STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ISAAC JOHNSON,

APPELLANT

APPELLATE CASE NO 2017-000873

FINAL BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying the motion for an independent evaluation of a minor child with autism, where the child had difficulty recalling certain events and was unable to commit to telling the truth?

II. Did the trial court err in allowing the State to call an expert witness, where the State withheld the expert's CV and thereby committed violations under Rule 5, SCRCrim and Brady v. Maryland[1], where Appellant had no notice of the purpose for which the expert was going to be called.

III. Did the trial court err in denying Appellant's motions for a mistrial, where the State's expert witness testified without proof that Appellant burned a minor child as a form of discipline, where a curative instruction was subsequently provided, and where the State again mentioned the word discipline?

IV. Did the trial court err in denying Appellant's motion for a directed verdict, where the State failed to prove that Appellant had the applicable state of mind, and where no evidence was offered proving that Appellant intended to burn the minor child?

---

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

V. Did the trial court err in admitting cumulative photographs depicting a minor child's burns, where the photographs were duplicative of other photographs and only showed the injuries from a slightly different angle?

VI. Did the trial court err in charging the jury, where the court neither charged accident nor the correct *mens rea* requirement under the great bodily injury statute?

STATEMENT OF THE CASE

Appellant was indicted for inflicting great bodily injury upon a child under S.C. Code Ann. § 16-3-95(A) by a Richland County Grand Jury on or about December 15, 2015. R. 676. The State, represented by Kathryn Luck Campbell, Lamar J. Fyall, and Nicole M. Simpson, called the case for trial on April 3, 2016 before the Honorable R. Knox McMahon and a jury. R. 91. Robert Louis Bank, Tracy E. Pinnock, and Jessica E. Sturgill represented Appellant. After a five-day trial, the jury found Appellant guilty. R. 653, ll. 14 – 19. Judge McMahon sentenced Appellant to twenty years' incarceration. R. 665, ll. 12 – 19.

This brief follows.

STANDARDS OF REVIEW

Competency

"Qualification of a witness is within the trial judge's discretion and his ruling will be reversed only for an abuse thereof." State v. Hudnall, 293 S.C. 97, 99, 359 S.E.2d 59, 61 (1987), overruled on other grounds by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

Brady v. Maryland

The trial court "abuses its discretion when it commits a legal error in determining whether a Brady violation occurred; we therefore review the district court's Brady ruling de novo." United States v. Parker, 790 F.3d 550, 558 (4th Cir. 2015). In conducting its de novo review, the appellate court reviews a trial judge's factual findings for clear error. Id.

Mistrial

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010.

Directed Verdict

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

Evidence Admissibility

The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

Jury Charges

"It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." Id.

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

On October 7, 2015, Keith Williamson, an officer with the City of Columbia Police Department, pulled over a dark blue can on Farrow Road for allegedly exceeding the speed limit. R. 131, ll. 6 – 24. After being advised that there was an injured child in the van, Williamson provided an escort to the hospital. R. 132 ll. 3 – 22. At the hospital, Williamson observed a male passenger get out of the van and carry a child in a blanket into the emergency room. R. 132 l. 25 – R. 133 l. 10. The driver of the van was Appellant's brother, Bruce Gibbs. R. 137, l. 5 – R. 439 l. 3.

After arriving at the hospital, Mary Smith, a registered nurse, assessed the extent of the child's injuries and recommended that the child be transferred to the burn center in Augusta. R. 123 ll. 18 – 23. Prior to that transfer, however, the child allegedly pointed at Appellant, the man who had carried the child into the hospital, and said "[h]e did this to me." R. 127 ll. 20 – 23.

Don Timmons, an officer with the City of Columbia Police Department, arrived at the hospital following the arrival of a burned child. R. 116, ll. 3 – 12. Timmons observed Appellant and the child's mother, Kristin Campbell. R. 117 ll. 5 – 21. His involvement in this matter was limited to the hospital visit; the case was turned over to the investigative department soon thereafter. Id.

