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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER W. BERKE,

APPELLANT

APPELLATE CASE NO. 2014-000464

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On March 20, 2013, a Berkeley County grand jury indicted appellant for unlawful conduct toward a child and infliction of great bodily injury upon a child. R. 509. On March 3, 2014, appellant was tried before the Honorable Deadra L. Jefferson and a jury. R. 1. Anne Williams and Colleen Taylor represented the State. R. 1. Chad D. Shelton and Cody Groeber represented appellant. R. 1. The jury convicted appellant of both counts. R. 478, l. 17 – 479, l. 6. Judge Jefferson sentenced appellant to concurrent terms of five years' imprisonment for unlawful conduct and twelve years' imprisonment for infliction of great bodily injury. R. 494, ll. 7 – 19. This appeal follows.

STATEMENT OF FACTS

Appellant Christopher Berke ("Berke") testified in his own defense. On September 5, 2011, Berke gave his fifteen month old daughter ("Minor") a bath for the first time. R. 367, ll. 9 – 21. Berke had been deployed to Afghanistan for large portions of Minor's life. R. 352, l. 12 – 353, l. 2. Berke, his wife, and his three children had been suffering from a gastrointestinal bug over the weekend. R. 364, l. 24 – 365, l. 13. Berke noticed vomit in Minor's hair and decided to bathe her because his wife was sick. R. 367, ll. 9 – 12.

Berke sat Minor in the water and "she was fine." R. 367, ll. 9 – 21. As Berke stood Minor up to wash her bottom half, "she freaked out." R. 367, ll. 9 – 21. Minor "started screaming and crying and that's when she slipped out of my hand and hit her head on the tub." R. 367, ll. 9 – 21. Minor's head hit the faucet. R. 380, ll. 9 – 16. Berke wrapped Minor in a towel to make sure she was okay. R. 367, ll. 22 – 24. He told his wife, Sandra Berke ("Sandra") what happened. R. 368, l. 1. Berke did not notice any other injuries on Minor. R. 368, ll. 5 – 6. Berke called his mother for advice and she told him to give Minor Triaminic and to keep an eye on her during the night. R. 384, ll. 5 – 21. He checked on Minor periodically throughout the night and went to bed at approximately 3:00 AM. R. 384, l. 19 – 385, l. 24.

The next morning Berke checked on Minor and she was still asleep. R. 368, ll. 8 – 24. He awakened his other daughter and got her ready for school. R. 368, ll. 7 – 24. He checked on his wife and she was still asleep. R. 368, ll. 13 – 24. He took his daughter to school and returned home. R. 368, l. 13 – 369, l. 16.

Sandra was still asleep. R. 369, l. 1. Berke awakened his wife, got her coffee, and then awakened the children. R. 369, ll. 5 – 12. Berke noticed Minor had bruising on

her head and face and told his wife. R. 369, ll. 9 – 12. Sandra came into the kitchen and saw Minor's bruising and swelling. R. 369, ll. 13 – 16. Berke still had active duty military health insurance so he called the military base to speak with the family care physician. R. 369, ll. 13 – 16. The military physicians were extremely busy and referred her to a pediatrician "off post." R. 369, ll. 17 – 25. Sandra took Minor to the pediatrician that morning. R. 370, ll. 7 – 18. Sandra called Berke from the pediatrician's office and told him they were going to take Minor to MUSC by ambulance. R. 370, ll. 19 – 23.

Dr. William Jacobsen ("Jacobsen") in the pediatric emergency department treated Minor when she was brought in by ambulance. R. 60, ll. 10 – 21. He initially noticed a "significant amount of bruises." R. 61, ll. 13 – 17. Blood had collected between the cranium and under the scalp. R. 63, ll. 1 – 7. Dr. Jacobsen ordered "a skeletal survey." R. 63, ll. 17 – 23. The tests run by the hospital showed a healing fracture in Minor's tibia and two "parietal skull fractures."[1] R. 64, ll. 2 – 19. The skull fractures were on the side of Minor's head. R. 64, l. 20 – 65, l. 2. Minor was admitted to the pediatric ICU. R. 145, ll. 9 – 12. Dr. Jacobsen spoke with Berke and he related the injury in the bathtub. R. 66, ll. 2 – 7. Berke told Dr. Jacobsen that the "left front of her head" struck the faucet. R. 66, ll. 8 – 9. Berke told Dr. Jacobson that he was able to catch Minor before she hit any other part of the bathtub. R. 66, ll. 2 – 7. Dr. Jacobsen also testified that he discovered that Minor's yearly immunizations were overdue. R. 67, ll. 10 – 19.

