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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2014-000464

The State, Respondent,

vs.

Christopher W. Berke, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

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

STATEMENT OF THE FACTS

Appellant is a married father of three children. The minor victim, Appellant's youngest child, was born in June 2010. Appellant deployed to Afghanistan from July 2010 until April 2011, and he lived with his wife and children from April 2011 until September 2011. (T.171; R.___). Appellant's wife was diagnosed with Graves Disease, a thyroid condition, which required surgery in May 2011. During his wife's recovery, Appellant took care of all three children in the home. (T.396-397; R.___).

During April and May of 2011, the minor victim began pulling herself up and hitting some developmental milestones a child her age should be achieving. In June 2011, Appellant's family moved from Kentucky to South Carolina. According to Appellant's wife, the minor victim refused to pull herself up after moving to South Carolina. (T.255; R.___). She indicated Appellant also noticed the difference in behavior. Appellant claimed the child continued to pull up and he had no concerns about her not walking. (T.401; R.___).

On September 5, 2011, Appellant's family was suffering from gastrointestinal issues, and his wife was sick in bed. Other than the stomach bug, both Appellant and his wife stated that the minor victim was in good health prior to September 5, 2011. Appellant noticed his daughter had vomit in her hair and decided to give the fifteen month old victim a bath. Appellant indicated he put the child in the water and "she was fine." (T.405; R.___). Appellant indicated the minor "slipped out of my hand and hit her head on the tub." (T.405; R.___). Appellant testified he spoke with his wife and his mother about what care he should give the child. (T.400; 406; 422; R.___). He put the child to bed for the night.

The next day, Appellant checked on the minor victim but did not turn on the light so he did not notice anything at the time. He also indicated his wife was asleep and stayed asleep until after he returned from taking another child to school. (T.115; 406; R.___). After waking up his wife, Appellant fixed breakfast. Appellant's wife noticed the bruising to the minor victim's face and took the minor victim to a doctor. (T.408; R.___).

The child was referred from a pediatrician's office to MUSC for emergency care. Dr. William Jacobsen, an emergency medicine physician with MUSC, first saw the minor victim. He indicated she presented with significant bruising and hematoma to the head. (T.96; 100; R___). Dr. Jacobsen had a skeletal survey done of the child, which indicated a possible healing broken arm, a healing broken tibia in the leg, and the injuries including skull fractures to the head. (T.101; R.___). The minor victim was admitted to the pediatric ICU.

Initially, Appellant told the emergency room doctor that the minor victim had struck her head on the faucet of the tub while he was giving her a bath. "He said that she didn't lose consciousness but that she kind of fell backwards and he tried to catch her and was able to do so before she hit any other part of the tub." (T.103; R.___). Dr. Jacobsen indicated Appellant told him the only portion of the minor victim's head to hit the tub was her left front. He indicated the story provided by Appellant was not consistent with the injuries sustained by the minor victim. (T.103-104; R.___).

The minor victim was seen by Dr. Robert Cina, a pediatric surgeon with MUSC. (T.129; 132; R.___). He reviewed the skeletal survey and noted the two broken bones and indicated they occurred at two separate times, so not in one related incident. (T.133;

R.___). He indicated she had two right side parietal skull fractures. (T.133-134; R.___). Dr. Cina indicated the injuries happened between three hours and forty-eight hours prior to her being seen at MUSC. (T.145; R.___). Further, he indicated because she had multiple hematomas, the pattern indicated the minor child struck her head in multiple places. (T.148; R.___).

Dr. Cina explained: "The amount of force necessary to not only cause the skull fractures but also to rip the blood vessels around the brain that caused that subdural hematoma is an order of magnitude more than what you would see at a fall from a standing position. . . ." He concluded the injury pattern seen on the minor victim was not consistent with Appellant's story of how it occurred. (T.136; R.___). Finally, he stated: "I've taken care of well over 1,000 trauma patients in my life; many of them kids, and that - - a fall from that height in my mind there was no way that that could cause sufficient amount of force to cause those fractures." (T.137; R.___).

