STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HASSAN ROBERT TYLER,

APPELLANT

APPELLATE CASE NO 2016-000708

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in failing to strike the testimony of prosecution witness, Dr. Anne Abel, or in the alternative grant a mistrial, where the prosecution did not disclose Dr. Abel's written notes regarding minor child's cause of death in a timely manner in violation of Appellant's state and federal constitutional right to due process and a fair trial.

STATEMENT OF THE CASE

On October 16, 2014, the Horry County Grand Jury indicted Appellant Hassan Tyler for homicide by child abuse. R. 470. On March 21-24, 2015, Appellant proceeded to trial before the Honorable Steven H. John and a jury. R. 1.

J.M. Long, III, represented Appellant, and Assistant Solicitors Martin D. Spratlin and Christopher D. Helms represented the State. The jury found Appellant guilty as charged. R. 459, l. 23 - 460, l. 12. The trial court sentenced Appellant to thirty years imprisonment. R. 467, ll. 10-20.

STATEMENT OF THE FACTS

On the afternoon of December 19, 2013, Appellant and his father rushed Appellant's three month old son, Minor 1, to the Loris Hospital Emergency room. Minor 1 was not breathing. R. 150, l. 5 - 152, l. 4. Dr. Robert Barefoot, who treated Minor 1 at the emergency room, recalled that Minor 1 was "neurologically . . . not responsive." *Id.*

Minor 1 was life lighted to McLeod Medical Center in Florence, but never regained consciousness. Minor 1 was removed from life support and died on December 20, 2013. Appellant was present at Loris Hospital and traveled with his family to Horry County when Minor 1 was transported there. R. 357, l. 3 - 361, l. 14.

Appellant's Testimony at Trial

Appellant would testify that he, his father, and his older son, Minor 2, had picked up Minor 1 at the two bedroom house that Minor 1's mother shared with her parents and seven other relatives at around 7:00 pm on December 18, 2013. R. 332, l. 4 - 336, l. 17. Appellant and his father had asked Minor 1's mother, Temetra Stinson, if Minor 1 could stay with them overnight. *Id.* Stinson agreed.

Appellant and Stinson were co-workers and had briefly dated. R. 328, l. 13 - 332, l. 3. Stinson unexpectedly become pregnant with Minor 1 towards the end of their relationship. Appellant was initially upset about becoming a father again, but visited Stinson and Minor 1 after the birth and was working to establish a relationship with Minor 1. *Id.*

After retrieving Minor 1's formula, car seat, and other items, Appellant, Minor 1, Appellant's father, and Minor 2 drove to the apartment Appellant shared with his parents and Minor 2. R. 332, l. 4 - 336, l. 17. Appellant and his mother fed Minor 1 and readied him for bed. Appellant and his family members stated that Minor 1 slept soundly through the night on

Appellant's bed. R. 337, l. 8 - 345, l. 20; R. 404, l. 14 - 405, l. 6. In fact, Appellant recalled that Minor 1 was very sleepy for most of the time that he was at Appellant's house. *Id.* Appellant testified that he slept at the foot of Minor 1's bed. *Id.*

The following morning, Minor 1 drank about half of his morning formula and went back to sleep. R. 345, l. 11 - 350, l. 8. Appellant's mother would testify that Minor 1 appeared fine the night he arrived and into the next morning. R. 404, l. 14 - 407, l. 20. Appellant stated he was alone with Minor 1 for most of the morning. Minor 2 was at school. Appellant's mother was at work. Appellant's father was outside working on his car. R. 345, l. 11 - 350, l. 8.

Appellant said that Minor 1 did not cry or scream much during the morning and early afternoon of December 18, 2013; only occasionally whining for his pacifier. *Id.* Appellant went to check on Minor 1 around 1:00 pm and found him stiff, lying on his stomach, having a seizure. R. 351, ll. 2-24. Appellant called Stinson to determine whether Minor 1 had ever had a seizure before and for advice on how to handle the emergency. R. 352, l. 19 - 354, l. 11. Appellant and his father decided to take Minor 1 to the hospital.

Police Investigation

Appellant was first interrogated by Loris Police Chief Joseph Vaught at the Loris Hospital just minutes after bringing his son in. R. 203, l. 2 - 205, l. 10. This first interrogation was brief and undertaken without advising Appellant of his *Miranda*[1] rights.

