THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions

Donald B. Hocker, Circuit Court Judge

Opinion No. 2016-UP-394 (S.C. Ct. App. filed August 3, 2016)

Appellate Case No. 2014-000197

THE STATE, ...RESPONDENT,

v.

SHAWN PATRICK WHITE, ...APPELLANT.

RETURN TO PETITION FOR REHEARING

On August 3, 2016, this Court issued an unpublished opinion which affirmed Appellant's conviction for homicide by child abuse. State v. White, Op. No. 2016-UP-394 (S.C. Ct. App. filed August 3, 2016). On August 31, 2016, Appellant submitted a Petition for Rehearing and by letter dated September 1, 2016, this Court requested that Respondent (the State) submit a return within ten days of the date of the letter. This return in opposition to the petition for rehearing now follows. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. Indeed, the Court appears to have employed a straightforward application of the standard of review for the denial of a motion for a directed verdict in finding the trial court properly submitted the case to the jury. The Court properly concluded the State submitted direct or substantial circumstantial evidence reasonably tending to prove Appellant guilty of each element of homicide by child abuse pursuant to Section 16-3-85 of the South Carolina Code.

First, Appellant argues this Court should reconsider its decision because White's presence alone with the victim during a portion of the time frame in which her acute injury occurred does not rise to the level of substantial circumstantial evidence of guilt. Yet, the unpublished opinion demonstrates this Court properly viewed the evidence in the light most favorable to the State and concluded there was direct or substantial circumstantial evidence reasonably tending to prove Appellant guilty of homicide by child abuse.

Based upon the expert medical testimony, it is uncontested that Victim's death was the result of injuries inflicted from non-accidental, blunt force head trauma. (R.p.170; p.213-p.215; p.285; p.308; p.313; p.322; p.325-p.328; p.333-p.334; p.337-p.338; p.351-p.352; p.376). Specifically, the injuries were inflicted from a non-accidental shake and a slam. (R.p.308; p.313; p.322; p.309-p.311; p.348-p.349; p.373-p.381). Expert medical testimony directly refuted any suggestion that the fatal injuries were caused by Victim's minor sister or a fall from the porch nine days earlier. (R.p.311-p.312; p.349-p.350). Expert medical testimony taken in the light most favorable to the State suggested that the injuries in question occurred "more than a few hours but not a full day" before the Victim arrived at the hospital and the first CAT scan was

administered. (R.p.213-p.214; p.305; p.288; p.304; p.319). However, this time frame was thereafter more specifically delineated by uncontested expert medical testimony indicating Victim would have not have been normal and would not have been able to eat or play but would have been nonfunctional after the fatal injuries were inflicted. (R.p.313-p.214; p.339; p.350-p.351). Appellant and Victim's sisters indicated Victim was happy, eating, interacting normally and playing with her sisters up to 10:00 p.m. on August 7, 2012. This evidence substantially limits the time when the injury could have occurred to some point after 10:00 p.m. on August 7th and within approximately thirteen hours before Victim was presented to medical care providers in Greenwood. This time frame is consistent with the medical testimony respecting the probable time the injury occurred. Dr. Troup testified that had the injury occurred more than one day prior to coming to the hospital, Victim would not have been normal leading up to admission and, "that some of the findings deeper in the brain stem on the other side would have looked worse by then." (R.p.323, lines 22-25).

Victim became nonfunctional after she was left alone with Appellant at 10:00 p.m. Victim was inexplicably placed on her back by Appellant in the Pack n' Play despite the fact that Appellant knew Victim preferred to sleep on her stomach. Appellant covered Victim with a blanket at some point that night and Victim was still on her back and covered with a blanket when LaBounty came home despite Victim's preference to sleep on her stomach. Appellant also ensured that Victim was covered with a blanket when he left the home the next morning likely to hide the bruises on the back of Victim's head, back of her neck, and left and right areas of her back from slam injuries which were later discovered by medical experts. The blanket also hid the marks and injuries on Victim's legs and arms. Victim did not awaken as she normally did for a bottle at 6:30 a.m. and did not wake up later at the normal time. In fact, Victim never woke up.

The sound LaBounty heard from the Victim when she came home from work was likely Victim struggling to breath and not snoring. Medical testimony reveals "a person may be unable to discern whether [a] child was sleeping or unconscious if the person was not aware [ ] head trauma had occurred." State v. Palmer, 408 S.C. 218, 226, 758 S.E.2d 195, 199-200 (2014).

In statements to a SLED agent, Appellant volunteered that the LaBounty's children were "spoiled brats," and admitted that only he and the girls were with Victim the night the injuries occurred. Appellant also volunteered that he put Victim in the Pack n'Play that night and "everything went to s__ after that. You don't think about shaking a baby to see if it is okay." (R.p.235). He also volunteered, "I guess they think it happened that night. But [Victim] didn't hit her head on the Pack n' Play." (R.p.233; p.236; p.239-p.240). These statements and Appellant's acts of accusing his brother and Victim's six year old sister of perpetrating the fatal injuries constitute evidence of Appellant's consciousness of guilt. State v. McDowell, 266 S.C. 508, 224 S.E.2d 89 (1976) (stating that any act, conduct, or statement by Appellant is admissible as evidence of consciousness of guilt).

