STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALYSSA ANNE DAYVAULT,

APPELLANT

APPELLATE CASE NO. 2020-001515

FINAL BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF FACTS 4

ARGUMENT

The trial judge erred in allowing the state to join two separate homicide by child abuse charges against Appellant at the same jury trial because the alleged acts took place thirteen months apart from one another and the joinder of the indictments resulted in extreme unfair prejudice to Appellant by allowing the state to argue that she killed two of her newborn children on separate occasions. 7

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

City of Greenville v. Chapman, 210 S.C. 157, 41 S.E.2d 865 (1947) 11, 12

State v. Beekman, 415 S.C. 632, 785 S.E.2d 202 (2016) 3, 11

State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996) 11

State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) 9

State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013) 11, 12, 13

State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) 11, 12, 14

State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002) 9

State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996) 9, 13, 14

State v. Tallent, 430 S.C. 438, 845 S.E.2d 508 (Ct. App. 2020) 12

State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (1985) (reversing 3, 12, 14

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) ..... passim

Rules

Rule 404(b), SCRE 7, 13

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the state to join two separate homicide by child abuse charges against Appellant at the same jury trial where the alleged acts took place thirteen months apart from one another and the joinder of the indictments resulted in extreme unfair prejudice to Appellant by allowing the state to argue that she killed two of her newborn children on separate occasions?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for two counts of homicide by child abuse. R. 296-299. Appellant's trial was held before the Honorable Steven H. John and a jury from October 12 – 15, 2020. Appellant was represented by Sharde Crawford and Kia Wilson. The state was represented by Scott Hixson, Joshua Holford, and Cara Walker. R. 51.

The jury found Appellant guilty as charged. The judge sentenced Appellant to forty-years-imprisonment on each count. R. 289, l. 7 – 290, l. 1.

This appeal follows.

STANDARD OF REVIEW

"A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). A trial judge's decision to allow joinder of charges that do not arise from a single course of conduct, are not of the same general nature, are not proved by the same evidence, and prejudices a defendant's substantial rights is an abuse of discretion. State v. Beekman, 415 S.C. 632, 639, 785 S.E.2d 202, 206 (2016); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (1985) (reversing prejudicial joinder because "nothing in this record shows these two forgeries are connected").

STATEMENT OF FACTS

On December 5, 2018 Appellant "presented to North Strand ER with heavy vaginal bleeding and a dangerously low hemoglobin." R. 140, l. 23 – 141, l. 8. Dr. Jessica Brown, who was admitted as an expert in obstetrics and gynecology, recalled that Appellant had an elevated pregnancy hormone level indicating that she was possibly pregnant. R. 141, ll. 16 – 19. Dr. Brown initially believed Appellant was having a miscarriage. R. 142, ll. 12 – 22.

According to Dr. Brown, Appellant denied being pregnant and stated that she was using birth control. However, Appellant had recently switched birth controls and Dr. Brown believed Appellant may have gotten pregnant between the use of the two birth controls. R. 143, ll. 10 – 25. Appellant was admitted to the hospital to receive blood and Dr. Brown scheduled a surgery for the following day. R. 144, ll. 4 – 18.

The next day, Dr. Brown began a surgical procedure on Appellant for "an incomplete miscarriage," at which time she discovered that Appellant had a "full-term placenta with a cord" in her uterus. R. 145, ll. 1 – 18. Dr. Brown removed the placenta. R. 145, l. 19 – 148, l. 3. While Appellant was recovering from surgery and waking up from the anesthesia, Dr. Brown spoke to Appellant's boyfriend and mother to ask whether they were aware of Appellant having recently given birth to a baby. They both denied knowing Appellant was pregnant. R. 148, ll. 12 – 25. Dr. Brown admitted that she did not know whether Appellant gave birth to a live, viable, or healthy baby. R. 157, l. 17 – 158, l. 5.