Appellant spoke with a social worker in the pediatric unit of MUSC's Children's Hospital. (T.108; 110-111; R.___). Appellant seemed nervous to the social worker. He provided her a similar story indicating the minor victim fell out of his arms and hit her head on the faucet. He also indicated he did not feel bonded with the minor victim. (T.112; R.___). Appellant told the social worker his wife was assisting another child at the time of the minor victim's injuries. (T.114; R.___). During the social worker's assessment, which occurred in the minor victim's room at the hospital, the child began to cry. The social worker noted Appellant was uncomfortable, raised his voice, and clenched his fists to his side. (T.113; R.___).

Appellant spoke with Deputy Arrington and Detective Fenton regarding the injuries to the minor victim. He initially provided the same story regarding the child falling from his arms in the bath and hitting her forehead on the faucet. (T.121-123; R.___). After being notified there were skull fractures on both the front and back of the minor victim's head, Appellant told law enforcement the minor victim had fallen backwards on the dining room table off the bench some time prior to the bath tub incident. (T.123; R.___).

Dr. Michelle Amaya, a professor of pediatrics at MUSC and board certified in child abuse pediatrics, examined the minor victim. (T.204; R.___). She found the minor victim had cutaneous bruising on her face, scalp, and ears. The minor victim also had swelling and a hematoma on the left side of her head over her ear. The other head injury found was the complicated skull fracture covered by another hematoma over the back of her head on the opposite corner from the one on her left side. (T.217; R.___). She then indicated all of the locations of bruising and hematomas, which were significant and extensively covered the minor victim's head. (T.218-220; R.___).

Dr. Amaya considered Appellant's version of what caused the minor victim's injuries. She indicated "[t]here is more that happened." (T.223; R.___). She indicated many of the areas of bleeding and bruising were caused by pulling the hair and not by the type of trauma Appellant described in dropping the child. (T.230-232; R.___). Further, Dr. Amaya opined if the child hit the faucet in the manner described by Appellant, the child would likely have a "goose egg" but it would not be enough to cause the shearing and bleeding underneath. (T.232; R.___). Dr. Amaya also described bruising to the

minor victim's ears consistent with "pinching or pulling of the ear by a hand" and indicated they were "not typically accidental." (T.237; R.___).

Dr. Amaya also considered the possible explanation given for the skull fracture of the child falling off a bench three weeks prior to being admitted to MUSC. She indicated the time frame of the injury was not consistent due to the swelling and bleeding present. (T.240-241; R.___). Dr. Amaya then reiterated the injuries seen in the minor victim could not have occurred from a simple fall in the tub. The height of the fall coupled with the weight of the child and force of impact could not have caused the complex fracture to the skull. (T.242-243; R.___). Further, Dr. Amaya indicated the injury would have been painful to the minor victim, she would have cried and been upset, and anyone around would have known the child was upset and hurt. (T.251; R.___).

Dr. Amaya opined the injuries were likely due to a whiplash type injury. She explained two points of contact existed as shown by the two locales of swelling in the minor victim's head. (T.260; R.___). She stated significant force was required because of the shearing and tearing of the veins in the head. (T.261; R.___).

Dr. Amaya also testified regarding the child's regression from pulling herself up in Kentucky to refusing to stand while in South Carolina. She indicated the regression was abnormal and would be a red flag to any pediatrician had the child been taken to a doctor. (T.255; R.___). Further, she testified the child would hold her leg out and refuse to put weight on it when being put down several weeks after she was admitted to MUSC. (T.268-269; R.___).

Appellant called Dr. Jennifer Canter from New York to testify as a defense expert. In describing the subgaleal bleeding, the bleeding between layers of scalp tissue,

she indicated as had Dr. Amaya, that a possible source of the bleeding would be "traumatic hair pulling from abuse." (T.347; R.___). Dr. Canter also agreed the minor victim's injuries happened no more than two days before she presented to MUSC. (T.355; R.__). Significantly, Dr. Canter was of the opinion "this is a child abuse case." (T.356; R.___). Even Dr. Canter had issues with Appellant's version of the events indicating the injuries to the left side of the child's head were consistent with his story, but "[y]ou add in the fact that there is a skull fracture on the other side and bruising to the other ear that raises the concern for child abuse." (T.368; R.___).

