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S.C. Supreme Court

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 Tracking No. 2014-001008

The State, Petitioner/Respondent,

v.

Julia Gorman, Respondent/Petitioner.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

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STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of the Case.

Factual Background

Petitioner and her co-defendant were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Petitioner. Petitioner and her co-defendant 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. (T.206-211; R. 250-255).

Petitioner's daughter also indicated her mother did not handle stress well and would let things bottle up. Her daughter testified Petitioner would go into a fit of rage once the anger was "uncorked." (T:246-247; R. 290-291).

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. (T.205-207; R. 249-251). The treating doctor indicated the toddler looked normal at the time of the examination and treatment. (T.269-270; R. 313-314).

On July 14, Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call from Petitioner. (T.300-301; R. 332-333). He testified Petitioner's co-defendant was holding the child on the couch when he arrived and he could tell the child was in grave condition. (T.302-303; R. 334-335). 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. (T.318; R. 350). Petitioner told Rosenthal the victim had been whiny and lethargic since the any bites. Memorably to Rosenthal, Petitioner

also told her the Petitioner had "raised several children in her lifetime and never seen such a bad one." (T.321-322; R. 353-354).

The emergency room nurse and the doctor who saw the toddler both testified his condition was critical. (T.329; Supp.R.1). The nurse indicated Petitioner seemed "very anxious, pacing back and forth in front of the bed, seemed very upset." She also testified when the victim would have a seizure Petitioner's co-defendant wanted to approach the bed to hold the child's hand and talk to him to get him settled down. Petitioner did not do the same at first, but only later on. (T.332; Supp.R.4). 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. (T.358; R. 365). He testified the injury was not accidental. (T.362; R. 369). The victim was transferred by helicopter to MUSC for more specialized care. (T.362-363; R. 369-370).

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. 397). She testified both sides of the 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. (T.416-417; R.407-408). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (T.411; R. 402).

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. 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; 425-426). She 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).

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 Petitioner and Petitioner's co-defendant. She testified she examined the child and his CT scans. Dr. Abel 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. 490). 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. 493-496). Dr. Abel testified anyone seeing the force being applied to the child would "perceive this was tremendous force." (T.534; R. 508).

As part of the background, Dr. Abel testified Petitioner indicated the victim had severe developmental problems and behavioral problems. Petitioner described a child to her that could only say one word, was clingy and whiny, and wanted to be held all the time. Dr. Abel testified the detailed pediatrician notes from when the child was in the

custody of its mother indicated otherwise. She testified at nine months the child was saying multiple words and that his development was normal. (T.534-535; R. 508-509).

Dr. Abel testified the injury to the child occurred sometime the day he was presented to the emergency room. (T.553-554; R. 527-528). She also testified the injury had to occur after people looked at the child and believed him to look normal. (T.554; R. 528). Dr. Abel testified based on the information provided by Petitioner and her co-defendant about the child napping and appearing normal, the injury occurred within three hours of the victim being taken to the hospital. (T.556-557; R. 530-531).

Marsha Bessant, a friend of Petitioner and Petitioner's co-defendant testified Petitioner was very stressed over financial issues. She also testified Petitioner would not remove her co-defendant from the checking account even though he was spending the money she earned and would be out at night instead of home when Petitioner cooked. (T.583-585; R. 538-540). In jail, Petitioner asked for pictures of her co-defendant and seemed only concerned with how her co-defendant was doing. (T.593-594; R.548-549).

Yvette Brown, an investigator with DSS, interviewed Petitioner after viewing the victim at MUSC. She testified Gorman told her the child was "cranky, he looked underweight, undernourished, and that his head had a squishy feel to it like it didn't have bone structure." (T.513; R. 487). She thought the comment seemed a little "odd."

Detective Troxell interviewed and took a statement from both Petitioner and Petitioner's co-defendant. Petitioner's co-defendant indicated Petitioner woke up about 4:45 am and left for work in the early morning. (Oct T. 62; R. 34). Petitioner's co-defendant indicated he woke the child up about 9:30 am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. (Oct T. 63-64; R.

35-36). He stated Petitioner arrived home at about 4:15 pm and they both went to the edge of the door to check on the victim who was still down from his nap. (Oct T.64-65; R. 36-37). They ate dinner before waking up the toddler. Petitioner went into the room and found him having a seizure. (Oct T.65-66; R.37-38).

Petitioner also gave a statement to Detective Troxell on July 18. She initially began discussing the days after the child was taken to the hospital along with some family background and history. (Oct T. 104-107; R. 76-79). She was then read her Miranda rights by Detective Troxell. (Oct T.117-119; State's Exhibit 67; R. 89-91; 887). After reading Petitioner her Miranda rights, the officers questioned her regarding the events leading up to the injuries sustained by the victim.

