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JAN 29 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUENTIN J. EVANS,

APPELLANT

APPELLATE CASE NO. 2015-000671

ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge committed plain error by not charging the jury on the defense of accident when such a charge was supported by the evidence, the defendant's testimony, and the defense's theory of the case as stated in its arguments to the jury?

STATEMENT OF THE CASE

On April 17, 2014, a York County grand jury indicted appellant for homicide by child abuse. R. 612. On March 16, 2015, appellant was tried before the Honorable J. Derham Cole and a jury. R. 1. Kevin S. Brackett and Willy Thompson represented the State. R. 1. David C. Cook represented appellant. R. 1. The jury convicted appellant. R. 603, ll. 4 – 23. Judge Cole sentenced appellant to forty-five years' imprisonment. R. 610, ll. 6 – 17. This appeal follows.

ARGUMENT

The trial judge committed plain error by not charging the jury on the defense of accident when such a charge was supported by the evidence, the defendant's testimony, and the defense's theory of the case as stated in its arguments to the jury.

Relevant Facts

On January 23, 2014, paramedics responded to a 911 call “for an unconscious child not breathing.” R. 77, l. 21 – 78, l. 12. Appellant, the infant's father, was outside and “very upset.” R. 79, ll. 3 – 7. Appellant directed the paramedics into the house and they attempted CPR on the infant (“Minor”). App. 79, ll. 3 – 20. Minor's pupil's were fixed and dilated and she showed no signs of life. App. 81, l. 2 – 83, l. 6. Appellant told the paramedic that Minor had fallen off of a bed earlier in the night. App. 83, ll. 7 – 14.

The State presented no direct evidence that appellant harmed Minor. Instead, the State built its case around the testimony of its forensic pathologist, Dr. Craig Hart (“Hart”). R. 109, l. 21 – 110, l. 5. Judge Cole qualified Dr. Hart as an expert in forensic pathology. R. 114, ll. 9 – 13. Dr. Hart autopsied Minor on the afternoon of her death. R. 114, l. 15 – 115, l. 1. He opined that Minor's death was a homicide. R. 184, ll. 11 – 15.

Dr. Hart based his opinion on several injuries he found during the autopsy. R. 184, l. 11 – 185, l. 18. He believed that Minor's injuries were consistent with “shaken baby with impact.” R. 182, l. 16 – 183, l. 1. Dr. Hart first pointed out several bruises that he believed were fresh on Minor's body, including on the arms, face, neck, and forehead. R. 118, l. 12 – 119, l. 12. Importantly, Dr. Hart described the bruise on Minor's forehead as “linear.” R. 120, l. 23 – 121, l. 13. Minor had a fractured collar bone, injuries to the “junction of the ribs to the vertebral column,” a subdural hematoma, and retinal

hemorrhages. R. 134, ll. 1 – 2; R. 146, ll. 13 – 25; R. 160, l. 4 – 162, l. 25; R. 170, ll. 13 – 20.

Dr. Hart opined that Minor's injuries could not have occurred in a single fall from the bed. R. 181, l. 4 – 185, l. 18. However, on cross-examination, Dr. Hart was forced to admit that the "linear bruise" he described on Minor's forehead could have been from the side of a headboard or footboard on a bed. R. 193, ll. 13 – 20. Dr. Hart also admitted that had Minor's head hit the floorboard or the ground, it could cause a single retinal hemorrhage, but denied it could cause multiple retinal hemorrhages. R. 187, l. 2 – 190, l. 9.

Shortly after appellant's daughter died, the police filmed appellant reenacting his daughter's fall for the coroner. State's Ex. 52. R. 227, l. 6 – 228, l. 24. Appellant's daughter was asleep on a small pallet on his bed. State's Ex. 52. He placed Minor to sleep on her side. State's Ex. 52. Appellant got up in the night to fix Minor a bottle. State's Ex. 52. When he returned from the kitchen, he did not see Minor on the bed. State's Ex. 52. He ran to the bed and found Minor had fallen off the side of the bed nearest the wall. State's Ex. 52. He pulled Minor up by her arm and comforted her. State's Ex. 52. Minor had trouble holding up her head. State's Ex. 52. Appellant put Minor back down on her side and he positioned himself in the bed so he could watch her. State's Ex. 52. Appellant fell asleep for ten or fifteen minutes and when he awoke, he could tell that Minor has having trouble breathing and was not responding to him. State's Ex. 52. He ran to the next room to get his mother. State's Ex. 52.