Two other doctors testified for the State. The first was Dr. Robert Cina ("Cina"). Dr. Cina testified that a CT scan showed subdural hematomas. R. 96, ll. 11 – 18. He

testified that it was "possible" that the injuries he saw on Minor's scans could have led to her death. R. 98, ll. 15 – 18. Dr. Cina opined that a fall in the bathtub could not have caused the skull fractures or the subdural hematoma. R. 99, ll. 7 – 17. He also opined that "the force required to break a bone in a child is much more than the force that would be necessary to break a bone in an adult." R. 100, ll. 4 – 6.

Dr. Cina could not date the subdural hematoma. R. 101, ll. 3 – 23. The best range he could give was from 12 hours to "2 or 3 days." R. 101, ll. 8 – 17. He could not date the skull fracture. R. 102, ll. 10 – 17. The doctors looked for retinal hemorrhages as a symptom of shaken baby syndrome and found nothing. R. 103, ll. 4 – 19. Dr. Cina prescribed Tylenol, kept Minor under observation, and Minor was discharged two days later. R. 105, ll. 5 – 14.

"Child abuse pediatrician" Michelle Amaya ("Amaya") was called in to investigate. Dr. Amaya described child abuse pediatrics as "a relatively new subspecialty." R. 169, ll. 16 – 21. She was a member of the "South Carolina child abuse medical response system." R. 168, l. 21 – 169, l. 4. She was "a founding member of a national honorary organization for child abuse physicians, which is called the Ray Helfer Society." R. 169, ll. 5 – 7. She was qualified without objection as an expert in the field of child abuse pediatrics. R. 170, ll. 6 – 8. She described her team's role as "a consultative service." R. 170, ll. 21 – 23. She stated that her "team gets consulted to help see if it's actually an injury or not an injury. And if it is an injury how was it

[1] Dr. Jacobsen and Dr. Cina also noted what looked like an older arm fracture. R. 64, ll. 2 – 9. R. 96, ll. 1 – 3. Dr. Amaya noted that the test results on the arm showed "an equivocal finding" and that it wasn't certain whether a fracture in the arm existed. R. 220, l. 15 – 221, l. 3.

caused? Was it an accident? Does it match the history? Or could it have been inflicted on the child." R. 171, ll. 14 – 19.

Dr. Amaya only interviewed Sandra and not Berke. R. 185, ll. 5 – 10. Sandra told Dr. Amaya that Minor fell frequently. R. 254, ll. 17 – 20. Sandra told Dr. Amaya that Berke brought Minor to see her the night before they went to the hospital "with a goose egg on her brow." R. 191, ll. 20 – 24. Dr. Amaya said the goose egg "could drain and cause a black eye." R. 191, l. 25. She described the child hitting her head on the faucet of the tub as "a very common injury." R. 195, ll. 6 – 9. Sandra also told Dr. Amaya about another bruise on Minor's cheek that existed prior to the incident in the bathtub. R. 198, l. 5 – 199, l. 4. Before knowing about the skull fracture, Sandra told Dr. Amaya that three weeks before the hospital visit, Minor fell backwards from a small bench in their kitchen. R. 203, ll. 15 – 25. Dr. Amaya opined that the skull fracture could not have happened three weeks prior to the hospital visit. R. 204, ll. 14 – 19. According to Dr. Amaya, children could not fall in the bathtub and receive a complex skull fracture, but they could receive skull fractures when they fall from doctors' exam tables. R. 205, ll. 1 – 25. Dr. Amaya based this opinion on the fact that Minor weighed 18 pounds and that "some math person" told her that would not be enough force to cause a complex fracture. R. 206, ll. 5 – 10.

Interestingly, Dr. Amaya stated that the skull fracture might not be obvious to a caregiver. R. 206, ll. 21 – 207, l. 2. Dr. Amaya testified, "if they touched her head – if they never touched her head they might have missed it. But if they touched her head it was readily apparent immediately." R. 206, l. 25 – 207, l. 2. Like Dr. Cina, Dr. Amaya opined that it "takes more force actually to break a baby's skull than it would to break"

the skull of an adult. R. 209, ll. 14 – 16. She further testified that "there are a lot of skull fractures that you would never know they were there and you find them by accident because there may not be any smoshy spot, which is swelling or blood collection over the area anymore at the time that you see them." R. 176, ll. 17 – 21. Dr. Amaya guessed that the subdural hematomas which were "thin and small" were "probably like at most 3 days old." R. 246, ll. 1 – 12. She also admitted that it was possible that the vomiting earlier in the day was related to the subdural hematomas. R. 247, ll. 13 – 16. She also admitted that it was possible that there were two events that caused Minor's head injuries but it also could have happened in one event. R. 258, ll. 3 – 12. R. 260, ll. 15 – 19.

