THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephanie Irene Greene, Appellant

Appellate Case № 2014-000764

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion № 27802
Heard February 15, 2018 - Filed May 23, 2018

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Stephanie Irene Greene respectfully requests that this Court rehear this matter to correct the following errors and omissions:

1. This Court made conflicting findings when it concluded "Alexis died from morphine poisoning when she was forty-six days old." *State v. Greene*, S.C.Sup.Ct. Order dated May 23, 2018 (Shearhouse Adv.Sh. № 21) at 19. This Court also stated "The evidence, scientific and otherwise, further allows a reasonable juror to conclude that Appellant's breast milk was the source of morphine found in Alixis's body." *Id.* at 23. "Alexis's death from morphine poisoning was caused by the morphine in Appellant's breast milk . . . ." *Id.* at 35. This Court also found "Appellant ignores the 'synergistic effect' of the morphine poisoning along with

Appellant's abuse of other drugs." *Id* at 19. If Alexis died from morphine poisoning, the consideration of any other drugs in her system as to the "synergistic effect" was simply not relevant or probative. In making these findings, this Court has confused the issue as to whether the State has proven that morphine alone caused the death of Alexis or if the "synergistic effect" caused the death. The opinion suggests this Court found only the "synergistic effect" caused the death as this Court discusses at length the drugs Stephanie I. Greene was taking. By discussing at length the "synergistic effect" this Court has implied the State has failed to prove that morphine alone killed the minor child, contrary to the instructions of the judge as discussed subsequently.

2. This Court erred in finding that "Moreover, the evidence showed that Appellant took more morphine than her doctors prescribed." On page 156, l 11-15, of the transcript, Dr. Susan Kovacs testified the morphine was also prescribed on a PRN basis. This means she could take the morphine as she needed the medication and was not limited to a certain number per day.

3. In the opinion this Court stated "In addition, the evidence presented at trial was sufficient to show that the morphine and Clonazepam found in Alexis came from Allellant's breast milk." *Id.* at 20. The record does establish that some morphine and Clonazepam could be transferred through breast milk. The record in this case establishes as a matter of fact that the .52 level found in Alexis could not have come through breast milk. The testimony of all the experts was that there was no reported cases of even a toxic level of morphine had ever been transferred to a minor child from a mother who was breast feeding while taking MS Contin. A toxic level as found by this court could be as low as .2. *Id.* at 24, n. 3. A jury cannot convict based upon a scientific fact to which there is no scientific testimony supporting that fact.

4. This Court erred in concluding that the "synergistic effect" or morphine with other

drugs caused the death of Alexis. In this case no expert ever testified as to how the different drug interacted with each other or even if they in fact do. No expert ever testified that a non-lethal level of Clonazepam combined with a non-lethal dose of morphine had ever combined together to cause a death of any person, much less a child receiving small doses of each through breast milk. What this Court has done is to accept the testimony of an expert who arguably said a "synergistic effect" could cause the death of Alexis and equate that with his saying in this case it did cause the death. The State, in a circumstantial evidence case depending upon expert testimony, must prove the combination of drugs could cause the death and in fact did cause the death. In a typical circumstantial evidence case involving lay testimony, the jury applying, their common sense, can make the connection between what could have happened and what did happen. Here, the average juror is not able to make the connection between a theory of the cause of death and the actual cause of death without some scientific testimony to support the connection. Had the jury received testimony from experts for the state as to how much of each drug an infant could receive through breast milk and that a combination of those drugs could be fatal, then the jury would have been supplied with the "did cause" proof needed by the State in this case. "But the courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

This Court failed to consider that even Dr. David H. Eagerton was ambivalent at best as to whether this "synergistic effect" caused the death of Alexis. When specifically asked if Alexis died from a "synergistic effect" of the drugs, he stated "Well, it's - - it's really hard you know. In toxicology they ask us a lot, you know. It's - - it's hard to exactly pin down, you know, a cause

of death, especially with a drug like morphine in an adult, because you can have some tolerance if you're taking morphine for a long period of time." Rec. on App. at 351, ll 15-20. His answer continues uninterrupted for another page and a half, but it is no more enlightening. If the expert for the state says "it's hard to pin down" then the jury in this case was asked to engage in "scientific guesswork." Such is not proof by any standard much less beyond a reasonable doubt.