Appellant testified in his own defense. Nothing was wrong with Minor during the day. R. 475, ll. 13 – 23. She ate, slept, and had dirty diapers. R. 475, ll. 13 – 23.

Appellant gave Minor a bottle at approximately 9:30 PM. R. 476, ll. 3 – 7. Minor woke up during the night and appellant tried to give her a pacifier. R. 477, ll. 11 – 23. Appellant’s brother had been sleeping in the room and then got up to move to another room because it was hot. R. 449, ll. 16 – 17. R. 477, l. 24 – 482, l. 21. Appellant got up at the same time to fix a bottle. R. 477, l. 24 – 482, l. 21. As he returned, he heard Minor crying. R. 477, l. 24 – 482, l. 21. Appellant “ran and jumped on the bed.” R. 479, ll. 1 – 5. When the baby calmed down, he put her back on her left side. R. 479, ll. 7 – 20.

Appellant dozed, but as he was sleeping he described that an image of his “daughter falling pops in my brain” and suddenly awoke. R. 481, ll. 1 – 5. Appellant could not feel her breathing and could not feel her pulse. R. 481, l. 9 – 482, l. 21. He held up her arm and it fell limp. R. 481, l. 9 – 482, l. 21. He ran to his mother’s room and his family called 911. R. 482, l. 6 – 483, l. 20. Appellant also called 911. R. 483, ll. 7 – 20. Appellant’s father performed CPR until the ambulance arrived. R. 483, l. 7 – 484, l. 15. Appellant ran outside to direct the ambulance to their house. R. 483, l. 7 – 484, l. 15.

In the first lines of his opening statement, trial counsel told the jury that appellant had always maintained his innocence from “the day of this terrible accident.” R. 70, ll. 10 – 16. In his closing, trial counsel implored the jury: “What do you do with an accident even if it’s a terrible horrific accident that takes a human’s life? Is it still an accident? Does it become a crime just because somebody passes away?” R. 536, ll. 19 – 24. The solicitor responded in his closing: “The defense contends that it was an accident. . . . That [Minor] didn’t just die as a result of an accident, an unfortunate event

that nobody could have prevented reasonably but she was killed through the intentional act of another person. A homicide.” R. 557, ll. 8 – 17.

Discussion

The trial judge did not charge the jury on the law of accident. R. 585, l. 3 – 601, l. 10. Appellant concedes that he did not request a charge on the law of accident or obtain a ruling on the charge from the trial judge. R. 532, l. 17 – 534, l. 14. R. 602, ll. 3 – 8. However, a trial judge has a duty to craft his charge to fit the facts of the case. State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989) (“In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.”).

“The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 394 (2001). “If there is any evidence to support a charge, the trial court should grant the request.” State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011).

The evidence entitled appellant to a charge on the law of accident. “Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer.” State v. Brown, 205 S.C. 514, 32 S.E.2d 825, 828 (1945). “If it be shown that the killing was unintentional; that it was done while the perpetrator was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused on the score of accident.” Id. Because the homicide by child abuse statute requires a mental state of “extreme indifference,” even if appellant acted negligently, he would still be entitled to the defense of accident. See S.C. Code Ann. § 16-3-85(A)(1). “[T]he State must prove the defendant performed a deliberate

act that he or she knew would create a risk of death to the child. A deliberate act in the face of such knowledge is a reckless disregard of the risk, and thus demonstrates an extreme indifference to the child's life." State v. Phillips, 411 S.C. 124, 135, 767 S.E.2d 444, 449 (Ct. App. 2014).

Appellant's testimony far exceeds the "any evidence" threshold necessary to charge the jury on accident. He testified that Minor fell off of the bed while he was fixing a bottle. R. 477, l. 24 – 482, l. 21. Appellant's re-enactment provided visual evidence of how the child fell off of the bed and how appellant retrieved the child from between the wall and the bed. State's Ex. 52. Nothing in appellant's testimony demonstrates that appellant acted unlawfully. While the pathologist rejected appellant's explanation of the accident, this Court does not weigh the evidence when determining whether a jury charge is proper. Furthermore, the pathologist admitted that the linear bruise on Minor's forehead could have been caused in the fall. R. 193, ll. 13 – 20.

