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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Honorable Joseph Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000764

The State, ... Respondent,

vs

Stephanie Irene Greene, ...

INITIAL BRIEF OF APPELLANT

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Question II: Did the trial court err in failing to direct a verdict or grant a new trial when the state failed to prove Stephanie Greene acted with extreme indifference as required by South Carolina Code § 16-3-85?

Question III: Did the trial court err in failing to instruct the jury they could convict on only one of the charges as a conviction of more than one charge would violate the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and Fifth Amendment to the Constitution of the United States of America as the same fact was used to prove the cause of death in each case?

Question IV: Did the trial court err in failing to require the state to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the constitution of the United States of America by her counsel not being able to respond to new arguments made by the state in its closing argument?

Procedural History

The State indicted Stephanie Irene Greene on September 15, 2011 on charges of homicide by child abuse, involuntary manslaughter, and unlawful conduct toward a child and homicide by child abuse. On March 31-April 4, 2014 she was tried before the Honorable J. Derham Cole, Sr. and a jury. On April 3, 2014 the jury convicted Mrs. Greene of all the charges. On April 4, 2014 Judge Cole sentenced her to five years on the charges of involuntary manslaughter, unlawful conduct toward a child and 20 years for homicide by child abuse. All sentences are concurrent. On April 14, 2014 Mrs. Greene filed her Notice of Intent to Appeal.

Factual History

In the early morning hours of November 13, 2010 Spartanbug County 911 received a call from the residence of Randy and Stephanie Greene about their child, Alexis, who was not responsive. Rec. on App. at 83, ll 2-19. The coroner's office was called and they arrived at about 6:16 a.m. Rec. on App. at 86, ll 1-8. The child was dead at the scene. Rec. on App. at 87, ll 1-11. Pursuant to their protocol Ellen Holmes conducted an interview with Mrs. Greene at the scene. Rec. on App. at 88, 6-20; 66, ll 2-6. The interview lasted about three hours. Rec. on App. at 89, ll 6-11. In this interview Ms Holmes obtained a medical history of the child and the activities of the child for the previous several days. She stated that in her opinion Mrs. Greene appeared to be under the influence. Rec. on App. at 87, ll 18-24.

As no immediate cause of death could be determined, blood and tissue samples were taken to be analyzed. When these results were returned Dr. John David Wrenn, the pathologist, issued his report on January 28, 2011 stating the cause of death was a result of respiratory insufficiency secondary to synergistic drug intoxication. Rec. on App. at 433, ll 18-

20. Mrs. Greene was then arrested on June 24, 2011 for homicide by child abuse.

Alexis Greene was born on September 28, 2010. At the time of the birth of their daughter, Mrs. Greene was being prescribed numerous pain medications for injuries she had sustained in an automobile accident years before and other physical complications. Rec. on App. at 177, ll 3-25 to 178, ll 1-11. Testimony from Dr. Carol A. Koistra confirmed that Mrs. Greene was totally disabled. Rec. on App. at 225, ll 3-25 to 228, ll 1-25. Dr. Koistra was primarily prescribing vicoprofen, a schedule III drug and several other drugs from schedule III and higher. Rec. on App. at 223, ll 4-9. Dr. Susan Kovacs, over a period of several years, prescribed various schedule II drugs to Mrs. Greene. 164, ll 23-25 to 165, ll 1-10.

Both doctors testified that they did not know Mrs. Greene was pregnant and they would not have prescribed the opioids had they known she was pregnant. Rec. on App. at 176, ll 18-23; 165, ll 8-13; 215, ll 6-11; 217, ll 3-10. Dr. Kooistra was unsure if she referred Mrs. Greene to Dr. Kovacs, but she did send Dr. Kovacs a copy of her report of November 4, 2010 which included a complete list of the prescriptions she was prescribing for Mrs. Greene. Rec. on App. at 221, ll 21-25 to 222, 1-16. Dr. Kovacs testified she did not know that Dr. Kooistra was prescribing vicoprefen. Rec. on App. at 166, ll 5-7. On cross examination she admitted that she had signed two documents in her office acknowledging that Mrs. Greene was in fact receiving vicoprofen through November of 2009. Rec. on App. at 183, ll 16-25 to 185, ll 1-17. The doctors also admitted that vicoprofen and morphine are frequently prescribed together. Rec. on App. at 179, ll 12-25 to 180, ll 1-6; 233, ll 1-10. Dr. Kooistra further admitted that the American Academy of Pediatric found nothing wrong with prescribing morphine while a woman is breast-feeding. Rec. on App. at 231, ll 19-25 to 232, ll 1-4.