ARGUMENT

I. Did the trial court err in denying Appellant's motion for a directed verdict regarding the charge of infliction of great bodily injury upon a child?

Appellant contends the trial court erred in denying his motion for a directed verdict because there was "no evidence" Appellant inflicted the injuries upon the minor child and "during the timeline given for the injuries, both parents were caring for the child and there were time periods when appellant was not with the child." Further, he seems to maintain the State failed to prove he intended to injure the minor victim. The issue of his intent was not raised as a ground for directed verdict and is therefore not preserved for review on appeal. Additionally, the State presented ample evidence indicating Appellant inflicted the injuries upon the minor victim.

Preservation

In making his motion for directed verdict, Appellant solely argued the State failed to present evidence he was the person who inflicted the great bodily injuries[1] upon the minor victim. Now, in his brief Appellant argues for the first time there is no evidence of his intent to injure the child. This issue was not raised as a ground below and is not preserved for review on appeal. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the

[1] Appellant does not claim, and has not claimed, the injuries sustained by the child do not satisfy the definition of great bodily injury.

trial court in support of the directed verdict motion are not preserved for appellate review.").

Merits

"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).

The State presented ample evidence Appellant caused the injuries to the minor victim sufficient to satisfy the requirements of section 16-3-95(A) of the South Carolina Code. Pursuant to the statute, great bodily injury means "bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." S.C. Code Ann. § 16-3-95(C). The injuries suffered by the child certainly met this definition and Appellant's own testimony indicates the child was "fine" until he had her within his care; thereby ruling out any other actor as the person who inflicted the great bodily injury upon the minor victim.

The only question in this case was not who injured the child, but whether the injuries were caused as Appellant described by an accident or whether the injuries were "inflicted" by Appellant through child abuse and the use of force described as being necessary by several medical experts. The judge correctly allowed this question to be one for the jury to determine whether they believed Appellant's story, or whether the doctors' expert opinions that significantly more force was required and that the injuries were not accidental should be believed.

Further, the State presented ample evidence of who caused the injuries suffered by the minor victim. The uncontroverted evidence presented at trial, including through the Appellant's own statements, showed the minor child was not injured prior to Appellant giving her a bath on September 5, 2011. The minor child's mother told Dr. Michelle Amaya the minor child "had a small bruise on her shoulder and she had a bruise on her left cheek . . . [but] she was otherwise fine" prior to this incident. (T.221; R.___). Appellant indicated the minor victim was "fine" when he put her in the bath and that the injuries occurred during the bath. While a number of witnesses testified that the injuries could have occurred up to 48-72 hours before the minor child arrived at MUSC, these witnesses also testified that the injuries would have been "readily apparent immediately" if someone touched the minor child's head. (T.244; R.___).

A number of witnesses testified that Appellant stated he was giving the minor victim a bath and that she had wiggled out of his hands and struck her head above the left eyebrow on the faucet of the tub. His own testimony at trial explained the same sequence of events. Further, Appellant's wife was not present at the time of these injuries. She was either in bed or assisting another child. Additionally, after the injuries, the wife was

asleep while Appellant admitted he remained awake for a period of time. The next day, the wife was again asleep when Appellant got a child ready for school and still asleep when he returned from taking the child. Appellant then indicated he woke the minor victim and his wife up for the morning. (T.406-407; R.___). The only evidence presented from the State or Appellant was that Appellant caused the injuries to the minor child. The Appellant merely contends that the minor child was injured as the result of an accident while the State presented direct medical evidence that the child's injuries could not have occurred under the circumstances described by Appellant. It was for the jury to determine which version of the facts they found more credible.

