

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

RECEIVED

Edward W. Miller, Circuit Court Judge SEP 21 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TARRAN MARTEIOUS EDWARDS,

APPELLANT

APPELLATE CASE NO 2016-000333

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in instructing the jury that Appellant could be found guilty of homicide by child abuse by proving Appellant knowingly aided and abetted another person to commit child abuse or neglect which resulted in the death of a child under the age of eleven where the state had indicted Appellant as the principal only and not under the aiding and abetting portion of the statute?

STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant for homicide by child abuse in violation of section 16-3-85(A)(1) of the South Carolina Code. R. 243-244. Specifically, the indictment alleged that Appellant “did in Greenville County, on or about the 17th or 18th day of November 2013, cause the death of [Minor], a child under the age of eleven, while committing child abuse or neglect, and the death occurred under circumstances manifesting an extreme indifference to human life.” R. 243-244. The indictment provided notice that the state alleged Appellant had violated section 16-3-85(A)(1) of the Code. R. 243-244. The state called the case for trial before the Honorable Edward W. Miller and a jury on February 8-9, 2016. R. 1. Leigh Booth Paoletti represented the state. R. 1. Amanda L. Wicker and Parker Ann Baxley represented Appellant. R. 1. The jury found Appellant guilty of homicide by child abuse. R. 238, ll. 8-12. Judge Miller sentenced Appellant to thirty years’ imprisonment. R. 240, ll. 18-20; R. 245.

Appellant filed a notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in instructing the jury that Appellant could be found guilty of homicide by child abuse by proving Appellant knowingly aided and abetted another person to commit child abuse or neglect which resulted in the death of a child under the age of eleven where the state had indicted Appellant as the principal only and not under the aiding and abetting portion of the statute.

Relevant facts

In August of 2013, Danielle Samples gave birth to Minor. R. 112, ll. 20-22. When Minor was approximately nine weeks old, he began staying with Tangela Kennedy and Appellant on the weekends. R. 93, l. 21 – R. 94, l. 2; R. 95, ll. 19-23; R. 111, ll. 17-19. Kennedy and Appellant were engaged and living together. R. 92, ll. 4-11. Over the weekend of November 17, 2013, Minor was with Kennedy and Appellant from late Friday evening through Sunday night while Samples went out of town. R. 96, ll. 9 – R. 97, l. 9; R. 115, ll. 6-14; R. 116, ll. 15. When Samples returned home on Sunday night around 8 p.m., she called Kennedy regarding Minor. R. 116, ll. 10-23. According to Samples, Kennedy wanted to keep Minor one more night. R. 116, ll. 17-18. This assertion seemed inconsistent with Kennedy's testimony that around 5 p.m. on Sunday she began feeling ill with a stomach virus and advised Samples of her symptoms. R. 97, ll. 10-11; R. 97, l. 25 – R. 98, l. 6; R. 107, ll. 18-20. Nevertheless, Minor remained with Kennedy and Appellant.

Over the course of Sunday afternoon and evening, Kennedy's illness progressed quickly, and at 11:29 p.m., she arrived at the emergency room of the local hospital. R. 99, ll. 13-17.¹ Kennedy claimed Appellant placed Minor in his car seat and into the car, and that Minor was

¹ Video evidence confirmed Kennedy's arrival at the emergency room. R. 83, ll. 14-20.

“fine” at the time. R. 99, l. 19 – R. 100, l. 12. Oddly, however, Kennedy stated the last time she “actually put [her] eyes on [Minor] before [she] got out of the car” at the emergency room was “[b]efore [they] walked out of the door” from the apartment. R. 101, ll. 6-10. While Kennedy entered the emergency room, Appellant and Minor waited outside. R. 102, ll. 4-6. Kennedy and Appellant spoke by phone and agreed that Kennedy would stay at the hospital while Appellant returned home with Minor. R. 102, ll. 7-24.