Dr. Kovacs, who was prescribing schedule II narcotics, admitted that she did not personally see Mrs. Greene but four times over a 23 month period ending in November of 2010. Rec. on App. at 199, ll 13-23. On one occasion Dr. Kovacs mailed the prescription to Mrs. Greene. Rec. on App. at 200, ll 3-9. Dr. Kovacs also referred Mrs. Greene to Carolina O.B.G.Y.N. Apparently the O.B.Y.G.N never told Dr. Kovacs, the referring doctor, that Mrs. Greene was in fact pregnant. Rec. on App. at 203, ll 4-25.

Kaushik Kotecha, employed by the South Carolina Department of Health and Environmental Control, was the primary investigator of the medicines prescribe by the various doctors. He testified that DHEC had a prescription monitoring system that all doctors in the state have had access to since 2007. Rec. on App. at 339, ll 3-15. He further stated that all the prescriptions except one were filled at a single pharmacy in Inman. Rec. on App. at 329, ll 8-21. He testified that when dealing with different medications a prudent patient would use the same pharmacy. Rec. on App. at 331, ll 11-16. He further stated that two prescriptions that had a warning against taking while breast-feeding were not found in the toxicology report. Rec. on App. at 333, 13-25 to 334, ll 1-4. The only drug found in the toxicology report that contained a warning against taking while breast-feeding was Clonazepam. Rec. on App. at 335, ll 9-25 to 336, ll 1-20.

The State called as experts in this matter Dr. David Eagerton and Dr. John David Wrenn. Neither testified that the morphine in the child was obtained though breast milk. When asked about the source of the morphine Dr. Wrenn stated "It's not my opinion that it was from milk or anything else. I just know that it was there." Rec. on App. at 435, ll 22-24. Dr. Eagerton testified when asked he could not say how the morphine got into the child other than "Had to get

into the baby somehow." Rec. on App. at 383, ll 12-18. Dr. Eagleton further admitted that no peer reviewed article involving morphine discusses a child being in a hospital from a toxic level of morphine obtained through breast milk. Rec. on App. at 365, ll 19-22. He also knew of no study that shows a child can obtain a toxic level of morphine through breast milk from a mother taking MS Contin, the morphine being taken by Mrs. Greene. Rec. on App. at 371, ll 18-21. He further admitted that the American Academy of Pediatrics listed morphine as safe to take while breast feeding. Rec. on App. at 375, ll 4-7. He also admitted that the Clinical Toxicology Journal reported that scant evidence existed that opioid toxicity could occur in breast-fed infants . Rec. on App. at 381, ll 12-25 to 383, ll 1-11. Nether Dr. Eaglerton nor Dr. Wrenn produced any medical or other scientific research that supported the proposition that an infant can receive a lethal level of morphine through breast milk.

Argument

Question I

Did the trial court err in failing to direct a verdict when the state failed to prove through competent medical evidence or otherwise that the morphine in the deceased child came from the mother through breast-feeding?

At the trial below the only theory the state had as to how the child obtained a lethal dose of morphine was through the breast-milk of the child's mother, Stephanie Irene Greene. The trial court charged the jury "[T]he state's allegation and theory in the case, that the child died as a result of consumption of a controlled substance through the mother's breast milk." Rec. on App. at 593, ll 5-7. The state, however, never produced any medical or scientific evidence that a mother could give a nursing infant a lethal dose of morphine through breast-milk. If the state fails in this proof, then the state fails in its proof of guilt against Stephanie Irene Greene.

