THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Honorable Joseph Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000764

The State, ... Respondent,

vs

Stephanie Irene Greene, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Question I

Did the trial court err in failing to direct a verdict when the state failed to prove through competent medical evidence or otherwise that the morphine in the deceased child came from the mother through breast-feeding?

Reasonable degree of medical certainty

The State has failed to argue against the position of Stephanie Greene that the State is required to prove to a reasonable degree of medical certainty that the morphine that killed Alexis Greene came from the breast milk of Stephanie Greene. No expert ever stated that such a fact was true to a reasonable degree of medical certainty. One reason that the experts for the State were unable to state such a medical fact is that the medical literature does not support such a position..

As noted in the opening brief the conclusion of Dr. David H. Eagerton that the morphine "Had to get into the baby somehow." (Rec. on App. at 369, ll 18), "It had to - - most commonly it had to get there by the oral route." (Rec. on App. at 383, ll 17-18) and "I think what we see is - - is more of a chronic type of exposure, which is consistent with through breast milk. Or it could be some combination of both. I don't know." is hardly proof to a reasonable degree of medical certainly that the breast milk of Stephanie Greene carried a lethal amount of morphine.

The only time Dr. Eagerton opined as to a reasonable degree of medical certainty was when he said the following:

> Q. (By Mr. Wise) So you - - we - - you cannot make a conclusion today as to how that morphine got into the baby.
> A. (By Dr. Eagerton) No, sir. I think I can make a conclusion as to

how. Like I said, at least some of it I believe within a reasonable degree of scientific and medical certainly had to come through the breast milk.
Rec. on App. at 384, ll 16-21.

Dr. Eagerton in his testimony following that statement was never able to say how much morphine can be obtained through beast milk. He further acknowledged that the medical literature in this area referred to a very small amount. The small amount was in the range of .04 mg per liter. He also had no studies that said that that level can be fatal to a child. He had previously acknowledged that the literature contains scant evidence of even a toxic level of morphine in breast fed infants. Rec. on App. at 367, ll 9-25 to 369, ll 1-18.[1]

Suppose Randy Greene were to bring a wrongful death case against the manufacturer of the morphine for the failure to warn the mother that the child could die from breast-feeding while taking morphine. If the same experts for the state in this case testified on behalf of Mr. Greene, the case would not go to the jury. The reason is simple - the civil court would required that Mr. Greene prove to a reasonable degree of medical certainty that the morphine in the child came through breast-milk. Under the testimony presented in this case, that burden would not have been met.

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[1] In the argument on the motion for directed verdict, the prosecuting attorney argued "And I remember specifically when Mr. Wise was asking him that question and through his testimony his opinion that this baby died from breast feeding - - from the morphine through breast milk." Rec. on App. at 456, ll 5-8.

What Dr. Eagerton actually said was:
Q. So you're in no position to say then that number came through breast milk?
A. I don't believe I've been asked one way or the other.
Q. Okay. But you don't have any basis for saying that it came through breast milk.
A. Had to get there somehow. Rec. on App. at 369, ll 12-18.
He later qualified his answer by saying "So, I don't think I have a basis to say it didn't, or at least some of it." Rec. on App. at 369, l 25 to 370, ll 1-2.

As noted in the opening brief, "the rule that when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of the experts must be at least that the disability or death 'most probably' resulted from the accidental injury." *Cross v. Concrete Materials*, 236 S.C. 440, 442, 114 S.E.2d 828, 829 (1960). *See, also, Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976)(applying the rule in a medical malpractice case). In the present case the ability to transfer different drugs through breast milk is not something that is within the common knowledge of lay people. This fact only can be established through expert testimony. The State in its brief never contended that any medical expert had testified to a reasonable degree of medical certainty that the morphine in the minor child came through breast-milk.