Consistent with his testimony at trial, Appellant told Vaught that he first realized something was wrong when "he went in the room where his son was asleep and observed that he had his arms and legs outstretched . . . as if he was having a seizure." *Id.* Vaught's first interrogation ended

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

when Minor 1 was taken by helicopter to Grand Strand Medical Center in Myrtle Beach and Appellant, with his family, followed.

Appellant was interrogated for a second time on December 21, 2013 by Vaught and SLED agent David Weaver. Appellant waived his *Miranda* rights and voluntarily spoke with the officers. R. 207, l.l. 2-22. Vaught conceded at trial that Appellant's recollection of the hours leading up to Minor 1's seizures of were unchanged from his earlier explanation in the first interrogation. R. 220, l. 3 - 221, l. 8. Vaught and Weaver both agreed that Appellant was very emotional during the second interrogation and repeatedly denied harming his son. R. 222, l. 16 - 224, l. 2.

Agent Weaver made the decision to arrest Appellant immediately after the second interrogation. R. 269, l. 19 - 272, l. 12. At trial, Weaver admitted that he arrested Appellant without interviewing any of Minor 1's other family members. *Id.* He had not spoken with Appellant's father, mother, or with Minor 2. *Id.*

Nor had he interviewed Stinson or any of Stinson's eleven relatives who lived with her at the time of Minor 1's death. He further admitted that he excluded from his consideration whether "anything [occurring] outside of twelve to fifteen hours" before Minor 1's death could have contributed to Minor 1's death. R. 272, ll. 2-17.

Weaver justified the arrest, noting:

> Because in my mind, we had the right person. I had -- the Defendant -- the Defendant had the opportunity. He was alone by his own admission, based on the medical evidence, based on the opinions from -- **from the doctors I spoke to, the attending physician at the emergency room, Dr. Proctor at the autopsy, provided me the timeline needed and the only one that was alone with the child**, the victim, at the time of death or at the time of the incident was the Defendant. That was by his own admission that his father was out -- that he was the only one in the apartment and his father was outside working on his car.

R. 276, ll. 3-13 (*emphasis added*). Weaver's assessment would become the theme of the State's circumstantial case against Appellant.

Medical Testimony of Dr. Robert Barefoot

Dr. Barefoot, who treated Minor 1 at the emergency room, observed that Minor 1 had bruising on his face and neck, but that he did not report any lacerations or wounds that appeared caused by a blunt object. R. 152, ll. 1-23. Dr. Barefoot testified there were no soft sports or "open holes" on Minor 1's skull. R. 163, ll. 1-11.

A CT scan of Minor 1's head revealed "bilateral subdural hematomas and internally subarachnoid hemorrhages." R. 153, ll. 4 - 154, l. 2. Put simply, blood accumulated in the area between Minor 1's brain and the surrounding tissue. Dr. Barefoot believed these injuries were similar to those frequently sustained in car accidents. *Id.*

The CT scan did not reveal any abdominal trauma or other signs of injury. R. 162, ll. 10-24. Dr. Barefoot also briefly explained that concussed individuals may not immediately experience symptoms of a concussion, but that nausea, seizures, and even loss of consciousness can first manifest themselves hours or days after the concussion was sustained. R. 165, l. 13 - 166, l. 13.

Medical Testimony of Dr. Michael Brown

Dr. Brown was the radiologist who conducted and evaluated Minor 1's CT scans. R. 177, l. 13 - 178, l. 25. Dr. Brown testified that the CT scan revealed "multiple areas of blood around the brain and within the skull. There were fractures of the skull and there was evidence of swelling of the soft tissues overlying the skull." *Id.*

According to Dr. Brown, fractures in Minor 1's skull were located at both temples and continued up the sides of the skull. R. 188, l. 22 - 189, l. 6. Dr. Brown declined to give a timeframe

for when the injuries occurred, but speculated that an individual would not be able to function with these injuries for more than twenty four hours. R. 181, l. 4 - 182, l. 24.

However on cross-examination, Dr. Brown backtracked and admitted that concussion symptoms can first appear several days after the injury causing the concussion is sustained. R. 192, l. 1 - 193, l. 13.