Dr. Amaya testified that Minor's immunizations were not current. R. 216, l. 17 – 217, l. 1. She also testified that Berke and Sandra had not taken Minor for her "well child visits." R. 263, l. 22 – 344, l. 5. Dr. Amaya testified that there was no indication that Minor had ever been treated for a broken leg. R. 227, l. 19 – 228, l. 4. She testified that the parents should have noticed the broken leg because Minor stopped standing when the family moved to South Carolina from Kentucky. R. 228, ll. 2 – 4. R. 242, ll. 17 – 243, l. 16.

The defense called Dr. Jennifer Canter ("Canter") as an expert witness. While she agreed with Dr. Amaya that the injuries were likely the result of child abuse, she agreed that with mobile children, sometimes the cause of a skull fracture can be unexplained. R. 322, ll. 1 – 20. Dr. Canter could not state with certainty that the skull fracture "would have been palpable during the bath" if it had occurred prior to the bath. R. 336, ll. 5 – 23. She also testified that with broken legs, sometimes there are not always outward signs that would alert parents. R. 323, ll. 10 – 19. Sometimes broken legs swell, but not

always. R. 323, ll. 10 – 14. She described certain factors that will cause the child to "say their leg hurts and aren't using it but you don't see anything from the outside." R. 323, ll. 15 – 19.

The defendant was not arrested for this alleged crime until a year and four months passed. R. 377, ll. 4 – 8. The lead investigator did not initially consider appellant a suspect until "the MUSC staff expressed their concerns." R. 162, ll. 3 – 15. The officer admitted that was "Quite a time later." R. 162, ll. 16 – 17.

ARGUMENT

1.

In a circumstantial evidence case, appellant was entitled to a directed verdict for infliction of bodily injury on a child where no evidence was presented as to how the child was injured and the child was not in his sole custody during the time period when the injury likely occurred.

As appellant argued during his motion for the directed verdict there was "no testimony that Mr. Berke inflicted the injuries upon – that are the subject of this, specifically the skull fracture, subdural and subgaleal hematomas." R. 267, ll. 19 – 23. Appellant argued that 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. R. 267, l. 11 – 268, l. 1. The State replied that there was no indication that Minor was injured before the bath and that Minor did receive an injury during the bath. R. 270, l. 20 – 271, l. 22. The defense cited 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) in support of its argument. The trial judge denied the motion for directed verdict on the basis of whether the jury would believe Berke's version of what happened. R. 274, l. 25 – 275, l. 15.

When the motion was renewed after the close of the defense case, the trial judge denied it, stating there was "direct evidence of great bodily injury. I don't think the State has to prove that both injuries are attributable to the defendant." R. 397, ll.8 – 19. The motion was renewed after the verdict and again denied. R. 484, l. 25 – 485, l. 20. During the sentencing colloquy, the trial judge described the injury as "an unfortunate incident" and stated "the statute is almost a strict liability statute." R. 491, ll. 11 – 24. The trial judge

further stated, "It basically holds any adult, or I guess really in Juvenile Court you probably could be charged with some component of the offense, of injuring a child, which in our society is the least of these; the least capable of protecting themselves and the most vulnerable." R. 491, l. 24 -492, l. 3. Judge Jefferson also stated, as regards Berke, "And I do not believe that he had any malicious intent, evil intent, or any real desire to harm any of his children." R. 493, ll. 13 – 15.

Berke was entitled to a directed verdict because there was no direct evidence that he caused the skull fracture, which was the great bodily injury, and no substantial circumstantial evidence that he caused or intended the injury. "When a case is built wholly on circumstantial evidence, if the State fails to produce substantial circumstantial evidence the defendant committed a particular crime, he is entitled to a directed verdict." State v. Bennett, 408 S.C. 302, 306, 758 S.E.2d 743, 745 (Ct. App. 2014). "The State has the burden of proving beyond a reasonable doubt the identity of the person who committed the charged crime or crimes." Id. "[T]he trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004).