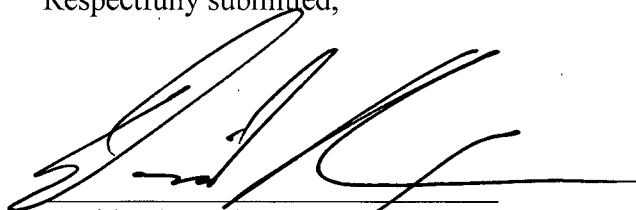
This evidence entitled appellant to a charge of accident. While appellant did not ask for such a charge, the need for it was plain from the evidence and the arguments of counsel and the trial court should have given the jury an accident charge. While "the plain error rule does not apply in South Carolina state courts," this rule is in conflict with the rule from Fuller that judges must fashion fact-specific charges on defenses. State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Only a handful of states have refused to adopt any form of plain error review. See Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 222 (2012) (noting that "[v]irtually all of the states have adopted a plain error type default standard for unpreserved contentions at least in criminal cases with only about

eight (8) states refusing to adopt such an exception or otherwise limiting any plain error review to death penalty cases or erroneous jury instruction claims.”). This Court should apply plain error in this limited circumstance and reverse.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of January, 2016.

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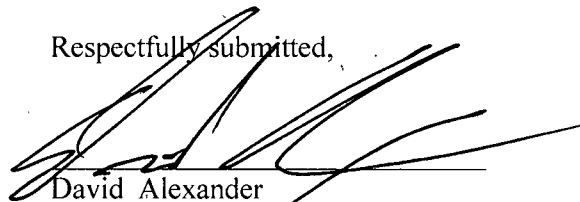
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Quentin J. Evans states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on March 19, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Quentin J. Evans.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT
STATE OF SOUTH CAROLINA

This 29th day of January, 2016.

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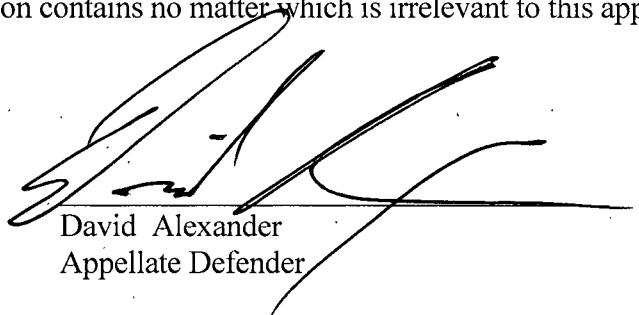
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial Transcript;
- (3) Defendant's Ex. 7;
- (4) State's Ex. 52 (video CD, to be transported).

I certify that this designation contains no matter which is irrelevant to this appeal.

January 29th, 2016



David Alexander
Appellate Defender

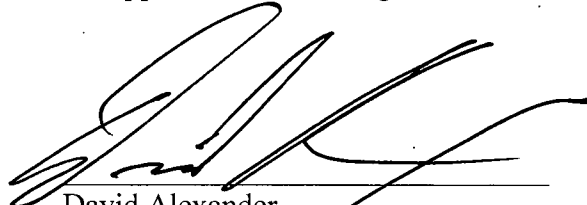
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

January 29, 2016



David Alexander
Appellate Defender

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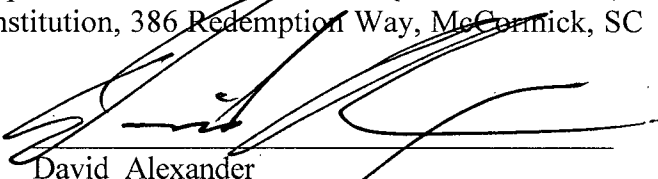
QUENTIN J. EVANS,

APPELLANT

APPELLATE CASE NO. 2015-000671

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Quentin J. Evans, # 363391 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of January, 2016.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of January, 2016.



(L.S.)

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