Colin Bailey, an investigator with the City of Columbia Police Department, participated in an interview of Appellant with James Charley on October 12, 2015. R. 169 l. 11 – R. 171 l. 7. Two days later, Charley and Bailey obtained and executed a search warrant at the home where Appellant and the child had been living. R. 176 ll. 6 – 18. As part of the search warrant, law enforcement "was seeking to, amongst other things, to measure the temperature of the water in

the, in the shower." Id. Charley directed Bailey to "do what [he] could to measure the temperature of the water in [the] shower." R. 189 ll. 13 – 19.

Bailey admitted that neither he nor Charley had ever done a water temperature measurement or "worked a case quite like this involving temperatures of water." R. 192 ll. 3 – 11. Using personal thermometers from his home, Bailey measures the temperatures that the water heater was "capable of producing." R. 192 ll. 3 – 9; R. 192 10 – 25. Bailey admitted that the temperature fluctuated, and he was unaware of anyone calling the manufacturer or dealer for the hot water heater to obtain specific details. R. 195, ll. 21 – 25; R. 204, l. 17 – R. 205 l. 6. He did not consult with an expert, and he acknowledged that this "[was not] the most scientific approach [he] could have taken to, to measure the temperature of the water." R. 206 l. 25 – R. 207 l. 7.

While testing the water temperatures, Bailey wore gloves. R. 206 ll. 5 – 8. He did not observe any burns on any of the adults' hands during his investigations. R. 208 ll. 8 – 10.

Appellant was interviewed a second time on or about October 19, 2015. R. 536, l. 4 – 21. Following the interview of Appellant, he was arrested. R. 541, ll. 10 – 20.

A three-day pre-trial hearing was held in March 2017 before Judge McMahon regarding the potential evaluation of the minor child. Hearing Transcript 1. Luck Campbell served as the Assistant Solicitor, and Robert Bank represented Appellant. Id. The trial court heard testimony from Dr. Jessie Raven and Heather Smith, two expert witnesses. At the conclusion of the hearing, the trial court ruled that an evaluation of the minor would not assist the court in the determination of competency of the witness. R. 68, ll. 4 – 14.

Discussion

I. The trial court erred in denying the motion for an independent evaluation of a minor child with autism, where the child had difficulty recalling certain events and was unable to commit to telling the truth.

At the pre-trial hearing, Dr. Jessie Raven, who had previously been retained by the Solicitor's Office in Beaufort County, was qualified as an expert in forensic and child psychiatry. R. 6, l. 20 – 7, l. 3. Previously, he had been asked by defense counsel to review records in this matter, including records of the minor child who "has a history of autism spectrum disorder." R. 7, ll. 5 – 9. Dr. Raven reviewed the child's pediatric records, records from independent resources, and discovery records provided by defense counsel. R. 7, ll. 12 – 19.

Dr. Raven discussed concerns regarding the competency of the minor child. R. 8, ll. 14 – 18. However, Dr. Raven did not outright opine whether the child was competent; he simply suggested, to a reasonable degree of medical certainty, that it would be beneficial to have the child evaluated "by someone specifically trained in autism" to ensure that the child is competent. R. 8, l. 19 – 9, ll. 23. Specifically, he offered some background in autism:

> My concern is that individuals with autism spectrum disorder sometimes appear to be more competent than they actually are. Oftentimes if someone is at a higher end of functioning they can articulate their words very well and communicate what their thoughts are pretty well but because of the autism spectrum disorder they may be interpreting facts - - they may have difficulty interpreting facts.
>
> They may have difficulty putting facts together in a way that is meaningful. They may appear to be answering yes to a question or even telling what a lie is or the truth is but not be able to have more meaningful communication about it.
>
> R. 9, l. 17 – 10, l. 3.

Dr. Raven repeatedly opined that it was important to have the minor child evaluated. R. 12, l. 9 – 14, l. 13. He suggested an interview evaluation, which would be non-invasive. R. 14,

ll. 3 – 13. He reiterated his opinion, namely "that there is not enough information" to indicate competence one way or the other. R. 17, ll. 19 – 25; R. 20, l. 18 – 21, l. 4; R. 20, l. 13 – 33, l. 8.

