ORIGINAL

RECEIVED
OCT 0 8 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARON DUANE DAVIS,

APPELLANT

APPELLATE CASE NO. 2012-213571

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

JUSTIN M. KATA
The Giese Law Firm, LLC
1315 Blanding Street
Columbia, SC 29201
(803) 708-6767

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 10

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 17
State v. Arnold, 361 S.C. 386, 605 S.E. 2d 529 (2004) 10
State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) 11, 12
State v. Cherry, 348 S.C. 281, 606 S.E.2d 475 (Ct. App. 2001) 16
State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 10
State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct.App.1996) 14
State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) 11
State v. Hepburn, 2011-190695, 2013 WL 6492390 (S.C. Dec. 11, 2013) 12, 13
State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct.App.2002) 10
State v. Kelly, 319 S.C. 173, 460 S.E.2d 368 (1995) 17
State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) 10
State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) 17
State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989) 13, 14
State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) 17
State v. Lollis, 343 S.C. 580, 585 (2001) 11
State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) 11, 12
State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct.App.2004) 10
State v. Stokes, 339 S.C. 154, 528 S.E.2d 430 (2000) 14, 15
State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct.App.2005) 10, 11

Rules

Rule 19, SCRCrim.P 9
Rule 403, SCRE 16

STATEMENT OF ISSUE ON APPEAL

I. Did the trial judge err in failing to grant the directed verdict motion to the Defendant?

II. Did the trial judge err in failing to charge the jury with a mere presence instruction?

III. Did the trial judge err in allowing jury to view the photographs of the victim?

STATEMENT OF THE CASE

In March of 2012, the Greenville County Grand Jury indicted Davis for homicide by child abuse, indictment #2012-GS-23-1479. On December 3, 2012, Davis proceeded to jury trial before the Honorable Edward W. Miller. Attorneys John Mauldin and Evelyn Mitchell represented Davis at trial. Attorneys Christy K. Sustakovitch and Leigh B. Poaletti prosecuted the case on behalf of the State. On December 6, 2012, the jury returned a verdict of guilty and Judge Miller sentenced Davis to life in prison without parole. A timely notice of intent to appeal was served on December 11, 2012. This appeal follows.

STATEMENT OF FACTS

I. BACKGROUND

Daron Davis and Shalita Dawkins began dating in February of 2009. (R. p. 126, line 13). They lived in separate residences. (R. p. 127, lines 17-19). Shalita Dawkins had two children when she began dating Daron. (R. p. 163, lines 15-20). Both of these children referred to Daron as "dad." (R. p. 164, lines 7-10). In November of 2009, Shalita became pregnant with the victim. (R. p. 128, lines 10-11). The victim was born on August 20, 2010 (R. p. 130, line 15) and shortly thereafter, Daron moved into the Shalita's home to help care for all three children. (R. p. 130, lines 16-19). Daron was out of work so he stayed home with the children while Shalita was at work. (R. p. 394, 430, 447).

Dr. Lynn Smith, the victim's pediatrician testified that the victim required no special care after she was born. (R. p. 87, lines 5-7). The victim's last doctor's visit was her two-month well visit in which Daron attended. (R. p. 89, lines 13-18). During this October 21, 2010 visit, Daron reported that the victim was very stuffy and congested and had some funny-sounding breathing noises. (R. p. 89, lines 21-22; p. 92, lines 16-20). According to the pediatrician, this was just routine newborn, one, two-month old baby nasal congestion and nothing was prescribed to the child. (R. p. 90, line 25 – p. 91, line 8).

On January 18, 2011, Shalita got up around 10:00 am and went to the store accompanied by Daron, her youngest son, and the victim. (R. p. 136, lines 6-20). Ms. Dawkins testified that the victim's demeanor was happy and her usual self (R. p. 136, lines 23-25). Shalita Dawkins left for work at 2:15 pm (R. p. 141, lines 12-15). Daron stayed home with the children and put them all to bed before Shalita returned in between 12:20 am and 12:40am (R. p. 143, lines 9-17; p. 178, lines 6-10). The victim's bassinet is maybe one and one half feet from the parents' bed. (R. p. 135, lines 21-

25). Before the two retired to bed for the evening, they had some verbal exchanges in the bedroom. (R. p. 144, lines 23-25). Shalita testified that she remembers the victim seeming as though she was acknowledging her voice by making a little baby sound. (R. p. 145, lines 1-3). At no point did Shalita check on the victim in her bassinet. (R. p. 145, lines 10-18). Daron was lying in bed when Shalita went to sleep around 2:00 am. (R. p. 146, line 20 – p. 147, line 1).