South Carolina has long recognized "the rule that when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of the experts must be at least that the disability or death 'most probably' resulted from the accidental injury." *Cross v. Concrete Materials*, 236 S.C. 440, 442, 114 S.E.2d 828, 829 (1960). *See, also, Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976)(applying the rule in a medical malpractice case). In the present case the ability to transfer different drugs through breast milk is not something that is within the common knowledge of lay people. This can be established only through expert testimony.

In an attempt to establish its case the state called Dr. David Wren and Dr. David

H. Eagleton as medical experts who opined concerning breast-milk and the morphine found in the minor child. No other witness gave any testimony as to whether lethal levels of morphine can be supplied through breast-milk. Neither expert called by the state testified to a reasonable degree of medical certainly that the most likely cause of the morphine levels in the minor child was through breast-milk. In fact neither testified that even a toxic level of morphine in the child through breast milk was possible.

On cross-examination Dr. Eagerton states:

> Q (By Mr. Wise) Well, I hand you - - look here at the highlighted portion about the LactMed website and see if that refreshes your memory?
> A (By Dr. Eagerton) Yes, sir.
> Q The National Institute of Health
> A Yes, sir.
> Q Did you access that website in preparation for your testimony here today?
> A I did
> Q And which article on the National Institute of Health website did you find that says a mother who breastfeeds can give her child a toxic level of morphine?
> A I don't recall
> Q Because it doesn't exist.
> A May not
> Q Do you think it it existed you would have found it?
> A I would hope so.
> Rec. on App. at 379, ll 6-24

He further testified:

> Q Look there if you would on this highlighted portion on the right hand side where the little star is.
> A. Ok
> Q. Read that to us.
> A. "The medical literature describes scant evidence of opioid toxicity in breastfed infants."
> Q. Do you have any evidence that's contrary to that?
> A. No, sir that's - -

Q. That's true
A. That's true, yes sir.
Q. So there's scant evidence
A. That's correct
Q. Which is pretty close to none
A. Yes, sir.
Q. Right?
A. That's right
Q. So you're in no position to say then that that number came through breast milk.
A. Had to get into the baby somehow.
Rec. on App. at 382, ll 20-25 to 383, ll 1-18.

* * *

Q. So you're not able to tell this jury how this morphine got into this child.
A. It had to - - most commonly it had to get there by the oral route.
Rec. on App. at 397, ll 15-18.

Dr. David Wrenn, the pathologist, was likewise no more helpful to the state. He speculated as to a theory and then said "It's not up to - - in my opinion it's not up to me to find out exactly everything that happened because this is not a research project." Rec. on App. at 443, ll 7-10. He later stated "I don't know how it got there. It's unquestionably there. And you can - - you can argue any mechanism you want, but it's there, period." Rec. on App. at 444, ll 9-11.

Neither expert ever cited any research project, study, or report of any mother giving her child even a toxic level of morphine from taking MS Cotin. Dr. Eagleton admitted on cross-examination that morphine was approved for use by breast feeding mothers. Rec. on App. at 375, ll 4-8; *See also, The Transfer of Drugs and Therepeutics Into Human Breast Milk: An Update on Selected Topics,* 132, PEDIATRICS, Official Journal of the American Academy of Pediatrics, e796, e801(September 2013) ("For these reasons, when narcotic agents are needed to treat pain in the breastfeeding mother, agents other than codeine (eg, butotphanol, morphine, or

hydromorphine) are preferred."); *The Transfer of Drugs and Other Chemicals Into Human Milk*, 108 PEDIATRICS, Official Journal of the American Academy of Pediatrics, 776, 781 (September 2001) (listing no sign or symptom in infant of mother taking morphine other than measurable blood concentration for morphine); *Postpartum maternal codeine therapy and the risk of adverse neonatal outcomes: A retrospective cohort study*, 50 Clinical Toxicology, 390, 394 (2012)("In summary, despite a recent report of neonatal death associated with maternal use of codeine, we found no evidence that prescription of codeine to women following delivery was associated with several measures of neonatal harm in large population studied over a 10-year period.")[1]

This Court and the South Carolina Supreme Court have said that a circumstantial evidence case must be based on substantial circumstantial evidence. "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." *State v. Cherry*, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004)(emphasis added); *See, also, Jackson v. Virginia*, 443 U.S. 307 (1979); *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011); *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001); *State v. Martin*, 343 S.C. 580, 541 S.E.2d 254 (2000); *State v. Gilliand*, 402 S.C. 389, 741 S.E.2d 521 (Ct. App. 2012); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App.