Heather Smith, a forensic evaluator and human services worker, admitted that the minor child did not initially promise to tell the truth. R. 45, ll. 1 – 9. She justified the response by suggesting that the child did not want to talk in the first place. Id.

Defense counsel handed the trial court a memorandum in support of its motion. R. 47, ll. 3 – 9. R. 71 Further discussion included detailed argument from defense counsel. R. 51, l. 4 – 55, l. 23. Counsel pointed out the minor child's Individualized Education Program ("IEP") which indicated that the child had "difficulty with retelling stories." R. 59, l. 8 – 61, l. 6; R. 7

At the conclusion of the hearing, the trial court ruled:

> I think in this case it would be more inherently intrusive, the examination of a young person who is also an alleged victim of such an event in ... life. More intrusive rather than less intrusive, and I believe it would have some emotional effect on the victim, such an examination.
>
> The probative value of the examination is not an issue before the Court as to whether or not there should be a psychological evaluation. Right now the only issue before the Court is whether there should be a psychological evaluation of the child to assist the Court in the determination of competency of the witness.
>
> ...
>
> So at this point, not having heard nor seen the victim, I would find that there is sufficient power in cross-examination if the victim were found competent. This is a pre-trial ruling that there be no psychiatric examination of the victim at this time.

R. 62, l. 7 – 69, l. 23.

Defense counsel renewed the motion after the jury was selected in Appellant's trial. R. 110, ll. 5 – 16. The trial court heard proffered testimony from the minor child. R. 248 – 259. The child answered in the affirmative when asked about the ability to say "I don't know" when

he did not know the answer to a question but was unable to put that theory into practice initially when asked ages of counsel and a gentleman in the courtroom. R. 257, l. 3 – R. 259, l. 19.

Following the proffered testimony, defense counsel renewed the motion for a private evaluation. R. 260, l. 23 – R. 263, l. 11. The trial court denied the motion and pointed out that the child was able to appreciate the difference between the truth and a lie. R. 263, l. 17 – R. 268, l. 25.

The minor child initially struggled to recall the underlying incident before the jury. R. 271, ll. 19 – 21. He also had a difficult time remembering the prior interview with Heather Smith and the events allegedly giving rise to his burns. R. 275, l. 21 – R. 276, l. 25.

"Every person is competent to be a witness except as otherwise provided by statute" or the Rules of Evidence. SCRE 601(a). "A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." SCRE 601(b).

The South Carolina Supreme Court has outlined relevant factors for determining a witness's competency, to include the requirements that "a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath." State v. Needs, 333 S.C. 134, 143 (1998) (citing Commonwealth v. Goldblum, 498 Pa. 455, 465 (Pa. 1982)).

As correctly articulated in the memorandum submitted by defense counsel, the trial court has authority through In re Michael H. to order an independent psychological evaluation in order to protect a defendant's right to a fair trial, the right to confront his accuser, and to "ensure the

truth of a matter is brought to light and justice to all parties before the court is served." 360 S.C. 540, 602, S.E.2d 729, 733 (2004). The Court adopted the Delaney[2] factors:

> (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

In re Michael H., 360 S.C. 540, 547, 602 S.E.2d 729, 732-3 (2004) (citing State v. Delaney, 417 S.E.2d 903, 907 (W. Va. 1992)).

All six factors are satisfied in Appellant's case, and the trial court therefore should have ordered an independent evaluation for competency.

Dr. Raven testified that an evaluation would be non-intrusive. The minor child in Appellant's case did not differ significantly from the child in Michael H. Once more, the expert offered by defense counsel opined that an evaluation would not be physical. The probative value of the examination was exceedingly high; the evaluation was absolutely necessary to protect the due process and fairness rights of Appellant. The timeline for the evaluation would have been shorter than in Michael H., thereby satisfying the fifth factor as well. Lastly, there were not sufficient resources available for the use by Appellant and his counsel.