Around 7:00 am the next morning, Shalita remembers Daron telling her that he was going to take Shalita's eldest son to the bus stop and then drive to the store to pick up some Black and Milds. (R. p. 147, lines 8-18). She then looked out the window and saw the car at the stop sign. (R. p. 147, 22-23). Shalita testified that when he came back from the bus stop, Daron woke her up by turning on the light and then making noises in the shower. (R. p. 148, lines 14-20; R. p. 181, lines 10-19) Shalita fussed at Daron because he was an adult and he should know better not to turn on the light. (R. p. 181, 7-19). Daron fed the victim a bottle and then held her in the bed with him.(R. p. 419). About thirty minutes later, Daron wakes Shalita up to tell her that the baby was not breathing right. (R. p. 149, lines 15-18). Shortly after 8:15 am, Shalita calls Pediatric Associates of Greer and describes the victim as having congested breathing. (R. p. 33, lines 2-3). Daron, Shalita, and the victim head to the doctor's office. (R. p. 150, lines 12-18). Upon arrival at the pediatrician's office, the victim is examined by Dr. Susan Shelley. (R. p. 32, lines 21-24). Dr. Shelley realizes that the victim was not breathing but did have a pulse. (R. p. 34, lines 12-17). Within two minutes, EMS arrived to take the victim to the hospital. (R. p. 36, lines 20-22). Dr. Shelley also testified that the victim did not have any visible injuries. (R. p. 47, lines 4-7). Shalita testified that from the time that she got home at 12:40 am until the child was taken and put into the EMS unit at the Pediatric Associates office, she was in the baby's presence 100 percent of the time. (R. p. 178, lines 6-10).

Once Daron and Shalita arrived at the hospital, the victim is already on a ventilator. (R. p. 154, lines 15-16). Daron and Shalita were holding hands. (R. p. 154, lines 16-19). Upon hearing of the extensive injuries to the victim, Shalita testified that Daron seemed shocked like she was. (R. p. 157, lines 5-9). Shalita further testified that she heard what the doctor was telling her about her daughter but did not understand why her daughter "looked fine." (R. p. 158, lines 8-9). After the meeting with the doctor describing the injuries sustained by the child, Daron began to yell and was asked to leave the hospital by security around 11:40 am. (R. p. 178, line 20 – p. 179, line 16). From 11:48 am to 5:53 pm that afternoon, Daron called Shalita eight times to check on the child and Shalita did not take those calls. (R. p. 179, lines 17-22). The victim passed away when she was taken on life support on January 23, 2011. (R. p. 160, lines 2-16).

On January 19, 2011, a search warrant was executed on Shalita and Daron's home. (R. p. 106, line 1 – p. 107, line 25). The only things taken from the property were photos of the residence. (R. p. 108, lines 4-6). Sergeant Shaw testified that he visited the home and examined the hardwood floors in every area looking for anything that might indicate that something had happened in any of those rooms. (R. p. 54, lines 15-19). He found no physical evidence of any foul play in the home. (R. p. 52, lines 23-25; p. 54, lines 1-21).

II. DR. JAMES FULCHER'S TESTIMONY

On January 25, 2011, Dr. James Fulcher performed an autopsy on the victim. (R. p. 61, line 23). He testified that he saw no external physical injuries. (R. p. 62, line 22). He further testified that after taking the scalp back, he found a significant amount of blood overlying the left side of the head. (R. p. 65, lines 7-12). There was no external trauma at the site. (R. p. 65, line 12). It was a deep tissue injury but there was no grossly visible hemorrhage or damage to the external head with the naked eye. (R. p. 65, lines 13-16). Exhibit 27, a photograph of the victim's skull, was

introduced. (R. p. 66, lines 9-15). He further testified in order for the victim to have sustained her injuries, she would have been involved in a series of events. (R. p. 72, line 16). Typically, the retinal hemorrhages are associated with a shaking or acceleration or deceleration injury. (R. p. 72, lines 18-20). However, that shaking can never cause a skull fracture. (R. p. 72, lines 20-21). There also must be an impact. (R. p. 72, line 20). So presumably, there was both an impact with something soft enough not to cause external damage but to fracture the skull and enough shaking to cause significant retinal hemorrhages. (R. p. 72, lines 22-25). Dr. Fulcher testified that forensics pathologists can sometimes time injuries and give an approximate time when then injuries occurred, however, in this case, the survival window where the victim was alive in the ICU makes that very difficult for a forensic pathologist to do with any real certainty. (R. p. 74, lines 21-25). Dr. Fulcher could not testify to a time frame when the injuries might have occurred because while the victim was on life support, inflammation was still occurring in the brain and it is impossible to differentiate at a cellular level which inflammatory cells came from the original injury versus what occurred on the 21st day. (R. p. 75, lines 4-10).