Appellant relies upon State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), and State v. Palmer, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014), to suggest that the evidence presented at trial was insufficient to overcome a Motion for Directed Verdict that Appellant inflicted the injury upon the victim. However, Appellant fails to recognize the applicable portion of this Court's decision in Palmer is the Court's analysis of the homicide by child abuse charge, not the aiding and abetting homicide by child abuse charge.[2]

The appellants in Palmer asserted that "the trial court erred in denying their directed verdict motions because the State did no present substantial circumstantial

[2] The defendants in Palmer were charged with homicide by child abuse, unlawful conduct toward a child, and aiding and abetting homicide by child abuse. This Court reversed only the trial court's denial of the Motion for Directed Verdict on the aiding and abetting homicide by child abuse because "mere presence at the scene is not sufficient to establish guilt *as an aider or abettor*." Palmer, at 234, 758 S.E.2d at 204 (emphasis added). See also State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005) ("To be guilty *as an aider or abettor*, the participant must have knowledge of the principal's criminal conduct.") (emphasis added).

evidence to prove identity . . . who inflicted the injuries that caused the child's death."[3] This Court found the State presented direct evidence the child's fatal injuries were the result of child abuse. Id. at 228, 758 S.E.2d at 201. This Court also found the State presented direct evidence regarding the date upon which the injury occurred. Finally, this Court found the State presented substantial circumstantial evidence that both appellants inflicted the injuries that killed the child. "Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which [the child's] injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries." Id. at 229, 758 S.E.2d at 201.

Similarly, in this case, Appellant argues that there was no substantial circumstantial evidence that Appellant caused the skull fracture. However, just as in Palmer, the State in this case presented evidence, including Appellant's own statements, that Appellant was the exclusive caregiver for the minor child, as his wife was dealing with an illness at the time and stayed in bed during the time at issue. Furthermore, the State presented evidence that directly contradicted Appellant's version of events regarding how the minor child was injured. While the falsity of this statement is not positive evidence of the defendant's guilt, "the impossibility that [Appellant's statement is] true is a circumstance the jury was entitled to consider in determining the guilt" of the Appellant. Palmer, at 231, 758 S.E.2d at 202-03.

[3] "[A] person is guilty of homicide by child abuse when he or she 'causes the death of a child . . . while committing child abuse.' 'Child abuse' is defined as 'an act or omission by any person which causes harm to the child's physical health or welfare,' and 'harm' occurs when a person 'inflicts or allows to be inflicted upon the child physical injury.'" Palmer, at 228, 758 S.E.2d at 201.

In essence, the State presented evidence that the minor victim suffered very serious injuries while taking a bath, and she was in the exclusive care and control of the Appellant. Appellant stated that the child's injuries were the result of an accident. The State presented evidence that Appellant's version of events could not be true, and that the child's injuries would require far more force than was possible from simply hitting her head on the faucet of a tub. Further, doctors testified regarding the bleeding and bruising to the scalp and ears caused by pulling and pinching, symbolic of child abuse and not an accident. Appellant's own expert surmised the injuries were the result of abuse and that while his story could explain some of the injuries it could not explain all of them. The evidence presented showed two different versions of events, and created a jury question regarding the credibility of the witnesses—the quintessential reason for sending a case to a jury.

Given the direct and substantial circumstantial evidence, the trial court correctly denied Appellant's motion for directed verdict with regard to the infliction of great bodily injury upon the minor child, and sent this case to the jury.

II. Did the trial court err in denying Appellant's Motion to Quash the Indictment?

Appellant maintains the trial court erred in denying Appellant's Motion to Quash the indictment for unlawful conduct toward a child. Appellant argued that the indictment did not define the actions that constituted a violation of the statute and that the time frame was overly broad. (Motion to Quash; R.___). On appeal, Appellant also alleges that the trial court "erred in allowing the State to present multiple offenses to the jury under one indictment." (Brief of Appellant p.16; R.___). First, the issue regarding multiple offenses is not preserved for review on appeal. Additionally, the indictment tracks the language of the applicable statute as required and is not overly broad in its timeframe.

