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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions

Donald B. Hocker, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-000197

The State,.....Respondent,

v.

Shawn Patrick White,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

White is not required "to prove that he was not guilty of" the alleged crime to obtain a directed verdict ruling in his favor. *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). Rather, "the State, by issuing an indictment and bringing the case to trial, assumed the burden of proving that he was guilty." *Id.* at 133, 322 S.E.2d at 452. In this case, the State did not present substantial circumstantial evidence of White's guilt. Therefore, this Court should reverse the trial court's decision to deny White's motion for a directed verdict.

I. White was Not the Only Adult with Victim when the Acute Injury Occurred

The State asserts that, viewing the medical testimony as to when victim's acute injury occurred in the light most favorable to it, victim's injury occurred sometime between 10:00 p.m. on August 7 and 9:40 a.m. on August 8—an almost twelve hour window.[1] (Br. of Resp't pp. 16-17). The beginning of this time frame is when victim's sisters went to bed after playing with her.[2] The end of the this time frame is approximately two hours before victim's CAT scan showing her acute injury. White was not the only adult with victim during the State's suggested window of time.

White was alone with victim in the living room between 10:00 p.m. on August 7 (when the siblings went to sleep) and 2:00 a.m. on August 8 (when LaBounty came home). (R. p. 232 lns. 23-25, p. 159 lns. 17-18). White and LaBounty were in the home with victim from 2:00 a.m.

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[1] The medical testimony includes numerous statements that the acute injury could have occurred "within minutes" before the CAT scan. (R. pp. 220 ln. 21 – 221 ln. 4, p. 288 lns. 7-9). However, the testimony most favorable to the State is that it occurred, at the least, within a few hours of the CAT scan. (R. p. 319 lns. 6-12).

[2] Dr. Troup's testimony, cited by the State for this time, referred to chronic injury rather than the acute injury. (Br. of Resp't p. 16). Dr. Troup testified "the ***older looking part of this***" CAT scan, "for it to have been that large, you would have been profoundly symptomatic before that morning" of August 8. (R. pp. 312 ln. 20 - 313 ln. 5) (emphasis added). The testimony relates only to the chronic injury and does not narrow the time frame in which the acute injury occurred.

until 6:15 a.m., when White went to work. (R. p. 163 lns. 23-25, p. 181 lns. 17-23). LaBounty was then alone with victim and the other children for over four hours, until 10:53 a.m., when she called her mother and then 911. (R. p. 36 lns. 21-25).

This case is distinguishable from *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), in which the Court of Appeals affirmed the denial of a directed verdict motion where the evidence undeniably showed ***both*** defendants were with the victim during the ***entire*** time frame in which the fatal injuries occurred. *Id.* at 484, 491, 597 S.E.2d at 890, 894. Here, White was with victim during only part of the time frame in which the acute injury could have occurred.

White further responds to two factual assertions made by the State. First, the State asserts that because the door to the front porch was opened, LaBounty was never alone with victim during the acute injury time frame. (Br. of Resp't p. 19, R. p. 166 lns. 6-8). That the porch door may have been open does not mean (1) the siblings could see LaBounty and victim at all times and (2) LaBounty could not inflict victim's injuries. The medical testimony is that the injury could occur in a matter of seconds. (R. pp. 310, 337, 399).

Second, the State asserts the snoring sound LaBounty heard from victim on August 8 "was likely victim struggling to breath and not snoring." (Br. of Resp't p. 17). There is no evidence to support this assertion. LaBounty testified it was normal for victim to snore. (R. pp. 185, 447). This indicates victim was sleeping normally when LaBounty came home. Further, the State's citation to *State v. Palmer*, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014), is misplaced because *Palmer* involved a child with two skull fractures and, therefore, medical testimony regarding that child does not apply to victim. *Id.* at 225-26, 758 S.E.2d at 199-200.

White is not required to prove that someone other than him is guilty of the crime charged. Rather, he must show that his guilt is not "fairly and logically deduced" from the State's

evidence. *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000). The limited time White spent alone with victim does not fairly and logically deduce his guilt.

II. Child C and Child I did not Testify they Heard White Injure the Victim

No witness testified they saw or heard White injure the victim. Viewing the evidence in the light most favorable to the State, Child C testified she heard a banging noise and then victim crying. (R. p. 105 lns. 13-15). This is not substantial circumstantial evidence that White caused the banging noise or the noise was White harming victim.

No witness testified as to whether the acute injury resulted from contact with a soft surface, such as a pillow, or a hard surface, such as the floor. Dr. Troup testified "[i]t doesn't have to be a hard surface as long as the brain inside the head gets that sloshing. Acceleration – the acceleration motion. A hard surface would cause more of an impact injury as well." (R. p. 309 lns. 8-12). The doctors found no evidence of a skull fracture impact injury, such as would occur from impact with the floor suggested by the State. (R. pp. 215 ln. 25 – 216 ln. 1, p. 318 lns. 20-21). There is not substantial circumstantial evidence White caused any of victim's injuries.