III. DR. ERIC BERNING'S TESTIMONY

Dr. Eric Berning, a pediatric critical care physician (R. p. 214, lines 17-22), testified that when he treated the victim, she had no injuries that he could see on the outside of her body. (R. p. 219, lines 14-16). Dr. Berning conducted a CAT scan of the victim at 9:46 am which was completed at 10:04 am. (R. p. 228 line 21 – p. 229 line 3). Dr. Berning came to the same conclusion that Dr. Fulcher did with regards to the types of injuries sustained by the child. (R. p. 234, line 22 – p. 235, line 10). He further goes on to state that for the amount of brain swelling shown on the 10:04 pictures in the CAT scan, his best guess would have the fracture to have taken place at least eight to twelve hours prior to the scan. (R. p. 234, line 24 - p. 235, line 4; R. p. 239, lines 17-20). He

testified that a baby with these types of injuries would appear to the untrained eye as a sleeping baby, would be able to make sounds, move, and appear to respond to a voice. (R. p. 240, line 22 – p. 241, line 8).

IV. DR. ANTHONY JOHNSON'S TESTIMONY

Dr. Anthony Johnson is a pediatric ophthalmologist who has been practicing for 26 years. (R. p. 276, lines 13-15). Dr. Johnson examined the victim's eyes when she was in the Pediatric ICU. (R. p. 279, lines 2-5). Dr. Johnson observed extensive hemorrhaging in both of the victim's eyes. (R. p. 279, line 25 – p. 281, line 17). Dr. Johnson could not give a specific time frame for the retinal injury to have occurred, however, he was able to state that the injury would not have occurred a month ago or two weeks ago, but it could have been there a week ago, or four days ago, or just a few hours ago. (R. p. 293, lines 2-15). All of those were possibilities. (R. p. 293, line 15).

V. DR. EARL CHRISTOPHER TROUP'S TESTIMONY

The State called Dr. Troup who is a Pediatric Neurosurgeon at the Children's Hospital at Greenville Memorial Hospital. (R. p. 296, line 11, - p. 297, line 6). Dr. Troup had the occasion to examine the victim's CT exams during his treatment. (R. p. 300, lines 20-22). Dr. Troup offered an opinion as to when the retinal hemorrhage occurred. He opined that it occurred within a few hours to less than a few days. (R. p. 305, lines 5-8). However, Dr. Troup could not give a specific timeline as to when the victim's retinal hemorrhage actually occurred. (R. p. 302, lines 22-24). With regards to the victim's skull fracture, Dr. Troup testified that this injury would have occurred hours earlier because of the separation of the fracture. (R. p. 303, lines 11-21). Dr. Troup further goes on to testify about the tissue in the victim's brain, specifically that the victim's brain was horribly swollen and mostly dead brain. (R. p. 307, lines 5-7). He further testifies that for that amount of destruction to have happened to the brain, it had to have occurred much longer than just a three hour window.

(R. p. 307, lines 11-19). When asked if the child could have lived ten to twelve hours before they stopped breathing, Dr. Troup testified that the child could not still be alive with that degree of injury occurring twelve hours ago. (R. p. 307, line 21 – p. 308, line 1). He testifies that a child may live for hours after a destructive injury like this. (R. p. 308, lines 2-5).

VI. DARRON DAVIS' STATEMENT

The State introduced a redacted recorded statement of the Defendant that was played for the jury. (R. p. 208, lines 20-21). This statement was taken the day the victim was taken to the hospital by Sergeant Fortenberry and Lieutenant Pressley. (R. p. 188, lines 9-14). Lt. Pressley testified that the Defendant appeared to be willing to talk with him. (R. p. 206, line 25 – p. 207, line 3). The interview lasted from 12:15 pm to 2:53 pm. (R. p. 208, lines 5-6). Throughout his statement, Daron repeatedly says, "I don't know what happened." (R. pp. 393 – 459). He further goes on to corroborate Shalita's testimony stating that when Shalita and Daron were talking in the bedroom the night before, the victim moved or raised up when she heard a voice and went right back to sleep. (R. p. 414, p. 435).

