STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2016-000708

The State, Respondent,

v.

Hassan Tyler, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The circuit court properly found there was no discovery violation or grounds for a mistrial in relation to the disclosure of the State expert's written notes.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On October 16, 2014, the Horry County Grand Jury indicted Appellant Hassan Tyler on one count of homicide by child abuse, arising from the death of Appellant's three month old son ("Victim') in December 2013. The matter was called for a jury trial on March 24, 2015, before the Honorable Steven H. John, Circuit Court Judge.

Victim's mother ("Mother") testified she met Appellant when they were employed at the same place, and they became romantically involved. In March 2013, she told Appellant she was pregnant and "he got mad and he walked out," because he did not want any more children. Appellant did not attend any of Mother's doctor's appointments during the pregnancy, he was not present when Victim was born on September 29, 2013, and he did not even see Victim until October 22, 2013. Between September 29 and December 18, 2013, Appellant saw Victim approximately five times. (Trial Transcript [TT], pp. 106-110; Record on Appeal [R.], pp. 73-77).

Mother testified Appellant, his father and his fourteen year old son, brought diapers and baby wipes for Victim to her home on December 18th. After they sat inside and played with Victim for a few minutes, Appellant's father suggested they take Victim home with them for the night. Mother agreed and packed a diaper bag with clothes, diapers and bottles. About ten minutes after they left her home, Mother realized they left Victim's pacifier behind, so she called Appellant and told him Victim might not sleep without his pacifier. Appellant responded "we good." (TT, pp. 110-115; R., pp. 77-82).

On the morning of December 19th, Mother spoke to Appellant by telephone to check on Victim and arrange a time for Appellant to bring him back to her home. She could hear Victim crying in the background, and stated it was an "unusual" cry because it was so loud. When she

asked Appellant what was wrong with Victim, he told her Victim was crying because he had been sleeping, and "all [Appellant] did was touch his lip." Appellant also told her Victim had a bruise over his eye from "laying across [Appellant's] belt buckle," and he had "put a hickey" on Victim's neck. (TT, pp. 115-119; R., pp. 82-86).

The next time Mother spoke with Appellant, he told her Victim had stopped breathing and he was taking him to the hospital. She immediately went to the hospital in Loris, and when she saw Victim, he was laying on the hospital bed "lifeless." Victim remained unconscious until he was airlifted to McLeod Medical Center in Florence later than afternoon. Mother met them at the Florence hospital, and Victim's condition had worsened. When she touched him, Victim "was cold." Victim never regained consciousness, and he died on December 20th after all life support was removed. (TT, pp. 119-122; R., pp. 86-89).

Mother's step-father testified he was present at Mother's home when Appellant picked Victim up on December 18th. He stated Victim was a healthy, happy baby, and when Appellant left with him that night, there were no bruises on Victim's body. When he saw Victim the next day in the hospital, Victim was cold, unresponsive, and had bruises on his body. (TT, pp. 141-149; R., pp. 108-116).

A Loris hospital emergency room nurse ("Nurse") testified she was working on December 19th when Appellant arrived with Victim and said he wasn't breathing. She took Victim from Appellant, who appeared to be very calm, and initiated resuscitation efforts. While hospital staff were working on Victim, Nurse noticed some bruising on his forehead, neck and body. Appellant told hospital personnel Victim had been laying on the bed shaking for one hour,

and when he stopped breathing, they brought him to the hospital. (TT, pp. 151-163, State's Exhibits 17-28 (Photos); R., pp. 118-130).[1]

The emergency room doctor ("Doctor") testified Victim had no heartbeat and was not breating when he arrived at the hospital. He and hospital staff were able to resuscitate Victim, "[b]ut neurologically, [Victim] was not responsive." During his examination of Victim, Doctor saw "bruisings around the face and neck and chest area." (TT, pp. 179-185, State's Exhibits 17-28 [Photos]; R., pp. 146-152).

Due to the bruising patterns on Victim's body, Doctor requested CT scans of his head, neck, chest, abdomen and pelvis, which is usually done in cases involving major trama. The scans showed skull fractures and bleeding on the brain generally sustained due to "high trauma," such as seen in car wrecks, "or a severe trauma with a lot of momentum." (TT, pp. 186-190; R., pp. 153-157).