[1] These articles and others were referred to during the trial and acknowledged by the state's experts to be authoritative. Codeine is converted by the human body to morphine.

2012).[2] The standard of review is not is there *some* circumstantial evidence that could be interpreted to be evidence of guilt. Nor is it so if one interpretation of the facts is consistent with guilt the verdict is to be sustained. To say a theory of guilt is possible is not substantial circumstantial evidence nor proof beyond a reasonable doubt. Concerning a review of a circumstantial evidence case, the Arkansas Supreme Court said "In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture." *Campbell v. State*, 2009 Ark. 540, ___, 354 S.W.3d 41, 44 (2009).

As to circumstantial evidence the South Carolina Supreme Court has said "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001). The Court has further said circumstantial evidence is sufficient to convict when " the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis." *State v. Daniels,* 401 S.C. 251,

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[2] The South Carolina Court of Appeals in *State v. Cherry,* 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001) discussed whether courts in applying the "substantial circumstantial evidence" standard are engaging in the weighing of evidence, which appellate courts are forbidden to do. The United States Supreme Court in *Jackson v. Virginia,* 443 U.S. 307 (1979) specifically rejected the "any evidence" standard in criminal cases. The Court said "But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. To the extent that any appellate court determines whether the circumstantial evidence is "substantial" or if the evidence is more than a "modicum" an appellate court will, to some extent, weigh the evidence, notwithstanding the frequent protestations to the contrary.

___, 737 S.E.2d 473 (2012). Further the court said "It is not sufficient that they create a probability, though a strong one . . . ." *State v. Schrock,* 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984)[3]. When no expert ever opined to a reasonable degree of medical certainly that the morphine most probably was administered through breast milk, the state has simply failed in its proof. This is especially true when all the authoritative sources concerning the taking of morphine while breast feeding say exactly to the contrary. When Dr. Wrenn, the expert for the states, can only conclude "So there's first time for everything." (Rec. on App. at 451, ll 17-18), that is hardly substantial circumstantial evidence as to how the child received the morphine. As the evidence in this case raises at best only a suspicion that the morphine came from her breast-milk, all the convictions of Stephanie I. Greene should be reversed.

Question II

Did the trial court err in failing to direct a verdict or grant a new trial when the state failed to prove Stephanie Greene acted with extreme indifference as required by South Carolina Code § 16-3-85?

Under South Carolina Code § 16-3-85 a person commits homicide by child abuse when " the death occurs under circumstances manifesting an extreme indifference to human life." The statute is not violated if the person is negligent or even grossly negligent or reckless. The action must show an extreme indifference to human life and not an extreme indifference to the consequence of ones actions. As the South Carolina Supreme Court has said "'extreme

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[3] While the evidence in this case does not meet the "most probable" standard, the *Schrock* case could also stand for the proposition that the "most probable" standard is not sufficient in a criminal case where the burden is beyond a reasonable doubt.

indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008). Thus, the state is required to prove that Mrs. Greene acted not negligently but with an intent to disregard the consequences of her actions which she knew could result in the death of her child. The act which the state contends that Mrs. Greene committed which was done with extreme indifference was breast feeding her child while taking prescription drugs. The state must prove Mrs. Greene had reason to know that this act could result in the death of her child and that she did the act with extreme indifference as to the consequences. The record simply does not support this conclusion.

The South Carolina Supreme Court has said "[I]t is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20–7–50." *Whitner v. State*, 328 S.C. 1, 16, 492 S.E.2d 777, 785 (1997). If "common knowledge," and not published medical studies, is sufficient to put one on notices about the consequences of cocaine, then numerous published medical studies ought to be sufficient to tell a woman that breast feeding while taking morphine is safe. As noted at the trial, scientific studies from numerous reputable organizations tell women that breast feeding while taking morphine is safe. Doing what these studies say is safe cannot lead one to conclude that breast feeding while taking morphine is acting with extreme indifference as to the consequences. But the record here provides more evidence that Mrs. Greene did not act with extreme indifference.

