STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County
The Honorable Edward B. Cottingham, Circuit Court Judge

Opinion No. 4785 (S.C. Ct. App. filed 1/26/11)
Appellate Case No. 2011-188646

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WESLEY SMITH,

PETITIONER.

RECEIVED
APR 15 2013
S.C. Supreme Court

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
S.C. Bar No. 73562
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, SC 29528
843-915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) 12

Greenville County DSS v. Bowes, 313 S.C. 188, 437 S.E.2d 107 (1993) 9

State v. Batchelor, 377 S.C. 341, 661 S.E.2d 58 (2008) 10

State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) 10

State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001) 11

State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) 10

State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002) 8, 10

State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008) 8-9, 10

State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005) 9

State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) 11

State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007) 9

Statutes

S.C. Code Ann. § 16-3-85 .... *passim*

STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly affirmed the trial court's instruction to the jury regarding aiding and abetting under subsection (A)(2) of the homicide by child abuse statute and properly concluded there was evidence supporting Petitioner's guilt under that subsection.

STATEMENT OF THE CASE

Petitioner was indicted in May 2004 in Horry County for homicide by child abuse. On April 14-17, 2008, he proceeded to trial before the Honorable Edward B. Cottingham and a jury. Petitioner was convicted of homicide by child abuse under subsection (A)(2) of S.C. Code 16-3-85 and was sentenced to twenty years. A notice of appeal was timely served and filed.

On January 26, 2011, the South Carolina Court of Appeals affirmed the conviction. See State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011). Petitioner's request for rehearing was denied on February 28, 2011. Smith's Petition for Writ of Certiorari followed on May 31, 2011, and the State submitted a Return on June 30, 2011. On August 24, 2012, this Court granted the Petition for Writ of Certiorari to review the propriety of the jury charge regarding subsection (A)(2) of the homicide by child abuse statute. Petitioner's Brief followed on December 27, 2012, and this Brief of Respondent follows.

ARGUMENT

The Court of Appeals properly affirmed the trial court's instruction to the jury regarding aiding and abetting under subsection (A)(2) of the homicide by child abuse statute and properly concluded there was evidence supporting Petitioner's guilt under that subsection.

Overview of the Facts

Petitioner and Charlene Dandridge, the parents of the victim, lived together with the victim and the victim's older brother. (R. p. 234-38). The victim was born on October 7, 2003, and, during the next four months, Dandridge worked while Petitioner stayed at home with the children. (See R. p. 127; p. 236-41; p. 245; p. 265). The first sign of child abuse and neglect surfaced in December 2003, about two months prior to the victim's death. (See R. p. 145-160). At a well-baby checkup, Dr. Cooper-Merchant noticed that the victim had a swollen and painful leg, which caused the victim to cry every time the leg was touched. (R. p. 145; p. 200). The doctor later determined that the victim had a spiral fracture of the femur. (R. p. 148). Such a fracture is generally considered an inflicted injury, non-accidental in nature, and is highly correlated with child abuse. (R. p. 148; p. 160; p. 186-88; p. 199-200; p. 376-80).

Petitioner initially told Dr. Cooper-Merchant that he had no idea how the injury happened. (R. p. 146, lines 12-14). After further probing, he told her that when he was napping and holding the child, the doorbell woke him and he dropped the child and she fell on the leg. (R. p. 147-49). Dandridge testified that Petitioner told her the injury occurred after he heard a loud knock at the door while he was napping in a chair with the baby on his chest. (R. p. 236-37). Petitioner told another doctor, Dr. Rahter, that the injury occurred when a neighbor came into the house and found the victim on the floor; Petitioner stated he did not remember anything and therefore assumed he had a seizure

and dropped the child.[1] (See R. p. 197, line 18 – p. 198, line 2). None of his stories were consistent with the medical findings regarding how the injury occurred. (R. p. 146-49; p. 199-200; p. 380, line 25 – p. 381, line 5). Further, although Petitioner and Dandridge believed the baby's leg was broken, instead of taking her to the hospital, they placed a homemade splint on the leg. (R. p. 236-37; see also p. 200, lines 2-15). Dr. Collins testified that ignoring and covering up the femur injury constituted medical neglect, in addition to the physical abuse that occurred upon infliction of the injury. (R. p. 380, lines 19-24).

