

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

State v. Palmer and Gorman, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014)

The State,

Respondent/Petitioner,

v.

Robert Palmer,

Petitioner/Respondent.

**BRIEF OF RESPONDENT
BY RESPONDENT/PETITIONER**

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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court correctly denied Palmer's motion for a directed verdict as to the charge of homicide by child abuse, and this denial was correctly affirmed by the majority of the Court of Appeals.

STATEMENT OF THE CASE

Procedural History

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

Factual Background

Palmer and his co-defendant, Gorman, were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Gorman. 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, Gorman 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 Gorman 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 Gorman 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 Gorman. 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 making it unlikely the toddler accidentally received the bruises. (T.519-522; R. 420-423). Dr. Abel testified anyone seeing the force being applied to the child to cause the head trauma would "perceive this was tremendous force." (T.534; R. 435).

Dr. Abel further testified if an observer was not present when the force was applied, 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). 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). 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 Gorman. Both testified Palmer was alone with the toddler all day. Both testified Gorman woke up about 4:30am and left for work in the early morning to be there before 6:00am. Gorman 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 Gorman arrived home at about 4:15 pm.

Palmer indicated when Gorman 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 Gorman did anything to the toddler.

Gorman 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. Gorman

indicated she found the toddler making strange noises with saliva running from his mouth. (T.739; R. 619). Gorman testified she never laid a hand on the toddler. (T.751; R. 631).

Gorman 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 Gorman claimed ignorance of what happened to the child.

At trial, Gorman 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. The trial court correctly denied Palmer’s motion for a directed verdict as to the charge of homicide by child abuse, and this denial was correctly affirmed by the majority of the Court of Appeals.

The trial court correctly denied Palmer’s motion for a directed verdict because the State presented substantial circumstantial evidence indicating he committed the homicide by child abuse. “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. . . .

S.C. Code Ann. § 16-3-85 (Supp. 2012).

The evidence in this case demonstrated the child died as the result of trauma that was intentionally and severely inflicted. Every doctor indicated it would require severe trauma to cause the type of injury, and it was not contested the toddler died as a result of his head injuries. Further, the evidence indicated the child was only in the custody of two people during the time frame in which the trauma causing his death could have occurred—Palmer and Gorman. Finally, there is substantial circumstantial evidence indicating Palmer caused the trauma during a period of time when Gorman was not present or the two acted in concert to cause the trauma; therefore, supporting the decision of the trial court to deny the motion for a directed verdict on Palmer's homicide by child abuse charge.

The primary case relied upon by Palmer to argue the State failed to present substantial circumstantial evidence is State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). Hepburn is clearly distinguishable from the case at hand and was properly distinguished by the majority opinion of the Court of Appeals.

In Hepburn, the South Carolina Supreme 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. The 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, the Court distinguished State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), the opinion the State primarily relies on in the instant case.

In Smith, the Court of Appeals 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).

According to the testimony of Palmer and Gorman, Palmer was home the majority of the day alone with the toddler. Gorman merely looked in on the toddler in the

morning and when she arrived home that evening. She did not go into the room or near the child. She testified he appeared to be sleeping, but she did not verify the condition of the child.

In the instant case, Dr. Abel and others testified the injury had to happen the day the toddler was taken to the emergency room. The doctors all testified the injury was severe and caused by blunt force trauma intentionally inflicted to the child. Further, they testified the child suffered fractures to the skull on both the left and right sides, as well as significant bleeding on the brain, and death of brain tissue.

Dr. Abel further testified if an observer did not see the force applied or identify the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). She testified it could be possible for an observer 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). Further, she specifically testified:

[T]he signs of head trauma are changing consciousness, sometime seizures, sometimes breathing abnormalities. They, they don't all happen at once, so a child could have a head injury and be quietly breathing and apparently sleeping but actually unconscious and it would not be possible for a person who didn't know that they had had the head injury to realize it until later, until something more started happening.

(T.559; R. 458).

As a result, the jury had evidence from which is could reasonably conclude the trauma was inflicted by Palmer prior to Gorman getting home and, if Gorman did not notice anything wrong from the doorway when she looked in on the toddler, then she would not have known something happened to the child until she went to pick up the child. Gorman testified she did not enter the room, but instead merely observed the child

appearing to be asleep. Gorman testified when she went into the room to pick up the child was when she noticed something wrong. Prior to this time, Palmer was the only one home throughout the day with the child.

Additionally, the jury could reasonably conclude the trauma occurred during the time both Palmer and Gorman were present. According to Dr. Roberts, if the trauma occurred before Gorman arrived home, then the child would have been immediately symptomatic and would not have been breathing normally. Gorman testified the child appeared to be sleeping and breathing normally when she arrived home. The medical testimony indicated the trauma could have occurred after Gorman arrived home. According to the defendants' statements, they remained home until calling 911. The trauma which occurred in this case was so severe, even if only one person inflicted the trauma, the other knew it was occurring and did nothing to stop it. As a result, this case would be remarkably similar to Smith in that the trauma occurred while both adults were present and Palmer either inflicted the trauma or allowed the trauma to occur.

Finally, the jury had evidence to support a conclusion the injury occurred when Gorman went to the store prior to dinner. As the majority of the Court of Appeals found, her testimony indicated she checked on the toddler when she arrived home and everything appeared normal. As stated above, according to Dr. Roberts, if the trauma occurred before Gorman arrived home, then the symptoms of the trauma would have been immediately noticeable. Gorman then went to the grocery store and returned. She testified she did not check on the child when she returned and next saw the child when she found him seizing and foaming at the mouth. Accordingly, the evidence when

viewed in the light most favorable to the State provides substantial circumstantial evidence Palmer inflicted the harm to the toddler.¹

¹ It should also be noted that in their briefs to the Court of Appeals and at oral argument before the Court of Appeals, the parties each argued the evidence demonstrated the other co-defendant committed the crime. The fact they could each find evidence supporting the other's guilt exemplifies why the trial court properly denied the motion for directed verdict and allowed the case to go to the jury.


CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision to the trial court and the Court of Appeals' opinion affirming that decision should be affirmed.

Respectfully submitted,

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December 1, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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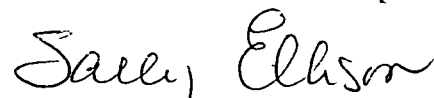
Petitioner/Respondent.

PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Brief of Respondent 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
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 1st day of December, 2014.



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December 1, 2014

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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Re: State v. Robert Palmer
Appellate Case Tracking No. 2014-000954

Dear Mr. Shearouse

Enclosed are the original and fourteen copies of the Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

William M. Blich, Jr.
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cc: Mr. Robert M. Pachak, Esquire (enclosures)
Victim Services (enclosure)