Petitioner stated she got up about 4:30-4:45 am and checked on the victim as she left. She stated he was sleeping. (Oct T. 119; R. 91). She arrived home between 4:00 and 4:30pm and checked on the minor victim. (Oct T. 120; R. 92). He appeared to be sleeping. (Oct. T. 120-121; T.737-739; R. 92-93; 810-812). She explained they then ate dinner, and after dinner, her co-defendant took the dog out while she went into the toddler's room to wake him up. (Oct. T. 121; R. 93). It was then she found him making strange noises with saliva running from his mouth. (Oct. T. 121; R.93).

Petitioner was asked directly: "So Sometime between, something happened between four and six-fifteen, didn't it, because when you went in at six-fifteen he was salivating, okay?" Petitioner responded: "Because, you know, when we checked on him and everything, well I checked on him even after four and he was fine so, so anywhere between dinner time, you know, as we were eating dinner until by six, whatever time I called 911." (Oct. T. 121; T. 739-740; R. 93; 666-667). She acknowledged only her and

her co-defendant cared for the minor victim in the days leading up to his death. (Oct T.130; T.748; R. 102; 675). Detective Trexell noted the only tears he saw from Petitioner during her statement were when he mentioned the possibility of going to jail. (Oct T.131; 137; T. 750; 755; R. 103; 109; 677; 685).

When questioned about the possibility of shaking the child out of frustration, Petitioner stated: "I don't think hard, I don't believe I - -." (Oct. T. 163; T.781; R. 135; 708). She stated at one point: "I don't know if I shook him hard, I don't know, I don't." She later stated: "If, if I shook him I swear to you I don't believe I shook him hard, you know. I don't think I have that much, I don't know." (Oct T.171; T.789; R. 143; 716). Both Petitioner and her co-defendant claimed ignorance of what happened to the child.

The victim died on July 16, after his mother and father decided to donate his organs. 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. 461). She testified the manner of death was homicide. (T.488; R. 462). Prior to his death, the victim's parents had him baptized. Petitioner's daughter begged Petitioner to attend, but Petitioner said she had other things to do. (T.160-162; R. 204-206).

ARGUMENT

I. The Court of Appeals properly found the State presented sufficient evidence from which a jury could find beyond a reasonable doubt that Petitioner was guilty of homicide by child abuse and unlawful conduct toward a child.

The majority of the Court of Appeals correctly found the State presented sufficient evidence from which a jury could conclude beyond a reasonable doubt that Petitioner committed the injuries to the toddler leading to his death. The majority properly distinguished this Court's opinion in State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). As a result, the Court of Appeals properly affirmed Petitioner's convictions for homicide by child abuse and unlawful conduct toward a child and the respective sentences.

"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; . . . .
>
> (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. . . .

S.C. Code Ann. § 16-3-85 (Supp. 2013).

The majority of the Court of Appeals properly relied on the case of State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), in which the Court found the trial court properly submitted the case to the jury when two people could have been responsible for the injuries. The majority also properly distinguished this Court's recent opinion in Hepburn, the case primarily relied on by the dissent.

In Hepburn, this 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 418, 753 S.E.2d at 403. This 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 442, 753 S.E.2d at 415-416. As a result, this 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).

This Court, in Hepburn, explained more of the distinguishing facts in Smith: "As in Smith, medical testimony adduced at trial indicated that the victim would not have appeared 'normal' within a short period of time after her injuries were inflicted due to the nature and extent of her neurological injuries." Hepburn, 406 S.C. at 442, 753 S.E.2d at 416. The Court then found in Hepburn, the State failed to show "Appellant herself was aware of the victim's injuries, let alone caused them." Id. As the majority of the Court of Appeals found and is highlighted below, the evidence in the instant case is more analogous to Smith.

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, Petitioner'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 Petitioner 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).

Most importantly, Petitioner 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). Based

on their statements, the only time either co-defendant was alone with the toddler after this time was when Petitioner 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 Petitioner 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 Petitioner alone at the child's bed with evidence indicating prior to that time the child was fine and could not have suffered the traumatic injury without Petitioner knowing it occurred. Petitioner'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 Petitioner committed the homicide by child abuse.

Further, it is appropriate for this Court to consider the Petitioner'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 Petitioner's guilt. Accordingly, the majority of the Court of Appeals did not err in affirming Petitioner's convictions and sentences.

CONCLUSION

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

Respectfully submitted,

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August 6, 2014

STATE OF SOUTH CAROLINA

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Certiorari to the Court of Appeals
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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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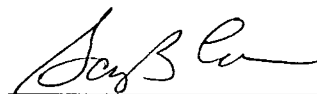
I further certify that all parties required by Rule to be served have been served.
This 6th day of August, 2014.



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