Following the well-baby checkup at which the femur injury was discovered, DSS temporarily removed the child from Dandridge and Petitioner's home and placed her in foster care. (R. p. 453-54; p. 238-39). DSS found child abuse and neglect on behalf of both parents. (R. p. 455, line 24 – p. 456, line 1). Nevertheless, for reasons that are unclear, the child was returned to them in mid-January, after DSS determined that the injury was non-accidental in nature but failed to determine how it occurred. (R. p. 239; p. 456-57). A court order was entered prohibiting Petitioner from having the victim in his sole custody. (R. p. 455, line 4). However, Dandridge testified that they violated this court order and that the victim was in Petitioner's sole custody while she was at work. (R. p. 241, lines 4-22; p. 259, lines 8-10).

The victim died shortly thereafter, on February 14, 2004. (R. p. 367, lines 18-19). The two contributing causes of death were determined to be pseudoephedrine toxicity and blunt-force trauma to the chest. (R. p. 390-91). The manner of death was listed as homicide associated with child abuse and neglect. (R. p. 391-92). The autopsy revealed that the victim had been given approximately 1300 nanograms of pseudoephedrine, four

[1] Apparently Petitioner had a history of seizures. (See R. p. 243, lines 12-19).

times the normal adult dose contained in over-the-counter medicines such as Sudafed. (R. 345, lines 20-23; p. 371, lines 15-21). The autopsy also revealed seventeen rib fractures, some of which occurred in the ten to twenty-one day period prior to death, and others which occurred in the forty-eight hours prior to death. (R. p. 376-389). The rib injuries were not present on January 15, 2004. (R. 185; p. 377-78; p. 381). Further, they were not caused by CPR administered prior to the victim's death. (R. p. 383, lines 4-5). Instead, these injuries were the result of child abuse – specifically, squeezing - and would have been very painful, causing the child to cry. (R. p. 377; p. 383-85; p. 389; p. 392).

On the day of her death, the only adults who saw the victim were Petitioner and Dandridge. (See R. p. 196-97; p. 202-203; p. 236, lines 15-17; p. 241, lines 4-8; p. 242-47). The victim actually died while Petitioner was caring for her and while Dandridge was at work, although Dandridge had been at home with them earlier that day on her lunch break. (See R. p. 241-46). Petitioner told police that he gave the victim "cough medicine" on the day of her death, while Dandridge testified that she did not give medicine to the victim on February 12, 13, or 14. (R. p. 216, line 14 – p. 217, line 6; p. 246, lines 3-7; p. 279, line 14 – p. 280, line 10; p. 455, lines 5-11). Although the child previously had a respiratory infection, there was nothing wrong with her that would have required medicine at the time of her death. (R. p. 198; p. 261-62; p. 288; p. 375). In addition, although the child was given a prescription for Rondec-DM, which contained a very small amount of pseudoephedrine, in January, Rondec-DM was not in the child's system at the time of her death. (R. p. 167-68; p. 211-12; p. 222-27). Neither this prescription, nor the victim's prescription inhaler, was found in a search of the residence conducted shortly after the victim's death. (R. p. 560).

The expert testimony indicated that over-the-counter drugs containing pseudoephedrine are often used to "chemically restrain" or "subdue" a child who is excessively crying. (R. p. 213-14; p. 219, line 18 – p. 220, line 2; p. 226; p. 374, line 11 – p. 375, line 7). Dr. Collins, who had extensive experience with child abuse cases, testified that it was common for abusers, in attempting to deal with a child who continually cried, to either isolate the child, re-injure the child, or to give the child medication to make it go to sleep. (See R. p. 389, line 11 – p. 390, line 4). As noted above, the victim had been suffering from painful rib injuries that occurred within forty-eight hours of her death, and from the previously-inflicted rib and femur injuries, all of which would have made her very irritable and caused her to cry. (R. p. 213-214; p. 389, lines 13-25). Dandridge asserted that Petitioner could not handle it when the child cried, and that he sometimes had to leave and take a walk. (R. p. 244, line 13 – p. 245, line 3; p. 262, lines 17-20). Dandridge also claimed that she never injured the victim and indicated that her other child did not injure the victim. (R. p. 238, lines 17-19; p. 243-47).

