 – 67, l. 1. The EMT was told that Child "fell off the back of the couch and landed on the floor." Tr. 67, ll. 9 – 11. When asked who gave him this information, the EMT replied, "I want to say the female that was there with the child told us he fell from the couch." Tr. 67, ll. 9 – 15. EMS

transported Child to the hospital in Greenwood and he was then airlifted to Greenville. Tr. 67, l. 19 – 70, l. 20. The EMT noted bruises to Child's legs in his report. Tr. 69, ll. 13 – 15.

Officer Martin Haralson ("Haralson") of the Greenwood Police department responded to the hospital in Greenwood. Tr. 82, ll. 18 – 25. He saw a bruise on child's leg. Tr. 83, ll. 20 – 25. He described child as "unresponsive" with "a blank stare." Tr. 84, ll. 1 – 5. He took photos of Child. Tr. 84, l. 17 – 85, l. 8. (State's Ex. 1 - 4). As described by the officer and can be seen by the Court in the photographs, some of the alleged injuries are "really hard to see." [1] Tr. 86, ll. 2 – 4. (State's Ex. 1 – 4; 22 - 29).

Officer Haralson spoke to Jackson at the hospital. Tr. 86, l. 11 – 87, l. 8. Jackson told the officer that he was preparing to give Child a bath. Tr. 86, l. 11 – 87, l. 8. While the tub was filling out with water, Jackson sat down next to the child on the couch and played a video game. Tr. 86, l. 11 – 87, l. 8. Child then fell from the couch "onto the top of his head." Tr. 86, l. 11 – 87, l. 8. When Jackson saw the child was not breathing, "he ran outside." Tr. 86, l. 11 – 87, l. 8. Since Jackson did not have a telephone he screamed for help. Tr. 86, l. 11 – 87, l. 8. Jackson ran next door where the neighbor had a phone and called 911. Tr. 86, l. 11 – 87, l. 8.

Jackson admitted lying to Officer Haralson about how Child hit his head. Tr. 163, ll. 15 – 22. Tr. 161, ll. 2 – 9. Jackson was scared that no one would believe what

happened to Child because Jackson was "a young, black man with dreads, you easily get judged by anybody." Tr. 161, ll. 2 – 9. Jackson was playing with child, lifting him up and down above his head, without releasing him. Tr. 153, ll. 4 – 16. An old injury in his wrist caused a sharp pain and Jackson dropped his son. Tr. 153, l. 17 – 155, l. 2. Child's head hit the floor. Tr. 155, ll. 19 – 22. Jackson saw child's head "dropping back" and child's eyes rolling which "scared the living daylights" out of Jackson. Tr. 156, ll. 1 – 4.

Jackson "shot out the door" because he did not have a phone to call for help. Tr. 156, ll. 1 – 6. He screamed and banged on doors begging for help. Tr. 156, ll. 9 – 22. A woman came outside, Jackson told her to call 911, and she went back for her phone. Tr. 156, ll. 9 – 22. Then, a friend of Jackson's opened his door and let him use his phone to call his mother who Jackson knew had medical training and was "closer than the paramedics." Tr. 157, ll. 4 – 17.

On cross-examination, Jackson stated he did not realize or did not know about Child's bruises. Tr. 168, l. 20 – 169, l. 1. Tr. 172, ll. 15 – 21. The solicitor cross-examined him further about Child's bruises:

Q. Now, you gave him a bath every night, didn't you?

A. Yes, ma'am.

Q. Did you play with him every day?

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[1] Officer Haralson was only referring to State's Exhibits 1 – 4 in his testimony, but appellant has included in the record all of the photographs of Child's bruises for the Court's review. Appellant would also point out that Exhibit 22, depicting Child's buttocks, was published to the jury with a curative instruction that no allegation of sexual abuse existed in the case. Tr. 99, ll. 3 – 19. Even the State's expert witness did not know what caused some of the irregularities depicted in Exhibit 22, although Child's grandmother testified Child had diaper rash. Tr. 114, l. 4 – 115, l. 13. Tr. 63, l. 16 – 64, l. 3.

A. Yes, ma'am. Brought joy to him. Brought joy to him. He smiled every time I played with him. That's why I played with him. If he didn't like me playing with him I wouldn't have played [with] him. We just sit there and played the game all night.

Q. But you never put those kind of bruises on him playing with him before?

A. Like I say, I didn't pay attention to if I was bruising him or not. I did not pay that no attention.

Q. So you weren't paying attention when you were bathing him?

A. Not to look for any bruises. Only thing I was concerned about was the diaper rash he had. He had bad diaper rash, so I wasn't looking for no bruises, something that I didn't that I was doing to him. I didn't know to look for that.

Tr. 172, ll. 3 – 21.

Segar did not notice any bruising on Child before she dropped him off at Jackson's house. Tr. 63, ll. 16 – 22. Segar said that Child had diaper rash and had "always had red splotches and a green one above his crack. All of them are born like that." Tr. 63, ll. 16 – 22. Child's mother testified he had no bruises when she dropped him off with Segar. Tr. 51, ll. 17 – 18.