He further states that he was out of the house from 7:00 am to about 7:20 am dropping Shalita's son at the bus stop and then heading to the store. (R. p. 435). After the officer continues to prod Daron into telling them what happened, Daron responds with "[n]othing happened on my clock." (R. p. 428). In fact, Daron says that the victim meant everything to him. (R. p. 428). He further testifies "I am telling you that I did nothing to contribute to what my daughter is dealing with right now." (R. p. 431). In fact, when the officers start to push him, he states, "[y]ou want me to give you information that I don't have." (R. p. 438). Daron had no reason to believe that the victim was hurt in any way. Throughout January 18th and 19th, she was acting normal, she cried and took her bottle, normal stuff. (R. p. 439, p. 440).

Following the evidence presented by the State, Daron moved for a directed verdict pursuant to Rule 19, SCRCrim.P based on failure of the State to present substantial circumstantial evidence which would warrant sending it to the jury. (R. p. 313, lines 12-14; p. 315, lines 7-9). The trial court denied this motion. (R. p. 318, lines 9-11). Daron presented no additional evidence. (R. p. 319, lines 19-20).

Prior to jury deliberations, Daron moved for mere presence to be charged to the jury. The judge denied this request. (R. p. 320, lines 4-10).

ARGUMENT

I. The trial judge erred in failing to grant the Defendant's directed verdict motion because the evidence submitted by the State did not rise to the level of substantial circumstantial evidence necessary to submit the case to the jury.

"In reviewing the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury." State v. Smith, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct.App.2004) (citing State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 70 (1998)) "In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight." Id. (citing Kelsey, 331 S.C. at 62, 502 S.E.2d at 69). "If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the jury." Id (citing State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct.App.2002)).

"The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." State v. Zeigler, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct.App.2005) (citing State v. Arnold, 361 S.C. 386, 390, 605 S.E. 2d 529, 531 (2004). "'Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.'" Id. (quoting State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "'However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.'" Id. at 102-03, 610 S.E.2d at 863. (quoting Cherry 361 S.C. at 594, 606 S.E.2d at 478). This court may reverse the trial court's denial of a motion

for a directed verdict only if there is no evidence to support the trial court's ruling. Id. at 103, 610 S.E.2d at 863 (citing State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92-93 (2002)).

A. Substantial Circumstantial Evidence

The South Carolina Supreme Court has issued two opinions clearly defining what is meant by "substantial circumstantial evidence" when reviewing the denial of a directed verdict motion. In State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-777 (2011), the South Carolina Supreme Court found that where circumstantial evidence merely raises a "suspicion" that the accused is guilty, the State has failed to present "substantial circumstantial evidence." Further defining the term "substantial circumstantial evidence," the Supreme Court recently reiterated that circumstantial evidence is "substantial" when it "reasonably tend[s]" to prove the guilty of the accused. State v. Odems, 395 S.C. 582, 587, 720 S.E.2d 48, 51 (2011), citing State v. Lollis, 343 S.C. 580, 585 (2001). A description of the evidence presented by the State in Bostick and Odems is instructive in this case because it clearly demonstrates that the evidence presented by the State against Mr. Davis falls woefully short of the standard set forth by the Supreme Court for what constituted "substantial circumstantial evidence."

In Bostick, the State relied on four pieces of circumstantial evidence to acquire a conviction of the defendant on a charge of murder: (1) the victim's personal items were found in a burn pile in a nearby house that was owned by the defendant's mother, (2) a heavy petroleum product was used as an accelerant in the burn pile and the defendant's mother did not use such accelerants, (3) gasoline was used as an accelerant to start a fire in the victim's home after she was struck by her assailant and gasoline was found on the defendant's shoes, and (4) blood was found on the defendant's jeans and an expert testified that although she could not conclusively determine that the blood was that of the victim, there was a ninety-nine percent chance that is

was the victim's blood. The trial judge denied the defendant's motion for a directed verdict. Bostick, 329 S.C. 134, 138, 708 S.E.2d 774, 776 (2011). The South Carolina Supreme Court found that even when "[a]nalyzing the evidence presented by the State in the light most favorable to it, [. . .] the State's evidence . . . raised only a suspicion of guilt . . ." Id at 141. The Supreme Court reversed the defendant's conviction.