Medical Testimony of Dr. Edward Proctor

Dr. Proctor performed Minor 1's autopsy on December 21, 2013. R. 231, l. 12 - 235, l. 2. He testified that Minor 1's skull had subcutaneous hematomas on the left and right sides. There was a fracture of the occipital skull (back of the skull) extending left to right and a second fracture in the right calvarial area (skull cap). R. 233, ll. 12-24. Additional hematomas were found in the areas of the fractures. *Id.* Dr. Proctor reported there were no other injuries to Minor 1 and he appeared well nourished. R. 234, ll. 3-7.

Dr. Proctor concluded that Minor 1 died from "blunt force trauma to the head resulting in a fractured skull and associated hemorrhages." R. 233, l. 12 - 235, l. 20. He opined that due to the thin and pliable nature of an infant's head, "a blunt force injury or **any kind of impact can separate the sutures and cause these kind of fractures**." R. 234, ll. 8-19 (*emphasis added*).

Dr. Proctor further testified that **Minor 1's head injuries were consistent with "[a] fall from an elevated crib several feet to the ground [or] hitting the back of the head."** R. 234, ll. 16-19 (*emphasis added*). "[S]omeone holding a child and drops the child on the head from three to four feet up can certainly cause that kind of injury and I, you know, a small fall back into the crib more likely than not, but dropping, you like from this height to the floor, it definitely could cause that kind of injury." R. 235, ll. 14-20.

Dr. Proctor reported that Minor 1 had only two bruises beyond the hematomas: a small contusion on his forehead and a small contusion around the umbilical area. R. 235, l. 12 - 236, l. 12. Dr. Proctor also explained that the skull has sutures that slowly fuse together and harden as a person ages, but that an infant's skull is not fully calcified or totally closed, making them significantly softer than an adult's skull. R. 236, ll. 5-2; R. 245, l. 5 - 246, l. 15.

On cross-examination, Dr. Proctor testified that there was no indication to me that there was a pointed or any kind of object that . . . hit [the skull] like that. It was more of a broader injury because it caused the transverse fracture across the back, separated the suture and came up." R. 241, l. 24 - 242, l. 6. Dr. Proctor further elaborated that:

> "In this case, [I] did a complete examination of the head and there was no patterned . . . no definitive patterned injury across the back of the head. **There was no set depression impact at the nidus of those fractures, i.e. like a blunt force hammer or something, there was nothing like that**. This was more a diffuse impact injury that caused the sutures to separate and the skull to fracture."

R. 243, l. 23 - 244, l. 5 (*emphasis added*).

On re-direct examination by the State, Dr. Proctor repeated that the injuries to Minor 1 were consist with a fall or drop from a crib and with someone accidently sitting on the child. R. 246, ll. 7-23. When pressed by the Statem, he conceded that the injuries were also consistent with Minor 1 having been pushed or falling into a wall. *Id.* A search of Appellant's apartment by police did not find any damage to walls. R. 432, ll. 5-20.

The State also asked Dr. Proctor whether he had, in his decades of performing autopsies, seen medical histories where the person being examined first complained of concussion like symptoms several days after experiencing significant head trauma. R. 250, l. 15 - 251, l. 7. To the State's surprise, Dr. Proctor responded that he had seen several such instances. *Id.*; *see also* R. 251, ll. 13-17.

State's Failure to Provide the Defense with the Written Notes of Expert Witness Dr. Anne Abel

On the third day of Appellant's four day trial, the defense objected to Dr. Anna Abel testifying as an expert witness for the State as the prosecution never produced any of her notes or a report of her opinion:

> We were provided a copy of her resume by the solicitor but, to date, we've had no copy of any reports, diagnosis, findings et cetera, notes, anything of that nature related to what she had reviewed and what her conclusions were . . . . [W]e have nothing in writing from this doctor to know what she's going to testify to and what her conclusions are.

R. 256, l. 20 - 257, l. 13. The defense argued that the failure to produce Dr. Abel's notes or report violated Rule 5, SCRCrimP, and *Brady*[2] obligations. *Id.*

The State responded that Dr. Abel was not involved in Minor 1's treatment. R. 257, ll. 15-19. She was a "child abuse pediatric doctor" and retained by the State only to generate expert medical testimony supporting their theory of Appellant's guilt. The solicitor claimed that, because of the capacity in which Dr. Abel was retained, she did not prepare a report for the defense to inspect. The solicitor conceded that she may have taken notes while she reviewed documents provided to her by the State. R. 258, l. 10 - 260, l. 3. Furthermore, the solicitor did not believe the notes were discoverable.

