STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal From Laurens County
Honorable Robert Addy, Jr., Judge
Appellate Court No: 2011-187128

THE STATE,

Respondent,

vs.

RICHARD BRANDON LEWIS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in declining Lewis' motion for a directed verdict [aiding and abetting homicide by child abuse] when there was purportedly no evidence that he aided, abetted, or assisted Ashley Hepburn in inflicting injuries upon the victim? (Appellant's Statement of Issues Presented, Question I).

2. Did the court err in declining to charge that the state had to prove that Lewis had a legal duty to protect the victim before the jury could convict him of aiding and abetting homicide by child abuse? (Appellant's Statement of Issues Presented, Question II).

3. Did the court err in declining to declare a mistrial when a state's witness testified, over objection, that Lewis' statement had "the possibility of guilt behind it"? (Appellant's Statement of Issues Presented, Question III).

4. Did the court err in declining to require the state to open fully on the law and facts and then to [only] reply to matters brought up in defendants' closing arguments? (Appellant's Statement of Issues Presented, Question IV).

STATEMENT OF THE CASE

The defendant Richard Brandon Lewis faced charges of homicide by child abuse (10-GS-30-1930) and aiding and abetting homicide by child abuse (10-GS-30-1929). His jointly tried co-defendant Ashley N. Hepburn also faced charges of homicide by child abuse (10-GS-30-1773) and aiding and abetting homicide by child abuse (10-GS-30-1774). (ROA. pp. 24-25). The defendant and jointly tried co-defendant came to trial with their separate counsel on February 22, 2011 before the Honorable Frank R. Addy, Jr., Judge, and a jury. On March 3, 2011 the jury found defendant Richard Brandon Lewis guilty of aiding and abetting homicide by child abuse and found co-defendant Ashley N. Hepburn guilty of homicide by child abuse. (ROA. p. 1196). The court sentenced the defendant to imprisonment for a term of ten years suspended upon service of seven years and sentenced the co-defendant to imprisonment for a term of forty-five years. (ROA. pp. 1217-1218).

ARGUMENT

The record contains substantial circumstantial evidence reasonably tending to prove the guilt of the accused, and the case was properly submitted to the jury.

Did the court err in declining Lewis' motion for a directed verdict [aiding and abetting homicide by child abuse] when there was purportedly no evidence that he aided, abetted, or assisted Ashley Hepburn in inflicting injuries upon the victim? (Appellant's Statement of Issues Presented, Question I). At the close of the evidence, Lewis noted the discussion about the jury charge which "in essence" addressed the trial evidence (ROA. p. 1071, line 21 - p. 1090, line 17) and moved for a directed verdict of acquittal on aiding and abetting homicide by child abuse on the ground that there was no substantial circumstantial evidence of the offense. The state maintained that there was evidence Lewis knowingly allowed events which led to the victim's death by abuse and neglect. The court denied the motion. (ROA. pp. 1090, line 18 - 1092, line 4). An examination of the record demonstrates the soundness of the trial judge's ruling.

Trial Testimony

During marital difficulty, Ms. Hepburn, her son and her infant daughter (victim) were living at her mother's home when the victim was heinously injured -- the day of October 12, 2009 and early morning of October 13, 2009. (ROA. pp. 300-306; p. 321; pp. 606-633; p. 651; pp. 843-846). Co-defendant Lewis was seeing Hepburn regularly. Lewis recalled an afternoon difficulty with Hepburn on October 12 starting with pillow play, Lewis calling Hepburn a bitch, and Hepburn slapping Lewis in the face. Additionally, Hepburn had anticipated but not gotten a job she needed. Lewis left about 5:00 PM. He returned about 8:30 when Hepburn's mother and her boyfriend were asleep. (ROA. pp. 94-104; pp. 111-

