STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2017-000559

THE STATE, ...RESPONDENT,

v.

HEYWARD LEGREE MARTIN, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3713

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

Post Office Drawer 3368
Aiken, SC 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial judge properly refused to allow testimony of "third-party guilt" because the evidence in question involved a remote act disconnected from the crime itself, was mere conjecture casting a bare suspicion upon Victim's mother, and was not inconsistent with Appellant's guilt.

STATEMENT OF THE CASE

On June 4, 2015, the Charleston County Grand Jury indicted Appellant for inflicting great bodily injury upon a child. On February 14–16, 2017, Appellant proceeded to a jury trial before the Honorable Doyet A. Early, III. Brian Katonak, Esquire, represented Appellant; Assistant Solicitors Ashley Hammack, Esquire, and Samuel Grimes, Esquire, represented the State. The jury found Appellant guilty as charged and the trial judge sentenced Appellant to twenty years' incarceration.

Appellant filed a timely notice of appeal on February 20, 2017, and subsequently submitted a brief in support. This Brief of Respondent follows.

STATEMENT OF FACTS

The State's Case

Sometime in the Spring of 2014, Victim and his mother (Mother) moved in with Appellant's family because "they had nowhere else to [live]" at that time. Around June 2014, Steven Tyler Hill began dating Mother. On June 10, 2014, Hill picked Mother up from her home around 4:30 p.m. to take her to a 5:30 p.m. class at the Aiken Center. Mother left Victim in the care of Appellant and his two children. Hill dropped Mother off at her class and visited his godchildren until Mother called him around 8:30 p.m. and asked to be picked up and taken home. They stopped by a gas station where Appellant's wife worked, picked up some soft drinks, and stopped by Hill's cousin's home, just down street from Appellant's, to pick up a few items. When they returned to Appellant's home at approximately 9:45, Appellant was holding Victim. Victim was pale, wrapped tightly in a towel, and Appellant was "freaking out" and claimed Victim was suffering from a seizure for approximately an hour, during which Appellant struggled to maintain Victim's breathing. Appellant also admitted he failed to call an ambulance. (Tr.p.66, line 8–Tr.p.75, line 19; Tr.p.87, lines 22–24; Tr.p.94, line 8–Tr.p.95, line 12; Tr.p.11, line 21–Tr.p.112, line 12).

Mother immediately took Victim and attempted to discover what was wrong. Hill observed red marks on Victim's body and that it appeared he had been "knocked out." Concerned, Hill and Mother sped to the hospital with Victim to obtain emergency care. After Mother and Victim went into the emergency room, Hill discovered a text around 10:39 p.m. from Appellant asking about Victim's status. Hill informed Appellant that doctors believed Victim had "blood on his brain from trauma" caused by some sort of impact. Hill asked Appellant whether something happened to Victim that night, and Appellant replied that he "forgot" to tell

them Victim fell off the bed earlier while he and the Victim took a nap and that he had hit Victim on the back in his efforts to get him to breathe. Appellant believed the fall occurred approximately three hours before Victim showed any symptoms of injury. Appellant also told Hill he "fe[lt] responsible" for the situation and "fe[lt] like shit." (Tr.p.75, line 20–Tr.p.82, line 18; Tr.p.90, lines 14–18; State's Exhibits 2–5).

Shortly after midnight on June 11, 2014, Investigator Kristopher Evensen, an officer with the Aiken County Sheriff's Office, was dispatched to the hospital to investigate Victim's injuries. He discovered Victim had suffered severe head trauma which was most likely non-accidental and that he had red marks over his face, above his right eye, neck, and back. He immediately interviewed Mother and Hill, both of whom explained their story and relayed the information they had received from Appellant. Using this information, Investigator Evensen obtained a search warrant to investigate Appellant's home and discover who or what caused Victim's injuries. He interviewed Appellant's wife Melissa, Appellant's stepson (Stepson), Appellant's stepdaughter (Stepdaughter), and Appellant himself. Appellant claimed Mother had watched Victim the entirety of the day before leaving for her class, at which time Victim appeared healthy and uninjured and did not show any signs of pain or distress. He claimed Victim only cried for approximately thirty seconds during a diaper change. He again claimed Victim had fallen off his bed, which Investigator Evensen measured as a twenty-three inch fall, while the two of them were napping and stated they had spent the majority of that evening in the bedroom. (Tr.p.91, line 22–Tr.p.109, line 16; Tr.p.114, line 7–Tr.p.115, line 4; State's Exhibit 16).