Kaushik Kotecha, a licensed pharmacist employed by DHEC, testifying for the

state said:

> Q. (By Mr. Wise) People are encouraged to use the same pharmacy, aren't they?
> A. Yes, sir.
> Q. And why is that?
> A. So you can kind of monitor the side effects of drugs. You know, you may be getting one drug that may counter the effect of another drug or, you know, you may have a drug that's synergistic effect, so yes.
> Rec. on App. at 328, ll 13-20.
>
> * * *
>
> Q. (By Mr. Wise) But she had been going to the same pharmacy as far back as you've got records.
> A. Yes, sir.
> Q. Which is a good practice
> A. Absolutely
> Q. A smart practice
> A. Yes, sir.
> Q. And there's not a person in the world you would encourage to do anything differently.
> A. No, sir.
> Q. Because it's important for your health to know what - - how drugs inter-react.
> A. Right, right
> Q. And pharmacist in many cases know better about that than the doctors who prescribe the drugs.
> A. Well, I don't want to say that because I might upset a lot of doctors here, sir.
> Q. But sometimes they do because the physicians don't know of the drugs a person is getting?
> A. That is correct.
> Q. Through either inadvertence or whatever.
> A. Right
> Q. And so the pharmacist is the one that can catch all of that.
> A. Right.
> Rec. on App. at 338, ll 1-125.

The record has scant evidence as to any abuse of the drugs by Mrs. Greene. She did not "doctor shop' and obtain prescriptions from various doctors. She only saw her regular

doctors and doctors to whom she was referred by them. None of her doctors testified she ever had a problem calling in for a refill because of a "lost" prescription. No testimony from any pharmacist ever testified that they believed the drugs being prescribed for Mrs. Greene were unusual or cause to be suspicious. Pharmacists are trained to report suspicious prescriptions. Rec. on App. at 327, ll 17-19. One reason for not having any report from a pharmacist may be that Mr. Kotecha, who worked for DHEC drug control and is a registered pharmacist, testified that he would not tell a woman not to take morphine while breast feeding. Rec. on App. at 336, 19-21.

The worse that can be said is that Mrs. Greene did not tell her two primary physicians that she was pregnant and was later breast feeding. While they did testify they probably would not have prescribed the morphine and vicoprofen had they known, the testimony at trial does establish that both are safe to take while pregnant and breast-feeding.

In addition to the above, three of the prescriptions provided to her contained a specific warning about taking the drug while breast-feeding. The MS Contin prescription, which contained the morphine, did not contain such a warning. Of the three that contained the warning, only one - Clonazepam - was found in the child.

With this background, there is simply no evidence that Mrs. Greene acted with extreme indifference in taking the morphine and continuing to breast-feed her child. The testimony at trial was that she did in fact research the drugs she was taking. Rec. on App. at 303, ll 6-20. What fact did the state establish that was the equivalent of "common knowledge" in the *Whitner* case that would put Mrs. Greene on notice that her taking morphine would in fact cause the death of her child through breast-feeding? Without this notice, there is simply no "extreme

indifference" as defined by the court.

Question III

Did the trial court err in failing to instruct the jury they could convict on only one of the charges as a conviction of more than one charge would violate the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and Fifth Amendment to the Constitution of the United States of America as the same fact was used to prove the cause of death in each case?

At trial defense counsel objected to the jury being permitted to return a verdict on each separate charge as such would be a violation of double jeopardy. Rec. on App. at 593, ll 13-18. To understand the double jeopardy argument in this case, one need look no further than *Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger* the United States Supreme Court in conducting an analysis as to double jeopardy said "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. The same fact used to prove involuntary manslaughter was used to prove the unlawful conduct toward a child and homicide by child abuse. The common fact was the child obtaining the morphine through breast feeding. No charge contained a different means of the child dying and therefore no fact was different.