A radiologist ("Radiologist") testified he interpreted Victim's scans and found skull fractures, and multiple areas of blood around the brain and within the skull. He described the fractures as of the temporal bones, extending up to the midline of the skull. He stated the "the most common thing in [his] practice to see these findings is following a motor vehicle accident or following an assault," and a person with such injuries, which he classified as "extensive," would not be able to function for a day. (TT, pp. 208-217; R., pp. 175-184).

On cross-examination, the Radiologist stated someone with a head injury may not experience symptoms for several days. Appellant asked the Radiologist about eggshell fractures, and the Radiologist stated he was not familiar with the term, but other doctors might use it. On redirect, the Radiologist stated he would not expect to see someone with the level of injury and

[1]State's Exhibits 3-28 (Photos) will be transported to the Court for consideration.

trauma Victim suffered not experience symptoms for several days, and again stated the type of extensive trauma he saw on Victim's scans is generally the result of a car accident or assault. (TT, pp. 225-228; R., pp. 192-195).

The pathologist who performed Victim's autopsy ("Pathologist") testified Victim had "significant trauma to the head area," including "a fracture of the occipital skull extending left to right and a fracture of the skull in the right calvarial area, which is the right side of the skull," multiple areas of bleeding in and around the brain, and swelling of the brain. He stated the injuries could be caused by a "significant" fall to ground and hitting the back of the head. The cause of death was "blunt force trauma to the head resulting in the fractured skull and the associated edema of the brain with the little splinter hemorrhages in the brain," which is "called diffuse brain injury occurring as a result of blunt force injury." The Pathologist reiterated the trauma was a "significant hard impact type injury." (TT, pp. 261-268; R., pp. 228-235).

The Pathologist described eggshell fractures as fractures of the skull. In Victim's case, "there were two fracture lines, one running across the occipital area in the back of the head, one running across the right skull and sutures separating somewhat, just sort of like, for like an egg." Based on the traumatic injuries Victim sustained, the Pathologist determined his death was a "homicide, which by definition is death at the hands of another." (TT, pp. 269-270; R., pp. 236-237).

On cross-examination, Appellant asked the Pathologist where the eggshell fractures were located, and the Pathologist again described the locations and types of fractures he found during Victim's autopsy. The Pathologist also testified there were no fractures in the temporal area, but he did find hemotomas there. Appellant then asked how many little fractures were in the eggshell fractures, and the Pathologist testified there were two linear fractures running across the

back and up the right side of Victim's head. He stated the blood he found in Victim's brain was "free blood," which had not started clotting, and it had been in the brain for "a day or so." (TT, pp. 271-275, 286; R., pp. 238-242).

Before trial resumed the next morning, Appellant indicated the State's next witness was Dr. Anne Abel, and stated he had received a copy of her resume, but no copies of any reports, diagnosis, findings, or notes related to what she reviewed and her conclusions, and alleged the failure to provide those documents was a discovery violation. The State informed the court Dr. Abel was retained as an expert, she did not prepare a report, and would testify as an expert witness based on the information she had reviewed. The court asked if the witness had made any notes of any kind, and the solicitor replied he was not aware of what notes she had made, but she did not prepare a report, and the State did not believe it was required to turn over her notes under the discovery rules. The court instructed the solicitor to find out if the witness had any notes, and if there were any notes, to make a copy for Appellant. As instructed, the State obtained a copy of Dr. Abel's handwritten notes, and provided the copy and a list of her conclusions to Appellant. (TT, pp. 301-306; R., pp. 256-261).

After the State presented another witness and the court briefly recessed, the solicitor informed the court Dr. Abel did not provide a report and had informed the solicitor she did not do reports in these types of cases, and everything on which she based her opinion was in the records and documentation already provided to Appellant in the discovery process. Appellant indicated Dr. Abel's notes merely listed what she reviewed and contained some notes about her review.

As to the list of Dr. Abel's findings, Appellant stated he was particularly concerned about the ability to cross-examine her about two findings – the child would have been knocked

unconscious by the blow, and the child would have stopped breathing within hours of the blow – because no other doctor had testified to those conclusions. The court noted Appellant could ask her what those conclusions were based on, and what records she relied on to reach them. The court also offered to assist Appellant in getting the other doctors back to testify so Appellant could call them as witnesses in his case. (TT, pp. 323-328; R., pp. 278-283).