Shortly thereafter, Appellant called Kennedy and said that when he was changing Minor’s diaper, Minor was not moving and not breathing. R. 103, ll. 5-21. Kennedy told Appellant to take Minor to Samples’ home. R. 103, ll. 22-24. Around midnight, Samples heard a knock at her door. R. 117, ll. 1-10. When she opened her door, Appellant was there with Minor. R. 117, ll. 16-17. Frantic, Appellant told her that Minor was not breathing. R. 117, ll. 18-19. At 12:15 a.m., Appellant and Samples called Kennedy from Samples’ home. R. 104, ll. 2-18. While Samples and Kennedy spoke by phone, Appellant called 911 for help. R. 118, ll. 13-23; R. 122, ll. 15-17. When EMS arrived at 12:23 a.m., the paramedic detected pulseless electric activity (PEA), which indicated “the downtime in which the child did not have a pulse was a very short time.” R. 59, l. 13 – R. 60, l. 3. Samples left with Minor in the ambulance to go to the hospital. R. 58, ll. 17-19; R. 67, ll. 4-6; R. 119, ll. 7-8. Appellant gathered Samples’ other three children and followed the ambulance to the hospital. R. 119, ll. 8-9; R. 67, ll. 7-13.

Kennedy denied observing “anything happen to [Minor] that would cause him to have bleeding on his brain.” R. 105, l. 25 – R. 106, l. 2. She also denied hurting Minor. R. 106, ll. 3-5.

Although Minor’s heart had stopped prior to his arrival at the emergency room, medical personnel were able to get his heart rate back. R. 134, ll. 1-3. Medical evaluations conducted at

the hospital revealed Minor had no brain function. R. 137, ll. 15-19. Additionally, testing revealed subarachnoid hemorrhage, subdural hemorrhage, and cerebral edema. R. 139, ll. 2-20. Although the cerebral edema was indicative of oxygen deprivation, the hemorrhages indicated trauma. R. 139, l. 21 – R. 140, l. 5.² After seventy-two hours, Samples removed Minor from life support. R. 120, l. 20 – R. 121, l. 7. The treating physician explained that subdural bleeding generally resulted from “an acceleration, deceleration type of injury.” R. 148, ll. 17-19. Not only could such an injury result from a car accident, but a repetitive acceleration, deceleration action could cause the injury. R. 150, ll. 13-18. The physician described Minor’s injuries as most consistent with “nonaccidental trauma,” which used to be called “shaken-baby syndrome.” R. 153, ll. 1-6. However, the doctor was unable to state *when* the injury to Minor occurred. R. 158, ll. 1-4.

During the autopsy, the pathologist found evidence of Minor’s brain swelling and subdural hemorrhage. R. 204, l. 12 – R. 205, l. 20. Additionally, the pathologist found “old blood” in the spinal canal within the neck region. R. 208, l. 21 – R. 209, l. 3. He also found “hemorrhage or trauma” to the “nerve roots” within the neck region. R. 209, ll. 4-8. Ultimately, he opined the injuries were the result of “hyperflexion, which is the head coming forward, and hyperextension, which is the neck going back.” R. 209, ll. 18-25. The cause of death was “nonaccidental head injury” per the pathologist. R. 210, ll. 8-12. He also ruled the death a homicide. R. 211, ll. 3-7.

Based upon the timeline presented by the evidence, the state’s case against Appellant was that the fatal injuries to Minor had to have occurred when Minor was solely in Appellant’s care.

² A pediatric ophthalmologist found hemorrhages behind both eyes. R. 187, ll. 7 – 25. According to the ophthalmologist, the injuries required repetitive force, such as “repetitive, violent shaking backwards and forward.” R. 192, ll. 6-25.