II. The trial court erred in allowing the State to call an expert witness, where the State withheld the expert's CV and thereby committed violation under Rule

---

2 State v. Delaney, 417 S.E.2d 903 (W. Va. 1992).

5, SCRCrim and Brady v. Maryland[3], where Appellant had no notice of the purpose for which the expert was going to be called.

Following the testimony of a crime scene investigator, Brian Sutton, defense counsel objected to the State calling an expert witness, Dr. Susan Lamb. R. 285. At this stage of trial, defense counsel had not yet even been provided Dr. Lamb's *curriculum vitae*. Counsel for Appellant received a medical report approximately fifteen minutes prior to voicing an objection. Notably, however, the State withheld the CV for Dr. Lamb. Defense counsel advised the trial court that there was a complete lack of notice:

> We asked for the CV's of all the state's potential experts before the trial started. We've been provided nothing, which is why we have no notice as to what would be testified. Your Honor, we would object to her testifying for, for any purpose for this trial. We believe it would - - it is a Rule 5 Brady violation.

R. 293, l. 11 – R. 286, l. 2.

The State argued that at a prior discovery meeting, defense counsel "indicated they had" received the medical report and a medical exam. R. 286 l. 10 – R. 287, l. 25. There was no mention of Dr. Lamb's CV during the State's response to the objection. Defense counsel differentiated between the State's contention that it had complied with the rules and the standard:

> I'm unaware of where in the rule it says that we are responsible for asking for every single piece of information that could exist in their file. We did sit down with [the Assistant Solicitor] and go through their file. I made a handwritten list at that point of all the items that we were missing, and [the] medical exam was never brought up. We told her that we had the ARC report, which we did get the ARC report. It's a three-page report, Your Honor. That was provided to [defense counsel] on February 12, 2016. We have the receipt I can make a part of the court record that is the date that that information was turned over to us, but there was no mention of any medical report when we met. If it had been, a copy would have been made at that point.

---

[3] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

> We were just handed this information. Their own witness's testimony about the exam being done does not then absolve them of their responsibility to make sure we have that information.
>
> So, Your Honor, the meeting happened. The medical report was not brought up. Now like I said, we're in a position where they're about to put a medical doctor on the stand, and I'm assuming again that they're going to attempt to qualify her as something, and we have no information, you know, until a few minutes ago about what this person would potentially testify about because - - based on the report we were, we were provided in court. So Your Honor, we would object to the entirety of the testimony.

R. 288, l. 4 – R. 289, l. 4.

Additional argument ensued wherein defense counsel made the discovery receipt a court's exhibit. R. 289, l. 12 – R. 291, l. 20. The trial court granted a continuance:

> I've read the rules once. Under Rule 5(b)(e), I understand the continuing duty to disclose. Also under (b)(d)(2) if this were a failure to comply, and I'm not finding that specifically: The court may order such party to permit discovery or inspection.
>
> Discovery has now been permitted. All has been turned over that were not turned over previously to the defense. I'm granting a continuance as to Dr. Lamb's testimony. You may call Dr. Lamb either in the morning or late this afternoon, not now. That will give them the opportunity to review both her CV and the report.

R. 291 l. 21 – R. 292 l. 7.

Counsel for Appellant later renewed the motion. R. 372, l. 4. – R. 373, l. 16.

Under Rule 5 of the South Carolina Rules of Criminal Procedure, failure to comply with a request provides the trial court with the authority to prohibit a party from introducing evidence not disclosed. SCRCrimp 5(d)(2).

The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. It requires the prosecution to disclose evidence that is: 1.) in its possession; 2.) favorable to the accused; and 3.) material to guilt or punishment. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87

L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The prosecution has the duty to disclose regardless of whether the defendant makes a specific request. Bagley, supra. This rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "Favorable" evidence includes both exculpatory and impeachment evidence. Bagley, supra. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682, 105 S.Ct. 3375. Once a Brady violation is established, reversal is required. Kyles, supra.