Similarly, in Odems, the State relied on four pieces of circumstantial evidence to acquire a conviction of the defendant on charges of robbery in the first degree, grand larceny, criminal conspiracy, and malicious injury: (1) the defendant was located in the getaway car shortly after the time of the robbery, (2) the items stolen from the victim's home were found in the getaway car, (3) the defendant fled from law enforcement when the car was pulled over, and (4) the defendant enlisted the assistance of an uninvolved individual in his attempt to evade arrest. Odems, 295 S.C. at 587-87. According to the Supreme Court, "[t]he circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial enough is insufficient to go to a jury." Id. The Supreme Court reversed the defendant's conviction.

State v. Hepburn

In State v. Hepburn, a Supreme Court decision filed December 11, 2013 with facts much like the facts in the present case, the Court relies heavily on the two cases referred to above. State v. Hepburn, 2011-190695, 2013 WL 6492390 (S.C. Dec. 11, 2013). The Supreme Court concluded that there was not substantial evidence to prove that the Appellant killed the victim. The Court explains, "[e]very State witness placed Appellant asleep at the time the victim sustained the fatal injuries. While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two co-defendants inflicted the victim's injuries,

but not that *Appellant* harmed the victim." State v. Hepburn, 2011-190695, 2013 WL 6492390 (S.C. Dec. 11, 2013).

The State failed to present substantial circumstantial evidence on which the trial court could have based the denial of Appellant's motion for directed verdict with respect to the homicide by child abuse charge. The only evidence the State presented, during its case in chief, was that Mr. Davis was present during the estimated time frame of abuse, the testimony of Shalita Dawkins stating that she did not do it, the opinion that Mr. Davis didn't react properly to the news of the victim's death and Mr. Davis's statement in which he repeatedly denied anything happening while he was watching the victim. None of this evidence reasonably tends to prove that Mr. Davis inflicted the victim's injuries and merely raises a suspicion that he harmed the victim.

It is undeniable that the State proved that the victim's death was caused by child abuse. However, even viewing the evidence in the light most favorable to it, the State's evidence merely raises a suspicion that Mr. Davis harmed the victim. None of the evidence presented in the State's case in chief reasonably tends to prove that Mr. Davis inflicted the victim's injuries.

The holdings in Bostick, Odems, and Hepburn support this conclusion. Thus, the Court should reverse the trial judge's denial of Daron's motion for a directed verdict.

II. The trial judge erred in failing to instruct the jury of a mere presence charge, when under the facts of this particular case, the Defendant was not the only person present to commit the injury.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and the

evidence presented. Id. The failure to charge "mere presence" may constitute reversible error. Lee, 298 S.C. at 364, 380 S.E.2d at 835. In State v. Dennis, the Court held

> Mere presence is generally applicable in two circumstances. First, in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that a person must personally commit the crime or be present at the scene of the crime intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. Secondly, mere presence is generally an issue where the state attempts to establish the defendant's possession of contraband because the defendant is present where the contraband is found. In such cases, the trial court may be required to charge the jury that the defendant's mere presence near the contraband does not establish possession.

State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct.App.1996).

The trial judge refused to charge mere presence to the jury. (R. p. 322, line 20). Mr. Davis' attorney argued that mere presence should be charged. He argues that the testimony that the mother returned to the residence at 12:40 am and the CAT scan was taken at 10:04 am, then you are talking about a period in excess of nine, anywhere to nine and a half hours, that both parties were in the house for that time. If something happened to the child after 12:40 am, it was committed by either of these two parents while the other parent was present which is consistent with this evidence. If one of the parents was either asleep when something occurred by the other parent or in the bathroom or in the other room if the parent responsible for inflicting the injuries took the baby from the bassinet and took the baby into the living room and that's where the injuries were inflicted, there are any number of combinations that are available for this jury to consider and mere presence would clearly apply. (R. p. 320, line 18 – p. 321, line 14).

The State argues that State v. Stokes, 339 S.C. 154, 528 S.E.2d 430 (2000) (R. p. 321, lines 15 – 20) should control the court's decision; however, this case is factually different than Stokes because Stokes "maintained he was not present at the commission of the assault upon the

child." Id. at 164. Aside from taking Shalita's child to the bus stop, Mr. Davis never denied that he was present at the family's home on Poplar Drive on the night of January 18, 2011 and the morning of January 19, 2011. Mr. Davis repeatedly denied that "nothing happened on my watch," but did not totally remove himself from the residence during a nine and a half hour time frame that both Shalita and himself were in the presence of the victim. Multiple experts for the State testified that they could not pinpoint a specific time that the injuries occurred. The many different opinions include Dr. Troup's testimony that the injuries could have occurred within a few hours to less than a few days. He also testifies that with the degree of injury that the victim sustained, a child could not be alive for twelve hours after the injury occurred. Another witness for the State, Dr. Johnson, testified that the retinal hemorrhaging could have been there a week ago, four days ago, or just a few hours ago, all of these time frames are possibilities. Furthermore, Dr. Berning, another State witness testified that his best guess was that the injury occurred eight to twelve hours prior to the scan done at 10:04 am. Dr. Fulcher, who performed the autopsy on the victim, could not testify to a time frame. At best, the State established an eight to twelve hour window in which the injury occurred, with nine and a half of those hours having both parents present.