The State never produced any medical testimony that concluded to a reasonable degree of medical certainty that the level of morphine in the minor child could have come through breast milk. Nor did any expert testify to any language that would be the equivalent of such language. While the cause of death may have been established beyond a reasonable doubt, the criminal means of causing that death was not established beyond a reasonable doubt. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971). Unless there is to be one standard of review in a civil case involving medical testimony and another in a criminal case, this Court should reverse the convictions in this case.

Substantial Circumstantial Evidence

As both this Court and our Supreme Court has held on several occasions, in a circumstantial evidence case, the State must produce substantial circumstance to sustain a conviction. *See, State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009) and *State v. Rogers*,

405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). All contested factual issues against the appellant are resolved in favor of the State. In this case, resolving those contested issues in favor of the State, no substantial circumstantial evidence exists that morphine through breast milk caused the death of the minor child.

The State misstates the testimony of Dr. Steve Karsch. While Dr. Karch did testify that he had seen a report of a child with 84 nanograms in its blood level, that amount is substantially less than the .52 miligrams found in the minor child's blood. Compare Rec. on App. at 490, ll 23-24 to 418, l 3-4. The amount reported in the minor child was 520 nanograms per milliliter. To compare the two values it would be .52 mg/L and .084 mg/L or 520 nanogram per milliliter and 84 nanograms per milliliter. Thus, the amount reported by Dr. Karch was substantially less than the amount found in the minor child.

Regardless of the mathematical calculation, the record does not contain substantial circumstantial evidence that morphine through breast milk caused the death of the minor child. As noted above, and contrary to the position asserted by the State in its brief at page 28, the criteria for reviewing evidence in a circumstantial evidence case is whether there is substantial circumstantial evidence to sustain the conviction.

The State has argued that this is not a purely circumstantial evidence case. Br. of Resp. at 29. What direct evidence is there that the morphine level in the breast milk was of such a sufficiently high level that enough would have passed to the minor child? The State never tested the breast milk of Stephanie Greene. Without that test, the level in breast milk is speculative at best. Without knowing that level, the evidence is purely circumstantial as to the manner of delivery of the morphine.

The State has argued that "The presence of numerous other substances in Alexis is strong circumstantial evidence establishing that the lethal levels of morphine passed through Greene's breast milk to Alexis rather than some already difficult to believe theory of accidental ingestion or forced ingestion." Br. of Resp. at 30. But how does the presence of other drugs establish that lethal levels of morphine, which the literature shows had not occurred before, suddenly pass through breast milk in this case? No such testimony exists in this case. No one has disputed that an amount of some drugs will pass through breast milk. No one has even suggested that the presence of another drug enables morphine to more readily pass through breast milk.[2]

While the State has attempted to bolster its case by contending that Mrs. Greene did not inform her doctors she was pregnant or nursing, such testimony is not relevant as to whether the circumstantial evidence in this case supports the conviction. Morphine does not react differently if it is prescribed with full disclosure or not. While Dr. Eagerton did discuss a cumulative affect, he did not testify as to an elimination rate in a minor child.[3] He did not testify as to how much would have been passed to the minor child if Mrs. Greene took the medicine as prescribed or even if she were abusing it. His theory was complete speculation.[4]

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[2] Dr. Wrenn, based upon a study, opined that about 3% of the morphine level in the mother would pass to the child through breast milk. Rec. on App. at 427, ll 4-8. If this is correct, and the level in the minor child was .52 mgL, the level in Mrs. Greene would have been 17.333 mg/L. She would have died long before reaching that level.

[3] Apparently Dr. Eagleton's cumulative affect theory applied only to morphine. No other drugs were found in an abnormal amount and thus were not cumulative.

[4] The State also argues that cocaine metabolite was found in the minor child. Br. of Resp. at 8. The testimony from Quintus Young, II was that while the initial test was positive, the confirmatory test was negative for cocaine. Rec. on App. at 129, ll 24-25

While the proof for the State in this case may have been difficult, difficultly in proof cannot be interpreted as being proof. The State could have conducted additional tests in its investigation in this case. They could have tested the stomach content of the minor child. They did not. They could have tested the hair of Mrs. Greene, they did not. They could have tested the breast milk of Mrs. Greene. Again, they did not.[5]

A finding by this Court that the State has not proven the morphine was administered to the child by breast milk would in fact require a reversal of all charges. If the passing of some drugs to an infant through breast milk is deemed to be unlawful conduct to a minor child, then no nursing mother would be safe from prosecution.