A further problem with the "synergistic effect" discussion is the Court is not clear as to what exactly it means. Does this mean the level in Alexis was in fact .52 but it was not lethal but combine with Clonazepam was lethal? If so, there is no testimony advocating that proposition. Or does this Court mean that the level did not have to be .52 but if the morphine at whatever level is combine with Clonazepam the two would be lethal. If so, there is no evidence in the record to support this conclusion. The record is void of any testimony that morphine at .01, .10 or .25 when combine with Clonazepam could cause death.

In addition the trial judge in this case limited the jury to one controlled substance. As the judge instructed the jury "And the term harm to the child's physical health or welfare in the context of this case refers to the infliction of physical injury or harm to a child resulting from the child's ingestion of a schedule II controlled substance." Rec. on App. at 567, ll 15-19. The testimony in this case is that Clonazepam is a Schedule IV drug. Rec. on App. at 304, ll 14-17. The charge limited the consideration of the jury to a single Schedule II controlled substance. Even if the use of the singular in the charge is deemed by this Court to include the plural, it clearly cannot include a drug other than a Schedule II. As the charge of the trial court provided no basis for the jury to consider the "synergistic effect" this Court erred in affirming the conviction on this basis.

5. This Court erroneously assumed the warning read by Dr. Eagerton was applicable to this case. The record on this case shows the warning was published in July of 2012, some 18 months after the death of the child in this case. Rec. on App. at 341, ll 19-23. In addition this Court failed to consider that the 2012 insert only warned of harm and not death. This Court further failed to consider that the word "harm" as used in the insert, does not include death. If death is even a potential result, the warning must mention that fact. 21 CFR § 201.57 (b)(1) and (6) 5. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 48, 777 S.E.2d 176, 183 (2015)("Specifically, FDA regulations require drug labels to include, inter alia: (1) "black box" warnings about serious risks that may lead to death or serious injury.") The warning in this case was not a "black box" warning the death of a child through breast milk containing morphine is even a potential possibility. Thus, this Court cannot as a matter of law or fact conclude "harm" would include the death of Alxis.

6. This Court erred in relying upon a summary in the LactMed article that ended by saying "Maternal use of oral narcotics during breast feeding can cause infant drowsiness, central nervous system depression and even death." *Greene*, at 23. The error in this conclusion is that the article itself reported no such finding. Dr. Eagerton admitted on cross -examination that the article specifically found that infants who were breast fed by mothers taking morphine were more alert and oriented than other infants. Rec. on App. at 393, ll 4-24. This Court further failed to consider that the article made no reference to any case where an infant died or is alleged to have died. Rec. on App. at 394, ll 2-19. The alleged death simply did not exist. A conviction cannot stand based upon one mythical death not discussed in the article. That is hardly any type of scientific study or conclusion nor is it support for the jury verdict in this case.

7. This Court erred in excusing the lack of scientific tests on infants who are being breast fed by mother's taking morphine. The Court quoted Dr. Wrenn's statement "I don't - I don't think anybody in here would subject [a] child to an ongoing test like that." *Id* at 28. The State elected to prove the means of delivery of the morphine, and any other drugs found, was through breast milk. The fact that the State elected a difficult, if not an impossible, fact to prove should not lessen the burden on the State to prove the case beyond a reasonable doubt. Besides, this Court ignored that there have in fact been numerous studies where breast feeding mothers are given morphine in hospitals and the mother and infant have been monitored. Even Dr. Wrenn made reference to one such study when be concluded that an infant, even with a less than fully functioning liver, would receive about 3% of the morphine in the mother who is breast feeding. If that were applied to this case, where the level in the infant was .52, Ms. Greene would have been required to have a morphine level of 17.333. This number is 2.407 times greater than the highest lethal dose testified to at this trial. When such scientific impossibility is affirmatively established in this case, no substantial circumstantial evidence exists to support the verdict of the jury.

In addition, every expert who testified stated they knew of no reports of even a toxic level of morphine being passed through breast milk. While certainly not a controlled scientific experiment, the total lack of even one reported toxic level of morphine being passed through breast milk should be cause for concern for this Court to conclude that somehow a level of .52, toxic by some estimates and lethal by others, was passed through breast milk in this one case and this one time.