112;126; pp. 843-855; p. 892-893). They had another difficulty around 10:00 PM when Hepburn's son had accidentally hit Lewis in the face and refused to follow Hepburn's directive to tell Lewis that he [the son] was sorry. Lewis told Hepburn, in substance, that if her son "didn't listen to her now he wasn't ever going to listen to her." Later, her son did not want to brush his teeth. Hepburn "yanked him up by the arm" - which Lewis had never seen by Hepburn - and spanked him in the bathroom. Lewis could hear her popping him at least four or five times from another room. The spanking made the son cry "pretty hard" and made Lewis "avoid" Hepburn. Lewis felt responsible for Hepburn's "whipping" her son by saying something to Hepburn earlier. Lewis entertained himself with television in the living room; after football, he asked whether Hepburn wanted to watch the movie "Congo" - she did not. This was about 11:00. Hepburn was in her room in bed with her son. The victim was in her crib in her bedroom. (ROA. pp. 856-860; p. 896). Lewis checked on the victim through her cracked door. He looked in, and she popped up her head. He knew that she was fine. Later, at 12:45 AM, he heard her cry faintly; she was teething. Lewis heard Hepburn stomp into the room, and he actually felt her footsteps. The victim cried a little, and "there were short pauses in between her cry and it just, it sounded to [Lewis] like she could have been shaken."[1] Then she was not crying. Hepburn left the victim's room and went back to her own room. Lewis thought that Hepburn was "agitated" and waited about ten minutes before asking her whether she wanted some food. She did not. Lewis ate, used the bathroom, and got ready for bed. Again, he checked on the victim and saw she was in a strange position in the crib - face down with her head against the bars. She was limp, barely

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[1] On cross examination Lewis again described the crying, "I just remember hearing breaks in her voice and pauses and it just sounds different than the way she would normally cry." (ROA. p. 957, lines 3-12).

breathing, and her mouth was bleeding. Lewis ran, carrying the child to Hepburn, and thought it odd that Hepburn did not immediately check on her child. Lewis, from his own experience, thought it was a seizure. They awakened Hepburn's mother and her mother's boyfriend and called EMS at 1:30 AM. (ROA. pp. 27-31; pp. 861-867; pp. 910-911).

Lewis acknowledged he was questioned about "shaken baby" at Greenwood Hospital. Later, after riding with officers to Laurens, making a statement (State's Exhibit No. 30) on October 13, at 6:42 AM, and talking to his grandmother, Lewis admitted in a second statement (Defense Exhibit No. 2), at 11:56 AM on October 13, 2009, that he had heard crying as though the victim were being shaken. (ROA. pp. 872-876; p. 903; pp. 909-912; SROA pp. 2-3; p.991; pp. 997-998). Lewis claimed he did not know, at the time, that the victim was being harmed; had he known, he would have stopped Hepburn. (ROA. p. 882 line 23-p. 883, line 19). Lewis also said he loved Hepburn; he did not tell the truth since he did not want to believe that she could hurt the victim and did not want to get her into trouble. (ROA. pp. 916-917). Looking back on hearing the stomping footsteps, he knew that [Hepburn] shook the victim. (ROA. p. 913, line 25-p.914).

Lewis thought that when an officer (Plaxico) came to the house on September 14, 2009, he might be arrested, and he fled. (ROA. p. 538; p. 916). The day after the victim died, Lewis was treated in Laurens and then at a VA hospital for an attempted suicide. (ROA. pp. 918-919).

Lewis affirmed that Hepburn had consistently given the same story: she was asleep from the time that she and her son lay down until he came into the room with the victim. (ROA. pp. 970-971). To his knowledge, Hepburn never gave a written statement to the police. (ROA. p. 973, lines 11-15).

At the time of the victim's death, Hepburn personally cared for her children. She thought the victim was too young to discipline and did not discipline her. (ROA. pp. 632-633; p. 648). Lewis was around the children because the children were around her. The victim would cry and cling to her when Lewis was around, and Hepburn had asked Lewis not to go into the victim's room when the victim was sleeping. (ROA. pp. 651-653).

Hepburn recalled that Lewis joined the children and her after her mother and her mother's boyfriend were in their bedroom. When the victim went to bed, the child was fine. The evening continued with Lewis playing with Hepburn's son and getting angry, and Hepburn told Lewis not to tell her how to parent. Hepburn again looked in on the victim, and she was fine. Hepburn read to her son and went to sleep after 10:30, and Hepburn did not again check on the victim. (ROA. p. 661 - p. 675, line 4). Lewis awakened her asking whether she wanted food or a movie. She declined and went back to sleep. She later awakened to find Lewis in front of her, acting odd, really calm, holding the victim in his arms, and telling her that the victim was not acting right. In fact, the victim was limp, not responsive, and she never awakened. (ROA. p. 675, line 5 - p. 677).