At the conclusion of the State's case, the defense made a motion for a directed verdict. (R. p. 420). The trial judge denied the motion, concluding there was sufficient evidence from which the jury could find Petitioner guilty of being either a principal under subsection (A)(1) of the statute or being an aider or abettor under subsection (A)(2). (R. p. 420-21). The defense did not mention any issue with section (A)(2) of the statute at that point. (See R. p. 420-26). No issue with section (A)(2) was raised until the close of all the evidence when the attorneys and the judge were discussing proposed jury charges. (See R. p. 570-72). Initially, one of Petitioner's attorneys requested that the court charge

section (A)(2). (R. p. 571, lines 6-10). Shortly thereafter, Petitioner's lead attorney stated that he was requesting that the court charge only section (A)(1), since "[t]hat's what he's indicted for." (R. p. 572, lines 2-5). The solicitor responded that he would have to consider whether there was "any evidence that would tend to give the jury the ability to convict of the lesser included offense." (R. p. 572, lines 13-16). The judge indicated he would consider the issue overnight. (R. p. 572-76).

The next day, the judge raised the issue again and indicated that "[t]he State has requested that I charge A and B of the applicable statute."[2] (R. p. 583, lines 16-20). Defense counsel argued that the indictment charged Petitioner with only subsection (A)(1) of the homicide by child abuse statute and therefore Petitioner and his attorneys were only on notice to prepare for (A)(1). (R. p. 584). He asserted there was no evidence in the record supporting that Petitioner "aided or abetted anybody in homicide by child abuse." (R. p. 585, lines 11-13). He also argued that subsection (A)(2) was not a lesser-included offense of subsection (A)(1). (R. p. 585, line 18). Finally, defense counsel stated that he was not prepared to defend a charge under subsection (A)(2). (R. p. 586, line 18 – p. 587, line 2). The trial judge disagreed with defense counsel's arguments, concluding that subsection (A)(2) was "probably a lesser included" offense of (A)(1), but if not, he still believed it would be reversible error not to charge section (A)(2) and give the finders of fact the opportunity to consider the charge which carries a lesser penalty. (See R. p. 587-91). The judge also noted that the jury charge including both subsections of the statute had apparently been approved by the Supreme Court inasmuch as the

[2] The parties and the judge refer to subsection (A)(1) as "A" and subsection (A)(2) as "B" throughout this discussion. (See R. p. 583-91).

charge had been provided to the circuit court judges for their use. (See R. p. 590, lines 7-18). Defense counsel took exception to the judge's ruling. (R. p. 591, line 11).

Thereafter, during the jury charge, the judge instructed the jury regarding subsection (A)(1), then told the jury that "the State may also prove homicide by child neglect by proving beyond a reasonable doubt that the defendant knowingly aided and abetted another person to commit child abuse or neglect which resulted in the death of a child under the age of eleven." (R. p. 620-21). The judge also defined "aid" and "abet." (R. p. 621, lines 18-20). Later, in a final charge to the jury, the judge discussed the verdict form. (R. p. 669-70). The judge instructed the jurors to consider first whether or not the State had proven beyond a reasonable doubt that Petitioner was guilty under subsection (A)(1). (R. p. 669, line 23 – p. 670, line 4). The judge indicated that if the jury found Petitioner not guilty as to (A)(1), the jury could then go on to consider Petitioner's guilt under subsection (A)(2). (R. p. 670, lines 4-15). The jury ultimately found Petitioner guilty of aiding and abetting under subsection (A)(2). (R. p. 676, lines 7-10).

Discussion

Petitioner was charged with the crime of "homicide by child abuse." (R. p. 693-94). A person can be found guilty of homicide by child abuse in two alternative ways: (1) if the person causes the death of a child while committing child abuse or neglect and the death occurs under circumstances manifesting an extreme indifference to human life; or, (2) if the person knowingly aids and abets another person to commit child abuse or neglect which results in the death of the child. S.C. Code Ann. § 16-3-85(A)(1) & (2); see State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002); State v.