Preservation

"An objection to the sufficiency of an indictment must be made before the jury is sworn as provided by section 17-19-90 of the South Carolina Code of Laws." State v. Fonseca, 383 S.C. 640, 645, 681 S.E.2d 1, 3 (Ct. App. 2009). "An objection to the sufficiency of the indictment made after the jury is sworn is untimely." Id. (citing State v. Gentry, 363 S.C. 93, 101-02, 610 S.E.2d 494, 499 (2005)). "An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Walker, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) (citing State v. Welk, 356 S.C. 76, 587 S.E.2d 683 (2002)).

Appellant's Motion to Quash presented at the trial court argued that the indictment fails for two reasons: (1) because the time period covered by the indictment is overly broad; and (2) the indictment gives no notice of the specific actions or inactions of the defendant that would make him guilty of the crime alleged. Nowhere in Appellant's motion before the trial court does Appellant argue that the indictment was duplicitous or

that the State was presenting multiple offenses under one indictment. The Trial Court denied Appellant's Motion to Quash in chambers, and then put her ruling on the record.

During the judge's ruling Appellant made no mention of new arguments regarding the indictment's duplicity. In his brief, Appellant seems to indicate Judge Jefferson did not allow trial counsel to present argument regarding the motion to quash on the record. However, a straightforward reading of the trial transcript does not support Appellant's assertion. After a brief recess, the Court stated "[i]n chambers the court heard the motion to quash as well as the motion to sever. I ruled on the motion to quash which was denied and took the motion to sever under advisement. I advised the parties prior to resuming jury selection that I had denied the motion and that I would put the basis of that ruling on the record." The Court then placed on the record an extensive ruling on the motion to sever. At no time did Appellant ask to specifically address the ruling on the motion to quash to add any other ground or get any specific rulings. (T.33-35; R.__).

The Court directed the parties' attention to a motion in limine to exclude character evidence. The Court then asked Appellant's counsel: "And I guess the question becomes do you all plan to present testimony regarding your client's reputation for truthfulness?" (T.35; R.___). Defense counsel addressed the Court and the following colloquy took place:

Counsel:	Your Honor, prior to - -
Court:	I'm not taking any further argument on the motion. I've already heard the motion. Your position is clear that you oppose it and so you don't have to take exception to it.
Counsel:	Your Honor, I just wanted to make the record - -
Court:	what is ambiguous about - -
Counsel:	sure **on the 404(b) evidence** - -

Court:	I've already heard argument. I'm not hearing any further argument.
Counsel:	I just want the record to be clear on the ruling **about the 404(b) evidence** - -
Court:	meaning?
Counsel:	Whether it is allowed in or not in based on the 404(b) - -
Court:	I don't know. You're going to have to make a contemporaneous objection. I don't know what they are going to present. I can't rule in advance.
Counsel:	Fair enough.

(T.35-36; R.___) (emphasis added). The only straightforward interpretation of the transcript is defense counsel was attempting to get clarification of the Rule 404 ruling and not adding a new argument related to the motion to quash. Because there is no indication that Appellant ever raised his duplicity argument to the trial court, these arguments have not been preserved for appellate review.[4]

Merits

Appellant argues that the indictment was not sufficient to place him on notice of the conduct he was required to defend.

> The test of the sufficiency of an indictment is whether
>
> > the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the offense that is intended to be charged.

[4] To the extent Appellant is requesting this Court review the challenged indictment on grounds other than those argued and reviewed by the trial court, the South Carolina Supreme Court has "routinely held the plain error rule does not apply in South Carolina state courts." State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Therefore, Appellant's use of Johnson v. Commonwealth, 405 S.W.3d 439 (Ky. 2013), to the extent it advocates for the use of a plain error review of the indictment, is misplaced.

State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005). "In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." Id. at 103, 610 S.E.2d at 500. "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

Additionally, the Supreme Court explained in Gentry: "Further, whether the indictment could be more definite or certain is irrelevant." Gentry, 363 at 103, 610 S.E.2d at 500. This or similar language has been used by this Court in many cases. See e.g., State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972); State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) ("The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet.").

Further, section 17-19-20 of the South Carolina Code provides:

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

The indictment in the instant case tracks the language of the statute under which Appellant was charged. See S.C. Code Ann. §63-5-70 (2008) (Unlawful conduct toward a child).