Without objection, the State offered Dr. Mary-Fran Crosswell ("Crosswell") as an expert "in child abuse pediatrics." Tr. 106, ll. 10 – 16. Dr. Crosswell examined Child on the day after he arrived at the hospital in Greenville. Tr. 107, ll. 19 – 21. She testified that Child suffered a subdural hemorrhage on his brain. Tr. 120, ll. 3 – 11. Dr. Crosswell said this injury was life-threatening and impaired Child's breathing. Tr. 121, ll. 1 – 15. She also explained the other bruises she noted on Child's body. Tr. 117, l. 2 – 118, l. 7. A diagram showing the bruises' location was entered into evidence. State's Exhibit 31.

A. No. It would not. The fact that he had multiple bruises on the soft tissues of his face, his ear, and his buttocks show that there are multiple planes on his body that were impacted that could not have resulted from an isolated fall.

Q. When you talk about multiple planes of his body, are you talking about his back and his side and his head?

A. Correct. On his head alone he had bruising on three planes of his body. One on one side, one on the front, and one on the other side. **It would not be possible for him to sustain all those injuries to three different planes of his body from a single, simple fall as described.**

Q. What would cause an injury to three separate planes on his face?

A. Multiple blunt force trauma to his head.

Q. So either multiple falls or multiple strikes? Something along those lines?

A. Correct.

Q. Would wrestling around, in your opinion, cause this degree of bruising?

A. No.

Q. Doctor Crosswell, taking all of these injuries into account, in your opinion are [Child's] injuries due to accidental trauma?

A. No, they are not.

Tr. 121, ll. 16 – 123, l. 1 (emphasis added).

The Charge Conferences at Trial

After the State rested, the trial court held a charge conference. Tr. 142, l. 21 – 149, l. 2. The defense originally asked that second degree assault and battery be charged as a lesser included offense. Tr. 143, ll. 9 – 13. Trial counsel stated, "I think there's evidence there to support a jury finding that it could be moderate injury, moderate bodily

injury, Your Honor." Tr. 143, ll. 9 – 13. The State responded that the assault and battery statutes were separate from the child abuse statutes and were not lesser included offenses of the charged crime of inflicting great bodily injury upon a child. Tr. 143, l. 14 – 145, l. 14.

Judge Addy discussed the problem of the assault statutes stating, "I am well aware of circumstances where you have a parent who unlawfully strikes a child, hits a child, but it doesn't rise to the level of great bodily injury. And it doesn't fall under unlawful conduct towards a child because of bodily harm is not so severe that the life or health of the child was endangered or is likely to be endangered." Tr. 146, l. 21 – 147, l. 5. The solicitor stated that the situation described by the court was covered by section 63 – 5 – 80 of the South Carolina Code, cruelty to children. Tr. 147, ll. 13 – 16.

Defense counsel amended her argument and asked the court to charge cruelty to children as a lesser included offense. Tr. 147, ll. 21 – 22. Tr. 148, ll. 18 – 24. Defense counsel cited the statute stating that "whoever cruelly ill treats, etc., etc., or inflicts unnecessary pain or suffering upon a child, whether the person is the parent or guardian or has charge or custody. And I think that is supported by the evidence." Tr. 148, ll. 18 – 24. The trial judge took the matter under advisement and the trial continued with Jackson's testimony. Tr. 148, l. 25 – 149, l. 4.

The trial judge resumed the charge conference after the defense rested. Tr. 174, l. 1 – 175, l. 23. The trial judge first noted that appellant's testimony warranted an accident charge. Tr. 176, l. 1 – 177, l. 1. He then asked the solicitor for her opinion on whether cruelty to children should be charged as a lesser included offense. Tr. 177, ll. 7 – 13. The solicitor admitted it was a lesser included offense but argued that the child's injuries

were too severe to warrant the charge. Tr. 177, l. 14 – 178, l. 2. Defense counsel responded that the cruelty to children statute provided for pain and suffering and that the evidence could be interpreted in this manner. Tr. 178, ll. 3 – 6.

The trial judge stated that Jackson's testimony was that the injuries "were completely accidental" and "the jury is either going to decide your client is telling the truth or he is not." Tr. 178, ll. 7 – 8. Defense counsel argued that if the jury decided that Jackson was not telling the truth, that "cruelty to children would be something they could convict on because it does provide for inflicting unnecessary pain or suffering upon a child." Tr. 178, ll. 20 – 24. Judge Addy then ruled that he would not charge cruelty to children, "based upon the law or based upon the evidence that's been presented today." Tr. 179, ll. 11 – 24. The trial judge's comments during his ruling seem to indicate that he agreed with the parties that cruelty to children was a lesser included offense, but that the evidence did not warrant the charge. Tr. 179, ll. 11 – 24.