R. 218, l. 18 – R. 219, l. 14. The prosecutor relied upon the testimony of the physician and the pathologist to argue to the jury that the injuries were not the result of an accident, but were inflicted. R. 215, l. 15 – R. 216, l. 1. According to the medical evidence, the prosecutor argued, Minor died as a result of “what doctors would formerly call shaken-baby syndrome, now called abusive head trauma.” R. 216, ll. 17-20. The state told the jury that “if anybody witnessed these injuries happening to a child, they would know immediately that the child needed medical attention.” R. 217, ll. 19-21. Relying upon the testimony of Kennedy and statements allegedly made by Appellant, the state argued Minor was “fine at the hospital,” but stopped breathing at home. R. 218, ll. 3-4. Minor’s injuries were “inflicted,” and “there were two people who had any contact with him for at least two days before he presented with these injuries, and there was one person who was with him when he quit breathing.” R. 218, ll. 10-14.³

The state argued Appellant “apparently snapped” and shook Minor “and caused those injuries” during the between when he dropped off Kennedy and called her to say Minor was not breathing. R. 220, ll. 13-21; R. 222, l. 23 – R. 223, l. 2. Admittedly, the prosecutor was unable to provide the jury with a motive. App. 221, ll. 1-13. The state suggested that Minor woke up and started crying inconsolably. App. 222, ll. 18-22.

In charging the jury, the judge instructed that Appellant had been charged with homicide by child abuse. He explained that in order for the jury to find Appellant guilty:

[T]he state must prove the following things beyond a reasonable doubt: one, that the defendant caused the death of a child under the age of 11 while committing

³ Importantly, the solicitor argued that Ms. Kennedy arrived at the emergency room at 11:29 or 11:30. R. 218, ll. 21-23. When the paramedic first touched Minor at 12:23, he “had no pulse, no heartbeat, his pupils weren’t responding, his limbs were limp,” but he had “a tiny little bit of electrical activity in his heart. R. 219, ll. 15-18. According to the treating physician, “the significance of that tiny little bit of electrical activity in his heart” meant “that his symptoms had not started hours before,” but had “started very close in time to when he presented to medical personnel for the first time at 12:23 a.m. R. 219, ll. 19-24.

child abuse or neglect. Child abuse or neglect is an act or failure to act which causes harm to the child's physical health or welfare. Harm to the child's physical health or welfare means that the defendant either, one, inflicted or allowed to be inflicted on the child physical injury; two, failed to supply the child with adequate food, clothing, shelter or healthcare and this failure caused a physical injury or condition which caused death; or three, abandoned the child causing the child's death.

R. 233, ll. 9-21. The judge explained that the state "must also prove beyond a reasonable doubt that the death occurred under circumstances showing an extreme indifference to human life." R. 233, ll. 22-23.

Although the evidence before the jury was that Appellant was the principal and he had not been charged as an aider/abettor, the judge instructed the jurors that the state "may **also** prove homicide by child neglect by proving beyond a reasonable doubt that the defendant knowingly aided and abetted another person to commit child abuse or neglect which resulted in the death of a child under the age of 11." R. 233, l. 24 – R. 234, l. 3 (emphasis added). He defined "aid" as "to help, to promote the course or accomplishment of or to give support to or to give assistance to." R. 234, ll. 4-6. He defined "abet" as "to encourage or appear to favor or support." R. 234, ll. 6-7.⁴ The judge used a verdict form and instructed the jury that there were "two possible verdicts" in the case – "either guilty or not guilty." R. 234, ll. 10-14.

⁴ Trial counsel did not object to the judge's jury instructions. Appellant readily admits this error is unpreserved for appellate review. Nevertheless, Appellant respectfully requests this Court reach the merits of the issue in the interest of judicial economy where the error is obvious from the record and prejudicial to Appellant. Furthermore, it is unclear whether the jury convicted Appellant as a principal or an aider/abettor, which would have impacted the sentencing structure. Under the statute, a person convicted under subsection (A)(1) may be imprisoned between twenty years and life. S.C. Code Ann. § 16-3-85(C)(1). However, a person convicted under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years. S.C. Code Ann. § 16-3-85(C)(2). Thus, it is possible the jury convicted Appellant as an aider/abettor, for which he would have been exposed to a term of imprisonment between ten and twenty years, but he was sentenced to thirty years' imprisonment due to the judge's error.

During the deliberations, the jury asked a series of questions: “Number one, when is the last time Ms. Kennedy had eyes on the baby? What was the baby doing? Two, how long after trauma could a heart pulse electrical activity still exist? Three, who put the baby in the car seat on the way to the ER? Four, we want Ms. Kennedy’s transcript.” R. 236, ll. 5-11; R. 242. To answer the questions, the judge had the court reporter play Kennedy’s testimony. R. 237, ll. 2-14. Approximately one hour later, the jury returned with a verdict finding Appellant guilty. App. 238, ll. 8-10.