On December 11, 2018, officer Erin Beasley with SLED, and officers Chris Bellamy and Will Lynch with the North Myrtle Beach Police Department, went to Appellant's house to interview her about her recent hospital visit. R. 164, l. 2 – 165, l. 11. This interview was video

and audio recorded on Lynch's body worn camera. State's Exhibit 16 (DVD First Interview of Defendant 12/11/18 on file with this Court).

Appellant initially denied having recently been pregnant and giving birth to a child. State's Ex. 16 at 1:20 – 5:50. However, after continued questioning, Appellant informed the officers that she had given birth to a stillborn[1] baby in the bathroom of her house and that she took the body to the "Hillside dump"[2] to dispose of it. State's Ex. 16 at 6:40 – 8:20; State's Ex. 16 at 12:48 – 13:00; state's ex. 16 at 21:10 – 21:35; R. 174, ll. 8 – 18. Appellant maintained that after she gave birth, she "blacked out" for approximately twenty minutes and that when she woke up the baby was blue and unresponsive. State's Ex. 16 at 18:00 – 19:25; R. 174, l. 19 – 175, l. 22.

After the first interview ended, the officers retrieved security video from the Hillside dump in an attempt to find video footage of Appellant dumping the body. However, the officers did not see Appellant on the video. R. 170, ll. 19 – 24; R. 180, l. 11 – 181, l. 7.

Officers interviewed Appellant a second time at the North Myrtle Beach Police Department and confronted her about having not seen her on the Hillside dump video cameras. R. 190, ll. 3 – 16; State's Ex. 17 (DVD Second Interview of Defendant 12/11/18 on file with this Court). After being confronted with this information, Appellant told the officers that she had placed the body of the baby that was stillborn in December of 2018 into the trashcan at her

---

1 Appellant later answered affirmatively to Beasley's question that the baby was born "alive and died in [Appellant's] arms." State's Ex. 17 at 15:30 – 16:00 (DVD Second Interview of Defendant 12/11/18 on file with this Court).

2 Beasley recalled that "the dump on Hillside" was "right down the road from [Appellant's] house." R. 169, ll. 16 – 22.

house. State's Ex. 17 at 13:00 – 15:00. Officer's then searched the trashcan and recovered the body.[3] R. 195, l. 17 – 196, l. 19.

During both of the interviews of Appellant, the officers also questioned Appellant about a previous visit to the hospital in November of 2017.[4] State's Ex. 16 at 5:50 – 6:20. Appellant stated after her hospital visit in November of 2017, she gave birth to a baby in her old apartment and that she "gave that baby up." State's Ex. 16 at 6:20 – 6:45; state's ex. 16 at 15:00 – 15:30. However, Appellant later told the officers that this baby was also dead. Beasley asked Appellant if her baby from November 2017 was also stillborn, to which Appellant responded that it was. State's Ex. 16 at 8:20 – 8:40. Appellant told the officers that this baby was born with the umbilical cord wrapped around its neck, took one gasp, "and that was it." State's Ex. 17 at 16:45 – 17:25; R. 175, l. 23 – 220, l. 6. Beasley also asked Appellant if she put that baby's body in the trash as well and Appellant responded that she had. State's Ex. 16 at 10:30 – 11:00. The body of this baby was never recovered.

---

[3] Dr. Nicholas Batalis, who was a forensic pathologist at the Medical University of South Carolina, performed an autopsy on the body of the recovered baby. R. 225, l. 14 – 229, l. 6. Dr. Batalis testified that his autopsy found "essentially no explanation for the child's death" from a medical or physiological standpoint. R. 232, ll. 12 – 22. Dr. Batalis further testified that the child being placed in an "oxygen-depleted environment" and dying from asphyxia would be consistent with his findings. R. 239, l. 22 – 240, l. 9.

[4] During the officers' initial investigation of Appellant's December 2018 hospital visit, they discovered that Appellant had also been to a different hospital approximately thirteen months earlier in November 2017. R. 184, l. 13 – 186, l. 5. Officers learned from Appellant's medical records that the doctor who she saw in November 2017 discovered that Appellant was approximately thirty-six weeks pregnant at that time. The doctor who saw Appellant in November 2017 also detected a fetal heartbeat that was "very good." R. 212, l. 20 – 213, l. 17.