Hepburn came to the point: Lewis was the only person who could have harmed the victim. (ROA. p. 700, lines 1-5).

Medical Trial Testimony

About 2:00 AM, October 13, 2009, Dr. Michelle Curry, emergency room physician at Self Regional Hospital in Greenwood, found the sixteen month old victim limp and unresponsive with shallow and weak respirations but a good pulse and blood pressure. EMT's had initially considered an allergic reaction and administered Benadryl. Dr. Curry's examination revealed bruises (probably inflicted over days) and retinal hemorrhages. A CAT

scan demonstrated a life threatening subdural hematoma containing enough blood to push the brain across to the opposite side of the skull. (ROA. pp. 52-59; p. 63; p. 87). The doctor thought that the injury had occurred shortly after the child's most recent meal and when she was in her usual state of health. (ROA. p. 63). The unresponsiveness and limpness would have affected the victim either immediately or within two hours of the initial injury. (ROA. p. 79, lines 5-14). Dr. Curry told Hepburn that her child had suffered non-accidental trauma and repeatedly questioned the co-defendants (Hepburn and Lewis). Neither one offered an explanation for the child's injuries such as a significant fall or significant injury such as a motor vehicle accident - although Dr. Curry remembered Hepburn's "repeatedly saying how could this happen and kind of questioning what had happened." (ROA. pp. 60-62; p. 65; p. 684, lines 13-22). In the face of the doctor's shocking finding, the family - including both defendants - offered the benign scenario of a normal child in her crib by about 10:30 PM and Lewis' subsequently finding her limp and unresponsive. (ROA. pp. 60-62; p. 78).

Pediatrician Robert Seigler saw the victim in the Greenville Memorial Pediatric Intensive Care Unit about 6:00 AM on October 13, 2009. When admitted, the victim was on life support. Dr. Seigler found acute subdural and retinal bleeding and severe brain injury which, in the absence of another explanation, indicated non-accidental traumatic brain injury consistent with child abuse. (ROA. pp. 169-172; pp. 177-178). The doctor observed twenty-eight bruises, including bruises to the abdomen, under the angle of the jaw, and clavicle that were atypical locations for accidental bruises. (ROA. p. 180; pp. 189-192). The victim's symptoms would have been virtually immediate to her severe injury and were inconsistent with a child who appeared normal. (ROA. p. 195, line 18 - p. 196, line 5).

Forensic pediatrician Dr. Mary-Fran Croswell evaluated the victim on October 13, 2009. She found significant brain injury including bleeding within the skull and between the two lobes of the brain and significant swelling pushing aside normal brain structures. She found her findings most consistent with abusive head trauma. The significant forces that had been applied to the brain and, as part of that, the eyes were consistent with a fall from several stories, more than a story high. (ROA. p. 204; p. 207; p. 209; p. 213, line 18 - p. 214, line 8).

Pediatric ophthalmologist Dr. Anthony Johnson examined the victim on October 14 and found retinal hemorrhages "too numerous to count in both eyes" that were consistent with injury from severe shaking. Accidental injuries to children from being ejected from a car or a fall from even a ten story building did not result in such extensive retinal hemorrhage. (ROA. pp. 244-245; p. 248, line 16 - p. 249, line 2; p. 253, lines 1-17). The victim's extensive injuries would have been immediate and very obvious to an observer. (ROA. p. 252, lines 1-14).

Dr. Michael Ward performed the autopsy October 19, 2009. In light of the child's history, her injuries were consistent with non-accidental head injury, child abuse, and they would have been almost immediately apparent. (ROA. p. 355; pp. 359-361; pp. 372-373). There were three distinct areas of impact to the skull, and there could have been more. (ROA. pp. 375-376). The head injuries were the cause of the victim's death, and her death was a homicide. (ROA. p. 363).

Applicable Law

> A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted).

"Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." State v. Mann, 560 S.E.2d 776, 781 (N.C. 2002). "Substantial evidence" is evidence that is existing and real, not just seeming or imaginary. State v. McAvoy, 417 S.E.2d 489 (N.C. 1992). For review of an agency's decision under the APA, "substantial evidence" is evidence that, in context of the whole record, a reasonable mind would accept to support the agency's action. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

To be guilty of an offense as an aider or abettor the participant must be chargeable with knowledge of the principal's criminal conduct, and mere presence at the scene is not sufficient to establish guilt as an aider or abettor. State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578 (2010).