As noted in the opening brief of Mrs. Greene, "It is not sufficient that they create a probability, though a strong one . . . ." *State v. Schrock,* 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). The evidence in this case is well below the probability standard of *Schrock.* If substantial circumstantial evidence has any meaning it certainly means the State must prove the case beyond a 50/50 probability.

Question II

Did the trial court err in failing to direct a verdict or grant a new trial when the State failed to prove Stephanie Greene acted with extreme indifference as required by South Carolina Code § 16-3-85?

As this Court has held "[I]n the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.

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[5] If a drug test were performed on the minor child at birth, the result was never entered into evidence.

State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). Furthermore, our Supreme Court has said "Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof." *State v. McKnight*, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). Thus, extreme indifference in the context of the homicide by child abuse act is more than mere recklessness.

The State correctly quotes Dr. Eaglerton as saying that the American Academy of Pediatrics had not recommended morphine for chronic pain while breast feeding, on cross-examination he was unable to produce a single article that supported his position. He testified that he had an article from the American Academy of Pediatrics that recommended that doctors not prescribe MS-Contin (morphine). Rec. on App. at 355, ll 2-13. At that point a break was taken so Dr. Eagleton could retrieve the article to which he was referring.

Upon Dr. Eagleton returning to the stand, he admitted the article did not exist. Rec. on App. at 357, ll 3-7. He then admitted:

> Q. (By Mr. Wise) Does that peer reviewed article talk about MS Contin being potentially dangerous creating a toxic level of morphine through breast milk?
> A. (By Dr. Eagerton) I don't believe I've seen one those of those, no sir.
> Rec. on App. at 371, ll 21

While Dr. Eagerton may have had an opinion concerning MS-Contin, he was unable to back up his opinion with any research or article. In all his research he was only able to

refer to a study that involved the level of morphine in a mother's breast milk. Rec. on App. at 358, ll 9-22. The levels in breast milk varied from 10 nanograms per milliliter to 100 nanograms per milliliter. Both of these levels are considerably below the 520 nanograms per milliliter found in this case.

The State further argues that because Mrs. Greene was taking a variety of drugs she had extreme indifference. The other opioid pain medicine she had been prescribed was oxycodone. This drug was not found in the minor child's system therefore there is no proof she was taking the drug while breast feeding the minor child. The published literature recommended against taking this drug while breast feeding. Rec. on App. at 363, ll 10-25 to 373, ll 1-20; 319, ll 16-25 to 320, ll 1-17.

What is the fact to which Mrs. Greene showed extreme indifference? When all the medical literature says taking morphine while breast feeding is safe, she could not have been acting with extreme indifference in regards to morphine. When she had all of her prescription filled at one pharmacy, she could not have been acting with extreme indifference in regards to the interaction of drugs. When the evidence shows through written documents that her primary doctors knew of each other, she could not be accused of doctor shopping and hiding prescriptions she was receiving. Rec. on App. at 169, ll 11-25 to 173, ll 1-20. In fact, the testimony shows that Drs Carol Kooistra and Susan Kovacs communicated with each other about Mrs. Greene. Rec. on App. 208, ll 1-13. Thus, the record does not establish an extreme indifference with her hiding the fact she was seeing another doctor.

The State contends "Even if the effects of the use of controlled substances by a breast-feeding mother on her child may not be precisely known, their potential harm is something

to which the public is well aware." Br. of Resp. at 36. No evidence of the common knowledge of the public was introduced at the trial. The State appears to be arguing that this Court can take judicial notices of a key element of the case against Mrs. Greene - the potential harm to her nursing child. When the published literature in the medical field fails to recognize such harm no court can take judicial notice of such a fact. The State never introduced any study that the medicine taken by Mrs. Greene in combination would cause any harm to her child.