In *Harris v. Oklahoma*, 433 U.S. 682 (1977) the United States Supreme Court recognized that when a greater crime includes all the elements of the lesser crime, double jeopardy precludes the prosecution for the second offense. As the court in *Harris* said "When, as here, conviction of a greater crime, murder, cannot be had without the conviction of the lesser

crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." *Id.* at 682. Arguably under the facts of this case unlawful conduct toward a child is a lesser included of involuntary manslaughter which in turn is a lesser incldued of homicide by child abuse. The only real difference being the degree of culpability.

The same principle was applied by the United States Supreme Court in *Ex parte Nielsen*, 131 U.S. 176 (1889). In *Neilsen*, the defendant pled guilty to a charge of unlawful cohabitation. The facts were that he was living with Anna Lavinia and Caroline Nielsen, claiming both to be his wife. He was subsequently charged with adultery by living with and cohabiting "with one Caroline Neilsen, he being a married man and having a lawful wife, and not being married to Caroline." *Id.* at 177. In ruling that the conviction of the crime of cohabitation was a bar to the charge of adultery, the United States Supreme Court said "[I]t seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.* at 188.

The same principles apply in this case. A conviction or acquittal of involuntary manslaughter precludes the conviction of another charge arising under the same act when it is used to prove homicide by child abuse or unlawful conduct toward a child. This was the basic holding of *Harris*

While the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508 (1990) was rejected in *United States. v. Dixon*, 509 U.S. 688 (1993), a proper reading of *Dixon* supports the position of Mrs. Greene. *Dixon* rejected the "same conduct," analysis but it did not reject a "same evidence" analysis. Indeed it could not reject such an analysis because *Blockburger* itself

uses a "same facts" analysis.[4] In *Dixon*, Justice Scalia made reference to an older English case that permitted a second trial of a defendant. His first trial for breaking and entering and stealing goods was stopped when it was discovered that no goods had in fact been stolen. The second trial was for breaking and entering with intent to steal. Justice Scalia then quoted with approval the following from the English case. "[T]hese two offense are so distinct in their nature, that *evidence* of one of them will not support an indictment for the other." *Dixon,* at 710 (emphasis added).

Dixon was charged with the violation of a court order that prohibited him, as a condition of his bond, from committing any criminal act. While on bond he was found in possession of drugs. Based upon that factual finding the trial judge found him to possess the drugs with intent to distribute and held him in criminal contempt. When he was subsequently tried for possession of the same drugs with intent to distribute, he contended that the prosecution violated double jeopardy. The United States Supreme Court held that the conviction did violate double jeopardy. Technically the same elements were not present as one involved the possession of drugs and the other involved a violation of a court order. But the Court found that the "elements" of the contempt charge included the "elements" of the drug charge.[5]

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[4] *Blockburger*, notwithstanding frequent pronouncements to the contrary, is not a "same elements" test. "Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. This is the only time the word "element" appears in *Blockburger.* As shown in the quote, "elements" is used in the sense of "facts."

[5] Surely the United States Supreme Court does not mean "elements" in the strict sense. If they do, then the protections afforded by the Double Jeopardy Clause can be defeated by an imaginative legislature that could find different "elements" for the same facts and therefore

The statutes involved in this case have no indication that the legislature intended for separate punishment to be provided for a conviction on each crime. Thus, there is no basis for contending in this case that the legislature intended successive punishment for a violation of the statutes.[6]

This case should be controlled by *Rutledge v. United States*, 517 U.S. 292 (1996), which was decided three years after *Dixon.* In *Rutledge*, the defendant was convicted of violating 21 U.S.C. § 846 (conspiracy to distribute controlled substances) and 21 U.S.C. § 848 (conducting a continuing criminal enterprise). "The 'in concert' element of his CCE offense was based on the same agreement as the § 846 conspiracy." *Id.* at 294. The United States Supreme Court, in holding that the two convictions violated the Double jeopardy clause, said:

> In this case it is perfectly clear that the CCE offense requires proof of a number of elements that need not be established in a conspiracy case. The *Blockburger* test requires us to consider whether the converse is also true - whether the § 846 conspiracy offense requires proof of any element that is not a part of the CCE offense. *Id.* at 298.

The Court ruled that the "in concert" portion of the CCE offense was the same facts as the "conspiracy" portion of the conspiracy count. The Court then held the two convictions violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution of

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subject a defendant to multiple punishments. As originally used in *Blockburger*, the focus should be on the facts to be proven, if double jeopardy is to afford a citizen any protection from an overly zealous and overly imaginative legislature.