ARGUMENT

The trial judge erred in allowing the state to join two separate homicide by child abuse charges against Appellant at the same jury trial because the alleged acts took place thirteen months apart from one another and the joinder of the indictments resulted in extreme unfair prejudice to Appellant by allowing the state to argue that she killed two of her newborn children on separate occasions.

Relevant Facts

The solicitor made a pretrial motion to join the two indictments against Appellant and proceed to trial on both charges at the same time. R. 37, l. 25 – 38, l. 23. The solicitor argued that joinder was proper pursuant to State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) because Appellant's video recorded statements were the primary pieces of evidence for both offenses and that it would be "very difficult, if not impossible, to separate the evidence of the second birth with the first birth." R. 38, l. 24 – 39, l. 14.

The solicitor argued in the alternative that, if the trial judge did not grant its joinder motion, the first birth should be admissible in a trial of only the second birth pursuant to Rule 404(b), SCRE as evidence of "lack of accident, motive, and intent."[5] R. 40, l. 1 – 41, l. 12. The trial judge indicated that before ruling on the motion he would need to review the medical records and hear testimony from the doctors that treated Appellant on both occasions, so the motion was continued. R. 46, l. 1 – 47, l. 11.

At the following hearing the solicitor called Dr. Karyn Markley, who testified that she was an OBGYN who treated Appellant after the surgical removal of the placenta in December of

---

5 The solicitor originally said he was not arguing that the first birth could be admissible in a trial of only the second birth pursuant to the common scheme or plan exception. R. 40, ll. 2 – 8. However, the solicitor later told the trial judge that "to some degree . . . common scheme or plan may very well apply in this case as well." R. 68, l. 24 – 69, l. 8.

2018. R. 78, l. 24 – 80, l. 23. Dr. Markley did not treat Appellant for her hospital visit in November of 2017. However, she recalled that in her treatment of Appellant, she reviewed Appellant's past medical records which included records from an emergency room visit in November of 2017. R. 81, l. 21 – 82, l. 16. The medical records from November of 2017 indicated that Appellant was between thirty-six and thirty-eight weeks pregnant at that time. R. 82, l. 17 – 83, l. 16.

Dr. Markley further testified that, based on her review of Appellant's hospital records from November of 2017, the pregnancy was "viable," which Dr. Markley defined as "the potential capacity to transition from life in the womb to life outside of the womb." R. 91, l. 22 – 92, l. 21. However, Dr. Markley admitted that she could not say whether the pregnancy was "healthy." R. 93, ll. 3 – 10. Dr. Markley did not testify before the jury at Appellant's trial; she only testified at the pretrial hearing for the state's joinder motion.

The state argued that the charges should be joined because both were provable by the same evidence – Appellant's statements to law enforcement – and because they were of the same general nature. R. 95, l. 10 – 96, l. 25. Defense counsel pointed out that the two homicide charges Appellant was indicted for did not arise out of a single chain of circumstances and were two separate dates and separate medical events. R. 98, ll. 9 – 14. Counsel also argued that the two incidents were not provable by the same evidence because Appellant went to two different hospitals and was treated by different doctors. R. 98, l. 15 – 99, l. 8. Appellant's statements to law enforcement regarding the two births were also notably different. Regarding the first birth in November of 2017, Appellant told the police that the baby was born with the umbilical cord wrapped around its neck. As to the second birth in 2018, Appellant told the police that immediately after she gave birth, she "blacked out" and when she woke up, the baby was dead.

R. 99, ll. 8 – 20. Finally, defense counsel cited to State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996) and argued that Appellant would be unfairly prejudiced by the joinder of the charges because the jury would be improperly influenced by hearing allegations that Appellant had killed two of her newborn children on two separate occasions. R. 99, l. 21 – 100, l. 14.

