STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown County

Honorable Kristi F. Curtis, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MARISSA COHEN,

APPELLANT

APPELLATE CASE NO 2020-000134

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# FINAL BRIEF OF APPELLANT

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KATHRINE H. HUDGINS
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

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal for the charge of unlawful conduct toward her son who died in a trailer fire when the State failed to prove that Appellant placed her son at an unreasonable risk of harm or that she unlawfully or maliciously caused harm or that she willfully abandoned him when she did not know her son was in the trailer at the time of the fire?

## STATEMENT OF THE CASE

In August of 2014, the Georgetown County Grand jury indicted Appellant, Marissa Cohen, for arson first degree, criminal conspiracy and unlawful conduct toward a child, indictments #2014-GS-22-809, 810, 812. (R. pp. 618-623, indictments). On January 6, 2020, Appellant proceeded to jury trial before the Honorable Kristi F. Curtis. Besscena M. Wilson represented Appellant at trial. Alicia Richardson and Elizabeth Smith prosecuted the case. The jury found Appellant guilty of all three charges. Judge Curtis sentenced Appellant to thirty-five (35) years for arson, five (5) years concurrent for conspiracy and ten (10) years concurrent for unlawful conduct toward a child. (R. pp. 624-626, sentencing sheets). A timely notice of intent to appeal was served on January 17, 2020. This appeal follows.

## STANDARD OF REVIEW

"In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, '[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.' Id. at 593, 606 S.E.2d at 477–78 (citing State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002)); *see also* Rule 19(a), SCRCrP. The trial court should 'grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as '[s]uspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.' Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (citations omitted). On the other hand, 'a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.' Id. (emphasis removed).

On appeal, '[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state.' Id. (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)); *see also* State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented 'any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,' this Court must affirm the trial court's decision to submit the case to the jury. Cherry, 361 S.C. at 593–94, 606 S.E.2d at 478; *cf.* Mitchell, 341 S.C. at 409, 535 S.E.2d at 127 ('The trial judge is required to submit the case to the jury 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.' ') (emphasis removed) (citation omitted)."

State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408–09 (2013)

## ARGUMENT

**The trial judge erred in refusing to direct a verdict of acquittal for the charge of unlawful conduct toward her son who died in a trailer fire when the State failed to prove that Appellant placed her son at an unreasonable risk of harm or that she unlawfully or maliciously caused harm or that she willfully abandoned him when she did not know her son was in the trailer at the time of the fire.**

Appellant and her three children, two boys and a girl, lived in a rented mobile home on James Drive in Andrews, South Carolina. (R. pp. 509-510). On the afternoon of March 28, 2014, Appellant decided to leave the mobile home because of electrical problems causing sparks. (R. p. 511, line 16 – p. 512, lines 1-6). Appellant made arrangements for her family to stay for the weekend at the Arbor Place Apartments and Appellant planned to get an estimate for the cost to repair the electrical system. (R. p. 512, line 4 – p. 513, lines 1-25). If the repairs were too expensive, she was going to move out of the trailer. (R. p. 513, lines 8-9). Appellant used three different sources for heating the trailer: 1.) propane if she could find someone to light it for her because she was scared to light it; 2.) electricity and 3.) kerosene when the electric bill got too high. (R. p. 532, lines 8-20). Appellant purchased kerosene on the morning of March 28, 2014, before she decided the family should stay elsewhere. (R. pp. 138-141). That same night that Appellant decided her family should stay at the Arbor Place Apartments, she gave her twelve-year old son permission to go to a party at the "Rec Department." (R. p. 514, lines 18-22). She called her son several times during the night. (R. p. 515, lines 2-17; p. 540, line 24 – p. 541, lines 1-19).

Ricky N. testified that he and his friend, Appellant's son, attended a party at the Recreational Center in Andrews on March 28, 2014. (R. p. 60, line 7 – p. 61, lines 1-19). When the party ended between 11:30 PM and midnight the boys got permission from Ricky's mother for Appellant's son to spend the night with Ricky and the two walked home together. (R. p. 61,

lines 2-13). Ricky lived close to the mobile home on James Drive where the Appellant's son lived. (R. p. 61, lines 14-19). Ricky testified that Appellant's son went to the mobile home to get some clothes but never returned. (R. p. 61, lines 10-11).

At 1:29 AM on March 29, 2014, members of the Andrews Volunteer Fire Department responded to a call about a fire at a "vacant" trailer on James Drive. (R. p. 86, line 3- p. 87, lines 1-2). When the firefighters entered the trailer, however, they discovered a young man. (R. p. 87, lines 6-10). The young man was identified as Appellant's son and he was pronounced dead at the scene. (R. p. 100, lines 7-24). The Andrews Fire Chief testified that if they had been told that there was someone inside the trailer, things would have been handled differently. (R. p. 77, lines 19-25). The neighbor who called 911 about the fire believed that the trailer was vacant because his nephew, Everett Langley, told him they were moving and helped Appellant move some things out of the house. (R. p. 69, line 22 – p. 70, lines 1-2). Appellant had moved some of their belongings into a storage unit but other items remained at the trailer. (R. pp. 519-520; p. 439, line 22 – p. 440, lines 1-3; p. 441, lines 23-25; p. 457, lines 1-12). Appellant had purchased renter's insurance in February of 2014, after she started having electrical problems at the trailer. (R. p. 150, lines 1-25; p. 521, lines 5-11). An arson investigator from SLED determined that the fire was intentionally set using kerosene and an open flame. (R. p. 340, line 20 – p. 341, line 1).