The evidence in this case, at best, merely raised a suspicion that Berke caused the skull fracture. No evidence existed that Berke intended to injure his child. In fact, the evidence showed that when Berke saw Minor's bruising and swelling, he immediately attempted to get her medical care. The suspicion of Berke came entirely from the fact that Berke stated the child hit her head on the faucet during the bath, even though it was not disputed that hitting her head on the faucet could have caused the skull fracture. Indeed, as the trial judge noted at sentencing, the refusal to grant a directed verdict in this case

amounted to "strict liability." Under the trial court's reasoning, since Berke admitted being present when the child received an injury during the bath, and he was present at other times when the child could have been injured, he therefore must have been responsible under the statute.

In Palmer, this Court ruled a directed verdict should have been granted on aiding and abetting child abuse. Palmer at 233-34, 758 S.E.2d at 204. Just as in Palmer, the medical testimony did not establish when the injury occurred and whether the injury would have been immediately apparent. Over the time period when the injury occurred, the appellant was not always in custody and control over the child. The mother was present as well as two other children, including one child that shared a room with Minor.

In Hepburn, the Supreme Court found that the circumstantial evidence was not substantial and a directed verdict should have been granted on a homicide by child abuse charge. Hepburn at 438-42, 753 S.E.2d at 413-16. Hepburn involved co-defendants and the Court held there was "no evidence that Appellant herself was aware of the victim's injuries, let alone caused them." Id.

In this case, the evidence showed that Berke gave the child a bath, the child slipped in the bathtub and received a blow to the head that could not have caused the skull fracture. The doctors could not time the skull fracture except within three days. The doctors agreed that the injury might not have been immediately apparent. Appellant was not in exclusive control over Minor during this entire time. The State never proved the exact mechanism of the injury. Under these circumstances, the State failed to present substantial circumstantial evidence of appellant's guilt and this Court should reverse his conviction.

2.

The trial court erred in denying appellant's motion to quash the indictment for unlawful conduct for the child where the indictment was insufficient to place appellant on notice of the facts constituting the crime and allowed the State to present duplicitous theories as to the alleged criminal acts.

The indictment for unlawful conduct toward a child only quoted the language of the statute. R.510. It contained no factual allegations. R. 510. The indictment read:

Unlawful Conduct Toward a Child

> That Christopher W. Berke did in Berkeley County, South Carolina, on or between December 1, 2010 and September 6, 2011, have charge or custody of [Minor], and did place the child at unreasonable risk of harm affecting the child's life, physical or mental health or safety. This is in violation of Section 63-5-70 of the South Carolina Code of Laws (1976) as amended.

R.510.

Prior to trial, appellant filed a Motion to Quash this indictment. R. 496. 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. R. 498. The court took a recess after picking the jury and when it returned, Judge Jefferson stated that she heard the motion to quash in chambers and denied it. R. 11, ll. 1 – 5. The trial judge then placed on the record her reasons for denying a motion to sever. R. 11, l. 4 – 13, l. 12.

Trial counsel then attempted to state his argument on the record, but the trial judge refused to allow him to do so:

MR. SHELTON: Your Honor, prior to—

THE COURT: --I'm not taking any further argument on the motion. I've already heard the motion. You position is clear that you oppose it and so you don't have to take exception to it.

MR. SHELTON: Your Honor, I just wanted to make the record—

THE COURT: --what is ambiguous about—

MR. SHELTON: --sure on the 404(b) evidence—

THE COURT: --I've already heard argument. I'm not hearing any further argument.

R. 13, l. 17 – 14, l. 2.

The State filed a reply to appellant's motion to quash. R. 503. The State argued the discovery was sufficient to place the defendant on notice. R.505. The State also cited an email to defense counsel that the acts that it believed constituted a crime were: (1) not taking Minor to well visits; (2) not getting her immunized; (3) not treating Minor's broken leg; and (4) not treating Minor's head injury. R.504. The State argued there were "multiple acts of neglect over a period of time." R. 508.

In its closing argument, the solicitor told the jury: "We can argue all day long about whether people should have to take their kids to the doctor, whether people should have to have their kids vaccinated." R. 443, ll. 20 - 24. The State also argued, "Had they been taking her in for well visits they might have noticed that she had a broken leg." R. 444, ll. 15 – 16. Finally, the solicitor argued, "So it's not just the untreated leg although any of these things on their own would prove this charge." R. 444, ll. 17 – 25.