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. Rule 5(a)(1)(C) requires:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

This rule clearly applies to evidence within the actual possession of the prosecution and seems to also apply to evidence within the possession of other government agencies. See State v. Gulledge, 326 S.C. 220, 487 S.E.2d 590 (1997). The definition of "material" for purposes of Rule 5 is the same as the definition used in the Brady context. See Fradella v. Town of Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997) (per curiam). Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation. State

v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996); State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992).

III. The trial court erred in denying Appellant's motions for a mistrial, where the State's expert witness testified without proof that Appellant burned a minor child as a form of discipline, where a curative instruction was provided, and where the State again mentioned the word discipline.

Defense counsel moved for a mistrial following the testimony of Dr. Richard Cartie. As counsel put it: "He testified during direct examination that the event that happened to [the child] happened as a form of discipline. That was an inadmissible statement. That was not included in his proffer. I don't believe there's any disagreement that was inadmissible." R. 405, ll. 1 – 17.

Counsel elaborated:

> At this point, the jury has now heard that word discipline, which is why it needs to be struck, but we're moving for a mistrial at this point because I don't think that bell can be unrung.
>
> Your Honor, the word discipline creates the first piece of evidence in this case that goes to a type of intent. [The child's] testified... on the stand and did not give any time of motive, intent, or anything along those lines. All the other witnesses' testimony has been limited to not include any of that because it is impermissible hearsay.
>
> Dr. Cartie, despite going through testimony through a proffer in front of Your Honor, let out the word discipline anyway. It's inadmissible. The jury now thinks that there is some type of motive or intent for Shane to have done this to him, and I don't think there's any way to fix that. So, we are moving for a mistrial. I don't believe that the jury can now look at this fairly, having heard that. I do ask for it to be struck. I just don't know that that will fix it.

R. 405, l. 7 – R. 406, l. 1.

The trial court, citing to State v. Bantan, 387 S.C. 412, 692 S.E.2d 201, (Ct. App. 2010), articulated the standard and denied the motion. R. 406 l. 20 – R. 408 l. 12. Defense counsel

renewed the motion for a mistrial based upon the reasonable deduction that a curative instruction would be insufficient. R. 406 ll. 13 – 15.

The curative instruction was given following the testimony of Kristin Campbell. R. 477 l. 15 – R. 478, l. 13. Defense counsel once more renewed the motion for mistrial and objected to the curative instruction. R. 480 ll. 3 – 6.

Following a second use of the word discipline, this time by the State, Defense counsel later renewed the motion for mistrial after the State rested. R. 566, ll. 4 – 8; R. 568, l. 11 – R. 569 l. 10. In particular, counsel argued:

> **Discipline is not a part of this trial**. It was a problem when Dr. Cartie brought it up. We've had to strike it from the record. We've had ... to give a curative instruction. I've had to move for a mistrial and then [the Assistant Solicitor], knowing all that, brought it up again, the inference being that he in some way is hiding that he was trying to discipline the child.
>
> They can't keep doing this, and so I'm renewing the motion for a mistrial. They've not heard the word discipline twice, this second time after they've already heard it the first time. They're not supposed to hear that. They - - I, I can't stop them from thinking that now. There's nothing I can do to fix that, Your Honor.
>
> So, along with our other motions that I can go into in more detail to renew, that specifically we're asking to renew based on our previous arguments and then this new question, line of questioning from [the Assistant Solicitor].

R. 568, l. 11 – R. 569, l. 10. (emphasis added).

Additional discussion took place between the trial court and the parties. R. 569, l. 12 – R. 572, l. 4. The trial court affirmed its ruling as to the first use of the word discipline and took the second under advisement. Id. Additional motions and objections were renewed and brought, including the request for an evaluation of competency. R. 572, ll. 5 – 12. The trial court later denied the motion for mistrial. R. 580, l. 8 – R. 582, l. 6.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.' " State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir. 1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

The trial court attempted to exhaust its remedies. It offered a curative instruction. However, the curative instruction was meaningless when discipline was brought up again, this time by the Assistant Solicitor. Therefore, it was of manifest necessity that the trial court grant a mistrial, where the jury was unable to escape the notion that Appellant burned the child as a form of discipline. After hearing it from the State and from the State's expert witness, the trial was tainted such that a mistrial was necessary.