Carolyn Montgomery testified at trial that when she brought an extra mattress for Appellant's two sons to sleep on at the Arbor Place Apartment, she found Appellant and the daughter asleep in a bed and one son asleep on the floor. (R. pp. 174-175). Montgomery asked about the other son and they suggested he might be at the trailer. (R. p. 175, lines 14-17). Appellant and Montgomery tried to call the missing son but they were unable to reach him. (R.

p. 175, lines 19-21). Montgomery went to find the son but learned about the fire and his death before she arrived at the trailer. (R. p. 176, lines 1-5).

Randy Collins was convicted in a separate trial of arson first degree involving the death of Appellant's son. (R. p. 372, lines 4-17). Collins admitted that he hoped for a reduction in his sentence in exchange for his testimony at Appellant's trial. (R. p. 373, lines 7-21). Collins claimed that Appellant offered him $5,000.00 from insurance proceeds to burn down the mobile home. (R. p. 377, line 12 – p. 378, lines 1-12). Collins admitted that the use of kerosene to set the fire was his idea. (R. p. 380, lines 18-23). Collins admitted to being involved with ten fires in his lifetime and receiving money from insurance claims from those fires. (R. p. 390, lines 1-17).

According to Collins, he told his nephew, James Miller, who is also Appellant's cousin, about the plan to burn the trailer. (R. p. 378, lines 13-19). Collins testified that Miller said, "that he wouldn't mind making a little bit of that yam." (R. p. 378, lines 17-19). Collins claimed that Appellant was supposed to have everything organized, doors were supposed to be open, the kerosene inside the house and nobody was supposed to be there. (R. p. 378, line 9 – p. 379, lines 1-8; p. 380, lines 24-25). According to Collins, however, when he and Miller went to the trailer the doors were locked and they were unable to get inside to light the kerosene. (R. p. 378, line 20 – p. 379, lines 1-15; p. 380, line 18 – p. 381, line 1). Instead, according to Collins, Miller lit something and threw it at a window. (R. p. 392, lines 16-19).

The jury found Appellant guilty of arson first degree involving the death of her son and for conspiring with Randy Collins and James Miller to burn down the mobile home. The jury also found Appellant guilty for unlawful neglect of a child. This charge should not have been

presented to the jury. The judge erred in refusing to direct a verdict of acquittal on the unlawful neglect charge.

At the close of the State's case Appellant moved for directed verdicts of acquittal. (R. p. 500, line 19 – p. 501, 502 lines 1-5). As to the unlawful conduct toward a child charge, counsel for Appellant argued:

> Your – Your Honor, we'd also move for a direct verdict on the charge of the unlawful treatment of a minor. Because, basically, the State has not presented any evidence that my client did anything wrong, anything different from Ricky N.[ ]'s mother. And it was understood that he – no one has said that he was a known bad child or disobedient child, he just didn't come home as instructed by his mother on the particular event. No one disputes the fact that she had taken her medications and fallen to sleep. Your Honor, so the State has presented no evidence to prove that she was neglectful of this child.

(R. p. 501, lines 12-23). The judge denied the motion stating:

> As to the unlawful conduct toward a child, the statute required that a parent or guardian place the child at unreasonable risk of harm effecting the child's life, physical or mental health, or safety. Or to do, or cause to be done, unlawfully or maliciously any bodily harm to the child so that the life or health is endangered or likely to be endangered.
>
> There is evidence that she made arrangement for the fire to be set. Gave the go ahead for the fire immediately after moving, while not knowing the whereabouts of the child. And knowing that this was the first night that the child would have spent away from home, which, in my thinking, increases the likelihood that he might return to the home. It looks like there were also still a number of items, personal items, in the home, clothing, beds, bicycles. Which, of course, increases the likelihood that somebody might return to the home to get those things. And, specifically, this child whose whereabouts were unknown at the time the fire started.
>
> So for those reasons the motion for directed verdict is denied. I do believe that there is evidence to go forward on those charges with the jury.

(R. p. 505, lines 3-24). A possibility that the twelve-year old would go back to the trailer is not sufficient. The trial judge erred in refusing to direct a verdict of acquittal for the charge of unlawful conduct toward a child. The State failed to prove that Appellant knew that her son was

in the trailer. Appellant had no idea that the twelve-year old son would go back to the trailer after the party. Without proving that Appellant knew her son was in the trailer, the State failed to prove that Appellant placed her son at unreasonable risk of harm. Without proving that Appellant knew her son was in the trailer, the State failed to prove that she unlawfully or maliciously caused harm to her son.

Appellant was indicted for unlawful conduct toward a child in violation of S.C. Code §63-5-70 which provides that:

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wilfully abandon the child.