The trial court erred in allowing the State to present multiple offenses to the jury under one indictment. "Duplicity is an ill-favored quality in both life and the law. . . ." State v. Samuels, 403 S.C. 551, 553, 743 S.E.2d 773, 774 (2013). "While commonly understood to be synonymous with deceitfulness and double-dealing, when used in the law,

duplicity means the charging of the same offense in more than one count of an indictment." Id. "Duplicitous indictments implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution." Id. at 556, 743 S.E.2d at 776 (internal quotations omitted). "For example, such indictments present the risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count." Id. "[D]uplicitous indictments are generally considered defective and may be dismissed on that ground." Id. "[A] defendant will prevail on appeal when he establishes both that an indictment was duplicitous and that he was prejudiced by the duplicity." Id. at 557, 743 S.E.2d at 776.

In Samuels, the indictment alleged the defendant assaulted two women using "and/or" between their names. Id. at 555, 743 S.E.2d at 775-76 (alleging an assault against "Patricia Speaks and/or Carla Daniels"). The women were the defendant's paramours. Id. at 553, 743 S.E.2d at 775. Together they confronted the defendant with his multiple romantic attachments and began calling other women he had simultaneously wooed. Id. The defendant did not respond well. Id. He held a gun to one woman's head and knocked the other one down before he fled. Id. at 553-54, 743 S.E.2d at 775.

The Court easily reached the conclusion that for "offenses against the person, a separate offense exists for each person subjected to the criminal conduct." Id. at 557, 743 S.E.2d at 777. For this reason, the indictment was duplicitous. Id. "By including both victims in one count, the indictment charged two offenses in one count and was defective for duplicity." Id.

A child sex case illustrates the fact that these are separate offenses and the danger of duplicity. State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009) *adopted as the Supreme Court's opinion in* State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011). In Fonseca, the "original indictment charged one count of a lewd act against a minor, but alleged two distinct incidents: one occurring in 2001 and another in 2003." Id. at 643, 681 S.E.2d at 2. The trial court ordered the indictment amended and the "State elected to proceed only on the 2003 lewd act." Id.

A recent Kentucky case presents a similar legal scenario. Johnson v. Commonwealth, 405 S.W.3d 439 (Ky. 2013). The defendant in Johnson faced charges for murder and "first-degree criminal abuse" arising from the death of her two-year-old son. Id. at 441. The child died from blunt force trauma to the abdomen. Id. at 442. The autopsy also revealed three distinct leg fractures that occurred at different times. Id. at 443.

The Kentucky Supreme Court reviewed the defendant's unpreserved duplicity challenge under its "palpable error" standard and reversed. Id. at 448. The defendant challenged her abuse conviction because the jury could have rendered a non-unanimous verdict concerning the three leg fractures. Id. The court found a unanimity error because the jury's verdict "could have covered either of the fractures that were caused by abuse, since the time frame listed in the instruction included both of them." Id. at 449. The court stated that it did not matter that the error was not apparent from the jury instructions because it arose from the proof. Id. "Regardless of how it happens—either when the instruction explicitly includes multiple criminal offenses **or the proof demonstrates**

them—when a jury instruction and resulting verdict cover multiple criminal acts, the same principles apply." Id. (emphasis added).

While the Supreme Court removed the jurisdictional aspect of South Carolina indictments in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), it did not do away with all objections to an indictment. Gentry ruled that an "indictment is a notice document." Id. at 102, 610 S.E.2d at 500. Indictments must state the offense 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. . . ." Id.

In this case, the indictment only quotes a statute that is extremely vague. It contains no facts. The solicitor argued that multiple, discrete acts could constitute criminal conduct under the act, including acts that are not criminal—failing to take a child for "well visits" and failing to have the child immunized. Appellant was not placed on notice of the conduct he was required to defend. Furthermore, the jury could have reached a non-unanimous verdict. Some jurors could have convicted him based on the immunizations or lack of well visits and some jurors may have convicted him on the basis of failing to recognize a broken leg. The trial court erred in not granting the motion to quash, prejudicing appellant. This Court should reverse.

3.

In this circumstantial evidence case, appellant was entitled to a directed verdict because two of the allegations by the State—failure to keep up with immunizations and failure to take the child to the Dr. when the child was well—are not criminal conduct and the State failed to present any evidence that appellant should have recognized that the child had a broken leg.