The Court disagreed and ordered the solicitor to produce Dr. Abel's notes for the defense. R. 258, ll. 4-15. The solicitor reiterated that he did not believe the notes were discoverable under Rule 5, SCRCrimP, "Your Honor, I'm at a loss as to the requirements of expert witnesses to provide notes of what they have reviewed?" R. 259, ll. 8-9.

The trial court then briefly explained to prosecutor the prosecution's disclosure obligations are under Rule 5 and *Brady* to the solicitor:

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

> If [expert witnesses] have made notes, written notes, written documentation of any kind, based upon their review of the information, those must -- of necessity must be turned over to the Defense for the purpose of cross examination because they form a basis for understanding the conclusions of the doctor. I appreciate -- we see this in civil court a lot. Experts are hired and are told not to make a report just to try and avoid the consequences of that. I do not believe that is proper and we will not engage in those types of games, especially in a criminal case. Any documentation the doctor has, you will make a copy of, if she intends to and has expressed any opinion to you that the previous report of the other doctor she agrees with, you will inform the Defense of that and you will do that now. We'll take a short break now. Thank you very much.

R. 259, ll. 10-24. The solicitor then informed the trial court that Dr. Abel had not brought her notes to court, but had left them in her hotel room. R. 260, ll. 2-22. The court ordered the State to proceed with other witnesses until Dr. Abel had retrieved and copied her notes. *Id.*

Defense's Review of Dr. Abel's Notes Immediately Prior to her Testimony

After Dr. Abel retrieved her "extensive notes," the State proffered additional arguments as to why her notes should not be disclosed:

> The State would like to put on the record in regards to any sort of discovery violation, any underlying -- the expert witness in this case did not provide a report and the State did not turn over a report because the expert witness did not provide it. She informs me that she typically does not do reports in cases such as this.

R. 278, ll. 17-23; *see also* R. 260, ll. 2-14. The prosecution also noted that all of the documents that Dr. Abel reviewed in making in her conclusions had been provided to the defense. R. 278, l. 24 - 279, l. 6.

The Court then advised the solicitor that, **in future cases**, the State must disclose expert witnesses' notes and provide a summary of the expert's expected testimony. R. 279, ll. 7-25. The defense was then given a brief opportunity to review Dr. Abel's notes and a one page list of the topics of her expected testimony. R. 279, l. 18 - 284, l. 5.

The defense identified several of Dr. Abel's conclusions that necessitated additional time for the defense to adequately counter. *Id.* Specifically, Dr. Abel concluded that it would have taken extensive force to cause the skull fractures. Additionally, Dr. Abel claimed she was able to determine that that Minor 1 would have been immediately knocked unconscious by the blow to the head. Finally, she believed that Minor 1would have stopped breathing within hours of the impact. The defense noted that these conclusions were not shared by the doctors who treated Minor 1 nor by Dr. Proctor, who performed the autopsy. *Id.*

The defense asked to be allowed, given the exceptional circumstances surrounding the disclosure of Dr. Abel's notes, to "pit" Dr. Abel against the other doctors. *Id.* The trial court refused, noting that the other doctors had not been asked the specific questions that the State was going to ask Dr. Abel. The defense observed that they had no prior notice of Dr. Abel's testimony and renewed the motion to exclude Dr. Abel's testimony. *Id.*

The trial court denied the motion and declined to sanction the State or impose any limitations on Dr. Abel's testimony. Following a brief stipulation, the trial court allowed the State to call Dr. Abel without providing the defense any additional time to examine Dr. Abel's notes or to retain a defense expert. R. 285, ll. 6-11.

Testimony of Dr. Anne Abel

Dr. Abel explained that she was a certified general pediatrician and the first doctor in South Carolina to ever become board certified in "child abuse pediatrics". R. 286, l. 4 - 288, l. 20. She then pontificated at length about her professional experience and her highly specialized practice in "child abuse pediatrics." *Id.*

She defined "child abuse pediatrics" as, "a field that has to do with training to evaluate children when someone has raised the suspicion of abuse or neglect and to take all the medical

information, examine the child, get all the information and put it together for report and, if needed, testify in court." R. 287, ll. 7-12.

Dr. Abel testified that, based on her review of Minor 1's medical records, the skull fractures were caused by "tremendous force . . . that means that the baby's head or body was impacted either by another person who was much bigger or heavier or slammed against an object." R. 293, ll. 17-22.

