

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,) No. CR-17-0486-PR
)
 Appellee,) Court of Appeals No.
) 1 CA-CR 15-0499
 v.)
) Maricopa County Superior Court No.
 JERICE HUNTER,) CR2012-008323-001 DT
)
 Appellant.)
)
)

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTRODUCTION

No crime attracts society's vitriol like murder of a defenseless child. Thus the community's outrage at the case of the disappearance and presumed murder of J.S. created a media firestorm. Specifically, when a child mysteriously disappears from the home, parents or caregivers inevitably come under suspicion. What sets this case apart from similar child-disappearance cases is that police and prosecutors thought they should bring this case to trial at all, and that the trial court found sufficient evidence to allow this case to go to the jury.

While sufficiency-of-evidence claims are ordinarily fact-intensive, this case presents a nuanced legal issue that this Court has only had opportunity to address obliquely. Despite the obligation to review the evidence *de novo*, the court of appeals (COA) refused to address the applicability of *State v. Bennett*, 213 Ariz. 562 (2006), because the party brief did not cite the case or explain the requirement of nexus between the predicate felony and the death. This is an issue of first impression that this case presents squarely, and *amicus* Arizona Attorneys for Criminal Justice ("AACJ") can provide enhanced argument. *See* Ariz.R.Crim.P. 31.15(b)(2)(B)(i),(iii).

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally

accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the right to criminal defendants to be convicted of crimes only where the evidence is legally sufficient. The prosecutors' closing arguments conclusively demonstrate that its entire case was based in speculation as to what happened to J.S., and the State's attempts to inflame the passions of the jury ultimately succeeded. This case bears all of the hallmarks of a wrongful conviction. This case exemplifies the classic phrase, "where there is smoke, there is fire." Some of the evidence in this case is strange; ultimately, however, it fails to meet the constitutional standards for criminal conviction.

Although *Bennett* supports Hunter's position regarding a nexus requirement, the parties as well as the COA failed to cite it, instead relying only on the general *West/Mathers* legal standard.¹ As this Court is duty-bound to review the claim for

¹ In its response to AACJ's brief below, the State asserted this is a new claim, and the COA accepted that. *Decision* at 6 n.2. This is incorrect; the claim is insufficient evidence, and an appellant need not be any more specific to preserve the issue. *State*

sufficiency of the evidence *de novo*, this Court will benefit from a brief that directs it to the applicable law, because it does not ignore fundamental error when it sees it. *State v. Brown*, 191 Ariz. 102, 103 (App. 1997). Conviction based on insufficient evidence, regardless of the legal ground asserted, constitutes fundamental error. *State v. Stroud*, 209 Ariz. 410, 412 n.2 (2005).

AACJ asks for this Court to grant review because, when dispassionately viewing the evidence, even “in the light most favorable to sustaining the verdict,” *State v. Payne*, 233 Ariz. 484, 496 n.1 (2013) (cites omitted), the evidence fails to support either conviction, but especially the felony-murder conviction. As this Court has repeatedly noted, “a properly instructed the jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.” *State v. West*, 226 Ariz. 559, 563 ¶17 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990), quoting in turn *Jackson v. Virginia*, 443 U.S. 307, 317 (1979)). Lower court will benefit from further exposition on *Bennett*.

In the absence of a body, the State’s job is made more difficult to establish proof that any child abuse caused death. The State seems to think that this absolves it of having to prove every element of each offense beyond a reasonable doubt. Yet,

v. Glissendorf, 235 Ariz. 147, 153-54 ¶¶20-22 (2014) (general request for “the reversal of both convictions” preserves claim of error that State must address). Hunter’s Petition for Review may be overly reliant on *amici* to explain the law to this Court, see Petition at 8-9, but these are proper purposes for *amicus* briefs under new Rule 31.15(b)(2)(B).

due process requires no less. U.S. Const. amends. V, XIV; Ariz. Const. art. II, § 4; *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson*, 443 U.S. at 313-14. The State has offered nothing but speculation and conjecture. The COA spent only three paragraphs explaining the evidence, in a confusing manner that challenges the reader to discern what constituted child abuse under circumstances likely to cause death or serious physical injury. This Court should vacate the convictions.

ARGUMENT

I. The evidence for both child abuse and felony-murder was insufficient.

A. No evidence was presented supporting a conviction for child abuse under circumstances likely to produce death or serious physical injury.

