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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable Robert E. Hood, Circuit Court Judge
Appellate Case No. 2014-001366

THE STATE,

Respondent,

v.

JOHN JULIUS SMITH,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Remand for an evidentiary hearing and additional findings by the circuit court is not warranted in this case because the evidence presented at the circuit court hearing, and the resulting order denying Appellant's motion for a new trial, were more than sufficient under any applicable standard. (Appellant's Issues I, II and III)

II. The circuit court properly found South did not apply to Appellant's resentencing request, and remand is not necessary because Appellant failed to present any evidence indicating resentencing should be considered. (Appellant's Issue IV)

STATEMENT OF THE CASE

Respondent concurs with paragraphs 1, 2, 5, 7 and 8 of Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On December 18, 2008, Appellant John Julius Smith pled guilty before the Honorable Howard P. King, Circuit Court Judge, to one count of infliction of great bodily injury upon a child, arising from injuries inflicted on Appellant's infant daughter (Victim). At the plea hearing, the State informed the court Victim's mother (also charged in connection with Victim's injuries) and grandmother took Victim to the hospital on May 5, 2008, where doctors discovered Victim had a skull fracture, swollen head, burns on her cheek, as well as multiple healing previous injuries, and subsequent investigation revealed Appellant was Victim's primary daytime caregiver. (Plea Hearing Transcript [PHT], pp. 12-13; Record on Appeal [R.], pp. _____).

The State further informed the court a M.R.I. confirmed a contusion and swelling on the left side of Victim's brain, and showed early signs of permanent loss of brain tissue in that areas. In addition, burns around and inside Victim's mouth appeared to be from putting an overheated bottle in her mouth. (PHT, pp. 14-15; R. pp. _____).

Victim's court appointed guardian ad litem stated Victim was in foster care and seeking doctors regularly. She further stated the doctors "know that she has permanent brain damage," but "are unable to predict what form this is going to take." As of the hearing date, Victim was "doing a lot of the same things that the other children are doing, you know, motor skill wise, but we just don't know." (PHT, pp. 16-17; R., pp. _____).

After the court accepted the guilty plea, Appellant stated he was sorry for what happened with Victim, claimed the head injury resulted from a fall off a chair caused by their dog, Victim's grandmother prevented him from taking Victim to the hospital, and insinuated Victim's grandmother caused Victim's other injuries. The court found

Appellant's explanations did not "ring true," and Appellant "simply did not take care of this child." (PHT, pp. 23-25; R., pp. _____).

The court then stated Appellant was "lucky that the child did not die," because Appellant would have been charged with homicide by child abuse and faced a sentence of twenty years to life imprisonment. Finding Appellant's conduct was "reprehensible," the court sentenced him to eighteen years incarceration.

On August 7, 2012, Appellant filed a motion for a new trial based on purported after discovered evidence.[1] He alleged medical report regarding Victim indicated she did not have a permanent or life threatening injury, and therefore, his guilty plea was invalid because there was no great bodily injury as a matter of law. He further alleged his plea counsel was ineffective by not obtaining the medical report prior to his guilty plea. (Motion for a New Trial After Discovered Evidence Pursuant to Rule 29(B), SCRCrimP; R., pp. _____). He amended the motion on December 17, 2012, to include copies of plea counsel's time records from his criminal case. (Supplemental Amendment to Motion for New Trial Rule 29(B) After Discovered Evidence; R., pp. _____).

The Honorable Robert E. Hood, Circuit Court Judge, heard the new trial motion on April 3, 2014. Two attorneys represented Appellant, and Appellant briefly testified at the hearing. The "newly discovered" evidence Appellant submitted consisted of a Department of Social Services form entitled "SCDSS Child and Family Assessment and Service Plan - Foster Care Family Centered Comprehensive Assessment and Case Plan," completed by an unknown person at some point after Victim had a medical examination

[1]According to Appellant's Statement of the Case, he filed the motion after his direct appeal was dismissed, and after he voluntarily withdrew his post-conviction relief application.