An attempt to run away is evidence of guilty knowledge and intent. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982).

Flight - wherever it occurs - is the consummate act of evasion, and while flight is not necessarily indicative of wrongdoing, it suggests wrongdoing. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

"[E]vidence of a suicide attempt is probative of a defendant's consciousness of guilt and is generally admissible for whatever value the jury decides to give it." State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011).

Discussion

Lewis knew Hepburn had not gotten needed employment. He knew about the pillow play difficulty. He knew Hepburn's son accidentally hit him in the face and declined Hepburn's attempt to have him [her son] offer an apology. Lewis knew that he [Lewis] had opportunely apprised Hepburn that if her son "didn't listen to her now he wasn't ever going to listen to her." Later, Hepburn's son did not want to brush his teeth, and Hepburn "yanked him up by the arm" and spanked him. He attributed Hepburn's imposing the corporal discipline to himself - saying something to her earlier. Witnessing the discipline caused him to afterward avoid Hepburn. Later after hearing the victim cry faintly apparently in response to teething, hearing and feeling Hepburn's footsteps toward the crying victim, and then hearing the child's aberrant crying, Lewis declined to respond. He declined to respond even though, earlier, he had purportedly checked on the child, and Hepburn's earlier disciplining her son - that Lewis thought he had instigated - concerned Lewis. And Hepburn's earlier discipline had concerned Lewis enough to avoid Hepburn - something quite beyond the ability of her infant daughter in her crib. Lewis knew then what he knew later. He instigated, abetted, and witnessed Hepburn's disciplinary outburst against her son, and he instigated, abetted, and witnessed Hepburn's disciplinary outburst against her infant daughter. Further, Lewis knew the cause of the victim being limp and unresponsive and participated in thwarting responders and the physician (ROA. p. 39, lines 3-12; p. 60, line 4 - p. 62, line 9) until its inevitable medical discovery - thus, insuring either delaying or preventing medical assistance

for the still living victim and aiding Hepburn in the child abuse that resulted in the victim's death. Hepburn's testimony attributed criminal responsibility to Lewis; Lewis' testimony attributed criminal responsibility to Hepburn and to himself in that he knowingly aided and abetted Hepburn to commit child abuse, and the child abuse resulted in the infant's death. Lewis confirmed his role in knowingly aiding and abetting Hepburn to commit child abuse that resulted in the death of the victim both by his flight from the police and by his attempted suicide. The record demonstrates relevant evidence necessary to persuade a rational juror to accept a conclusion - that Lewis aided and abetted the commission of child abuse that resulted in the death of the victim - and the court's denial of the motion for directed verdict should be affirmed.

II.

The court soundly declined a jury charge that is not a correct statement of the law.

Did the court err in declining to charge that the state had to prove that Lewis had a legal duty to protect the victim before the jury could convict him of aiding and abetting homicide by child abuse? (Appellant's Statement of Issues Presented, Question II). Counsel says the court should have charged that the jury could only convict Lewis for an act of omission if they found he had assumed a duty as to the minor child. (IBOA p. 16) Pursuant to S.C. Code §16-3-85, the trial judge instructed the jury that the defendants were, in part, charged with aiding and abetting homicide by child abuse.

> To convict either of the defendants of this charge the State must prove 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 eleven. To be liable as an accomplice otherwise known as aiding or abetting the defendant must have knowledge of the principal's criminal conduct. Mere presence at the scene of the crime is not sufficient to establish guilt as an accomplice. Aid means to help, to promote the course or accomplishment of, to give support to or to give assistance to. Abet means to encourage or appear to favor or support.

(ROA. p. 1182, lines 11-24). The state had earlier objected to defense counsel's proposed charge number two since it implied a legal duty toward the child as an element of the offense or as requisite to finding criminal liability. The state noted another statute proscribed unlawful conduct toward a child [S.C. Code §63-5-70], and it applied to people who have charge or custody of a child. In the present case, the defendants were not charged under that statute. (ROA. p. 1074, lines 15-25). The court noted defense counsel's objection and found that the statutory offense of homicide by child abuse was applicable to the defendant, and the

court would include a charge on mere presence in its jury instruction. (ROA. p. 1078, line 12 - p. 1079, line 10).