Neither the State's opening statement nor its closing arguments explained what act (or failure to act) constituted child abuse as charged in the indictment. 3/25/15 RT 28-74; 4/20/15 RT 23-76, 147-82. On appeal the State asserts the following evidentiary bases for supporting the conviction: 1) J.S. had been spanked and/or "whipped"; 2) T.J. saw J.S. with bruises on her body; 3) T.J. saw "black stuff" coming out of J.S.'s eyes; 4) T.J. said that J.S. had been kept in their mother's closet for long periods of time; and 5) T.J. said J.S. "smelled like death." Answering Brief at 41-55. The COA relied on physical discipline resulting in bruises, clumps of hair missing, confining J.S. "to a bedroom closet without food, water, or medical care," and that J.S. "could no longer speak and barely move." *Decision* ¶20. These will be

addressed in turn.

The first two bases are easily shown to be meritless. A.R.S. §13-3623(A)(1) prohibits causing any child to suffer physical injury or, having care or custody of the child, causing or permitting the child to suffer injury or have the child's health endangered, "[u]nder circumstances likely to produce death or serious physical injury." It is a lesser-included offense under §13-3623(B)(1) to commit child abuse under circumstances not likely to produce death or serious physical injury. The State, and the COA by extension, may not alter the charges in an effort to uphold the conviction; such violates due process and the notice requirements of the federal and state constitutions. U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, §§4, 24; *see also State v. Rivera*, 207 Ariz. 69, 72 ¶8 (App. 2004) (quoting *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937)) ("It is axiomatic that '[c]onviction upon a charge not made would be sheer denial of due process.'"); *State v. Martin*, 139 Ariz. 466, 471 (1984) ("These rules seek to give substance to the constitutional guarantees that an accused stand trial with clear notice of the crime with which he is charged."). Because the spankings and whippings could not possibly support a conviction under §13-3623(A)(1) because it is not probable that injuries from such spankings could cause serious physical injury or death. The COA clearly erred in relying on bruises and missing hair.

To the extent that a child abuse charge is based on endangering health, the

child need only be subjected to potential harm. *State v. Mahaney*, 193 Ariz. 566, 569 ¶¶16-17 (App. 1999); *State v. Nereim*, 234 Ariz. 105, 110 ¶16 (App. 2014). But, in the context of the greater offense of likelihood of serious physical injury or death, “[l]ikely’ has been interpreted literally and means ‘probable’ as compared to ‘possible.’” *State v. Johnson*, 181 Ariz. 346, 350 (App. 1995) (quoting *State v. Greene*, 168 Ariz. 104, 108 (App. 1991)).

In *Johnson*, 181 Ariz. at 350, there was sufficient factual basis for a guilty plea to child abuse under circumstances likely to cause death or serious physical injury because dangerous items such as razor blades and syringes already filled with liquid cocaine were strewn around an apartment, and the objects were readily accessible to the children who were playing unsupervised in the apartment. The evidence was insufficient, however, to prove the likelihood of serious physical injury or death where a mother caused her children to live in absolute squalor with guns in the home, because one of the guns was jammed and no testimony was introduced either that the other guns were loaded or that the living conditions had any likely medical effect on the children. *Greene*, 168 Ariz. at 105-07.

The three remaining claims by the State are all based on the same testimony of T.J.: the “black stuff” coming out of J.S.’s eyes, her weakness to the point of needing help reaching the bathroom, and that their mother’s closet “smelled like death.” 4/2/15 RT 21-23. The first two statements are not inconsistent with

recognizing illness in another person, and it was understood that Hunter had separated J.S. from the other children to protect them from the contagious ringworm. T.J. even testified that the “stuff” coming out of J.S.’s eyes appeared to be related to “pink eye.” *Id.* at 70. T.J. also explained that, when she had contracted ringworm, her mother had separated her from the other children in the same manner. *Id.* at 71-72. This testimony provides verification, not contradiction, to the defense that Hunter was caring for an ill child while simultaneously keeping her other children healthy.

The COA, like the State, looked more at how State’s counsel represented T.J.’s testimony, rather than at the actual testimony. The COA claimed that J.S. was denied food and water. *Decision* ¶¶20, 22. This is untrue: T.J. only said that on one occasion she gave J.S. some barbecue meat and water. 4/2/15 RT 22. Also, T.J. never said the room “smelled like death” as the State claims. *Id.* On the contrary, the exchange between the prosecutor and T.J. shows that this is the prosecutor’s opinion, not that of the witness:

Q: Was there anything about the way that the room smelled that you remember?

A: I don’t know. She was -- mom was burning incense.

Q: Did you ever tell anyone it smelled like death?

A: Yes.

Q: Was that accurate? Was that right?

A: Kind of.