The indictment tracks the statute stating, "That Marissa Cohen did in Georgetown County on or about March 28-29, 2014, while having charge or custody, or being the parent or guardian, or being responsible for the welfare of the minor child, [Appellant's son], age 12, place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or did unlawfully or maliciously cause or cause to be done bodily harm to the child so that the life or health of the child was endangered or was likely to be endangered; or did willfully abandon the child, in violation of Section 63-5-70, S.C. Code of Laws , 1976, as amended." (R. p. 623, indictment). The indictment fails to allege how Appellant placed her son at risk or how she unlawfully or maliciously caused harm to her son or how she willfully abandoned him.

In S.C. Dep't of Soc. Servs. v. Jennifer M., 404 S.C. 269, 280–81, 744 S.E.2d 591, 597 (Ct. App. 2013), the South Carolina Court of Appeals discussed the case of State v. Jenkins, 278 S.C. 219, 294 S.E.2d 44 (1982) (n. 9 omitted) and wrote:

> In Jenkins, the defendant was convicted of the misdemeanor crime of unlawful neglect of a child, in violation of section 16–3–1030 of the South Carolina Code, after she left her eight year-old and five year-old sleeping alone in the house for an hour, and the two children died in a fire during that time. 278 S.C. at 220–21, 294 S.E.2d at 45. In addressing whether the statute required proof of criminal negligence, as opposed to simple negligence, our supreme court noted that the legislature may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and the knowledge or ignorance of the act's criminal character is immaterial on the question of guilt. Id. at 221–22, 294 S.E.2d at 45. The court must look to the language of the statute, construed in light of its purpose and design, to determine whether knowledge and intent are necessary elements of a statutory crime. Id. at 222, 294 S.E.2d at 45. Noting the statute in question was enacted to provide protection for those persons whose tender years or helplessness rendered them incapable of self-protection, the court concluded the legislature's failure to include "knowingly" or other apt words to indicate criminal intent or motive evidenced "the legislature intended that one who simply, *without knowledge or intent that his act is criminal,* fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates § 16–3–1030 of the Code." Id. at 222, 294 S.E.2d at 45–46. (emphasis added).

As the Court of Appeals noted in footnote 9, the statute at issue in Jenkins, S.C. Code §16-3-1030, was repealed but similar provisions appeared in S.C. Code §20-7-50 which is the predecessor to the current unlawful conduct toward a child statute found in S.C. Code §63-5-70.

S.C. Code §16-3-1030 provided:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the court.

See Jenkins.

S.C.Code § 20–7–50 provided:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20–7–490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

See Whitner v. State, 328 S.C. 1, 5, 492 S.E.2d 777, 779 (1997).

In the Jenkins case the Court of Appeals found that unlawful neglect, pursuant to the repealed statute S.C. Code §16-3-1030, only required a failure to provide proper care and attention that results in endangerment or likely endangerment. In Jenkins the defendant failed to provide proper care by leaving the children unattended. Appellant in the present case did not fail to provide proper care. Instead, Appellant's son, without her knowing, returned to the trailer that burned. The State failed to prove unlawful conduct toward a child.

In the Jennifer M. case the South Carolina Court of Appeals found that a woman could not be found to have abused or neglected her child by using drugs when she did not know she was pregnant. In the present case, Appellant can not be guilty of unlawful conduct toward a child when she did not know that her twelve-year old son would return to the trailer that was burned. The State did not prove that Appellant failed to provide proper care when she did not know the son returned to the trailer.

In contrast to the unlawful conduct toward a child statute that, in this case, requires the State to prove that Appellant knew her son was in the trailer when it burned, the first degree arson statute provides, "A person who wilfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures a burning that results in damage to a building, structure, or any property specified in subsections (B) and (C), whether the property of the person or another, which results, either directly or indirectly, in death or serious bodily injury to a person is guilty of the felony of arson in the first degree and, upon conviction, must be

imprisoned not less than thirty years." S.C. Code Ann. § 16-11-110(A). The unlawful act is the arson and the resulting death makes it first degree. Appellant does not challenge on appeal the trial judge's refusal to direct a verdict of acquittal for the first-degree arson charge. The judge, however, erred in refusing to direct a verdict of acquittal for unlawful conduct toward a child.

The unlawful conduct toward a child statute requires placing the child at an unreasonable risk of harm, unlawfully or maliciously causing bodily harm to the child or willfully abandoning the child. The State can not prove that Appellant placed her son at an unreasonable risk of harm or that she unlawfully or maliciously caused harm or that she willfully abandoned him without proving that she knew he was in the trailer at the time of the fire. The possibility that the son would go back to the trailer is not sufficient. The State presented no evidence that Appellant knew her son was in the trailer at the time of the fire. The trial judge erred in refusing to direct a verdict of acquittal for unlawful conduct toward a child.

## CONCLUSION

Based on the above argument, this Court should remand the case and order the trial court to direct a verdict of acquittal for the unlawful conduct toward a child indictment.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of February, 2021.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."



Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 25th day of February, 2021.