Again the State argues through some "common knowledge" theory of proof that "Just as the public is aware of the danger of a mother's crack use to an unborn child, the general public is also certainly aware that taking medications while breast feeding poses the risk of harm to a child." Br. of Resp. at 37. First "common knowledge" was not proven at the trial below and cannot be used by this court as a fact to sustain the conviction. Furthermore., when the medical literature does not support this broad statement, how can such knowledge be "common knowledge" to the general public? Mrs. Greene never used morphine without medical supervision. The State argues that Mrs. Greene's action were especially egregious because she was a nurse. The testimony was she researched the drugs. The research would have shown that taking morphine while breast-feeding was safe.

While the question of intent is generally for the jury to decide, the State must produce at least some evidence from which the jury could conclude that Mrs. Greene acted not carelessly or recklessly, but with extreme indifference to the consequences of her actions. She took the precaution of having her prescriptions filled at the same pharmacy. Except for one, they were all filled in her current married name. The one that was not was in her prior name. No one ever testified that they would not have issued or filled that prescription because it was in the

"wrong" name. Neither this court nor the jury can speculate as to any intent from that one prescription.

Question III

Did the trial court err in failing to instruct the jury they could convict on only one of the charges as a conviction of more than one charge would violate the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and Fifth Amendment to the Constitution of the United States of America as the same fact was used to prove the cause of death in each case?

The unlawful conduct toward a child was premised upon the fact that Mrs. Greene took drugs that passed through her system into her infant child through breast milk. The involuntary manslaughter charge is premised upon the fact that Mrs. Greene took drugs that passed through her system into her infant child through breast milk. The homicide by child abuse is premised upon the fact that Mrs. Greene took drugs that passed through her system into her infant child through breast milk. The same basic fact is proven in each case.

Another way of examining the double jeopardy argument is to assume that the State had elected to prosecute Mrs. Greene in three separate actions. If the jury had acquitted Mrs. Greene on the charge of homicide by child abuse, could the State have then tried her for unlawful conduct toward a child? And if acquitted in that action could they have then tried her for involuntary manslaughter? The simple answer is no. If the State's concept of double jeopardy is correct, the protection is non existent because the legislature could always define different elements to the same facts and have multiple prosecutions.

What fact is different in an involuntary manslaughter case that is not present in the homicide by child abuse case? This is the key question as stated in *Blockberger v. United States.* Is the reckless conduct required by involuntary manslaughter always the extreme indifference of homicide by child abuse? As noted in the opening brief the only difference is the degree of culpability. Extreme indifference is a greater degree of culpability than the recklessness of involuntary manslaughter. While homicide by child abuse always requires the death of a child, that is not a fact different from involuntary manslaughter which may include a child.

Our Supreme Court has held "[C]hild abuse could never be defined as an unlawful activity 'not tending to cause death or great bodily harm,' and for this reason, the elements of involuntary manslaughter will never be included in the greater offense of homicide by child abuse." *McKnight v. State*, 378 S.C. 33, 52, 661 S.E.2d 354, 363 (2008). The State ignores in its brief that the difference between the two is the degree of culpability. But if the elements are not the same, then an abnormality occurs. By convicting on both, the jury has found simultaneously that Mrs. Greene committed child abuse resulting in death and committed an act which was not likely to cause death. The same act could not satisfy both.

As to unlawful conduct toward a child, the same facts are required for homicide by child abuse. While unlawful conduct toward a child does include the requirement that there be a relationship between the child and the defendant, under the facts of this case that relationship was established and as such unlawful conduct would be a lesser included offense. As this Court has said "A trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the defendant committed the lesser included of the crime charged. *State v. White*, 353 S.C. 566, 571, 578 S.E.2d 728, 731 (Ct. App. 2003) aff'd as

modified, 361 S.C. 407, 605 S.E.2d 540 (2004)(citations omitted). Here the facts would support a conviction of unlawful conduct toward a child and therefore the charge under the facts of this case would be a lesser included. Unlawful conduct toward a child would not be a lesser included if the defendant did not have relationship with the child that was within the meaning of the statute. But if that relationship had not been proven, then there would also be no basis to submit the case to the jury.