on **April 13, 2009**, four months **after** Appellant's guilty plea, and a medical report from **July 8, 2009**, over six months after his guilty plea. Appellant also submitted the full transcript of his guilty plea hearing. He argued the DSS form and medical report indicated Victim had no lingering medical issues, and therefore, she was not as injured as the State claimed at the plea hearing, and there was no "great bodily injury." (Motion Hearing Transcript [MHT], pp. 4-23, MHT Exhibits 1, 2 and 3; R., pp. _____).[2]

The State argued Appellant could not file a motion for a new trial from a guilty plea, which required him to waive his right to a trial and admit guilt, and the issue raised in Appellant's motion should have been raised in his direct appeal or post-conviction relief proceeding. As to the merits, the State argued the "new" evidence did not change or contradict the facts regarding the injuries Appellant inflicted on Victim as stated at the plea hearing, and the plea judge relied on the totality of Victim's injuries, rather than just her permanent brain damage, in setting Appellant's sentence. The State further indicated the guilty plea took place in December 2008 because Appellant wanted to enter the plea, and at that time, the State had not indicted Appellant, and was not pushing for a plea. (MHT, pp. 23-41; R., pp. _____).

Appellant then "amended" his motion to seek the alternative relief of a new sentencing hearing in the event the court did not grant a new trial. He also asked to keep the record open so he could submit additional medical records regarding Victim's condition, which the court granted. (MHT, pp. 41-48, 53; R., pp. _____).

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[2]Appellant also contended his plea counsel's testimony at a post-conviction relief hearing supported his "newly discovered evidence" claim, but he never submitted a transcript of the hearing. Therefore, the circuit court had nothing more than hearing counsel's statements about what Appellant said happened during the post-conviction relief hearing, which does not constitute evidence, and there is nothing for an appellate court to review regarding Appellant's claim.

Appellant testified he pled guilty because his plea counsel told him Victim's mother and grandmother, who were also criminally charged in connection with Victim's injuries, would probably testify against him if the case went to trial, and he would face a twenty year sentence. He stated she told him he would get "a little slap on the wrist" because he did not have a record, and he would not have pled guilty if he had known about the reports from April and July 2009. (MHT, pp. 49-52; R., pp. _____).[3]

After receiving and reviewing the additional medical records,[4] Appellant's motion and arguments of counsel, the circuit court denied Appellant's motion for a new trial, citing the factors relevant to new trial motions. The court found all the evidence Appellant presented was "insufficient to change the results of [Appellant's] December 18, 2008, guilty plea." (Order Denying Motion for New Trial, June 16, 2014; R., pp. _____). This appeal followed.

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[3]In response to Appellant's testimony, the State informed the court Appellant did have prior convictions, including a conviction for assault and battery of a high and aggravated nature "just two years prior" to his guilty plea. (MHT, p. 53; R., pp. _____).

[4]The supplemental medical records were submitted under a protective order, and will be provided to the appellate court under seal. (Order to Produce Medical Records dated April 21, 2014; R., pp. _____).

ARGUMENT

I. Remand for an evidentiary hearing and additional findings by the circuit court is not warranted in this case because the evidence presented at the circuit court hearing, and the resulting order denying Appellant's motion for a new trial, were more than sufficient under any applicable test. (Appellant's Issues I, II and III)

Appellant contends the circuit court applied an incorrect test in denying the new trial motion, the order denying the motion was inadequate, and the "newly discovered evidence" he presented met the traditional five factor test. He further contends the case should be remanded to the circuit court for an evidentiary hearing and additional findings by the circuit court. In support of his contentions, Appellant conflates a Rule 29(b) motion for a new trial based on after-discovered evidence with a post-conviction relief proceeding. In any event, the record in this case is sufficient for appellate review without remand, and Appellant's evidence failed to warrant a new trial under **any** test.

A. Applicable Test

Pursuant to Rule 29(b), SCRCrimP, new trial motions based on after-discovered evidence must be filed within one year after the evidence is actually discovered, or the date the evidence could have been discovered by the exercise of reasonable diligence. To warrant a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. State v. Harris, 391 S.C. 539, 706 S.E.2d 526, 529 (Ct. App. 2011) (*citing* State v. Spann, 334 S.C. 618, 513 S.E.2d 98, 99 [1999]).