Martucci, 380 S.C. 232, 248-49, 669 S.E.2d 598, 607 (2008). Under the definitions contained in section (B) of the statute, "child abuse or neglect" includes an act or omission by any person which causes harm to the child's physical health or welfare, and "harm to a child's health or welfare" includes physical injuries one "inflicts or allows to be inflicted" upon the child. See S.C. Code Ann. § 16-3-85 (B). Regardless of whether a person is convicted pursuant to section (A)(1) or section (A)(2), the person is guilty of the crime of homicide by child abuse. The only distinction between a conviction under section (A)(1) and a conviction under section (A)(2) comes at sentencing - under section (A)(1), a person must receive a penalty of twenty years to life, and under (A)(2), a person must receive a penalty of ten to twenty years. See S.C. Code Ann. § 16-3-85(C).

Inasmuch as the statute is of relatively recent "legislatorial vintage," there is no longstanding body of law under which to analyze the offense. State v. Mitchell, 362 S.C. 289, 298-99, 608 S.E.2d 140, 145 (Ct. App. 2005), *opinion vacated in part by* McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). Thus, the statute's wording and construction must be scrutinized to ascertain the intent of the legislature. See, e.g., State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 726 (2007) ("The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature.") (citation omitted). Initially, it is apparent that the homicide by child abuse statute "displays the legislature's intent to define and target a specific societal problem." State v. Mitchell at 297, 608 S.E.2d at 144; see also Greenville County Dept. of Social Services v. Bowes, 313 S.C. 188, 197-98, 437 S.E.2d 107, 112-13 (1993) (Toal, J., dissenting) (discussing the increasing rate of child deaths from abuse and neglect in South Carolina).

Further, the dual nature of the homicide by child abuse statute, and the broad definitions contained in section (B), clearly evince the legislature's intent to address the two primary difficulties in cases of child abuse and neglect: that abuse almost always occurs in secret, and that it is often difficult to distinguish the relative culpabilities of two parents living in the home with the child victim. See State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (2008); State v. Fletcher, 379 S.C. 17, 27-28, 664 S.E.2d 480, 484-85 (2008) (Toal, C.J., dissenting). Additionally, the statute addresses the fact that both parents are to blame for the death of the child because each disregarded his and her fundamental parental duties. See State v. Jarrell at 99, 564 S.E.2d at 367 ("A parent has a specific and nondelegable duty to serve the best interest of [his or] her child and should make every effort not to knowingly place [his or] her child in harm's way."). The homicide by child abuse statute is "grounded in the public policy that an adult is not only prohibited from physically abusing a child, but also is prohibited from deliberately sitting by and allowing a child's life to be threatened by the abuse of another." State v. Fletcher at 27-28, 664 S.E.2d at 485 (Toal, C.J., dissenting). Clearly, the legislature did not intend for *either* culpable parent to escape liability for his or her child's death, whether the parent was the principal abuser or a facilitator of the abuse.

Subsection (A)(2) is, essentially, a hybrid: in addition to being a statutory accomplice liability counterpart of subsection (A)(1), it is also a sort of "lesser offense" of (A)(1) because it provides for a lesser penalty. Therefore, the State submits that both sections should be charged to the jury when there is evidence presented at trial supporting each section. See State v. Batchelor, 377 S.C. 341, 344-45, 661 S.E.2d 58, 59-60 (2008); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (both stating that it is

"well-settled" that an indictment charging a defendant as a principal will support a conviction based upon accomplice liability); compare State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001) (holding that assault and battery of a high and aggravated nature is to be considered a lesser-included offense of assault with intent to commit criminal sexual conduct even though the elements of these two crimes do not meet the "elements test," and recognizing that this holding "presents an anomaly in the law, akin to manslaughter and murder"), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Although Dickman and the other accomplice liability cases are not directly on point because they deal with the common law regarding accomplice liability rather than a statutory accomplice liability section such as the one at issue here, the principles of Dickman are, nevertheless, applicable. Since the homicide by child abuse statute creates two ways for a person to be guilty of one crime - first, by being a principal abuser, and second, by being an aider or abettor of the abuse - it creates the same dichotomy that is present in the accomplice liability cases. Further, as the Court of Appeals noted, the subsection does not add any elements necessary for conviction. See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 498 (Ct. App. 2011). Thus, subsections (A)(1) and (A)(2) are the statutory equivalents of principal and accomplice liability under the common law. Additionally, subsection (A)(2) is a statutorily-created lesser offense of (A)(1) since it is part of the same section but carries a lesser penalty. Therefore, in the same way that an indictment charging a defendant only as a principal supports a conviction on a theory of accomplice liability, and in the same way that an indictment for an offense supports a conviction for a lesser-included offense, the indictment in Petitioner's case charging him

only under section (A)(1) supports his conviction for aiding and abetting under section (A)(2).