Dr. Lyle Fisher, a pediatric intensive care specialist, treated Victim at the hospital and was also tendered as an expert in pediatric critical care medicine at trial. Dr. Fisher noted Victim

had numerous injuries. He testified Victim had various marks and bruising on his right forehead, left eyelid, behind the right ear, under the left side of his chin, and his back. All of the marks were approximately the same color, leading Dr. Fisher to conclude they were all incurred at about the same time and were relatively "fresh" when Victim arrived at the hospital. Based on the various locations of the marks, Dr. Fisher ruled out the possibility that they were caused by a single impact. (Tr.p.116, line 17–Tr.p.123, line 13; State's Exhibits 6–10).

X-rays, CT scans, EEGs, and an MRI revealed the vast head trauma Victim received. The tests revealed: (1) a skull fracture; (2) bleeding in various locations within Victim's skull; (3) bleeding outside the skull but below the skin; and (4) bleeding inside multiple layers of both Victims' eyes. The CT scan performed the night Victim was admitted to the hospital showed Victim's internal bleeding occurred within a short period of his scan, but Dr. Fisher could not give an exact time for when the trauma occured.[1] He noted there was no way Victim's multiple, severe injuries were caused by a single fall from twenty-three inches off the ground or from receiving CPR. Further, based on the severity of the wounds, a conscious Victim would have been in severe agony and, without question, demonstrated outward symptoms of his distress. Ultimately, Dr. Fisher concluded Victim's head and eye injuries were caused by repeated shaking back and forth which caused his brain to bounce back and forth in the skull and the fragile lining of his eyes to tear. (Tr.p.125, line 6–Tr.p.147, line 3; Tr.p.151, line 4–Tr.p.152, line 14).

Victim's father (Father), who had custody of Victim at the time of trial, testified the latter suffered extensive, permanent injuries from his trauma. Victim is blind, unable to walk unaided,

[1] Dr. Fisher testified a CT scan can reveal the general age of a bleeding internal injury based on the density of the observed blood. Fresh blood is very close to bone color on a scan because it is "hyperdense" and has yet to be broken down by the body. (Tr.p.136, line 18–Tr.p.137, line 5).

has severe language deficiencies, and experiences multiple seizures a day. (Tr.p.153, line 14–Tr.p.155, line 21).

After the State concluded its case, trial counsel proffered testimony from several witnesses in an effort to get their testimonies admitted as evidence of third-party guilt. As explained by trial counsel, Appellant's theory of the case was Mother, "somebody who suffered from PTSD and ha[d] been shown . . . not competent to stand trial" was the person who caused Victim's injuries. Trial counsel first questioned Dr. Matthew Gaskins, a forensic psychiatrist, about an evaluation on Mother he performed on March 17, 2016. Trial counsel alleged Dr. Gaskins' report indicated Mother suffered from PTSD three months prior to Victim's assault, but the State corrected the allegation and demonstrated Mother began suffering from PTSD three months after Victim's traumatic injuries. Additionally, the State noted the uncontroverted evidence at trial showed Victim was a healthy, functioning child when Mother left him with Appellant eliminating the possibility Victim received his injuries while under her care. Dr. Gaskins' testimony, even if presented at trial, did not provide the causal connections necessary to be admitted as evidence of third party guilt. (Tr.p.164, line 10–170, line 22).

The trial judge agreed, finding trial counsel failed to meet the requirements of State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), in which the Supreme Court of South Carolina listed the requirements for the admission of evidence of third-party guilt. However, the trial judge allowed trial counsel to proffer additional testimony. Trial counsel called both Appellant and Stepson to testify. They testified that around 4:00 p.m.[2] on June 9, the day before the incident, Mother and Victim were in their room at the back of the house when both Appellant

[2] Appellant believed the time the incident occurred was around 4:00 p.m. Stepson was unable to recall the time he heard the noises. (Tr.p.180, lines 6–11; Tr.p.184, lines 10–20).

and Stepson heard loud screaming from the baby followed by a loud "bang," after which Victim stopped crying. (Tr.p.170, line 23–Tr.p.185, line 16).

The trial judge found the additional proffered testimony was not proper evidence of third party guilt, noting it was "pure[ly] speculative" and did not demonstrate a logical connection between the heard sounds and Victim's traumatic injuries and length of time between the sounds and Victim's first signs of distress. However, the trial judge did permit trial counsel to introduce additional evidence that Victim was not in Appellant's care until approximately 5:00 p.m. on the day in question and to argue the injuries could have occurred prior to that point. (Tr.p.191, line 13–Tr.p.193, line 17).