Appellant asserts the five factor test enunciated in Spann and Harris was superseded by Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014). He acknowledges Jamison involved a post-conviction relief proceeding, but contends it created a two-part test to analyze a request for relief based on newly discovered evidence following a guilty plea that should be expanded to Rule 29(b) motions after a guilty plea.[5]

In Jamison, the Supreme Court addressed the issue of "whether and to what extent an otherwise valid guilty plea may be vacated in PCR proceedings on the basis of newly discovered evidence." 765 S.E.2d at 128. Acknowledging "a valid guilty plea must be treated as final in the vast majority of cases," the Court found the post-conviction relief statute does not preclude post-conviction relief following a guilty plea in all circumstances, and the traditional, five factor, newly discovered evidence test is "not the proper test for analyzing whether a PCR applicant is entitled to relief based on newly discovered evidence following a guilty plea." *Id.* at 129.

The Court then held post-conviction relief based on newly discovered evidence after a guilty plea is warranted:

> "**only** where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is **of such a**

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[5]In an obvious effort to minimize his voluntary withdrawal of his post-conviction relief application, by way of footnote Appellant questions why his post-conviction relief counsel advised him to withdraw the application at the post-conviction relief hearing and file a Rule 29(b) motion rather than pursuing the after-discovered evidence issue in the post-conviction relief proceeding. He alludes to the possibility post-conviction relief counsel filed the application late, implying counsel advised him to withdraw the application because of the late filing. (Brief of Appellant, p. 14, n. 7). The State notes Appellant's application was **not** dismissed as **untimely**, and actually resulted in a hearing **on the merits**. Regardless of counsel's reason(s) for advising him to withdraw the application and proceed with a Rule 29(b) motion, Appellant concedes he voluntarily withdrew the application.

> **weight and quality** that, under the facts and circumstances of that particular case, the **'interest of justice'** requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea **only where the interest of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty plea conviction.** In so holding, we caution that **it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt.**

Id. at 130 (emphasis added).[6]

The Jamison majority formulated the "new" test based on language in the post-conviction relief statute, specifically S.C. Code Ann. §17-27-20(A)(4) (2014), which provides that any person convicted and sentenced for a crime may assert a post-conviction relief claim alleging the existence of material evidence, not previously presented and heard, which requires vacating the conviction or sentence "in the interest of justice." Nothing in the majority opinion indicates the new test applies outside of the post-conviction relief context, and given the Court's repeated references to the finality of a guilty plea, there is no indication the test will apply in any other context, including a Rule 29(b) motion after a guilty plea. Therefore, the traditional five-factor test still applies to Rule 29(b) motions.

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[6]Notably, two justices dissented, specifically stating the five-factor test best serves the interests of justice regardless of whether the PCR applicant pled guilty or was convicted by a jury. Apparently recognizing the new two factor test imposed a higher burden on defendants than the traditional test, the dissent feared the new test "may give rise to the unintended consequence of dissuading criminal defendants from entering guilty pleas. 765 S.E.2d at 131 (Pleicones, AJ, dissenting opinion).

B. Sufficiency of the Record for Appellate Review

Appellant further contends the case should be remanded for the circuit court to make additional findings of fact because the order denying his motion for a new trial is insufficient for appellate review.[7] While acknowledging extensive findings of fact and conclusions of law are not required in the post-trial motion context, Appellant claims the order in this case was so cursory the appellate courts cannot ascertain the basis for the circuit court's ruling. Appellant's claim might have merit if the order was the only thing before the appellate court, but the claim is meritless given the totality of other matter in the record.

Post-trial motions for a new trial based on after discovered evidence, including the determination of the evidence's credibility, are within the trial court's discretion. State v. Harris, 391 S.C. 539, 706 S.E.2d 526, 529 (Ct. App. 2011). Granting a new trial on after discovered evidence is not favored, and the appellate court will affirm the trial court's denial of such a motion absent error of law or abuse of discretion. *Id.* (*citing* State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 [1978]).

