ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State, Respondent,

vs.

Robert Palmer, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Trial court did not err in refusing to enforce the proffer agreement between Appellant and the State because Appellant breached the agreement. Additionally, Appellant has demonstrated no prejudice from the failure to enforce the agreement and has no relief to which he is entitled.

II. Trial court did not err in denying Appellant's motion for a directed verdict.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant and his co-defendant were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Appellant's co-defendant. Appellant and the victim's grandmother lived together for approximately four years. They came into custody of the child after the child's mother had to leave him with them in order to attend to business out of town prior to reuniting with the child's father.

Prior to the mother leaving, the child was taken to the doctor due to ant bites and congestion from allergies. He was given medication and was scheduled to return later for immunizations. The treating doctor indicated the toddler looked normal at the time of the examination and treatment.

On July 14, 2008, Appellant's co-defendant left for work before 6:00am and the child was sleeping and fine. The toddler remained in the care of Appellant throughout the day. Appellant fed the child at 9:30am and again around noon. Around 3:30pm, Appellant laid the victim down again for a nap.

Around 4-4:30pm Appellant's co-defendant arrived home from work and checked on the toddler who appeared to be sleeping. She did not touch the child or closely examine the child. Around 6:00pm, the parties finished dinner and Appellant's co-defendant went to wake the toddler. She found him limp, arms bowed, and frothy saliva coming from his mouth. She called 911 and the child was taken to Conway Medical.

Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call. He testified Appellant was holding the child on the couch when he arrived and he could tell the child was in grave condition. The child was given over to Erica Rosenthal a

paramedic that arrived. Rosenthal testified the child had a right sided gaze and appeared to be having a seizure.

The emergency room nurse and the doctor who saw the toddler, both testified his condition was critical. They both indicated he was posturing due to the head trauma. A CAT scan was done and revealed skull fractures and bleeding in the brain. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. She testified the injury was not accidental.

Dr. Roberts, a neuro-radiologist with the Medical University of South Carolina (MUSC), testified the toddler suffered blood around the brain, severe swelling of the brain, loss of the gray-white differentiation which indicated dead brain tissue, and severe fractures. (T.406; R. 332). She testified both sides of the skull were fractured by severe traumatic force. (T.409-410; R. 335-336). She indicated the fractures were caused by a force similar to falling out of a three story window or being involved in a motor vehicle accident. (T.416-417; R. 342-343). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (T.411; R. 337).

Dr. Roberts also testified the injury was acute, or very recent. She testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 339-341). She testified a person with the type of injury sustained by the toddler would be immediately and severely symptomatic. She said the child would lose consciousness, have altered breathing, seizures, and would not be able to move or have other normal functions. (T.419; R. 345). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 346-347; 360-361).

Dr. Abel, the Director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, testified she was called in to examine the toddler. She testified she took some background history from Appellant and Appellant's co-defendant. She testified she examined the child and his CT scans. She testified the fractures of the child's skull were similar to a cracked pot and indicated it appeared to be caused by severe forceful impact against a hard surface. She testified the blows were to both sides of the head. Dr. Abel indicated the degree of force used was "massive." (T.516; R. 417). Dr. Abel also testified to bruising on the child, including several suspicious bruises in locations it would be unlikely the toddler accidentally received the bruise. (T.519-522; R. 420-423). Dr. Abel testified anyone seeing the force being applied to the child would "perceive this was tremendous force." (T.534; R. 435).

Dr. Abel further testified if an observer did not see the force applied or the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). Dr. Abel testified the injury to the child occurred sometime the day he presented to the emergency room. (T.553-554; R. 452-453). She testified it could be possible for an observer not to be able to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457).

Dr. Schandl, a forensic pathologist with MUSC, testified the toddler had fractures on both sides of his skull. She testified the cause of death was inflicted blunt head trauma. (T.487; R. 393). She testified the manner of death was homicide. (T.488; R. 394).

Detective Troxell interviewed and took statement from both Appellant and Appellant's co-defendant. Both testified Appellant was alone with the toddler all day. Both testified Appellant's co-defendant woke up about 4:30am and left for work in the early morning to be there before 6:00am. Appellant's co-defendant testified she checked on the toddler and he appeared fine before she left. Appellant indicated he woke the child up about 9:30am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. Appellant's statement noted his co-defendant arrived home at about 4:15 pm.