Her conclusion was considerably more tailored to the State's theory of the case than Dr. Proctor's conclusion that the fractures were caused by Minor 1's head impacting a flat surface during a fall. R. 234, l. 8 - 236, l. 12. How Dr. Abel gained this additional insight from simply studying the medical records provided by the State was not explained.

Dr. Abel also described the skull fractures differently than the other doctors. She was the only medical professional to use the term "eggshell fracture" which she defined as "not a simple fracture" but one caused by extreme force. R. 296, l. 20 - 298, l. 1. She based this on her reading of the Dr. Proctor's pathology report. By contrast, Dr. Brown, the radiologist, was unfamiliar with the term. R. 194, ll. 2-24. Oddly, given Dr. Abel's claim, Dr. Proctor testified that the fractures were not "eggshell fractures," but were lineal following the skull's sutures. R. 194, ll. 15-24; R. 236, l. 5 - 238, l. 3-25.

Dr. Abel stated that the "eggshell fractures," that only she identified, could not have been caused by a fall from only a few feet. R. 293, l. 14 - 295, l. 15. **She opined that only a fall from multiple stories or a car crash where the baby was ejected from the vehicle would cause the "eggshell fractures".** ***Id.***

Confusingly, Dr. Abel speculated that Minor 1 would have been knocked unconscious by the force of the blow to the head, but she contradictorily refused to speculate as to when Minor 1

would have first exhibited symptoms of the impact. R. 295, l. 5 - 296, l. 19. However, she believed that Minor 1 would have stopped breathing within just hours of sustaining the injury. *Id.*

Unlike Dr. Proctor, Dr. Abel concluded - based on Dr. Proctor's pathologist report - that the skull fractures were caused either by an object or "part of the human body, such [as] a foot or, or a fist." *Id.* When prompted by the State, she summarily ruled out the possibility of a delayed onset concussion without elaboration. R. 299, l. 12 - 300, l. 5. Unlike the other doctors who treated or examined Minor 1, Dr. Abel concluded that, to a reasonable degree of medical certainty, there was no explanation for Minor 1's injuries, other than child abuse. She never defined what constituted "child abuse". R. 300, ll. 1-5.

On cross-examination, the defense attempted to impeach Dr. Abel by having her admit that the State paid for her testimony. R. 300, l. 16 - 303, l. 1. Dr. Abel admitted that she reviewed only documents sent to her by the prosecution, including Appellant's statements to police.

She had never spoken with Drs. Barefoot, Brown, or Proctor. Dr. Abel was also apparently unaware that Stinson's family had a history of seizures. R. 304, l. 14 - 305, l. 20. On re-direct, Dr. Abel repeated that, in her professional opinion, there was no "reasonable cause of these traumas other than child abuse." R. 315, ll. 20-22. Dr. Abel was the State's last witness.

The defense renewed their motion to exclude Dr. Abel's testimony at the close of the State's case because of the State's failure to provide the defense with Dr. Abel's notes. R. 321, ll. 12-16. The trial court denied the motion to exclude holding, for the first time, that the State had not committed a discovery violation. R. 321, l. 17 - 322, l. 4. In so ruling the trial court noted that the defense had access to the underlying documents that Dr. Abel claimed to use in forming her opinion. *Id.*

The court held that the State had satisfied disclosure requirements by providing Dr. Abel's notes to the defense on the third day of trial immediately before Dr. Abel was scheduled to testify. *Id.* Accordingly, the trial court believed that defense counsel had had adequate time to prepare for her testimony and found that the prosecution did "everything, absolutely everything that they were required to do in this particular matter." *Id.*

The defense also moved for a mistrial on the same grounds. The motion was denied. R. 426, l. 8 - 427, l. 16.

ARGUMENT

The trial court erred in failing to strike the testimony of prosecution witness, Dr. Anne Abel, or in the alternative grant a mistrial, where the prosecution did not disclose Dr. Abel's written notes regarding her opinions on Minor 1's cause of death, in a timely manner in violation of Appellant's state and federal constitutional right to due process and a fair trial.

Rule 5(a)(1)(c) of the South Carolina Rules of Criminal Procedure provides:

> 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.

(*emphasis added*). Court of Appeals remarked that "[t]he requirements of Rule 5 ... are judicially created discovery mechanisms for use in criminal proceedings." *State v. Kennerly*, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998). When a trial judge determines the prosecution violated Rule 5, the judge may fashion the proper remedy.

