STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Court of General Sessions

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARON DUANE DAVIS,

APPELLANT

Appellate Case No. 2012-213571

REPLY BRIEF OF APPELLANT

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<u>ARGUMENT</u>

I. The State's evidence against Appellant was entirely circumstantial and not substantial, thus the trial court erred when it denied Appellant's motion for a directed verdict made at the close of the State's case.

The Respondent argues that the evidence presented by the State established fourteen conclusions that indicate Appellant inflicted the injuries of the victim and therefore, the directed verdict motion was correctly denied. Appellant disagrees.

Respondent argues that the evidence presented establishes that the Appellant had exclusive dominion and control over Child from 2:15 pm on January 18th to 12:45 am on January 19th. This is misstated. The time frame in which the Mother returned home is arguable, however, it is established that the Mother returned home sometime in between 12:20 am and 12:40 am that morning (Tr. p. 218, lines 9-17; Tr. p. 253, lines 6-10).

Respondent argues that the evidence presented establishes that the Mother was only alone in the house with Child between 7:00 am and 7:30 am. Mother testifies that Appellant was lying in the bed when Mother went to sleep at 2:00 am. Respondent fails to acknowledge the fact that the Mother could have exercised dominion and control to the child while the Appellant was asleep.

Respondent argues that the evidence presented establishes that the medical evidence indicated that the Child's skull was fractured ten to twelve hours and definitely more than three hours, prior to the CAT scans taken around 10:00 am on January 19th. Dr. Fulcher could not testify to a time frame (Tr. p. 145-146, lines 17-10). Dr. Anthony testified that the injury to the eyes could have been there a week, 4 days, or a few hours ago. (Tr. p. 401, lines 2-15). Dr. Earl Troup testified that the child could not live 12 hours with that degree of injury, but more than three hours. (Tr. p. 417, line 21 – p. 418, line 1). If the child could not live 12 hours with this injury, then the Child would have to have received the injury after 10:00 pm but before 7:00 am. Both, Mother and the Appellant were present with the Child for the majority of the time windows testified to by the State's experts. Appellant repeatedly states that he did not injure the child and none of the State's experts testified to anything that indicates who inflicted the injuries to the child.

Finally, Respondent urges this court to draw a conclusion that Appellant caused the injuries to the victim by comparing the emotional reactions of the Mother versus Appellant. Respondent wants to focus on how the Mother was extremely distraught at the doctor's office and the hospital, but Appellant was completely unemotional and flat at the hospital while personnel were working on the Child, as well as when the doctor told him and Mother that Child would not survive, even when Child's grandmother started yelling at him and asking what he did to Child. Respondent does not mention in their brief that Appellant was escorted out of the hospital-by-hospital security for yelling and being emotional. (Tr. p. 337-339) Respondent also fails to mention the testimony of Mother that "Daron seemed shocked like she was." (Tr. p. 232, lines 5-9).

The State's evidence against Appellant is entirely circumstantial in nature. Even when viewed in the light most favorable to the State, the fourteen conclusions argued by Respondent do not connect Appellant to the crime. The conclusions by the state do not create an evidentiary link between the Appellant and the crime of homicide by child abuse and only raise suspicions that Appellant committed the crime. Therefore, the motion for directed verdict should have been granted.

II. The trial court erroneously failed to charge the jury with mere presence.

The fact that Appellant and Mother were both present in the same house with the victim, for approximately nine and one half hours, coupled with the inability of the State's medical experts to give an opinion as to a specific time of the infliction of the victim's injuries that is outside of the time Mother and Appellant were together with the child, is enough evidence to support a mere presence charge, thus the trial court committed reversible error by failing to charge the jury with a mere presence instruction.

Respondent's reliance on the proposition that because the state decided not to prosecute Mother and because no theory of accomplice liability was put forth by the state that a mere presence jury charge is not appropriate is contrary to the interests of justice.

Respondent cites that a "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 charge 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). The court in Stokes and Dennis do not hold that a mere presence charge is only appropriate in the two circumstances listed above, but that it is generally appropriate in the two circumstances argued by the respondent. The two cases cited by respondent do not totally foreclose on the possibility of a factual scenario supporting a mere presence charge even if the State does not proceed on an accomplice liability theory. The "law to be charged to the jury is to be determined by the evidence presented at trial" and the evidence presented supports a mere presence charge. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989).

The evidence presented at trial establishes that both Mother and Appellant, both of which deny participating in the crime itself, were present at the scene of the crime, together, for a duration of nine and a half hours. The State's own witnesses testify that the injuries of the victim could have been sustained during the time frame that both Mother and Appellant were inside of the house together.

Appellant contends that these facts alone are enough to support a jury instruction on mere presence and that the trial judge erroneously failed to charge the jury with mere presence.

III. The State's argument that the photograph was necessary for corroborating the statements of its medical experts and that of the Mother is unnecessary.

Appellant contends that the use of the photographs added no probative value to any fact that hadn't already been established or was contradicted. The fact that there were no outward signs of trauma to the victim had already been conclusively established thru the testimony of all of the medical experts and the mother. All the witnesses corroborated each other. No additional probative value existed at the time of entry of the photographs into evidence. Therefore, the highly prejudicial nature of the contents of the photograph out weighed the probative value gained by re corroborating what had already been corroborated.

CONCLUSION

For the aforementioned reasons, it is clear that the trial judge abused his discretion when he denied Appellant's motion for a directed verdict at the close of the State's case. It is also clear that the trial judge erroneously failed to charge the jury with mere presence as well as erroneously admit a photograph of the victim in a hospital bed on a ventilator. Therefore, this Court should reverse Appellant's conviction.

Respectfully submitted,

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This 15th day of August, 2014.

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DARON DUANE DAVIS,

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APPELLATE CASE NO. 2012-213571

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant 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. Darn Davis, #233384, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of August, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2014.

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

RECEIVED
AUG 15 2014
SC Court of Appeals