A trial court's order denying post-trial motions is sufficient if the court's reasoning for the denial can be determined from the record on appeal. Clark v. S. Carolina Dep't of Pub. Safety, 353 S.C. 291, 578 S.E.2d 16, 26 (Ct. App. 2002), *aff'd*, 362 S.C. 377, 608 S.E.2d 573 (2005). Further, there is no blanket requirement the trial court set forth a separate explanation on all of its post-trial motion rulings. *Id.*

The order denying Appellant's motion for a new trial recited the evidence before the circuit court, including the motion itself, Victim's medical records submitted at, and

[7]Appellant refers to the order as an "Order of Dismissal," but the order is entitled Order Denying Defendant's Motion for a New Trial.

subsequent to, the hearing, and argument of counsel. The order further makes it clear the circuit court based its ruling on the five factor test in Harris, and "a review of the facts of the case, the motion and arguments, and **all** evidence presented."[8] (Order Denying Defendant's Motion for a New Trial, p. 2; R., p. _____) (emphasis added). "All" the evidence included the transcript of Appellant's guilty plea hearing, which is significant to determining the validity of Appellant's claims (discussed below).

This Court will have all the evidence presented to the circuit court, and know exactly what factors the circuit court considered in ruling on Appellant's motion. Regardless of how the circuit court analyzed each particular factor, this Court can look at the evidence, and determine whether it supports the circuit court's denial of Appellant's motion.[9]

C. Application of Factors

Appellant asserts his guilty plea and sentence should be vacated and his case remanded for a new trial because he established all five factors of the Harris test. Regardless of which test applies (Harris or Jamison), however, Appellant failed to meet it.

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[8]Appellant's *pro se* motion and the supplement to it primarily consist of Appellant's self-serving assertions regarding his post-conviction relief proceeding and alleged ineffective assistance of plea and post-conviction relief counsel, none of which is supported by any actual evidence.

[9]Again trying to conflate a Rule 29(b) motion with post-conviction relief proceedings, Appellant asserts the order in this case "does not comply with the mandate of S.C. Code Ann. §17-27-80." (Brief of Appellant, p. 22). The order requirements of §17-27-80 apply only to orders in post-conviction relief proceedings, and are not relevant to this case.

1. Harris Factors

The Harris factors require a defendant to show the newly discovered evidence would probably change the result if a new trial is granted, it was discovered after the trial and could not have been discovered before trial by the exercise of due diligence, it is material to the issue, and is not merely cumulative or impeaching. Appellant argues he met the first factor through his self-serving testimony he would not have pled guilty if he had seen the **subsequent** medical reports prior to his plea. His argument completely ignores the plea hearing transcript, and the "new" evidence's substance.

During the plea hearing, Victim's guardian specifically stated Victim was "doing a lot of the same things that the other children are doing," and she was seeing doctors regularly, including an appointment with a pediatric neurologist the next month, but the doctors could not predict how much the permanent brain damage would affect her in the future. (PHT, pp. 16-17; R., pp. _____). Thus, Appellant was well aware the full extent of Victim's impairment was unknown in December 2008, but voluntarily and intelligently pled guilty "straight up" to inflicting great bodily injury to Victim, with no negotiation regarding his sentence.[10] Indeed, the record clearly reveals Appellant's counsel advised him on several occasions prior to the plea to wait until Victim's prognosis was more certain. (Supplemental Amendment filed December 17, 2012 [Attorney Time Records]; R., pp. _____).

[10]Significantly, Appellant does not contend the circuit court failed to properly, and fully, advise him of the consequences of entering a plea, including the fact the plea would constitute a waiver of his right to a trial and any defenses he might have to the charges. The hearing transcript shows the court thoroughly discussed the matter with Appellant, and gave him ample opportunity to consult with counsel, prior to accepting Appellant's plea. (PHT, pp. 3-12; R., pp. _____).

As the circuit court noted during the motion hearing, the "new" evidence did not contradict any of the medical evidence available in December 2008. (MHT, pp. 45-46; R., pp. _____). In fact, the "new" evidence **confirmed** the information submitted at Appellant's plea hearing: 1) Victim sustained "permanent brain damage" from the injury to her head; and 2) determining the long term effect of the damage required continued medical care and monitoring.[11] (MHT - Exhibit 3; R., pp. _____).