Appellant indicated when his co-defendant arrived home they both checked on the toddler and decided not to wake him. (T.687; R.470). According to Appellant, they only walked to the edge of the door and not all the way into the room. (T.687; R. 567). Appellant testified they ate dinner before waking up the toddler. He testified she went into the room and found him having a seizure. (T.688; R. 568). Appellant admitted no one else comes over to assist him during the day when he is caring for the toddler. (T. 693; R. 573). According to Appellant, neither he nor his co-defendant did anything to the toddler.

Appellant's co-defendant also gave a statement in which she indicated that the toddler was in Appellant's care throughout the day. She testified she got up at 4:30am and left for work after checking on the child. She arrived home between 4:00 and 4:30pm and checked on him. He appeared to be sleeping. (T.737-739; R. 617-619). She confirmed they then ate dinner, and after dinner, she went into the toddler's room to wake him up. It was then she found him making strange noises with saliva running from his mouth.

(T.739; R. 619). Appellant's co-defendant testified she never laid a hand on the toddler. (T.751; R. 631).

Appellant's co-defendant testified the only time she picked up the toddler the day he was admitted to the emergency room was when she picked him up after dinner. (T.798; R. 678). Both Appellant and his co-defendant claimed ignorance of what happened to the child.

At trial, Appellant's co-defendant testified similarly to how she testified in her statement. She gave similar details about leaving for the day. Her story, however, changed regarding the sequence of events upon arriving home. She testified, and presented a time card from her employer, indicated she left her job at 3:45pm. She testified it takes about 45-50 minutes to get home. (T.920; R. 790). She indicated when she arrived home, she checked on the toddler. She verified when she came home she only walked to the door and did not attempt to pick him up. (T.921-922; R. 791-792). She then testified she went to the IGA to get food for dinner and to the video store. She produced a check written to the IGA the day the toddler was admitted to the hospital. It indicated it was processed by IGA at 3:52pm, which she testified would be impossible because of the time it takes to get there from work. She indicated it made sense if the clock was off and should have been 4:52pm. (T.923-925; 927; R. 793-795). She testified when she arrived home from IGA she did not check on the child again. (T.929; R. 799). She confirmed after dinner she entered the child's room and found him "breathing funny" with "saliva hanging out of his mouth." (T.931; R. 801). She called for Appellant, who immediately took the child while she called 911. (T.931-932; R. 801-802).

ARGUMENT

I. Trial court did not err in refusing to enforce the proffer agreement between Appellant and the State because Appellant breached the agreement. Additionally, Appellant has demonstrated no prejudice from the failure to enforce the agreement and has no relief to which he is entitled.

Appellant contends the trial court erred in refusing to enforce the proffer agreement entered into between Appellant and the State. Appellant breached the agreement by failing to be fully forthcoming with the information about the toddler's death and, as a result, the agreement was rendered null and void under its terms. Further, the State completed the extent of its part of the agreement in considering the charges it brought against Appellant. Appellant has not demonstrated any relief he would be entitled to under the proffer agreement he failed to receive, and as a result has not demonstrated how he was prejudiced by the trial court's refusal to enforce the agreement.

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. See State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct.App.2004).

"Our case law unequivocally establishes agreements between defendants and the State should be interpreted 'in accordance with general contract principles.'" State v. Wills, 390 S.C. 139, 144, 700 S.E.2d 266, 268 (Ct. App. 2010) (quoting State v. Compton, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (Ct. App. 2005)). "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Compton, 366 S.C.

at 678, 623 S.E.2d at 665 (citing Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). "Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Language which is perfectly clear determines the full force and effect of the document." State v. Gates, 299 S.C. 92, 95, 382 S.E.2d 886, 887 (1989) (internal citations omitted).

In the instant case, the parties entered into a proffer agreement which was neither a plea agreement nor an immunity agreement. The proffer agreement required, *inter alia*:

> 1. Robert Andrew Palmer shall submit himself to agent(s) of the State for the purpose of the briefing regarding this matter and all other matters materially bearing on this matter. He shall be completely truthful concerning his involvement in this matter, and completely truthful concerning the involvement of all other individuals in this matter. He shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter, and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by a direct question. Any and all information provided by Robert Andrew Palmer under the terms of the proffer may be recorded in any fashion at the election of the State . . . .