III. White is Blameless and did not Shift Blame to Anyone

White did not blame victim's injuries on either his brother or Child C. The State makes this argument based on an incorrect interpretation of the testimony of Major Lightle, who conducted an interview of White on August 9. (R. p. 227 lns. 14-15, p. 229 lns. 2-3).

As to the statement regarding White's brother, stating the fact that an event occurred is not shifting blame. There is no dispute that White's brother knocked victim off the front porch steps on July 30. White told LaBounty about this fall when she returned home, LaBounty believes White's account of the fall, White's brother confirmed his account of the fall, and the fall could not have caused any of victim's injuries. (R. pp. 154-55, p. 176 lns. 5-13, p. 246 lns. 10-19). White stated the fall *may* have caused victim's injuries *in response to* Major Lightle

asking him "what do you think caused [victim]'s injuries." (R. p. 234 lns. 21-24). White did not shift blame to his brother but provided an answer to a direct question from an investigating officer.

As to the assertion that White blamed Child C for the injury, White actually said she could *not* have caused the injury. Major Lightle testified White told her

> [Child C] . . . was jealous of [victim], and [Child C] had told him yeah, that's why I squeeze [victim] and choke her. And he told me that Chief Galloway had asked the doctor if [Child C] could do something like that, a six-year-old could do something like that, and ***the doctor had said no, a six-year-old can't choke a child and squeeze a child to cause the injuries that [victim] had*** when she presented to the emergency room.

(R. pp. 233 ln. 21 – 234 ln. 6). White did not blame Child C for victim's injury. Rather, he said that Child C could not have caused the injury.

These statements are not evidence of White's consciousness of guilt, and the trial court erred in weighing the statements to decide the directed verdict motion.

IV. White's Arguments are Properly Preserved

The arguments regarding the State's failure to present evidence of a motive and White's mental state, and absence of evidence that White caused the chronic blood injury found in victim's brain are preserved. During White's motion for a directed verdict, he argued that the State presented "no history about Shawn being violent." (R. p. 400 lns. 12-13). White also argued "We've heard no testimony that anyone saw him do anything to [victim], no evidence that he told anyone that he did anything to [victim]." (R. p. 385 lns. 21-23). White raised these arguments to the trial court, which, having listened to the testimony and evidence presented, ruled on them by denying the motion for a directed verdict. White satisfied "the long-established preservation requirement that the losing party generally must both present his issues and

arguments to the lower court and obtain a ruling." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

V. The State Failed to Present Any Evidence of Criminal Intent

The State argues motive is not an essential element of an offense charged and, therefore, the Court should not consider its failure to present any evidence of a motive of White to harm victim. (Br. of Resp't p. 20). However, the cases cited by the State do not state that motive need not be proven. Rather, they state that, instead of being a separate element of an offense, "motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (internal quotation marks omitted). In this case, the State was required to prove by substantial circumstantial evidence that White "cause[d] the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an ***extreme indifference to human life***." S.C. Code Ann. § 16-3-85(A)(1) (2003) (emphasis added). The absence of any evidence of a motive supports White's argument that the State failed to prove the mental state element of the crime charged by substantial circumstantial evidence, i.e., that it did not prove "extreme indifference to human life." *See State v. Thrailkill*, 73 S.C. 314, 318, 53 S.E. 482, 484 (1906) ("[T]he presence or absence of evidence of a motive may be considered in determining whether there was the criminal intent . . . .").

In *Palmer*, this Court specifically noted the existence of evidence of a motive to support its decision to affirm the denial of a directed verdict. 408 S.C. at 230-31, 758 S.E.2d at 202. The State presented no such evidence in this case. Rather, the evidence presented is that LaBounty told SLED after victim's death that White "was great" with her children. (R. p. 189 lns. 11-13). She trusted White enough to leave victim alone with him while she went out of town and then to leave all four girls with him when her mother could no longer care for them. (R. p. 153 lns. 5-

21). There is no evidence of any prior act of abuse or indifference by White to victim or anyone else. The State presented no evidence of "extreme indifference to human life" exhibited by White.

CONCLUSION

The State failed to present substantial circumstantial evidence that White committed the crime of homicide by child abuse. The evidence presented raised, at most, a suspicion that White committed the crime charged. Therefore, White requests this Court reverse the trial court's decision to deny his directed verdict motion and reverse his conviction.

Respectfully submitted,

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The undersigned hereby certifies that on May 29th, 2015, the foregoing **FINAL REPLY BRIEF OF APPELLANT** was served on all counsel of record via hand delivery as follows:

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