Appellant then moved to exclude Dr. Abel's testimony on the ground she was "a surprise witness," but stated he was "prepared and ready to go forward." The court denied the motion, but told Appellant they would address the issue at the end of the State's direct examination of Dr. Abel, and give him more time to develop a cross-examination if necessary. (TT, pp. 328-329; R., pp. 283-284).

Dr. Abel was qualified, without objection, as an expert in child abuse pediatrics. She testified the records she reviewed indicated Victim was "a healthy child, growing appropriately for his age," prior to December 18, 2013. She stated the medical records revealed Victim was unconscious when he was brought to the hospital on December 19th, he had no heart rate and was not breathing. The records further revealed he had sustained more than one skull fracture, had bleeding within the brain, and his brain was swelling. Dr. Abel identified one difference between the initial CT report by the radiologist, which described the fractures as bilateral temporal parietal fractures (on both sides of the head), and the Pathologist's report, which described the fractures as eggshell fractures on the right side of the head and the back of the lower part of the head. (TT, pp. 331-337; R., pp. 286-292).

Dr. Abel further testified Victim could not have caused the injuries to himself because it took tremendous blunt force such as an impact by another person who was bigger or heavier, or being slammed against an object. She stated it would take a fall from a high elevation to a hard

surface to cause the type of fractures Victim sustained. She further testified the blow or injury causing the skull fractures would be so severe the baby would be unconscious immediately, and would stop breathing within minutes or up to a couple of hours. (TT, pp. 337-342; R., pp. 292-297).

When the State concluded Dr. Abel's direct examination, the court called counsel to the bench. After the bench conference, Appellant proceeded with Dr. Abel's cross-examination, and questioned her extensively regarding the records she reviewed and the basis for her opinions. (TT, p. 345-360; R., pp. 300-315).

After the State rested, the court denied Appellant's motion for a directed verdict, making extensive findings regarding the evidence presented. Appellant then renewed his motion to exclude Dr. Abel's testimony, or for a mistrial, based on an alleged discovery violation by the State. The court denied the motion, expressly finding no "violation of discovery in any way," the State had provided Appellant all the information on which Dr. Abel relied in reaching her conclusions, and the State also provided Appellant all of Dr. Abel's conclusions prior to her testimony as ordered by the court. The court also noted its willingness to give Appellant more time to prepare Dr. Abel's cross-examination, but Appellant declined to take the additional time. (TT, pp. 362-367; R., pp. 317-322).

Appellant testified on his own behalf, essentially denying any knowledge of how Victim was injured, and presented testimony from his mother and sister. (TT, pp. 372-476; R., pp. 323-426). The jury convicted him as charged, and the court sentenced him to thirty years incarceration. (TT, pp. 532-541; R., pp. 459-468). This appeal followed.

ARGUMENT

The circuit court properly found there was no discovery violation or grounds for a mistrial in relation to the disclosure of the State expert's written notes.

Appellant contends the trial court erred in denying his motion to exclude Dr. Abel's testimony or grant a mistrial, because the State failed to timely disclose Dr. Abel's written notes, thereby violating Appellant's state and federal right to due process and a fair trial.[2] Appellant's contention is premised on an exceptionally broad, and legally inaccurate, interpretation of the discovery rules in criminal cases, as well as extremely cherry-picked and misleading references to the record.

A. Rule 5, SCRCrimP

Under Rule 5, SCRCrimP, criminal defendants are entitled to their statements, criminal records, and any documents or tangible objects **material** to the preparation of their defense, or **intended for use by the prosecution**. State v. Bryant, 372 S.C. 305, 642 S.E.2d 582, 587–88 (2007) (emphasis added). There is no right to discovery in a criminal trial in South Carolina beyond what is provided by statute, case law, or court rule. *See* State v. Miller, 289 S.C. 316, 345 S.E.2d 489, 490 (1986); State v. Flood, 257 S.C. 141, 184 S.E.2d 549 (1971) (there is no general discovery in criminal cases in South Carolina). Further, there is no requirement either side turn over a general witness to the other side prior to trial. *See* Miller, 345 S.E.2d at 490 (interpreting prior Circuit Court Rule 103, now Rule 5, SCRCrimP, and finding a defendant cannot be required to turn over a witness list prior to trial); State v. Nicholson, 366 S.C. 568, 623

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[2]Appellant never asserted a state constitutional issue before the circuit court, and therefore, and rights afforded under the state constitution are not properly before this Court. *E.g.*, State v. King, 416 S.C. 92, 784 S.E.2d 252, 260 (Ct. App. 2016) ("'It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.'") (*quoting* Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 [1998]).