(Proffer Agreement; R. 994). The agreement clearly required Appellant to provide all information concerning the homicide of the toddler without the State having to ask direct questions. Therefore, when Appellant failed to provide all the relevant information regarding the time line of the toddler's death, he breached the provisions of the proffer agreement. It was only after the State learned of a different time line from the pathologist and radiologist that Appellant was open to questioning about the actual events which took place leading to the death of the toddler. (June 10T. 2-3; 5; R. 2-3; 5). Appellant's counsel, in her motion to enforce the proffer agreement, states: "Mr. Palmer met with

[Appellant's counsel], and a brief summary of **additional details** concerning the new time line was given to Assistant Solicitor Lively and an invitation to re-interview Mr. Palmer was made." (Motion to Enforce Proffer Agreement page 2; R. 996) (emphasis added). The State, therefore, had a right to withdraw from the proffer agreement because under provision 5 "Violation of any term of this Proffer renders all terms null and void." (Proffer Agreement; R. 994).

Further, the proffer agreement only established a single obligation on the part of the State. It read:

> The State shall consider the extent and degree of cooperation of Robert Andrew Palmer in the election of charges and at the sentencing of Robert Andrew Palmer, and shall advise the Court of Robert Andrew Palmer's extent and degree of cooperation in connection with this matter. . . .

(Proffer Agreement page 2; R.995). As the trial court found, the State had every right to charge Appellant as it deemed appropriate. There was absolutely no requirement the State charge Appellant only with a lesser included offense or that he not be tried as a codefendant with Gorman. The only requirement was for the State to consider his cooperation in reaching its decision. There is no evidence this was not done, especially in light of the State's belief that Appellant was not entirely forthcoming regarding the time frame and the events leading up to the toddler's death. As a result, Appellant cannot demonstrate how he was prejudiced, or show any provision of the proffer agreement with which the State failed to fully comply.

In his brief, appellant sets forth four ways in which he allegedly was prejudiced. First, he was not allowed to testify against his co-defendant, and instead, was a co-defendant tried at the same time as Gorman. However, the proffer agreement makes it

clear that he was only testifying on behalf of the State "upon being called upon to do so." (Proffer Agreement; R. 994). Further, nothing prohibited Appellant from testifying at trial either for or against his co-defendant. Therefore, Appellant did not detrimentally rely on the agreement and was not prejudiced in this manner.

Second, Appellant contends the State had to elect favorable charges in return for his cooperation. This completely misstates the obligation of the State under the proffer agreement. As stated above, the State merely had to consider his cooperation, and absolutely no restrictions existed on the charges which could be brought against Appellant. There was never a promise Appellant would only be charged with a lesser included offense instead of being charged with homicide by child abuse. Appellant did not detrimentally rely on the agreement, nor was he prejudiced by the State's withdrawal.

Third, appellant contends the State offered no help at sentencing contrary to the agreement. The State was not obligated to offer any specific help at sentencing or make any type of recommendation at sentencing. Its sole obligation was to make the court aware of the extent and degree of cooperation by Appellant. This was thoroughly accomplished both pretrial and by Appellant's counsel during sentencing.[1] As a result, Appellant did not detrimentally rely on the proffer agreement and was not prejudiced in any regard by its withdrawal.

Fourth, Appellant contends the State was able to gain information through their debriefing of Appellant and their interviews to try to make a case against Appellant. The proffer agreement specifically allowed the State to use any information obtained during

[1] The State notes that Appellant's cooperation only went so far because it was only after the time frame was condensed that he offered to be interviewed for a third time to provide additional details which he was obligated to provide from the beginning. Because of the pretrial motion, the court was well aware of Appellant's cooperation or lack thereof. (June 10 T.2-5; R. 2-5).

the interviews. Further, the State submitted appellant did not provide them any significant information. Finally, the State did not offer any recordings or other statements by Appellant from the interviews during trial. Accordingly, Appellant could not have detrimentally relied or been prejudiced in this manner.

Finally, Appellant has not demonstrated any relief to which he is entitled. As mentioned, the agreement did not entitle him to testify unless the State chose to call him. It did not entitle him to be charged with a specific crime or receive a specific sentence. Accordingly, even if the agreement was enforced, the State could still try Appellant for the same charges, using the same evidence, and ask for the same sentence considerations as it did in the instant case. As a result, if the agreement is enforced, there is no relief which Appellant can receive which he has not already received.

Therefore, the State submits the trial court did not err or abuse his discretion in refusing to enforce the proffer agreement any further than it had already been performed.