Appellant, Stepson, and Stepdaughter, all testified at trial. Stepdaughter testified Appellant was in a bedroom with Victim while she slept in her own room. According to Stepdaughter, Victim appeared happy and healthy at the time Mother left the home. Stepson claimed Appellant took the Victim to a back room, but eventually left Victim by himself while he went onto the back porch to smoke a cigarette and repair a lawnmower. (Tr.p.207, line 25–Tr.p.223, line 13).

Appellant recounted that after Victim was placed in his care, he placed the latter in a swing so he would fall asleep. Then, he picked Victim up and placed him on the bed. Rather than watch the child, he decided to go outside and smoke a cigarette and repair a lawnmower. He admitted to leaving Victim unaccompanied for approximately thirty minutes and that he lied to police about what he was doing when Victim was injured. When he went inside, Victim was face-down on the floor. At this point, Victim was largely alright with the exception of a tiny cut. An hour after that, Appellant changed Victim's diaper and fed him, but was surprised when Victim consumed only a fifth of his usual formula serving. Thirty minutes later, Victim began

"stiffening up" and suffering seizures. Appellant admitted Victim appeared healthy even after he fell from the bed and during the diaper change an hour after that. He further admitted Victim was able to cry during a second diaper change and that the crying lasted only thirty seconds. (Tr.p.224, line 22–Tr.p.245, line 21).

ARGUMENT

The trial judge properly refused to allow testimony of "third-party guilt" because the evidence in question involved a remote act disconnected from the crime itself, was mere conjecture casting a bare suspicion upon Victim's mother, and was not inconsistent with Appellant's guilt.

Appellant argues the trial judge erred in refusing to allow trial counsel the ability to present evidence of third-party guilt implicating Mother as the source of Victim's injuries. Specifically, Appellant alleges the trial judge should have allowed him to present witness testimony indicating that the day before Victim was taken to the hospital, he and Stepson heard Victim crying, heard a loud "bang," and then heard no further crying from Victim. The State disagrees with this allegation of error. The evidence would not have raised an inference of Appellant's innocence because it was mere conjecture not inconsistent with evidence of his own guilt and therefore did not raise a reasonable presumption as to his own innocence. Notably: (1) the evidence was dependent on significant conjecture and accompanying inference; the loud noise heard by Appellant and Stepson was the result of Mother harming Victim; (2) even if Mother did, in fact, hit Victim the medical evidence showed Victim was struck multiple times on various parts of his body and that repeated shaking, not an isolated blow, caused Victim's injuries; and (3) The statements of Appellant, his family members, and Hill indicated Victim was healthy and normal at the time Appellant took custody of Victim which, according to the medical evidence at trial, would have been impossible if Victim had suffered his traumatic injuries over twenty-four hours prior.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). In Holmes v. South Carolina, 547 U.S. 319, 324

(2006), the United States Supreme Court articulated its approval of the rule adopted by this Court in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, this Court explained:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are **inconsistent with his own guilt**, and to such facts as raise a reasonable inference or presumption as to his own innocence; **evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.** . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. **Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.**

State v. Gregory, 198 S.C. 98, 104–05, 16 S.E.2d 532, 534–35 (1941) (internal citations omitted) (emphasis added).

In State v. Rice, 375 S.C. 302, 313, 652 S.E.2d 409, 414 (2007), *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011), Rice sought to impeach co-defendant Iris Bryant with a prior inconsistent statement Bryant made to a fellow prisoner. The substance of the purported statement Bryant made to her fellow prisoner was that a woman named Nikki was responsible for the murder in the case, not Rice. Id. In a footnote, the court noted, "Rice sought to introduce testimony that Bryant's cousin, Tiki, committed the crimes. However, Bryant's initial statements to police did not mention Tiki, but instead named Nikki as the person involved. . . Whether Tiki and Nikki were the same person remains unresolved." Id. at 337 n.1. The court found:

> The trial court adhered to the Gregory rule and applied the proper standard for admission of third-party guilt evidence-there must be such proof of connection with the crime, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. The evidence Rice asserted in support of introducing the third-party guilt testimony implicated Nikki at times, and Tiki at

> times, with no clarification as to whether they were the same individual. **The record is void of facts or circumstances, other than Bryant's inconsistent statements, linking anyone other than Rice to Brennan's murder. The proffered evidence casts a mere "bare suspicion" on Nikki or Tiki and fails to connect either to the murder by way of the facts and circumstances surrounding the crime.**

Id. at 322 (emphasis added).