S.E.2d 100, 105 (Ct. App. 2005) ("The State, however, is not required to provide its witness list to a criminal defendant.").

This case is almost on point with Nicholson, in which the defendant argued the trial judge erred in refusing to grant his motion to suppress the testimony of an expert witness offered by the State or, in the alternative, to grant a continuance so he could obtain his own expert on the subject. The witness was called to testify about the general characteristics of a sex abuse victim, and the defendant contended the notice he received from the State about this witness several days prior to trial was insufficient for him to prepare his defense. In affirming the trial court, the Court of Appeals noted the State is **not** required to provide its witness list to a criminal defendant, and the State's disclosure of the witness to the defense before trial was nothing more than a professional courtesy. 623 S.E.2d 100, 105–06.

In this case, the record reveals Appellant knew Dr. Abel was a potential State's witness **before** the jury was selected. During *voir dire*, the court listed all of the State and defense witnesses, including Dr. Abel, to ascertain whether any of the potential jurors knew them. After jury selection, the court proceeded with a hearing to determine the admissibility of Appellant's statements to law enforcement, and then recessed for the day. (TT, pp. 9-10, 45-86; R., pp. 9-10, 17-58). When court resumed the next morning, the State commenced its case and presented seven witnesses. Appellant did not raise any issue regarding Dr. Abel during the first or second day of trial, even though her identity was known and there was ample opportunity to do so, but waited until the third day to express concern. (TT, pp. 87-300; R., pp. 59-255).

Appellant conveniently omits any reference to Nicholson in arguing the State's failure to turn over Dr. Abel's notes constituted a discovery violation. If the State was not even required to provide Dr. Abel's name prior to trial, it seems clear the State was not required to turn over her

notes.[3] This conclusion is bolstered by Rule 5(2), which provides the State is not required to turn over statements made by prosecution witnesses, or prospective prosecution witnesses, unless ordered to do so before or after the witness testifies on direct. Rule 5(2), SCRCrimP. The circuit court ordered the State to turn over the notes and a summary of Dr. Abel's conclusions prior to her testimony, and the State complied. The court also offered to give Appellant more time to prepare his cross-examination if necessary, but Appellant declined.[4] In short, there was no Rule 5 violation, and Appellant had ample time to prepare for Dr. Abel's testimony.

B. Brady

Under Brady v. Maryland, 373 U.S. 83 (1963), the State must disclose evidence favorable to the accused **if** the evidence is material to either guilt or punishment, and defendants claiming a Brady violation must demonstrate: 1) the evidence **was favorable** to the defense; 2) it was **in the possession of**, or known to, the prosecution; 3) it was **suppressed** by the prosecution; and 4) it **was material** to guilt or punishment. Bryant, 642 S.E.2d at 587–88 (2007) (citing Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 [1999]). Appellant correctly asserts Brady requires the prosecution to fully disclose all exculpatory evidence in its possession, and if disclosure is required, the nondisclosure must be so serious there is a reasonable probability the suppressed evidence would have produced a different verdict. Even if the notes should have been produced

[3]The circuit court's initial statement indicating production of the notes at issue was required by the discovery rules was erroneous, which the court ultimately acknowledged by subsequently finding there was no discovery violation "in any way." (TT, pp. 366-367; R., pp. 321-322).

[4] Arguably, by declining the offer of additional time to prepare, Appellant waived any appellate issue. *Cf.*, State v. Bantan, 387 S.C. 412, 692 S.E.2d 201, 204 (Ct. App. 2010) (rejection of trial court's offer to give curative instruction waived any challenge to the offending testimony on appeal); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260, 267 (1996) (issue not preserved when defendant refused trial court's curative instruction); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727, 732 (1996) (party waived right to complain of error when trial court's offer of curative instruction refused); State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct.App.1996) ("In rejecting the trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any complaint he had to the challenged testimony.").

evidence would have produced a different verdict. Even if the notes should have been produced prior to trial, which the State vigorously disputes, other than conclusory statements of prejudice, Appellant utterly fails to explain how Dr. Abel's notes could be considered **exculpatory** under **any** version of the facts, or how having her notes earlier could have produced a different result.