Moreover, LaBounty was never alone with Victim after Victim was last seen eating, playing and interacting normally. Upon arriving home from work, LaBounty napped on a couch in the living room with Appellant and later with Child R. LaBounty moved with Child R to the bed in her bedroom where she was ultimately joined by all of her children. After LaBounty and the children got out of her bed, LaBounty was in the presence of Victim's sisters all morning, including when the door was open to the porch of the small home while the older girls colored. Victim's sisters testified that they did not hear or see LaBounty injure Victim the morning Victim went to the hospital. Appellant conceded to law enforcement officers that LaBounty would never harm her children. This case is clearly distinguishable from State v. Hepburn, 406

S.C. 416, 753 S.E.2d 402 (2013), where two adults were in the home at the time the injuries were inflicted and were jointly tried for the offenses. The evidence in this case does more than raise a suspicion of the identity of the person who inflicted Victim's fatal injuries; instead it establishes that no one other than Appellant is guilty. There is no reason for this Court to reconsider its decision to affirm the trial court's denial of Appellant's motion for a directed verdict.

Second, Appellant argues this Court should reconsider its decision because the testimony of Child C and Child I raised merely a suspicion of guilt and does not amount to proof. However, this Court appropriately focused on the existence of evidence and not its weight. That evidence, viewed in the light most favorable to the State, showed Appellant was the only adult alone with Victim when the children ended their play at 10:00 p.m. on August 7, 2012, until LaBounty came home at 2:00 a.m. on August 8, 2012. At some point after 10:00 p.m. and before LaBounty came home, Victim's two sisters heard loud noises described as "bang, bang, bang" on the floor coming from the living room where only Appellant and Victim were located. Appellant was the only adult in the home at the time. Child C heard Victim cry in connection with the banging. Victim's sisters were locked in their bedroom by Appellant at the time and could not get out. The evidence establishes that Victim suffered a "slam" injury and had bruises on the back of her head, the back of her neck, and the left and right areas of her back consistent with being slammed on the floor or other surface. Thus, the testimony of Child C and Child I provided substantial circumstantial evidence of Appellant's guilt and raised more than mere suspicion.

Third, Appellant argues this Court should reconsider its decision because "it does not address his argument that the State failed to produce substantial circumstantial evidence that he acted with 'an extreme indifference to human life.'" (Petition for Rehearing, p.3). However, this

Court specifically noted the statutory requirement that the death must occur "under circumstances manifesting an extreme indifference to human life" in affirming Appellant's conviction. Furthermore, the evidence reflects that substantial, violent force was required to inflict the fatal injuries. (R. p.301-p.303; p.318). Appellant was the only adult alone with Victim when the children ended their play at 10:00 p.m. on August 7, 2012, until LaBounty came home at 2:00 a.m. on August 8, 2012. At some point after 10:00 p.m. and before LaBounty came home, Victim's two sisters heard loud noises described as "bang, bang, bang" on the floor coming from the living room where only Appellant and Victim were located. The evidence establishes that Victim suffered a "slam" injury and had bruises on the back of her head, the back of her neck, and the left and right areas of her back consistent with being slammed on the floor or other surface. Thus, the State submits this Court sufficiently addressed Appellant's claim that the State failed to produce evidence of extreme indifference, and the substantial evidence itself supported the Court' ruling.

Finally, Appellant argues this Court should reconsider its decision because it does not address Appellant's argument that the trial court improperly weighed the evidence. He points to particular evidence considered by the trial judge in denying his motion for a directed verdict. However, this consideration of the evidence merely demonstrates the trial court was concerned with the existence or nonexistence of evidence, not its weight. Contrary to Appellant's claim, the trial court merely recited the evidence presented at trial and did not weigh it. It is Appellant who asks this Court to improperly weigh the evidence by pointing out inconsistencies in testimony rather than considering it in the light most favorable to the State. The credibility of a witness and weight to be accorded evidence are matters for the jury and not the trial court when ruling on a directed verdict motion or for this Court when reviewing the trial court's ruling.

WHEREFORE, based on the foregoing arguments and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
September 12, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions

Donald B. Hocker, Circuit Court Judge

Opinion No. 2016-UP-394 (S.C. Ct. App. filed August 3, 2016)

Appellate Case No. 2014-000197

THE STATE, ...RESPONDENT,

v.

SHAWN PATRICK WHITE, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Return to Petition for Rehearing*, dated September 12, 2016, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Kathleen Chewning Barnes, Esquire
Barnes Law Firm, LLC
Post Office Box 897
Hampton, SC 29924

Robert M. Dudek, Chief Appellate Defender
Division of Appellate Defense
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29201-1589

I further certified that all parties required by Rule to be served have been served. This 12th day of September, 2016.

Angela Bennett
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

September 12, 2016

Kathleen Chewning Barnes, Esquire.
Barnes Law Firm, LLC
Post Office Box 897
Hampton, SC 29924

Robert M. Dudek, Chief Appellate Defender
Division of Appellate Defense
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29201-1589

State v. Shawn Patrick White
Appellate Case No. 2014-000197

Dear Ms. Barnes and Mr. Dudek:

I am enclosing one (1) copy of the Return to Petition for Rehearing in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services