The Rule itself explains that if a party failed to comply with the rule, the court "may prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Rule 5(d)(2), SCRCrimP. The *Kennerly* Court explained the definition of "material" as used in Rule 5 is the same as the definition used in the context of violations and obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *Kennerly*, 331 S.C. 453, 503 S.E.2d at 220. Thus, evidence is material for purposes of Rule 5 "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

As explained by the Court of Appeals, the goal of Rule 5 is to ensure a criminal defendant's right to a fair trial. Further, the role of a prosecutor is to be a minister of justice, not the

representative of an ordinary party. As the representative of the sovereign, the prosecutor's interest in a criminal prosecution is not to win, but to see that justice is done. *Kennerly*, 331 S.C. 454, 503 S.E.2d at 220.

> The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Riddle v. Ozmint, 369 S.C. 39, 46, 631 S.E.2d 70, 74 (2006). Similarly, the Rules of Professional Conduct impose certain duties upon prosecutors.

Specifically, the Rules require a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilty of the accused or mitigates the offense." Rule 3:8(e), SCACR. The special duties imposed upon prosecutors are due to the prosecutor's "responsibility of a minister of justice and not simply that of an advocate." Thus, the prosecutor has "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, cmt. 1, SCACR.

"The *Brady* disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." *Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing *Brady, supra*). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). It is enough that it undermines confidence in the verdict. *Id.* at 435.

Brady requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. United States Supreme Court decisions have elaborated the *Brady* obligations to include (1) the duty to disclose impeachment evidence, (2) favorable evidence in the absence of a request by the accused, and (3) evidence in the possession of persons or organizations. *See Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *Kyles, supra.* Material must be disclosed "when prejudice to the accused ensures . . .[and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Discussion

Under S.C. Code Ann. § 16-3-85(A)(1), an individual is guilty of homicide by child abuse if "the person 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.**" (*emphasis added*). Child abuse is defined as, "an act or omission by any person which causes harm to the child's physical health or welfare" § 16-3-85(B)(1).

Harm to the child's physical health or welfare "**occurs when a person inflicts or allows to be inflicted upon the child physical injury,** including injuries sustained as a result of excessive corporal punishment; (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or (c) abandons the child resulting in the child's death." § 16-3-85(B)(2)(a)-(c) (*emphasis added*).

The State's theory was that Appellant must have murdered his son because he was the only one with the child during the time period that the State believed Minor 1 was injured. R. 276, ll. 2-13. The State's theory did not allow for Minor 1's death to have been the result of an accidental fall or drop as Dr. Proctor repeatedly suggested. R. 235, l. 2 - 246, l. 15.

However, the State had no evidence of any deliberate act by Appellant that inflicted physical injury on Minor 1, let alone "under circumstances manifesting an extreme indifference to human life" as required for homicide by child abuse. § 16-3-85(A)(1). Moreover, the State could not conclusively establish that Minor 1's injuries were sustained during the approximately eighteen hours Minor 1 was in Appellant's care.

Therefore, Dr. Abel - specializing in the newly minted field of "child abuse pediatrics" - was retained to generate expert witness testimony linking the State's theory to the medical evidence. R. 258, ll. 18-21. In order to bolster the State's theory, that Appellant inflicted fatal injuries on Minor 1 "under circumstances manifesting an extreme indifference to human life," Dr. Abel's conclusions had to deviate at key junctures from the conclusions of the doctors that treated Minor 1 and from the autopsy results.

Unsurprisingly, each point of deviation favored the State's theory. Since the State never disclosed Dr. Abel's notes and Dr. Abel - likely deliberately - did not issue a report, her incriminatory opinions were unknown to the defense until day three of Appellant's trial. R. 278, ll. 17-22. The defense simply could not have anticipated her opinions from looking at the medical records turned over during discovery because Dr. Abel's conclusion were not shared by the other doctors involved in Minor 1's treatment or by the investigation into his death.

For example, Dr. Abel described Minor 1's skull fracture as an "eggshell fracture." To her this indicated that Minor's 1 skull shattered under "tremendous force." R. 293, ll. 14-22. This was a unique diagnosis. Dr. Brown was unfamiliar with the term "eggshell fracture." R. 194, ll. 2-24. Dr. Proctor, the pathologist, testified that the fractures were not "eggshell fractures" but were linear fractures located along the skull's sutures, the weakest, thinnest part of an infant's skull most prone to breaking. R. 238, l. 5 - 246, l. 23.