The trial judge ruled that the state could proceed on both indictments against Appellant. The judge found that there were "glaring similarities to both of the crimes," and that the allegations were "of a nature that are closely related in kind, place, and character." R. 100, l. 16 – 101, l. 25.

Discussion

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). "Generally, when offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced." State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) (internal footnote omitted). "Offenses are considered to be of the same general nature where they are interconnected." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." Id.

Here, the trial judge erred in allowing Appellant to be jointly tried on the two indictments for homicide by child abuse. The two charges did not "arise out of a single chain of

circumstances." Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265. Further, the charges were not provable by the same evidence because Appellant was treated by different doctors, at different hospitals, and in different years. Although Appellant was questioned about both incidents in the same video recorded statements, these statements could have been redacted so that the jury would have only heard evidence of one of the incidents. In fact, severing the two charges and redacting the statements was the only way to ensure Appellant received a fair trial. While the charges were similar in nature, they were far from identical and the unfair prejudice that Appellant suffered because of the joinder was insurmountable.

In ruling that the indictments against Appellant could be joined, the trial judge focused primarily on the "glaring similarities" of both allegations against Appellant. However, the judge failed to consider the other elements of joinder. The two charges for which Appellant was indicted occurred more than one year apart from one another and had absolutely nothing to do with one another. The judge erred by finding that "these crimes are of a nature that are closely related in kind, place, and character" while ignoring the extreme prejudice Appellant would suffer by joining the indictments. R. 100, l. 15 – 101, l. 25.

Appellant's case is readily distinguishable from the decisions in other joinder cases where separate criminal offenses have been found to "arise out of a single chain of circumstances." For instance, in State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), the defendant forced the victim into her house at gun point and shot her to death. In the days immediately following this murder, the defendant broke into a church, another person's house, and killed another person while attempting to steal a car and money to evade the police. Id. at 160-61, 478 S.E.2d at 263. The Supreme Court found that joinder of the first murder and the subsequent burglary charges was proper because the defendant committed the burglaries "solely to avoid capture by police for

the [murder]." Id. at 164, 478 S.E.2d at 265. See also State v. Beekman, 415 S.C. 632, 636-38, 785 S.E.2d 202, 204-05 (2016) (joinder of lewd act on a child and first-degree CSC with a minor of separate victims was proper where the victims were siblings and the alleged offenses took place in the same house over the same time period); City of Greenville v. Chapman, 210 S.C. 157, 161-62, 41 S.E.2d 865, 866-67 (1947) (holding joinder was proper for twenty-three counts of adulteration of milk where every offense was "identical" except for the dates, and every offense arose out of the same contract whereby defendant was obligated to provide victim with 400 gallons of milk every day); State v. McGaha, 404 S.C. 289, 293-95, 744 S.E.2d 602, 605 (Ct. App. 2013) (holding joinder of numerous counts of CSC with minor against two siblings proper where the abuse happened during the same time period and location); State v. Carter, 324 S.C. 383, 478 S.E.2d 86, 88 (Ct. App. 1996) (holding joinder of threatening the life of a public official with attempted armed robbery was proper where defendant threatened the life of the officer who was in the process of arresting him for the attempted robbery).

Thus, in Tucker, Beekman, Chapman, McGaha, and Carter, the crimes were interconnected and properly joined. Unlike each of those cases, here, there was no connection whatsoever of the two separate charges. The charges did not take place over the same time period, indeed they occurred more than one year apart from one another. The charges against Appellant simply cannot be said to be "in substance, a single course of conduct or connected transactions." Beekman, 415 S.C. at 637, 785 S.E.2d at 204.