IV. The trial court erred in denying Appellant's motion for a directed verdict, where the State failed to prove that Appellant had the applicable state of mind, and where no evidence was offered proving that Appellant intended to burn the minor child.

Following the close of the State's case-in-chief, counsel for Appellant moved for a directed verdict. R. 572, l. 22 – R. 574, l. 19. In particular, counsel noted the *mens rea* requirement and posited that the State failed to offer any evidence as to Appellant's state of mind or intent. Counsel contended that the specific *mens rea* requirement would be that Appellant acted intentionally. Id. Counsel argued that as a whole, the statute requires intent. R. 576, l. 16 – R. 577, l. 14.

The trial court, citing State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002), denied the motion for a directed verdict. R. 578, l. 7 – R. 580, l. 3.

"The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) and State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995)). "The accused also is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." *Id.* (citing State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Gore, 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995)). "However, if there is any direct or 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." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)).

Appellant was charged under S.C. Code Ann. § 16-3-95: "It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years."

The trial judge erred by failing to direct a verdict, because the State failed to present any evidence Appellant intended to inflict great bodily injury upon the child. The only evidence offered by the minor child was that "[Appellant] did it." As pointed out by counsel during the directed verdict motion, there's no further explanation. R. 575, l. 11 – R. 576, l. 14. Therefore, as articulated by counsel, the evidence does not get "past the level of a mere suspicion that [Appellant] might have done something." Id.

V. The trial court erred in admitting cumulative photographs depicting a minor child's burns, where the photographs were duplicative of other photographs and only showed the injuries from a different angle.

Defense counsel objected to the admission of pictures from Palmetto Health Richland. R. 209, l. 7 – R. 213, l. 4. These pictures depicted the burns on the child, and the specific objection was that three of the photographs were cumulative. Id. In particular, counsel objected to State's Exhibits 4, 6, and 7 as cumulative. Id.

In response to the objection, the State advised that it must prove great bodily injury to the child. Id. The State reasoned that the photographs showed different angles of the child's injuries. Id. Defense counsel noted that the images from the objectionable photographs also appear on State's Exhibits 3 and 5. Id. The trial court agreed with the State and overruled the objection. R. 211, l. 12 – R. 212, l. 4.

Following the objection, the State called Dr. William Ferrara. R. 213. Dr. Ferrara pointed out the cumulative nature of the photographs, in particular with respect to State's Exhibits 5 and 6: "**again this is showing** extensive burns to the posterior thorax with **again** the skin sloughing." R. 228, l. 14 – R. 229, l. 4. (emphasis added).

Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point. McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905, 909 (1937); Johnston v. Belk- McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 399 (1938).

"Photographs pose a danger of unfair prejudice when they have 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' " Id. (quoting State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009)). "Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." Id.; see State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

The admission of these additional photographs in Appellant's case was both unnecessary and prejudicial. As correctly set forth by counsel, and as noted by the State's expert, these graphic photographs were cumulative. They showed injuries that were already before the jury in the form of other exhibits; their inclusion in the record of this case and subsequent presentation to the jury was cumulative.

VI. The trial court erred in charging the jury, where the court neither charged accident nor the correct *mens rea* requirement under the great bodily injury statute.

Appellant was charged under S.C. Code Ann. § 16-3-95: "It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years."