Alone among the doctors involved in the case, Dr. Abel was adamant - despite admitting that the medical documents she reviewed did not support her conclusion - that the skull fractures were caused either by an object or by "part of the human body, such [as] a foot or, or a fist." R. 296, ll. 9-19. She offered no explanation as to how she was able to reach this conclusion while relying on reports and documents generated by doctors who did not agree with her.

By contrast, Dr. Proctor concluded that Minor 1's injuries were consistent with an accident, such as a short fall onto a hard surface or an individual rolling over the child while sleeping. R. 238, l. 5 - 246, l. 23. He further testified that such fractures were not unusual given the fragility of an infant's skull "[i]n a small child, the skull is thin and pliable, but a blunt force injury or any kind of impact injury can separate the sutures and cause these kind of fractures." R. 234, l. 8 - 236, l. 25.

Dr. Proctor did not find a point of impact by a blunt object during the autopsy. R. 241, l. 5 - 244, l. 5. Likewise, Dr. Barefoot testified that he did not find any hole or punctures in the skull while treating Minor 1. R. 162, l. 10 - 163, l. 6. To Dr. Proctor this suggested that the fractures were likely caused by the back and right side of the skull impacting a flat surface. R. 238, l. 5 - 246, l. 23.

Dr. Abel was also unique among the testifying medical professionals in asserting that the amount of force necessary to cause Minor 1's skull fractures was akin to the force an infant would experience while being ejected from a car or while being dropped from several stories on to a hard surface. R. 294, l. 7 - 297, l. 22. Critically, she was alone in concluding that the injuries to Child 1 could only have been the result of "child abuse," a term that she never bothered to define. R. 300, ll. 1-5.

Her testimony was the "evidence" the State needed to allege that Minor 1 died because of physical injuries Appellant inflicted on him "under circumstances manifesting an extreme indifference to human life." The trial court was right to admonish the solicitor for not disclosing

Dr. Abel's notes. R. 258, l. 4 - 260, l. 22. However, the trial court erred in concluding that no discovery violation had occurred and in failing to strike or grant a mistrial based upon the solicitor withholding Dr. Abel's notes. R. 321, l. 17 - 322, l. 4; R. 426, l. 8 - 427, l. 16.

As explained by defense counsel, the solicitor's failure to disclose Dr. Abel's notes resulted in the defense being unprepared to address three critical medical conclusions that were unique to Dr. Abel: (1) that it would have taken "tremendous force" to cause the skull fractures; (2) that Minor 1 would have been knocked unconscious by the blow to the head; and (3) that Minor 1would have stopped breathing within hours of the impact. R. 281, ll. 5-23.

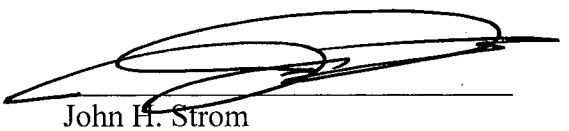
The defense needed the State to disclose Dr. Abel's notes not just for impeachment purposes, but also so as to have the opportunity to seek funding for a defense medical expert in order to effectively counter Dr. Abel's testimony. By not disclosing her notes, the State was able ambush the defense with Dr. Abel's damning, but medically dubious expert testimony while robbing the defense of the opportunity to effective respond. R. 281, l. 5 - 283, l. 3.

Accordingly, the court should have excluded Dr. Abel's testimony as the mid-trial disclosure of her notes unfairly prejudiced Appellant and constituted an egregious discovery violation by the State. The court's failure to craft any remedy whatsoever violated Appellant's right to a fair trial and due process of law.

CONCLUSION

Based on the foregoing arguments Appellant respectfully request that this Court reverse his conviction and remand the matter for a new trial.

Respectfully Submitted,



John H. Strom
Appellate Defender

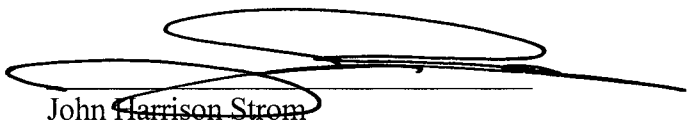
ATTORNEY FOR APPELLANT

This 22nd day of May, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 22, 2017



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