4/2/15 RT 23. Thus, her testimony was not that the room “smelled of death.” Rather, that statement was “kind of” accurate, which is the same as saying that it was not accurate. Furthermore, there is no foundational evidence that would show how a thirteen-year-old girl would know what “death” smells like. This is classic speculation and conjecture. No rational trier of fact would take this testimony to mean anything other than the room smelled bad. Rooms occupied by ill people often become malodorous. Similarly, T.J. disclaimed the word “zombie” as describing J.S.’s demeanor and explained it was just a word she used at the time because she had a more limited vocabulary. *Id.* at 75-76. Yet, that setback did not stand in the way of the State arguing to the jury, falsely, that T.J. testified J.S. appeared as a zombie. 4/20/15 RT 37.

Sick children (as well as sick adults) typically lose appetite and thus become physically weak, but they also typically get better on their own. Notably, T.J. said nothing that suggests that J.S.’s apparent illness was either caused or prolonged by Hunter’s actions or inactions. There was no medical testimony concerning the likelihood of death if ringworm was left untreated. *See Greene, supra.* But, rather than look for evidence, the COA relied on speculation and conjecture. *Decision* ¶22.

B. No evidence was presented supporting a conviction for felony-murder.

1. *No evidence of homicide.*

The COA adopts the State’s argument by exaggerating the size of the blood

stain in the closet. Answering Brief at 41-42, 45, 52; *Decision* ¶20. The State introduced no evidence as to when that blood appeared in the closet. But in any event, there was very little blood, such that it could not possibly be evidence of J.S.’s death. The testimony of Dan Merena, the State’s DNA expert, showed that the primary blood stain was significantly smaller and that the great majority of the stained carpet was diluted, which is consistent with an attempt to clean the stain with water. 4/14/15 RT 53-57; Exhibit 196 (diagram of stain). During closing arguments, the State did not contest the size and character of the stain as presented by Merena and defense counsel characterized the stain as presented in Merena’s diagram as “that little V or triangular section right in the middle” as the dark blood stain, and “he labeled the outer areas, three outer layers, remember they were diluted stains.” 4/20/15 RT 101. While the State’s closing argument referred to a “significant amount of blood” that was not from a “nose bleed, ... cut finger or a scraped knee,” *id.* at 66, it never contested Merena’s testimony, *id.* at 39-40.

In *State v. Anthony*, 218 Ariz. 439, 440-41 ¶3 (2008), this Court described evidence supporting a triple-murder prosecution of the defendant’s wife and two stepchildren as entirely circumstantial because the bodies were undiscovered. But the evidence connecting Anthony to their disappearance was strong. Anthony’s wife and her children disappeared within a five-hour window before they were scheduled to fly to Ohio; \$84,000 was moved from his wife’s separate account to a joint

account and Anthony used \$39,000 to buy a truck; and Anthony expressed no surprise at his family's disappearance and no concern for their well-being. *Id.* at 441 ¶¶4-8. Also, just before the three were scheduled to leave town, Anthony scheduled services for house and carpet cleaning, where cleaners removed blood stains from carpets and disposed of a bloody mattress. *Id.* at 441-42 ¶¶5, 10-14. With this information and having been in the house when it "looked 'immaculate' with a strong smell of Pinesol," police obtained a search warrant and found traces of blood throughout the house. Blood had seeped through carpet onto the concrete slab underneath. *Id.* ¶19. Yet, the State's blood expert testified "that the volume of blood discovered in the house was too small to prove either that the victims had died or the cause of any death." *Id.* at 443 ¶22.

At trial, Hunter focused on the lack of evidence of murder based on no substantial evidence that a death had occurred. The State introduced evidence through T.J. that J.S. was no longer in the home about a week before the police were called about J.S. being missing, and it also introduced evidence from a neighbor about a drive to Tempe to throw out a bag for which the contents cannot reasonably be said to be J.S.'s body. Yet the State introduced no evidence, through T.J. or any other witness, explaining how Hunter might have moved the body from the apartment to the neighbor's car during the light of day. A small blood stain, smeared through normal cleaning efforts with water, is insufficient to establish death.

Finally, the State paraded countless witnesses about neighbor Somia Abdelgadir driving Hunter to a Tempe dumpster and the exhaustive search of 96,000 tons of garbage at the Butterfield landfill by hundreds of volunteers over several months. The State apparently convinced the jury of its belief, as stated in closing argument, that J.S.'s body was still in that landfill. 4/20/15 RT 23-24. This is the textbook definition of speculation and conjecture. *See* Answering Brief at 45. There was never any actual evidence that the bag that Somia saw Hunter put in a Tempe dumpster was J.S.'s lifeless body; in fact, all the other physical evidence (such as the DNA testing of Somia's trunk) contradicts that. The COA's reliance on Somia's testimony, *Decision* ¶¶21-22, was misplaced.