Similarly, in State v. Cooper, 334 S.C. 540, 547, 514 S.E.2d 584, 588 (1999), the defendant proffered the testimony of Solomon Nelson who claimed he overheard Shirley Gilmore tell Peter Wayne Marshall that Gilmore, Dottie Suber, and the defendant's girlfriend murdered the victim in the case. Marshall admitted having a conversation with Gilmore concerning the murder but denied Gilmore confessed to the killing. Id. Marshall testified at trial Gilmore told him the defendant did not act alone in the murder. Id. Gilmore proffered testimony that she did not tell Marshall she killed the victim. Id. Gilmore testified she only told Marshall she believed the defendant was innocent. Id. The Court emphasized the fact that the defendant admitted the sole purpose for calling Gilmore was to impeach her with Nelson's testimony, thereby supplying evidence of her guilt. Id. at 549. The Court noted "this Court has imposed strict limits on the admissibility of third-party guilt." Id. The Court found:

> In the instant case, Gilmore admitted having a conversation with Marshall concerning Defendant's case, but denied admitting to the crime. Aside from Nelson's assertion, there was no credible evidence linking Gilmore to Victim's murder. Gilmore testified in camera that she had never been to Victim's house. Thus, there was no evidence that tended clearly to point out that Gilmore was guilty of the crime. Nelson's testimony would therefore be prohibited under Gregory, supra.

Id. at 549–50.

In State v. Swafford, 375 S.C. 637, 639–40, 654 S.E.2d 297, 298 (2007), Swafford attempted to introduce evidence at trial that a third party, Jerry Gillespie, was driving his truck at the time of the accident that led to his being charged with felony driving under the influence

resulting in death. Swafford sought to introduce two particular pieces of third-party guilt evidence. Id. at 640. Firstly, Carol Johnson testified in camera that she knows Swafford and saw him about 12:30 P.M. on the day of the accident riding in the passenger side of his truck. Id. Johnson identified Gillespie as the driver of the truck. Id. Secondly, Brian Bobo testified in camera that Gillespie was his best friend and told him the evening of the accident that he was involved in a terrible accident while driving Swafford's truck. Id. Gillespie testified in camera and denied any involvement in the accident. Id. The Court ruled the trial judge in this case considered Cooper, reiterated the rule in Gregory, and properly considered the weakness of the proffered evidence. Id. at 643. The Court found Johnson's testimony did not offer proof Swafford was a passenger at the time of the accident nor that Gillespie was the driver at that point in time. Id. at 642. Johnson's testimony offered no reliable proof that he was driving at the time of the accident. Id. The Court also found no error in the exclusion of Bobo's testimony, as Bobo could produce no support for his bare assertion that he called Gillespie the night of the accident. Id.

In the instant case, the trial judge applied the Gregory standard in determining Appellant's and Stepson's statements regarding the loud noise they heard were inadmissible evidence of third-party guilt. First, as noted by the trial judge, the proposed testimonies did not demonstrate a causal connection between the noise and Victim's injuries. Appellant's testimony, if believed, only established the two men heard a loud "bang," after which Victim stopped crying. The conclusion the loud noise was caused by Mother hitting child relied upon pure conjecture from the jurors, and such assumptions run counter to the Gregory rule.

Further, even assuming jurors believed Appellant's and Stepson's testimonies and drew the tenuous inference that the noise resulted from Mother hitting Victim, such evidence was not

inconsistent with his own guilt because the other evidence at trial, including Appellant's own statements, indicated such event was a remote act which could not have caused Victim's traumatic injuries. Dr. Fisher informed law enforcement Victim's injuries could have occurred sometime between Mother's return home on June 10, 2014 up to twenty-four hours prior to that time. However, Appellant's testimony places the "loud noise" outside of that twenty-four hour window. Additionally, Victim's bruises and the CT scan indicated all of Victim's injuries were fresh and resulted from multiple blows which all occurred during the same relatively brief time period, shortly before he arrived at the hospital. Most importantly, Dr. Fisher repeatedly testified Victim, based on the severity of his injuries, would have been in extreme pain and inconsolable anytime he was conscious after they occurred. At trial, it was undisputed that Victim was happy and healthy at the time Appellant began caring for him that night. In fact, Appellant admitted that Victim did not begin to show signs of distress until hours later.

Accordingly, because the proffered testimonies failed to implicate Mother or offer any facts inconsistent with Appellant's guilt, the trial judge did not err in excluding the evidence related to the loud noise on June 9, 2014.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: _____
William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

April 6, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2017-000559

THE STATE, ...RESPONDENT,

v.

HEYWARD LEGREE MARTIN, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 6th day of April, 2018.

Angela Bennett
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ALAN WILSON
ATTORNEY GENERAL

April 6, 2018

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

RE: State v. Heyward Legree Martin – Appellate Case No. 2017-000559

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

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