The substance of Lewis' argument may be that he was merely present, lacked legal responsibility for the victim, and did nothing to aid and abet Hepburn. The argument in part repeats his contention concerning the sufficiency of the evidence and wants merit. The applicable statute, S.C. Code §16-3-85, requires no legal responsibility for a victim. Rather, the statute proscribes causing 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 or knowingly aiding and abetting another person to commit child abuse or neglect, and the abuse or neglect results in the death of a child under the age of eleven. Contrary to Lewis' position, there is substantial circumstantial evidence that he knowingly aided and abetted Hepburn in committing child abuse, and the abuse or neglect resulted in the death of her infant daughter.

III.

The court gave a curative instruction and soundly declined to grant a mistrial.

Did the court err in declining to declare a mistrial when a state's witness testified, over objection, that Lewis' statement had "the possibility of guilt behind it"? (Appellant's Statement of Issues Presented, Question III).

Hepburn and Lewis talked to the emergency room chaplain at the same time, but Lewis was the talker. Lewis said that after initially checking on the victim, he watched television for about an hour and a half, again checked and found her sideways in her crib and unresponsive. In the middle of his narrative, Lewis commented the victim "didn't like him but he loved her." The chaplain thought the comment was odd, in the sense of incidental or unnecessary, and relayed it to the attending physician. (ROA. pp. 145-152; p. 164). The chaplain explained, on cross examination by Hepburn's counsel, he had asked nothing to "provoke" the comment. (ROA. p. 154, lines 14-21). Next, counsel elicited the chaplain's testimony of his knowing nothing about foul play, and "it appeared to be a statement that had the possibility of having guilt behind it." Lewis' counsel moved for a mistrial on the basis that the chaplain had testified to Lewis' guilty knowledge, and the "bell can't be unrung." Counsel also noted that the witness was unqualified to give such an opinion. The court said it would instruct the jury to disregard the comment and that [finding of fact] was solely for the jury. The court denied the motion for mistrial and found its curative instruction would be sufficient. (ROA. p. 155, line 13; SROA- p. 1).

The court's curative instruction to disregard Brown's comment clearly and forcefully addressed the matter raised by Lewis' counsel, and that is demonstrated by the instruction itself and the want of either a contemporaneous request for any additional charge or an

objection to the sufficiency of the court's instruction. (ROA. p. 158). "An instruction to disregard incompetent evidence . . . usually is deemed to have cured the error in its admission. . . . A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out." State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). There was no error.

IV.

The court applied state law and exercised sound discretion in controlling the order of summation to the jury.

Did the court err in declining to require the state to open fully on the law and facts and then to [only] reply to matters brought up in defendants' closing arguments? (Appellant's Statement of Issues Presented, Question IV). Lewis wanted the state to open fully on the law and facts. The defense would then offer rebuttal to state's argument. The state could reply only on matter raised by the defense. The state opposed the motion and claimed final closing argument in that both defendants testified. The court denied Lewis' motion. (ROA. pp. 1092-1093).

In criminal trials, the solicitor is entitled to open and close arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808 (1977). The right to open and close arguments is a substantial right, and the denial of this right constitutes reversible error. State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397 (Ct. App. 2005). In South Carolina, the solicitor is not required to open his closing argument with any argument on the facts, State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652 (1971), overruled on other grounds State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) but may do so as a matter of discretion. Rodgers.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, State v. Oglesby, 384 S.C. 289, 292, 681 S.E.2d 620, 622 (Ct. App. 2009). That discretion includes the presentation of closing arguments and should not be reversed absent an abuse of discretion. State v. Penland, 275 S.C. 537, 539, 273 S.E.2d 765 (1981); State v. Garlington, 90 S.C. 138, 21, 72 S.E. 564, 566 (1911). Contrary to Lewis' position (IBOA, p. 20), the trial

judge's following the appellate law of this State is not a failure to exercise discretion. The assignment of error demonstrates no error of law and no prejudice to the defendant.

CONCLUSION

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

Respectfully submitted,

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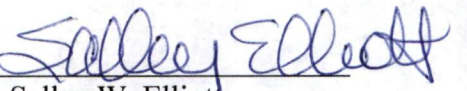
BY: 
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CERTIFICATE OF COUNSEL

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

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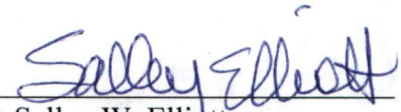
By: 
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