II. Trial court did not err in denying Appellant's motion for a directed verdict.

Appellant maintains the trial court erred in denying his motion for a directed verdict. The State presented ample evidence the toddler was viciously and intentionally struck on both sides of his head. The time line presented by the doctor's testimony included a significant period of a day in which Appellant was home alone with the child. Further, if the statements and testimony of the co-defendant are believed, then Appellant was the only other person who could have committed the actions.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

In relevant part, section 16-3-85 of the South Carolina Code provides:

> (A) A person is guilty of homicide by child abuse if the person:
> (1) 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; or

> (2) 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.
> (B) For purposes of this section, the following definitions apply:
> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
> (2) "harm" to a child's health or welfare occurs when a person:
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment. . . .

It is clear from the statutory definition that to be guilty of homicide by child abuse or aiding and abetting homicide by child abuse one does not have to actually inflict the injury, but must either by act or omission all the injury to be inflicted. The evidence demonstrated clearly the child died as the result of trauma that was intentionally and severely inflicted. Every doctor indicated it would require severe trauma to cause the type of injury and it was not contested the toddler died as a result of his head injuries.

The only issue Appellant contends the State failed to prove is whether Appellant can be identified as one guilty of homicide by child abuse. This case is remarkably similar to the case of State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), in which this Court found the trial court properly submitted the case to the jury when two people could have been responsible for the injuries. In Smith, this Court explained:

> The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child's physical health. Additionally, harm to a child's health occurs when a person either inflicts, or allows to be inflicted physical injury upon a child. Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have

> been obvious to these two adults, along with the evidence of possible cover-up, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death.

Smith, 359 S.C. at 492, 597 S.E.2d at 894. (internal citations omitted). This Court found where the evidence indicated one of the two adults clearly caused the injury, the fact the exact identity of the individual who physically caused the harm is not necessary to support sending the case to the jury.

According to the testimony of Appellant and his co-defendant, Appellant was home the majority of the day alone with the toddler. Appellant's co-defendant merely looked in on the toddler in the morning and when she arrived home that evening. She did not go into the room or near the child. She testified he appeared to be sleeping, but she did not verify the condition of the child.

In the instant case, Dr. Abel and others testified the injury had to happen the day the toddler was taken to the emergency room. The doctors all testified the injury was severe and caused by blunt force trauma intentionally inflicted to the child. Further, they testified the child suffered fractures to the skull on both the left and right sides, as well as significant bleeding on the brain, and death of brain tissue.

Dr. Abel further testified if an observer did not see the force applied or the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). She testified it could be possible for an observer to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457). Further, she specifically testified:

> [T]he signs of head trauma are changing consciousness, sometime seizures, sometimes breathing abnormalities.

> They, they don't all happen at once, so a child could have a head injury and be quietly breathing and apparently sleeping but actually unconscious and it would not be possible for a person who didn't know that they had had the head injury to realize it until later, until something more started happening.

(T.559; R. 458).

As a result, it is possible the injury could have been inflicted by Appellant prior to Appellant's co-defendant getting home and, if the co-defendant did not notice anything wrong from the doorway when she looked in on the toddler, then she would not have known something happened to the child until she went to pick up the child. Appellant's co-defendant testified she did not enter the room, but instead merely observed the child appearing to be asleep. She testified when she went into the room to pick up the child was when she noticed something wrong. Prior to this time, Appellant was the only one home throughout the day with the child. Accordingly, the evidence when viewed in the light most favorable to the State shows Appellant either inflicted the harm.

The only opportunity Appellant's co-defendant had to inflict the harm would be when she entered the room to pick up the child. There is no testimony indicating any events took place during this time which would have caused the severe blunt force trauma to both sides of the toddler's head. The doctors indicated the trauma would be severe and as a result, had something happened during this time Appellant would have known. Appellant arrived in seconds when called by his co-defendant and so was within very close proximity to where she was with the child. At that distance, he should have known something occurred or was occurring if his co-defendant was the one who physically harmed the child. In the light most favorable to the State, he either inflicted the harm which went undiscovered until Appellant's co-defendant picked up the child, or he knew

and allowed the injury to be inflicted. In either situation, there was evidence sufficient to send the case to the jury for its consideration.

CONCLUSION

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

Respectfully submitted,

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February 25, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable Larry B. Hyman, Circuit Court Judge
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The State, Respondent,

vs.

Robert Palmer, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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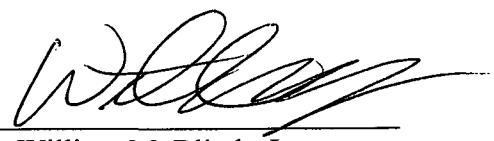
BY: 
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February 25, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
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The State, Respondent,

vs.

Robert Palmer, Appellant.

PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 25th day of February, 2013.

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