Appellant conceded in his motion to the trial court that his argument that the indictment's time frame is overly broad has been defeated by this Court's decision in State v. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 854 (Ct. App. 2007). In Tumbleston, this Court examined a challenge to the specific time alleged in an indictment. In finding the defendant's indictments for criminal sexual conduct with a minor and committing a lewd act on a minor did not require the precise time of each offense, the Court reiterated its test for determining the sufficiency of an indictment with regards to a purportedly overbroad time period, involves a determination of "(1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury." Tumbleston, at 98-99, 654 S.E.2d at 853-54 (citing State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005). As Appellant admitted before the trial court, neither of these factors are implicated in this case; therefore, the indictment is not invalid for lack of a more specific time.

Additionally, this case does not present the type of surprise or due process violation found by the plurality opinion in the Supreme Court's recent case of State v. Baker, 2015 WL 543493 (2015).[5] The plurality found because of the lack of notice the

[5] At the time of this Brief, the opinion in Baker is not final and the State's Petition for Rehearing is still pending consideration by the Supreme Court.

State's six-year indictment filed shortly before trial deprived Baker of his due process rights. The same considerations and circumstances are clearly not present in this case.[6]

Finally, Appellant argues that the unlawful conduct indictment is duplicitous. Assuming, *arguendo*, that Appellant did preserve this issue for consideration in this appeal, the argument is without merit. The State did not present multiple offenses to the jury under one indictment as alleged by Appellant, but rather presented separate pieces of evidence of a long-term pattern of unlawful conduct toward the minor child.

A duplicitous indictment is one that alleges two distinct and separate offenses in the same count. See State v. Samuels, 403 S.C. 551, 555-556, 743 S.E.2d 773, 776 (2013). However, an indictment alleging only a single crime and merely includes more than one method of violation, not creating a new crime, is not duplicitous. See State v. Pee Dee News Co., Inc., 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985) (indictment for obscenity, which included multiple methods of violation of the statute found not duplicitous); State v. Sheppard, 248 S.C. 464, 466-467, 150 S.E.2d 916, 917 (1966) (finding indictment for DUI not duplicitous because the "indictment charges only one offense which may be established by proof that the defendant operated a motor vehicle while under the influence of intoxicating liquor or of narcotic drugs, either or both.").

The indictment in this case alleges Appellant did "have custody or charge of [minor child], and did place the child at unreasonable risk of harm affecting the child's life, physical or mental health or safety." (Indictment; R.___). This indictment is not

[6] Appellant was indicted March 20, 2013. Appellant was notified of the specific acts that would form the basis of the State's case on the unlawful conduct charge by at least February 15, 2014. (State's Reply to Defense Motion and Exhibits attached thereto; R.___). Appellant's trial counsel filed the motion to quash on February 28, 2014. Appellant's trial began March 3, 2014.

duplicitous because it alleges the commission of only one crime, unlawful conduct towards a child. It alleges the single crime, by setting forth the various means by which the crime can be committed under section 63-5-70. Setting forth the various means of committing the crime has been previously held appropriate by the South Carolina Supreme Court.

Further, any issue with the indictment is entirely harmless and has not prejudiced Appellant. As stated in Samuels: "proceeding to trial on a duplicitous indictment does not alone create reversible error. For example, federal courts employ a prejudice analysis and will reverse a conviction for duplicity only where two or more distinct crimes are combined into one count and the defendant is prejudiced thereby." Samuels, 403 S.C. at 556, 743 S.E.2d at 776. It is undisputed that the minor child was not taken to well visits; was not properly immunized; had an untreated broken leg that was weeks old; and was not taken to the hospital following her head injury until the day after the injury.[7]

Appellant was only sentenced based on the single count of unlawful conduct towards a child. Under Appellant's argument that there were multiple offenses presented under the one charge, then Appellant actually benefited from the undercharging. As a result, Appellant cannot demonstrate how she was ultimately prejudiced by the State's decision to indict him on one count of unlawful conduct toward a child. See e.g., U.S. v.