Petitioner was charged with the crime of "homicide by child abuse," and a plain reading of the statute gave him notice that there were two ways in which a jury could reach a verdict of guilty for that crime. (See R. p. 586, lines 22-24; p. 683, lines 11-25). Therefore, although the State *sought* to prove Petitioner guilty of the acts described in section (A)(1), Petitioner was on notice - considering the longstanding law regarding principal and accomplice liability, and lesser offenses, and considering the very nature of the case - that, if evidence was presented that could support a conviction under (A)(2), that section should be charged to the jury.[3]

The trial judge properly charged section (A)(2) in this case because there was evidence presented that would support a conviction under that section.[4] For example, if the jurors disbelieved Dandridge's denials, they could have found that Petitioner knowingly aided and abetted in Dandridge's commission of homicide by child abuse since he, as the father and primary caretaker of the victim, knew of the abuse and neglect[5] - which was clearly causing physical harm to the victim - and promoted and encouraged it by not putting a stop to the abuse and/or not seeking timely medical attention for the victim. (See R. p. 236-82; see also p. 146, line 15 – p. 147, line 4; p. 164-65; p. 196-98; p. 202-203; p. 236-37; p. 241-47; p. 244, line 13 – p. 245, line 3; p. 246, lines 3-9; p. 255-

---

[3] Contrary to Appellant's assertions, the case of Bailey v. State is distinguishable because it involved a situation where the State described specific *factual allegations* in the indictment. See Bailey v. State, 392 S.C. 422, 433-36, 709 S.E.2d 671, 677-78 (2011). Bailey did not address a situation involving accomplice liability or lesser offenses.

[4] Notably, as mentioned previously, Appellant did not move for a directed verdict on section (A)(2) despite the fact that the trial judge specifically mentioned that he believed Petitioner could be found guilty under that section. (See R. p. 420-26).

[5] Under the statute, "child abuse or neglect" includes both acts and failures to act. See S.C. Code Ann. § 16-3-85(B). Therefore, the jury could have found Petitioner knew of Dandridge's acts or her failures to act and promoted and encouraged them.

58; p. 259, lines 17-19; p. 261, lines 11-22; p. 276, lines 17-25; p. 279, lines 7-19; p. 448-58; p. 480-92; p. 539-60; see also p. 689, lines 10-22). Therefore, since there was evidence supporting Petitioner's liability as an aider or abettor pursuant to subsection (A)(2), the judge properly charged that subsection. (See R. p. 587, line 16 – p. 588, line 24; p. 684, lines 11-13).

CONCLUSION

For all of the reasons discussed in detail above, this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

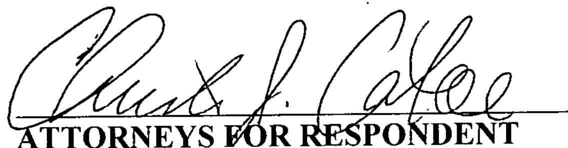
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit



ATTORNEYS FOR RESPONDENT

April 15, 2013

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County
The Honorable Edward B. Cottingham, Circuit Court Judge

Opinion No. 4785 (S.C. Ct. App. filed 1/26/11)
Appellate Case No. 2011-188646

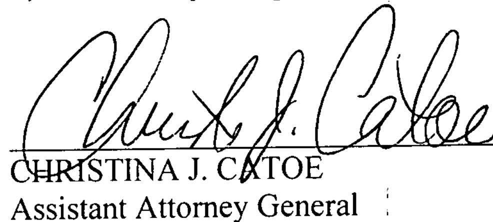
THE STATE OF SOUTH CAROLINA, RESPONDENT,

v.

WESLEY SMITH, PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Brief of Respondent** in the above-referenced case has been served upon **KATHRINE H. HUDGINS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **15th day of April, 2013.**



CHRISTINA J. CATOE
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737