2. *Felony-murder requires proof that the death occurred "in the course of and in furtherance of" the predicate felony.*

The jury was instructed only as to felony-murder under A.R.S. §13-1105(A)(2), which requires proof that "the person commits ... child abuse under section 13-3623, subsection A, paragraph 1 ... and, in the course of and in furtherance of the offense ... the person or any other person causes the death of any person." As shown above, there is no evidence of child abuse under §13-3623(A)(1), but there is also a lack of evidence that J.S. died and that her death occurred "in the course of and in furtherance of the offense."

Even if there is substantial evidence both that Hunter committed child abuse and that J.S. died, however, there is no evidence that J.S. died as a result of Hunter's

child abuse. *State v. Fernane*, 185 Ariz. 222 (App. 1995), held there was substantial evidence supporting child abuse convictions; it suggested, but did not affirmatively hold, that the sufficiency of the child abuse convictions necessitated a finding that the felony-murder conviction was also supported by substantial evidence. This Court explained *Fernane*'s false assumption:

The opinion in *Fernane* seems to assume that the mere conviction for child abuse supports a conviction for felony murder. That assumption is incorrect. Conviction for the underlying felony does not automatically support a conviction for felony murder; the State must also prove that the child abuse caused the victim's death. Unlike *Fernane*, Bennett was charged only with child abuse based on her delay in seeking medical treatment for Greyson and not for child abuse based on leaving Greyson with someone she knew to be dangerous. Here, the child abuse conviction establishes that Bennett's delay in seeking medical care for Greyson endangered his health, but does not itself establish that his death "would not have happened" in the absence of that delay. Thus, we need not defer to the superior court's ruling on the sufficiency of the evidence in this case. We do not decide the issue ourselves because the superior court has not yet had a chance to apply the correct legal standard, and the court of appeals has never addressed the issue.

Bennett, 213 Ariz. at 568 ¶28 (citing *Fernane*, 185 Ariz. at 223-24).

In *Bennett*, the defendant was charged with child abuse and first-degree felony-murder for failing to seek timely medical care for her infant son, who ultimately died. *Id.* at 564-65 ¶¶4-5. Although the child victim's body was examined, and abuse even proven, this Court remanded the case for a new hearing on ineffective assistance of appellate counsel as to the first-degree murder count because appellate counsel failed to argue sufficiency of the evidence for defendant's felony-murder

conviction. The State had relied solely on a doctor's equivocal testimony that delay in seeking treatment "may or may not" have caused the child's death. *Id.* at 567-68 ¶24 & n.3. Thus the testimony about the delay in medical care "endangered [the victim's] health but does not itself establish that his death 'would not have happened' in the absence of the delay." *Id.* at 568 ¶ 28.

The cases on which *Bennett* relied, *see id.* at 567-68 ¶24, similarly require such a causal connection between the child abuse and the death. *Ex parte Lucas*, 792 So.2d 1169, 1171 (Ala. 2000) ("If the State did not introduce evidence that medical treatment would have saved or prolonged the child's life, then the State did not prove that Lucas's failure to provide the child with medical treatment actually caused, or resulted in, the child's death."); *State v. Muro*, 695 N.W.2d 425, 432 (Neb. 2005) ("to establish that Muro's unlawful conduct was a proximate cause of Vivianna's death, the State was required to prove beyond a reasonable doubt that but for Muro's delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden."). Other states also impose this requirement. *E.g.*, *Commonwealth v. Pugh*, 969 N.E.2d 672, 688 (Mass. 2012); *Patel v. State*, 60 N.E.3d 1041, 1053-54 (Ind. App. 2016); *State v. Thornton*, 720 S.E.2d 572, 584-85 (W.V. 2011).

The COA altogether ignored this issue, and in so doing disregarded its duty to evaluate the sufficiency of the evidence *de novo*. Review should be granted so this

Court may hold squarely, as a matter of first impression, that conviction for felony-murder requires proof of nexus between the predicate felony and the death.

CONCLUSION

The State actually invoked Lady MacBeth in claiming that Jerice Hunter's guilt is proven by cleaning a blood spot in her house. Answering Brief at 46. This is not Shakespeare; the government cannot obtain its convictions through prognostications of three witches. It must present substantial evidence to twelve rational jurors who must find guilt proven beyond a reasonable doubt. These protections exist precisely for cases such as this, where, poetic flourish aside, the State could muster only speculation and conjecture. For these reasons, AACJ asks this court to grant review.

RESPECTFULLY SUBMITTED this 22nd day of February, 2018.

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