[7] Appellant asserts that "acts that are not criminal—failing to take a child for 'well-visits' and failing to have the child immunized" could have been the sole basis for the guilty verdict. Again, this argument was not presented to the trial judge, and therefore has been waived on appeal; however, it is the State's position these acts are circumstantial evidence demonstrating Appellant's placing the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety, in violation of section 63-5-70 and are to be viewed in conjunction with all the actions taken by Appellant. The State does not contend in this case the actions standing alone are sufficient to constitute the crime of unlawful conduct.

Sturdivant, 244 F.3d 71, 80 (2d Cir. 2001) ("a court can avoid prejudice to the defendant by sentencing him based upon a conviction for only one offense").

In addition, the trial court charged the jury that its verdict had to be unanimous. Specifically, she charged: "Ladies and gentlemen, your verdict must be a unanimous one, which means all 12 of you must agree in order to reach a verdict on each indictment." (T.512; R.___). The trial court then reiterated the need for a unanimous verdict right before sending the jury back for deliberations. This charge provided assurance the jury rendered a unanimous verdict. Appellant has failed to demonstrate any prejudice from going forward on this indictment even if this Court found it was duplicitous.

III. Did the trial court err in denying Appellant's motion for a directed verdict regarding the charge of unlawful conduct toward a child?

Appellant contends the trial court erred in denying his motion for directed verdict with regard to the charge of unlawful conduct toward a child. The State presented sufficient evidence to warrant sending the charge to the jury. Additionally, the specific issue raised by Appellant was not the basis for directed verdict at trial and, therefore, is not preserved for review on appeal.

Preservation

At trial, Appellant moved for directed verdict on the unlawful conduct charge. His motion indicated: "As for the Unlawful Conduct again, we're talking about a timeframe in which . . . both parents were involved with the child and had custody of the child and were involved in the medical treatment." He continued: "I think all the testimony suggests actually that the Mother . . . is the only one who had gotten medical treatment for the child. Part of that was while our client was in Afghanistan." (T.306; R.___). His argument at trial appears to be the State failed to demonstrate he had custody of the child or either the child was primarily in the mother's custody. On appeal, he now argues the State failed to present substantial circumstantial evidence of the underlying allegations, not that he did not have custody of the child. As a result, the issue is not properly preserved for review on appeal. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to

the trial court in support of the directed verdict motion are not preserved for appellate review.").

Merits

On the merits, the State presented sufficient evidence to warrant sending the case to the jury. The State's evidence indicated Appellant knew or should have known the minor victim suffered from some ailment to her leg and he failed or refused to obtain proper medical attention. Additionally, the State presented evidence the minor victim was in the care or custody of the Appellant during such time that medical attention was appropriate.

As the trial court observed, "there is testimony of times when [Appellant] was available, was in a primary care giving role, had the ability to observe his child and failed to attend to her needs." (T.315; R.___). It is clear the mother suffered from Graves disease and spent a portion of the time after Appellant returned from his deployment recovering from surgery related to her condition. The evidence indicated Appellant was the primary caregiver during this time. Further, it is undisputed he was the parent of the minor victim and as such had the duty to provide proper care to the child. [8]

Additionally, the State presented evidence Appellant should have known he needed to obtain medical care for the minor victim's leg. Prior to Appellant moving his

[8] Appellant argues the State failed to present sufficient evidence he alone was responsible for the care of the minor child. To the extent Appellant argues the State had to prove that Appellant, and Appellant alone, was responsible for the minor child's health and safety, the State disagrees. See Palmer, 408 S.C. at 233, 758 S.E.2d at 195. Simply because another individual may also be guilty of a crime does not excuse Appellant's omissions in protecting the minor child's health and safety, nor does it keep the solicitor from bringing charges against only Appellant. See State v. Thrift, 312 S.C. 282, 291, 440 S.E.2d 341, 346 (1994) ("Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.").