The second scenario is most applicable to the facts presented in this case. Here, the entire prosecution rests on the fact that the Defendant was in the victim's presence and had the opportunity to exercise dominion and control over her during the guessed timeframe that the injuries were inflicted. However, Mr. Davis wasn't the only person in the presence of the victim during the guessed time period that the injuries were inflicted. The child's mother, Shalita Dawkins, was present and had the ability to exercise dominion and control over her. The only

evidence presented was the fact that the child died from injuries related to child abuse and that both the Defendant and the child's mother were present.

In conclusion, the State's own expert evidence places two people present with the child that could have exercised dominion and control over her during the State's expert's opinions as to when abuse occurred. Therefore, the court committed reversible error when a mere presence instruction was not given to the jury.

III. The trial judge erred is allowing the admission of photographs of the victim in the hospital on a ventilator and of the victim's skull.

The State presented photographs of the victim in a hospital bed on a ventilator, as well as a photograph of the victim's skull. Daron objected and argued that the photographs should not be admitted into evidence because the danger of the photograph's prejudicial effect far outweighed its probative value. The trial court overruled Daron's objection. This was error.

Rule 403, SCRE, provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation or cumulative evidence."

A. The photographs have no probative value.

The photographs of the victim in the hospital on a ventilator had no probative value. Evidence is probative if "it tends to prove or disprove an element of the case." State v. Cherry, 348 S.C. 281, 298, 606 S.E.2d 475, 478 (Ct. App. 2001). The State entered two photographs as proof that the mother had no reason to believe that the baby was so severely injured. The State had multiple doctors testify that the child had no outward signs of injury. The photographs were cumulative and therefore should not have been entered into evidence.

B. The photographs created a danger of unfair prejudice.

It is clear that the admission of the photographs created a danger of unfair prejudice.

"To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Kelly, 319 S.C. 173, 178, 460 S.E.2d 368, 370-371 (1995) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). Further, a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts. State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999); see also State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997).

Undoubtedly, this photo creates an unfair prejudice towards Mr. Davis. When the photograph, Exhibit 27, was introduced, the Court had to address a member of the gallery because of an emotional outburst. This fact alone highlights the prejudicial nature of the photograph. The contents of the photograph, accompanied by the emotional outburst, played to the sympathies of the jury, created prejudice towards Mr. Davis, and did nothing to substantiate any facts that hadn't already been established by the State.

CONCLUSION

For the aforementioned reasons, it is clear that the trial judge abused his discretion when he denied Darron's motion for a directed verdict at the close of the State's case. It is also clear that the trial judge erroneously failed to charge the jury with mere presence as well as admit a photograph of the victim in a hospital bed on a ventilator. Therefore, this Court should reverse Darron's conviction.

Respectfully submitted,

By: ______________________

Justin M. Kata
Attorney for Appellant
The Giese Law Firm, LLC
1315 Blanding Street
Columbia, South Carolina 29201
(803) 708-6767

Robert M. Dudek
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1330

This 31st day of October, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

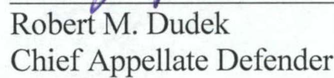
DARON DUANE DAVIS,

APPELLANT

APPELLATE CASE NO. 2012-213571

CERTIFICATE OF SERVICE

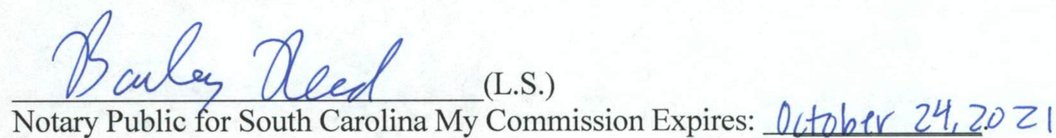
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Final Reply Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, this 8th day of October, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of October, 2014.



(L.S.)
Notary Public for South Carolina My Commission Expires: October 24, 2021