In State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986), the Supreme Court found that joinder was improper where the defendant escaped from prison and raped and murdered two different women on two consecutive days. The Middleton Court held that the two murders did not arise out of a single chain of circumstances and required different evidence for proof. The

Court reversed Middleton's convictions noting that the prejudice to him was "apparent." Id. at 23-24, 339 S.E.2d at 693. Similarly, in State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985), this Court found that joinder of two separate forgeries was reversible error. The Tate Court noted that even though the forgeries were of the same general nature, they were not a single course of conduct, nor were they connected transactions. Id. at 464, 334 S.E.2d at 290. This Court also held that the defendant was unfairly prejudiced by the joinder because "it [was] likely the jury would infer criminal disposition based on evidence of one forgery and on that basis alone find [the defendant] guilty of another forgery." Id.

The charges against Appellant were also not provable by the same evidence. See State v. Tallent, 430 S.C. 438, 446, 845 S.E.2d 508, 512 (Ct. App. 2020) (holding joinder of CSC with minor and contributing to the delinquency of a minor was proper where the victims of the respective crimes were siblings and all of the crimes were provable with the same witnesses). Appellant was treated by two different doctors, at two different hospitals, in two different years. There was no body discovered from the November 2017 case and in fact, the only evidence that a baby was even born was Appellant's video recorded statement. Contrary to the solicitor's argument that it would be "impossible" to try the charges separately, the only piece of overlapping evidence was Appellant's recorded statements which could have easily been redacted to ensure Appellant's right to a fair trial was not violated.[6]

While there are some similarities between the two charges against Appellant, they are certainly not identical as in Chapman, 210 S.C. 157, 41 S.E.2d 865 and McGaha, 404 S.C. 289, 744 S.E.2d 602. Appellant maintained that the first child was born with the umbilical cord

---

6 The parties agreed to substantial redactions of both of Appellant's video statements indicating that the state was more than capable of redacting the videos to avoid violating Appellant's right to a fair trial. R. 103, l. 1 – 124, l. 25.

wrapped around its neck and was already dead. As to the second child, Appellant maintained that after the child was born, she blacked out and when she "came to," the baby was dead.

Finally, the joinder of the charges resulted in extreme unfair prejudice to Appellant by suggesting she had a propensity to kill her newborn children. The unfair prejudicial impact of introducing evidence that Appellant, not once, but twice killed her newborn babies more than one year apart from one another cannot be overstated. There was no way Appellant could receive a fair trial as to either one of the charges.

Furthermore, had the charges been severed, evidence of one would not have been admissible in the trial of the other. This Court noted in McGaha that "[i]n cases where the defendant argues prejudice from the admission of evidence of the other charges tried in the same case, our courts have analyzed whether evidence of one or more charges would be admissible in a trial involving only the other charge." McGaha, 404 S.C. at 298, 744 S.E.2d at 606.

In State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996), the defendant was jointly tried and convicted of assault and battery of a high and aggravated nature (ABHAN) and homicide by child abuse. The ABHAN was based on allegations that the defendant had beaten a two-and-a-half-year-old boy several times between December of 1993 and January of 1994. The defendant admitted to law enforcement that he had previously beaten the boy with a belt or a switch. Id. at 109-10, 470 S.E.2d at 365. The homicide charge was based on a one-year-old girl who had been beaten to death in this same time period by "brutal blows to her head and neck from a blunt instrument or fist." Id. at 110, 470 S.E.2d at 366. The Smith Court held that the defendant was unfairly prejudiced by having been jointly tried on the charges because the charges were not sufficiently similar to fall under the common scheme or plan exception to Rule 404(b), SCRE and therefore, the ABHAN would not have been admissible in a trial of only the homicide. Id.

The state had very weak evidence against Appellant for the November 2017 homicide charge and therefore sought to try the cases together so that the jury would convict Appellant of the first child's death based on the evidence of the second death. Trying the two cases together unfairly prejudiced Appellant because this improperly suggested to the jury that she had a propensity to harm her newborn children and likely resulted in the jury convicting her on an improper basis instead of the actual evidence. The trial judge erred in allowing the state to join the charges against Appellant and Appellant's convictions should be reversed. See State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2021.

CERTIFICATE OF COUNSEL

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

November 18, 2021

Adam Sinclair Ruffin
Appellate Defender

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