As to whether the "new" evidence was available or could have been discovered prior to Appellant's plea, Appellant equates newly "discovered" evidence with newly "created" evidence. Even though the subsequently created medical records were not available in December 2008 because they did not exist, Appellant did know Victim continued to receive medical care, and he was advised **not** to enter a plea before receiving further information regarding Victim's condition. (PHT, pp. 16-17, Supplemental Amendment to Rule 29(b) Motion [Attorney Time Records]; R., pp. _____). Consequently, he could have discovered the "new" evidence by simply taking counsel's advice and not entering a plea before the evidence was available.[12]

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[11]Appellant's contention he would be acquitted if the case goes back for a trial is premised on his argument Victim's injuries were not "as severe" as the State represented at the plea hearing. In essence, Appellant continues to exhibit the same callousness toward Victim as he did when he inflicted her injuries. Rather than being grateful Victim seems to be meeting age appropriate development markers (so far), he reduces her permanent brain damage to "minor speech issues." He also claims an injury sufficient to cause **permanent brain damage** did not create a substantial risk of death or protracted loss or impairment of the brain's function. This claim is simply beyond belief.

[12]Appellant's assertion the case "may still have been called prior to the additional medical reports" is rank speculation, and flies in the face of the undisputed fact he had not even been indicted on the charge when he pled guilty in December 2008. (PHT, p. 5; R., p. ____). Even strictly applying a 180 day period between indictment and trial, it is highly unlikely the case would be called prior to July 2009, and if Victim's prognosis was still unknown when the case was called, Appellant could seek a continuance on that basis.

Finally, the "new" evidence was not material to the issue of Appellant's guilt or innocence in large part because it was merely cumulative to the information submitted at the plea hearing. As discussed above, the 2009 records confirm Victim's permanent brain injury and need for continued care and monitoring to determine the long term effect.

Therefore, the only Harris factor Appellant could realistically contend was in his favor is the availability of the "new" evidence when he pled guilty in December 2008, and only because the evidence did not even exist at that time. That factor standing alone is not sufficient to warrant setting aside his guilty verdict and granting a new trial, and the remaining factors weigh against Appellant.

2. Jamison Factors

Assuming for argument purposes the Jamison factors apply in this case, Appellant still failed to meet them. The first Jamison factor goes to whether the "new" evidence was discovered after the plea, and reasonably could not have been discovered before the plea. As discussed above, Appellant could have reasonably discovered the "new" evidence prior to his plea by simply following counsel's advice and waiting.

Further, for many of the reasons Appellant could not meet the Harris factors, he could not meet the second Jamison factor, which requires the "new" evidence to be of such weight and quality the interests of justice require vacating Appellant's guilty plea.[13]

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[13]See Lindsey v. State, 2014 ND 174, 852 N.W.2d 383, 394 (2014) (manifest injustice analysis for newly discovered evidence after a guilty plea requires the defendant to show (1) the evidence was discovered after the guilty plea, (2) the failure to learn about the evidence before the plea was **not the result of the defendant's lack of diligence**, (3) the newly discovered evidence is material to what would have been the issues at trial, and (4) the **weight and quality of the newly discovered evidence would likely result in an acquittal at trial**).

Essentially, Appellant's "new" evidence changed nothing. The long term effects of Victim's permanent brain damage were unknown in December 2008, and remained unknown in 2009. The fact she appeared to be progressing appropriately for her age did not undo the permanent brain damage Defendant caused. As the circuit court analogized, a defendant cannot "unrob" a bank he pled guilty to robbing. (MHT, p. 48; R., pp. _____). Rather than relieving Appellant of the consequences of his guilty plea, the interests of justice in this case mandate the solemnity of his plea be affirmed.

The analysis in this case begins and ends with one undisputed fact: the head injury Appellant admitted inflicting on Victim resulted in **permanent brain damage**. All the evidence before the circuit court in connection with Appellant's new trial motion confirmed that fact. Accordingly, the circuit court did not abuse its discretion in denying Appellant's motion, and its ruling should be affirmed.

II. The circuit court properly found State v. South did not apply to Appellant's resentencing request, and remand is not necessary because Appellant fail to present any evidence indicating resentencing should be considered. (Appellant's Issue IV)

Appellant asserts the circuit court erred in finding State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993), did not apply in this case as to the issue of resentencing based on the purported after discovered evidence. The State submits the circuit court's finding was correct, but even if South applies, there is no evidence in this case warranting remand for resentencing.