As articulated by counsel, Black's Law Dictionary defines unlawful as "[n]ot authorized by law; illegal or [c]riminally punishable ." (10th ed. 2014). Defense counsel, in turn, argued that this definition "creates a strict liability situation for [Appellant] in this charge." R. 607, l. 23 – R. 609, l. 13. Counsel demonstrated thoroughness in having researched this issue:

> The problem is we don't have the legislative history of this. There is no history. We have looked, which is why we have resorted to reading the statute as a whole, the statute on its face, all three sections, A, B, and C.
>
> B requires somebody to stand by, allowing somebody to injure their child. It's allowing somebody to do something intentionally to their child, which is what makes them criminally responsible under Subsection B. Subsection C is an exclusion. If somebody intentionally inflicts corporal punishment on their child, they are excluded from criminal responsibility if it's just corporal punishment.
>
> So, the statute as a whole has an intent element included in it. Just because it's left out of Section A does not make it a strict liability offense.

R. 610, l. 18, l. 22 – R. 611, l. 10. The trial court indicated that it would not advise the jury that this was a strict liability offense, with the Assistant Solicitor agreeing: "No, sir, we aren't." R. 611, ll. 11 – 13. The trial court then declined to charge the jury on specific intent. R. 612, l. 7 – R. 614, l. 7. Defense counsel renewed the objections. R. 616, ll. 3 – 9. After the jury was charged, defense counsel renewed the objections. R. 617, l. 18 – R. 637, l. 5.

Notably, the jury returned during deliberations with a question: "What is criminal negligence under the criminal intent statute? Same question for recklessness." R. 637, ll. 18 –

20. The trial court and parties wrestled with how to respond to these questions. R. 637, l. 22 – R. 646, l. 8. Defense counsel reasoned that the jury was likely interpreting examples from the charges to be the standard and therefore suggested that the trial court recharge without the examples. R. 641, ll. 2 – 7. The trial court pointed out that none of the examples were specific to the charge facing Appellant. R. 642, l. 23 – R. 643, l. 12. Defense counsel suggested that the jury charges were unclear, because "if it was clear, they wouldn't have asked the question." R. 643, ll. 14 – 23.

After the trial court indicated that it was not going to advise the jury that the examples provided in the charges as given did not apply to the matter *sub judice*, defense counsel reiterated the request that "criminal negligence was not charged in the specific crime to [Appellant], and then reread the intent charge." R. 645, l. 16 – R. 646, l. 4.

Following the trial court's response to the jury, the jury requested written jury charges or the opportunity to take notes. R. 646, ll. 13 – 15. The trial court responded in the negative to both inquiries. R. 646, l. 16 – R. 649, l. 13.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472–73 (2004); State v. Brown, 362 S.C. 258, 261–62, 607 S.E.2d 93, 95 (Ct. App. 2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. Sheppard, 357 S.C. at 665, 594 S.E.2d at 473. Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. Id. When a charge is inadequate as

given, a party must request further instructions or object on grounds of incompleteness to preserve the issue for review. Ford, 334 S.C. at 454, 513 S.E.2d at 390.

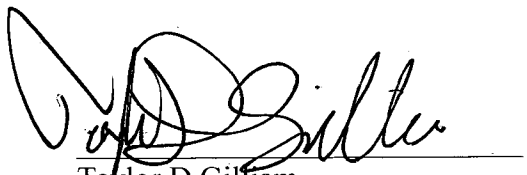
"When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014) (quoting State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (citation omitted). "Thus, whether or not the error was harmless is a fact-intensive inquiry." Id.

As this Court noted in State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014), the error cannot be harmless when the evidence does not support one clear-cut conclusion. As noted by counsel throughout Appellant's trial, there was no evidence Appellant intentionally placed the minor child in the bathtub for an extended period of time and maliciously caused the injuries. Therefore, the evidence cannot be construed as only showing Appellant to have caused these injuries intentionally.

The requested jury charge on accident was intertwined with the proposed charge on *mens rea*. Both represent the idea that Appellant did not intentionally injure the minor child and allow the jury to indicate accordingly with a verdict. This option was removed from the jury's hands.

CONCLUSION

For the foregoing reasons, Appellant would respectfully request that this court reverse his conviction and sentence, or in the alternative, remand his case for a new trial in a manner consistent with the above-requested relief.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 7, 2018

Taylor D. Gilliam
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589