In her closing argument, defense counsel argued that "Bruises, no matter how horrible, don't cause death. Like I said, I'm talking about substantial risk of death because that's the standard of the law here." Tr. 187, ll. 14 – 17. Citing Dr. Crosswell's testimony, the State argued that even if there was a fall, it "couldn't cause... all of the other bruising that [Child] had on his body." Tr. 190, ll. 7 – 13. The trial judge ultimately charged only unlawful conduct toward a child as a lesser included offense and did not charge cruelty to children. Tr. 206, l. 1 – 208, l. 19.

Discussion

Because the severity of Child's injuries was a question of fact for the jury, the trial judge erred in refusing to charge cruelty to children. The law to be charged is determined

from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

As pointed out by defense counsel, one of the key facts the jury needed to decide was the severity of Child's injuries. Tr. 178, ll. 20 – 24. As is relevant to this case, the three child abuse statutes differ in terms of the severity of the injuries or risk of injury to the child. The charged crime defines "great bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." S.C. Code Ann. § 16-3-95 (C). The next rung down on the ladder of child abuse statutes is unlawful conduct toward a child. S.C. Code Ann. § 63-5-70. A parent can be found guilty if he either places "the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety" or "unlawfully or maliciously" causes "any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered." S.C. Code Ann. § 63-5-70(A)(1) and (2).

The trial judge recognized that the distinction between these two statutes—for purposes of the evidence presented in this case—was the severity of injury because he charged unlawful conduct as a lesser included offense. Tr. 206, l. 1 – 208, l. 19. Despite

this recognition, he decided as a matter of law that the injuries were too severe and therefore excluded cruelty to children from the jury's consideration. This decision was error because the evidence presented could have been found to constitute "unnecessary pain or suffering" or cruel treatment. S.C. Code Ann § 63-5-80. See also State v. White, 361 S.C. 407, 413-14, 605 S.E.2d 540, 543 (2004) (noting that whether to charge a lesser included assault offense depends, in part, "on the degree of violence and the circumstances attending to the attack.").

The severity of the injury was very much a question for the jury. See State v. Murphy, 322 S.C. 321, 325-26, 471 S.E.2d 739, 741 (Ct. App. 1996) (finding that question of severity of assault required the charging of a lesser-included assault offense). As the pictures admitted into evidence show, reasonable people could differ on the severity of the bruises on the child's body. State's Ex. 31; State's Ex. 1-4, 22-29. Dr. Crosswell described Child's symptoms from the bruises as being "not able to sit down." Tr. 119, ll. 4 – 13. The only medication Child was given for pain was Tylenol. Tr. 128, ll. 18 – 20.

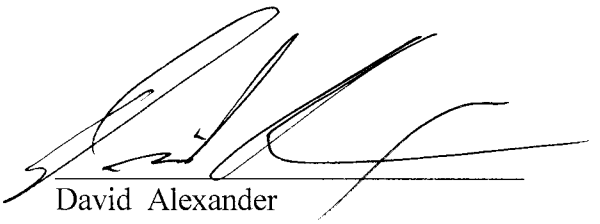
Defense counsel pointed out discrepancies in the findings between the Greenwood and Greenville hospitals, with the Greenville scan calling the head injury "subtle" and showing "no significant soft tissue swelling." Tr. 125, ll. 4 – 24. Dr. Crosswell apparently felt the child's injuries were not so severe that she felt comfortable disregarding the radiologist's recommendation to perform an MRI. Tr. 125, l. 14 – 126, l. 11. The child did not require any surgical procedure for the brain. Tr. 128, l. 18 – 129, l. 13. Child made a full recovery and had no subsequent problems. Tr. 56, l. 8 – 57, l. 21. Tr. 65, ll. 17 – 22.

The evidence also supported the giving of the cruelty to children charge based on the bruising because Jackson had a defense to the head injury. The jury could have believed Jackson's testimony that the head injury was accidental. He received a charge on accident. Tr. 207, ll. 4 – 12. The jury could also have believed Dr. Crosswell that the bruises were not received in the fall, that Jackson inflicted them, but they were only of the severity contemplated by the cruelty to children statute. For these reasons, the charge of cruelty to children was supported by the evidence and the trial court erred in refusing appellant's request for this lesser included offense.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Trial transcript pages 1-4; 40-78; 81-211; 227-31.
(3) State's Exhibits 1-4; 22-29 (photos of child to be transported and should be placed under seal, pending the appropriate motion from the parties);
(4) State's Exhibit 31;
(5) Defendant's Motion for New Trial;
(6) Order Denying Motion for New Trial

I certify that this designation contains no matter which is irrelevant to this appeal.

July 11th, 2014.

David Alexander
Appellate Defender

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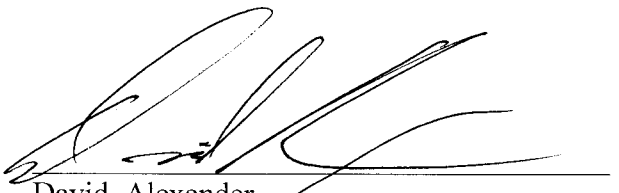
CERTIFICATE OF SERVICE

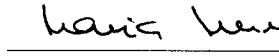
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Matthew Antwain Jackson, #356505, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of July, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.