When appellant moved for a directed verdict on the unlawful conduct charge, the solicitor responded, "And he placed the child at unreasonable risk when they didn't have the leg treated, they didn't get her immunizations, and they didn't take her for well visits." R. 272, ll. 2 – 5. The trial judge denied appellant's directed verdict motion at the close of the State's case, again after the close of the evidence, and again after the verdict. R. 272, l. 22 – 278, l. 10. R. 396, ll. 16 – 397, l. 19. R. 484, l. 21 – 485, l. 20. Appellant ultimately received a sentence of five years' imprisonment on this charge. R. 494, ll. 7 – 12.

The State failed to present substantial circumstantial evidence of Berke's guilt on this charge. Bennett at 306, 758 S.E.2d at 745. The South Carolina Supreme Court "has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011). Specifically, the trial court "should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." Odems at 586, 720 S.E.2d at 50 (citation omitted).

Every circumstance relied upon by the State must be proved beyond a reasonable doubt and point conclusively to the guilt of the excused to the exclusion of every other

reasonable hypothesis. State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) *abrogated by* State v. Cherry, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004). Even though the Edwardstraditional circumstantial evidence definition" is no longer given as a jury charge, it remains a vital tool for judges examining the sufficiency of circumstantial evidence at the directed verdict stage. Odems at 590-91, 720 S.E.2d at 52-53.

The time frame alleged in the indictment was between December 1, 2010, and September 6, 2011. R. 509. It was undisputed that Berke was deployed with the Army in Afghanistan from July 19, 2010, until April 19, 2011. R 352, l. 23 – 353, l. 2. Berke's attorney asked Berke what he considered to be a "dumb question" that Berke could not do anything about the child's medical care while he was in Afghanistan—Berke replied he could not. R. 355, ll. 12 – 15.

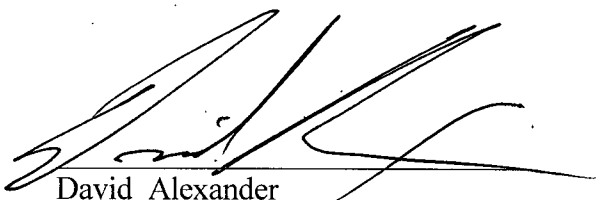
The solicitor did not argue below that Berke broke Minor's leg. R. 12, ll. 15 – 18. In closing, the solicitor argued that Minor had "a broken leg that wasn't treated." R. 429, ll. 4 – 5. However, the evidence the State relied on that Berke knew Minor had a broken leg was almost nonexistent. The State's strongest evidence was Dr. Amaya's testimony that the parents should have noticed the broken leg because Minor stopped standing when the family moved to South Carolina from Kentucky. R. 228, ll. 2 – 4. R. 242, ll. 17 – 243, l. 16. Berke testified he tried to help Minor learn to walk, that Minor would pull herself up in her crib, and he had no concerns about her not walking. R. 362, l. 23 – 363, l. 5. Dr. Canter testified that with broken legs, sometimes outward signs do not exist that would alert parents to the existence of a fracture. R. 323, ll. 10 – 19. This does not rise to the level of substantial circumstantial evidence and cannot form the basis for a conviction.

Nor does the other conduct complained of meet the substantial circumstantial evidence standard, even if the conduct can be considered criminal. The solicitor cited no authority for the prospect that failing to have a child immunized or taken to the doctor when the child is not sick—"well visits"—are criminal acts in this State. Many parents choose to not have their child immunized because of perceived health risks. Many families lack the money to take children to the doctor when they are sick, let alone well. Furthermore, the evidence showed that the child had been taken to the doctor in the past by the parents and had some immunizations, but this was a military family in transition not only in moving from Kentucky to South Carolina, but in Berke's transition from military to civilian life. Berke's wife had thyroid cancer and Graves' disease. R. 358, l. 21 – 361, l. 5. R. 363, l. 17 – 364, l. 20. The trial court erred in not granting a directed verdict under these circumstances and this Court should reverse appellant's conviction.

CONCLUSION

For the foregoing reasons, the Court should reverse appellant's convictions.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 15th, 2015

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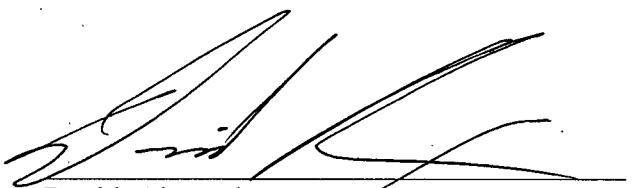
CHRISTOPHER W. BERKE,

APPELLANT

CERTIFICATE OF SERVICE

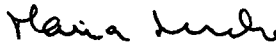
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of May, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of May, 2015.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.