Appellant maintained his innocence during the sentencing proceeding. R. 240, ll. 12-16. The judge sentenced him to thirty years’ imprisonment and gave him credit for 813 days, which he had spent in jail awaiting trial. R. 240, ll. 18-22; R. 245.

Discussion

The state alleged Appellant committed homicide by child abuse in violation of section 16-3-85(A)(1) of the South Carolina Code. R. 243-244. That portion of the statute, which the indictment quoted and referenced, provides that a person is guilty of homicide by child abuse if the person “causes 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). Alternatively, the statute provides that a person is guilty of homicide by child abuse if the person “knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.” S.C. Code Ann. § 16-3-85(A)(2).

The South Carolina Supreme Court held “[t]he common law principles of accomplice liability ... do not apply in the context of the homicide by child abuse statute.” State v. Smith, 406 S.C. 215, 219, 750 S.E.2d 612, 614 (2013). Construing the plain and ordinary meaning of

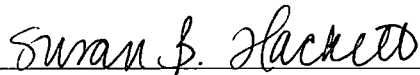
the statutory language, the Court held “the language of section 16-3-85 unambiguously signal[ed] the General Assembly’s intent to codify two distinct crimes – homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to section (A)(2), each with distinct elements and sentencing ranges.” Id. The Court went on to explain that “[b]ecause the section (A)(2) offense is not a lesser-included offense of section (A)(1), an indictment expressly charging only a section (A)(1) offense does not provide notice of a section (A)(2) charge.” Id. at 219-220, 750 S.E.2d at 614. According to the Court, where “the General Assembly provides separate offenses in the same statutory scheme, only the indicted offense should be submitted to the jury.” Id. at 219 n. 6, 750 S.E.2d at 614 n.6. The Court explained that charging the jury with the unindicted section (A)(2) offense was “error and constituted a material variance from the indicted crime.” Id. (Bailey v. State, 392 S.C. 422, 431, 709 S.E.2d 671, 676 (2011)).

The trial judge erred in charging the jury with not merely an alternative theory of liability, but an entirely separate offense, where Appellant had no notice of the offense and the state had not indicted him with the offense or alternative theory. The state’s evidence supported its theory that Appellant was the principal – the person who inflicted the injuries. Certainly, the record contained some evidence that Kennedy may have inflicted the fatal injury shortly before she went to the emergency room, but in order for the jury to arrive at that conclusion, the jury would have to disbelieve the evidence that Minor was “fine” when Kennedy went to the hospital. The state presented a case of circumstantial evidence that the injury had to occur during a short window of time prior to 12:23 a.m. The undisputed evidence was the Kennedy was at the emergency room at 11:30 p.m. According to the state, Appellant alone inflicted the injury causing Minor’s death. Appellant had been apprised that the state would proceed under this

theory at trial as evidenced by the indictment. The plain and ordinary language of the indictment only charged Appellant as a principal. He had no notice that the jury would be permitted to consider whether he was guilty as an aider/abettor. By instructing the jury that they could find Appellant guilty as an aider/abettor, the judge erred.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of September, 2016.

STATE OF SOUTH CAROLINA

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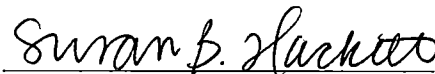
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tarran Marteious Edwards states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge Edward W. Miller, which was held on February 8-9, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Tarran Marteious Edwards.

Respectfully Submitted,



Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of September, 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) Entire trial transcript;
- (2) Court's Exhibit #2 (jury note);
- (3) True-billed indictment (2014-GS-23-467); and
- (4) Sentence sheet

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

September 21, 2016

Susan B. Hackett
Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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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."

September 21, 2016.

Susan B. Hackett

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Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned 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 have been served on Tarran Marteious Edwards, 323814, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of September, 2016.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of September, 2016.

[Signature] (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.