In death penalty cases, after a finding of guilt, the court or jury must find and consider statutory aggravating and mitigating factors in a separate sentencing proceeding. S.C. Code Ann. §16-3-20 (B) (2013); S.C. Code Ann. §16-3-20(C) (2013). The specific issue in South, a death penalty case, was whether the traditional five factor test (Harris factors) "should be applied to a motion for a resentencing proceeding **in a bifurcated capital case**." 427 S.E.2d at 669 (emphasis added). The Supreme Court held the traditional test applied, with modification of the materiality factor to require that the newly discovered evidence be material to any mitigating or aggravating circumstances. *Id.* at 669-670. Appellant does not cite, and the State cannot find, any authority in South Carolina expanding South to non-capital cases, which do not require findings regarding aggravation or mitigation in determining an appropriate sentence.[14]

[14]Appellant did not raise the resentencing issue until he sought to amend his Rule 29(b) motion at the motion hearing. Therefore, even assuming resentencing relief is available under Rule 29(b) in a non-capital case, it was not timely asserted in this case. *Cf.* State v. Warren, 392 S.C. 235, 708 S.E.2d 234, 236 (Ct. App. 2011) (timely post-trial motion limits the court's authority to the issue raised in the motion, and any amendments to the motion raising additional issues are subject to the Rule 29 deadlines).

Even if South applies in this case, however, Appellant's "new" evidence does not indicate resentencing is warranted. As discussed in depth in Issue I, the evidence Appellant submitted in support of his new trial motion was not really "new." More importantly, it is abundantly clear from the plea hearing transcript that the sentencing court did not base Appellant's sentence solely on the potential long term effects of Victim's permanent brain injury, and Appellant's "new" evidence would not change the basis for his sentence.

After hearing evidence regarding Victim's head injury and multiple other injuries, such as broken bones and burns, as well as Appellant's "explanation" of what happened, the sentencing court found Victim's injuries were significant and Appellant was **not** credible.[15] Appellant then implied Victim's fractures and burns "could have happened while she was in the mother (sic) care." In response, the court noted Appellant did not take Victim to the hospital after the head injury, stating Appellant "just simply did not take care of this child," and Appellant was lucky Victim did not die. (PHT, pp. 22-25; R., pp. ____). In short, the court found Appellant inflicted Victim's injuries, including the head injury resulting in permanent brain damage, and the head injury could have

[15]Appellant's contention none of the medical records indicated "bleeding" in Victim's brain is demonstrably inaccurate. A May 8, 2008 MRI of Victim's brain revealed a "smally subacute subdural hematoma over the left cerebral hemisphere," with "subdural blood" "along the left tentorium," and a "tiny focus of extra-axial blood over the right parietal lobe." (MR Brain W/O Contrast Final Report dated May 8, 2008) (submitted with Victim's medical records under seal). In short, blood accumulated on Victim's brain and in the surrounding cerebral fluid.

caused Victim's death, particularly because Appellant did not seek medical care for Victim after the injury.[16]

When determining an appropriate sentence for Appellant, the court had sufficient information regarding Victim's injuries and prognosis, and Appellant's culpability. The eighteen year sentence imposed was well within the statutory penalty range for inflicting great bodily injury upon a child. *See* S.C. Code Ann. §16-3-95 (2003) (person found guilty of inflicting great bodily injury upon a child may be sentenced up to twenty years in prison). The sentencing judge acted within his discretion in sentencing Appellant, and even if resentencing is an available remedy, Appellant's "new" evidence does not warrant remand for resentencing.

[16]Appellant asserts the court's comment that Appellant was lucky Victim did not die "reflects his misperception of the severity of the child's injury based upon the State's recitation of the facts. (Brief of Appellant, p. 25). To the contrary, the comment was simply a statement of fact. Appellant is indeed lucky Victim did not die as a result of Appellant's action and/or inaction.

CONCLUSION

Based on the foregoing, Respondent submits the circuit court's denial of Appellant's new trial motion should be affirmed.

Respectfully submitted,

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THE STATE,

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JOHN JULIUS SMITH,

Appellant.

PROOF OF SERVICE

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

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I further certify all parties required by Rule to be served have been served.

This 19th day of October, 2015.

Sally B. Ellison

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SC Court of Appeals

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Re: The State v. John Julius Smith
Appellate Case No. 2014-001366

Dear Ms. Caudy:

Enclosed are two copies of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)