Under the State's theory of double jeopardy the legislature could pass many laws giving different names to the same elements or requiring slightly different factual proofs for the exact same act and a defendant would not have any protection from double jeopardy. In the context of a search and seizure Justice Cothran warned "To hold that the citizen shall enjoy such immunity, and yet when it is flagrantly violated his person shall be subjected to punishment and his property confiscated, upon the strength of evidence thus unlawfully obtained, is but to 'keep the promise to the ear and break it to the hope.'" *State v. Prescott*, 125 S.C. 22, 117 S.E. 637, 638 (1923)(dissenting). *See also*, *Sandel v. State*, 126 S.C. 1, 119 S.E. 776 (1922). The same principle applies to double jeopardy protections.

Question IV

Did the trial court err in failing to require the state to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the constitution of the United States of America by her counsel not being able to respond to new arguments made by the state in its closing argument?

The order of closing arguments and the content of those closing arguments are subject to a due process analysis. As the Delaware Supreme Court has said "For a time, courts were adamant in confining the scope of a plaintiff's rebuttal strictly to a response to points raised in defense counsel's closing summation. . . . The rule is rooted in the concepts of due process and fundamental fairness. Simply put, it is unfair and often highly prejudicial for plaintiff's or State's counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply. *Bailey v. State*, 440 A.2d 997, 1002 (Del. 1982)(internal citation omitted). This simple statement sums up the position of the appellant.[6] This case was cited in the opening brief of Mrs. Greene.

Contrary to what the State appears to argue in its brief, Mrs. Greene is not contending that she was entitled to the last argument. Mrs, Greene acknowledges that this is not available to a defendant who presents evidence as she did. What Mrs. Greene contends is that the State should be required to open fully on the law and the facts and then reply only to new issues raised by the defense argument. This is not asking too much and is of course fndamentally fair.

In his closing the solicitor strongly suggested that Dr. Bridges told her not to take morphine. Rec. on App. at 547, ll 21-23. Dr. Bridges only told Mrs. Greene not to take vicoprofen because it is dangerous in the third trimester of her pregnancy. Rec. on App. at 224, ll 21-25 to 225, ll 1-9. Because the State was not required to open fully defense counsel did not have an opportunity to correct this incorrect impression. He further states that Dr. Wren had

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[6] Recently the South Carolina Supreme Court has proposed a change to rule ___ to meet the objection of the appellant in this case.

testified the minor child died from morphine exposure through breast milk. Rec. on App. at 554, ll 8-10. Dr. Wren testified he did not know how the minor child obtained the morphine level. As he stated "I don't know how it got there." Rec. on App. at 430, ll 9. He further argued that "This baby should not have been exposed to vicoprofen." Rec. on App. at 546, ll 22-23. The testimony at trial was that no hydrocodone, the active ingredient in vicoprofen, was not present in the minor child's blood. Rec. on App. at 320, ll 13-17. Had defense counsel had a fair opportunity to refute these allegations, the jury would have had a fairer understanding of the evidence in this case.

Not requiring the State to open fully on the law and the facts deprives defense counsel of the right to fully respond to the theory of the State in prosecuting the case and is inherently unfair. The State, however, has the advantage of hearing the complete theory of defense counsel before he makes a closing argument. Such a procedure is unfair.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, the judgment in this matter should be reversed.

July 15th, 2015

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on July 16, 2015, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the Final Brief and Final Reply Brief in the above case addressed to David Spencer, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 16 day

of July, 2015.

Mary Jane Hartley (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

July 15th, 2015

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