In an effort to obscure the lack of a legal basis for his claims, Appellant presents certain statements as facts in the record. For instance, Appellant asserts the Pathologist "repeatedly suggested" Victim's injuries were the result of an accidental fall or drop. (Brief of Appellant, p. 17). A cursory review of the Pathologist's testimony, however, reveals the fallacy of this assertion.

When asked about what type of trauma could cause Victim's extensive injuries, the Pathologist testified significant hard impact would be required to cause the injuries, dropping Victim on his head from three or four feet in the air could cause the injury, and he ultimately concluded the manner of death was homicide. (TT, pp. 268-270; R., pp. 235-237). On cross-examination, he again stated someone dropping Victim on his head could cause the injuries if it was from a sufficient height to produce an impact strong enough to cause the skull fractures. (TT, p. 279; R., p. 246). Therefore, the Pathologist did not "suggest" the injuries were caused by an accidental fall or drop, and his conclusion the death was a homicide belies any possibility he believed the injuries were inflicted accidentally.[5]

Appellant also asserts Dr. Abel's reference to the fractures of Victim's skull as "eggshell fractures" was not shared by any other doctor in the case, specifically the Pathologist. (Brief of Appellant, p. 18). Again, the record reveals this assertion misrepresents the record.

[5] Even if Victim was dropped on his head, if may well have been, and probably was, intentional.

fracture lines, one running across the occipital area in the back of the head, on running across the right skull and sutures separating somewhat, just sort of like, for **like an egg**." (TT, p. 269; R., p. 236) (emphasis added).

On cross-examination, Appellant asked the Pathologist the following: "And that there were two - - **were the eggshell fractures here** (indicating)?. (TT, p. 271; R., p. 238) (emphasis added). Subsequently, he asked the Pathologist how large the "**eggshell fractures**" were, and "[h]ow many little fractures were there in these **eggshell fractures**." In response, the Pathologist testified there were "two significant linear fractures, one running this way and one running across the calvarium at the back." (TT, p. 274; R., p. 241) (emphasis added). Read in context, the Pathologist was describing the linear fractures within the **eggshell fractures**.

Finally, Appellant contends Dr. Abel was "unique among the testifying medical professionals in asserting the amount of force necessary to cause Minor 1's skull fractures was akin to the force an infant would experience while being ejected from a car or while being dropped from several stories on to a hard surface." He further contends she was "alone" in concluding Victim's injuries could only have been the result of "'child abuse.'" (Brief of Appellant, p. 19). As with his other contentions, the record belies their validity.

Both the Doctor and Radiologist testified the injuries they observed in this case were generally seen in cases involving high momentum acceleration type accidents such as car wrecks. (TT, pp. 186-187, 215, 228; R., pp. 153-154, 182, 195). The Pathologist testified the blunt force impact required to cause the injuries had to be "significant," and he determined the manner of death was homicide, which by definition ruled out accidental infliction of the injuries. (TT, pp. 266-270, 279; R., pp. 233-237, 246). This testimony is absolutely consistent with Dr.

(TT, pp. 266-270, 279; R., pp. 233-237, 246). This testimony is absolutely consistent with Dr. Abel's testimony regarding the force necessary to inflict the injuries, and supported her conclusion the injuries were the result of child abuse.[6]

The circuit court correctly found there was no discovery abuse in this case. Appellant was not entitled to pre-trial discovery of either the name of the State's expert witness, or the notes she took while reviewing the records Appellant already had in his possession. Appellant knew about the expert no later than the first day of trial, but did not raise any issue regarding her testimony until the third day of trial. Thereafter, the State fully complied with the court's instruction to provide Appellant with the expert's handwritten notes and a summary of her conclusions before the expert testified. Appellant declined the court's offer of additional time to prepare his cross-examination of the expert, and vigorously challenged her conclusions during cross-examination.

The record fully supports the circuit court's ruling, and there is nothing in the record indicating the outcome would have been different if Appellant had received the expert's information earlier. Therefore, the circuit court's ruling should be affirmed.

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[6] Appellant implies Dr. Abel's failure to define "child abuse" somehow negatively impacts the credibility of her testimony. Dr. Abel did not need to define child abuse because the term is defined in the homicide by child abuse statute, and the circuit court gave the jury that definition for purposes of deliberations. (TT, p. 527; R., p. 458). The jury had to find evidence sufficient to meet the statutory definition regardless of any definition Dr. Abel could give.

CONCLUSION

Based on the foregoing, the State respectfully submits Appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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