[6] The theory that if the legislature intended successive punishment, there is no double jeopardy violation but if they did not intend successive punishment there is a double jeopardy violation is questionable at best. Surely the United States Supreme Court did not mean that if the legislature intended to violate double jeopardy there is no violation but if they did not intend to violate the provision, there is a violation.

the United States of America. The Court focused upon the facts that were necessary to prove the elements of the crime and not what the elements had been named by congress.

Under the principle set forth in *Blockburger*, *Dixon*, *Harris*, and *Rutledge*, the state cannot convict Mrs. Greene for homicide by child abuse for giving her child a lethal dose of morphine through breast milk and involuntary manslaughter for the exact same act and then for unlawful neglect of a child for the exact same act. The act of giving a child a lethal dose of morphine through breast milk may be given different names by the various statutes. But different names does not mean that the state did not use the same facts to prove each case. Whether the crime is called homicide by child abuse, involuntary manslaughter or unlawful conduct toward a child, the exact same facts were used to prove each separate crime.

Question IV

Did the trial court err in failing to require the state to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the constitution of the United States of America by her counsel not being able to respond to new arguments made by the state in its closing argument?

Trial counsel requested that the state be required to open fully on the law and the facts and then reply only to matter raised by defense counsel in his closing argument. Rec. on App. at 533, ll 20-25 to 536, ll 1-15. The trial judge denied this request.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury. The practice of the State opening only on the law and then closing

fully on the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the state to open fully on the law and the facts. In *State v. Atterberry,* 129 S.C. 464, 124 S.C. 648 (1924) the Supreme Court held that the failure to require the state to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party."[7] In reversing the conviction of the defendant the Court said "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorney's were required to make their arguments. This was refused. This was error." *Atterberry*, 129 S.C. at ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id.* at ___, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again the defense counsel requested that the state be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry,* Rule 59 of

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[7] Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

the Circuit Court Rules had been changed to Rule 58 and the rule then read "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." [8] *Lee*, at 318, 178 S.E.2d at 656. Thus began the more recent, but incorrect, practice of requiring the state to open only on the law and not the facts.

Today Rule 43 (j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that "Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 1004 (internal citations omitted). The court further held "Application of these authorities to the facts at hand compels us to reverse and remand the case

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[8] Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id.* In South Carolina "sandbagging" by a prosecutor is not only approved but is actually legalized.

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see*, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). The treatise writers also support the requirement that the state open fully on the law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.[9]

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing. The inherent logic of this position has been acknowledged by this court concerning reply briefs and oral argument. "An appellant may not use either oral argument or the reply brief as a vehicle

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[9] The Florida Supreme Court also noted that forty-seven states follow the common law.

to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The reason of this rule in the appellate court is a party should have a fair chance to respond to matters raised by counsel in their briefs. The rule should also be applied to arguments before a jury.

CONCLUSION

For the reasons set forth in Question I, this matter should be reversed and the charges dismissed against Stephanie I. Greene. For the reasons set forth in Question II, the charge of homicide by child abuse should be reversed and dismissed against Mrs. Greene. For the reasons set forth in Question III, the matter should be remanded for a new trial with the state being required to elect upon which charge they desire to proceed or the jury being instructed to return only a verdict on one charge. For the reasons set forth in Question IV, this matter should be reversed and remanded for a new trial.

December 22, 2015

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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DEC 23 2014
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Honorable Joseph Derham Cole, Circuit Court Judge

Case No.2014-000764

The State, ... Respondent,

vs.

Stephanie Irene Greene, ... Appellant.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on December 22, 2014, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Initial Brief and Designation of Matter in the above case addressed to Salley W. Elliott, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed Sandy Traynham

before me this 22 day

of December, 2014.

/s/ Mary Jane Foster (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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December 22, 2014

Jenny Abott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State vs. Stephanie Greene, 2014-000764

Dear Ms. Kitchings:

Enclosed herewith is the original Initial Brief and Designation of Matter concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/mjh