family from Kentucky to South Carolina, the minor victim stood with assistance, and cruised, "meaning that [her parents] could pull her up to a stand and she might take a step or two." (T.254; R.___). Appellant's wife told Dr. Amaya "when they were still in Kentucky that [minor victim] was standing but since they moved to South Carolina in the last four months she clarified that [minor victim] stopped standing; stopped pulling to a stand." (T.255; R.___). According to Dr. Amaya, the minor child's regression was a very serious issue. Dr. Amaya testified "there was clear clinical correlation of her stopping standing—where she had already pulled to a stand and then she quit standing, which the Mother reported that **they** had noticed." (T.258; R.___) (emphasis added). Further, testimony indicated after the child was treated for her injuries she still refused to put her leg down or put weight on her leg, and she would actively lift the leg or rotate to avoid putting it on the ground. (T.268-269; R.___).

Dr. Amaya's testimony presented sufficient evidence Appellant knew something was wrong with his child when she stopped pulling herself up to a standing position and refused to put weight on the injured leg. While Appellant may not have known the extent of the injury, it is incumbent upon the caregiver of a child to seek medical assistance when they notice they child regressing from previously established developmental milestones and acting in such a way to indicate the possible injury. See State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("parents have a duty to lend their aid in creating an atmosphere that will foster the best interests of the child").

Appellant further asserts that not having a child vaccinated and not taking the child for well-visits are not criminal acts and cannot support an indictment for unlawful conduct toward a child. The State presented these two omissions by Appellant as

evidence Appellant created an unsafe environment for the minor victim. As pieces of a larger evidentiary puzzle, Appellant's failures to provide for the medical needs of the minor victim are important aspects of the State's case, even if these failures alone would not be sufficient to support an indictment for unlawful conduct toward a child.

The Supreme Court's holding in State v. Jenkins, 278 S.C. 219, 294 S.E.2d 44 (1982), in which the Court addressed the required intent under a prior version of the unlawful conduct statute, is instructive in this case. The appellant in Jenkins left two of her children, ages eight and five, sleeping alone in her house while she went for a ride with a friend. Id. at 220, 294 S.E.2d at 45. When she returned home approximately an hour later, the house was burning. Id. at 221, 294 S.E.2d at 45. Both children died in the fire. Id.

Jenkins was charged with unlawful neglect of a child. The statute proscribed any person having legal custody of any child from refusing or neglecting to provide the proper care and attention for the child. The Court held that the State presented sufficient evidence to create a jury question as to whether the mother had acted unlawfully in leaving her children at home alone for one hour. Further, the Court explained knowledge and intent were not elements of the crime. Id. at 222, 294 S.E.2d at 45-46.

The Court concluded:

> By failing to include "knowingly" or other apt words to indicate criminal intent or motive, we think the legislature intended that one who simply, without knowledge or intent that his act is criminal, fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates § 16-3-1030 of the Code.

Id. at 222, 294 S.E.2d at 45-46.

Jenkins' act of riding around with a friend may not have been illegal, and she may not have intended or even known of the possibility her children would die in a fire while she was out. The Supreme Court, however, still found sufficient evidence of neglect to send the question to the jury because her actions showed a failure to provide proper care and attention for a child. Similarly, in this case, there may be some question about whether Appellant's failure to ensure his child received vaccinations and well-visits are illegal acts. However, the State does not assert that these actions in isolation form the basis of the unlawful conduct charge. Rather, the list of failures to provide for the health and safety of the minor child, punctuated by his failure to obtain care for the child's clearly injured leg, formed the basis of the indictment. As a result, the trial court properly denied his motion for directed verdict because the State presented evidence he had custody of the child and placed the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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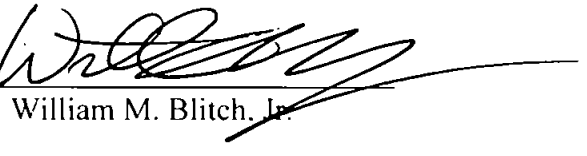
BY: 
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ATTORNEYS FOR RESPONDENT

March 26, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2014-000464

The State, Respondent,

vs.

Christopher W. Berke, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 26th day of March, 2015.

Sally Ellison

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March 26, 2015

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RE: State v. Christopher W. Berke
Appellate Case Tracking No. 2014-000464

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services