8. This Court erred in concluding that there was scientific evidence in this record to

support a finding an infant does not have the ability to metabolize drugs effectively. Even assuming this is correct for a 46 day old child, this is not something the lay jury would be aware of and would require some scientific evidence to establish that not being able to metabolize morphine was in fact the cause of death in this case. This finding cannot be left to speculation and conjecture. This Court failed to consider that Dr. Eagerton testified he did not know at what rate a 46 day old infant would metabolize morphine. He testified as follows:

> Q. So if the function - - if the liver on a child is functioning at 33 per cent you don't know if that's enough to clear morphine or not.
> A. Well, that's a different question. You said the function. Obviously, the - - the function means to live. If you're talking about to clear a specific drugs, that's a different question. I don't know the answer to that either, but it's a different question.
> Q. Okay. But you don't if - - if a young six-week old infant has 50 percent liver function you don't know how much morphine would be cleared with that.
> A. Not precisely, no. Rec. on App. at 395, ll 8-20

Dr. Wren fairs no better. He testified:

> Q. All right. So when you - - do you know at what rate a six-week-old child's liver will metabolize anything or metabolize substance?
> A. Counselor, I tried to explain that at the start. We are chemical Everybody is different. I tried to - - to tell the jury that even with alcohol we don't do the same thing. So I can't tell you rates.
> I don't think there's ever been any studies about how well they do, but it is well known. It's - - I tried to explain from the drug levels that they give infants, and children too, they don't do as well with the same levels we do.
> Q. Children - - or mothers are frequently given morphine and breastfeed the child with no problem.
> A. I don't know.
> Q. You don't know.
> A. No. I'm not a clinician.
> Q. Okay. Or a toxicologist.
> A. No, I'm not a toxicologist either. Rec. on App. at 438, l 12 to 439, l 5.

If neither of the experts does not know the rate at which any drug will metabolize and does not know if a child is harmed or not when breast fed by a morphine taking mother, they are hardly sources that any jury may rely upon to conclude the failure to metabolize drugs is reason for the morphine level in this case. If neither expert knew how much morphine could be cleared, a jury of lay people could not know, unless this Court can conclude the jury collectively, with no scientific testimony to support it, knew more than the experts. If the State's theory of drugs building up in infants is correct, then no heroine addict or morphine addict would be able to deliver a live child. The theory of the failure to metabolize is just that - theory. Simply because a doctor testifies it could, does not mean the State has met its burden of proving it did. A jury is not permitted to speculate.

9. The majority opinion is critical of the dissent for allegedly misinterpretating the standard of review by a trial judge in directing a verdict and that of a jury in drawing inferences from those facts. Once issue of credibility are resolved, a trial judge and an appellate court are in equal position with a jury to draw reasonable inferences from the facts. "Here, however, the jury was not called upon to make credibility determinations, as almost all of the relevant facts adduced at trial were undisputed. Instead, the jury was asked to make inferences based on the evidence, a task that we are no less qualified to undertake." *People v. Carter,* 158 A.D.3d 1105, 1112, 70 N.Y.S.3d 661 (N.Y. App. Div. 2018).

The standard of appellate review in a circumstantial evidence case determines if the review is designed to assure the conviction of the guilty at the price of some innocent defendants having their cases affirmed or to exonerate the innocent at the price of also freeing some guilty defendants. "Because, as discussed, courts should err on the side of ensuring innocent persons

are not convicted, rather than ensuring that the guilty are, they should employ a review mechanism that strives to reverse all unjust convictions, even if such a standard means reversing some proper convictions. The reasonable hypothesis of innocence standard is one such method." Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 245 (2007). *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) ("This heightened scrutiny requires us to consider 'whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.'") The standard of review is not is there *some* circumstantial evidence that could be interpreted to be evidence of guilt. Nor is it so say that if one interpretation of the facts is consistent with guilt the verdict is to be sustained. To say a theory of guilt is possible is not substantial circumstantial evidence nor proof beyond a reasonable doubt.

In affirming the conviction in this case, the majority contends there is substantial circumstantial evidence to sustain the conviction. But there is no evidence, substantial or otherwise, the .52 level of morphine could be obtained through breast milk. There is no evidence, substantial or otherwise, to support the theory that morphine received through breast milk can build up in a 46 day old child so that it reaches toxic or lethal levels.

This Court in this opinion, or any other opinion, has never defined "substantial circumstantial evidence." Without a definition telling Ms. Greene what is substantial circumstantial evidence, this Court denies due process rights granted to her under the Fourteenth Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina. The term certainly has to mean more than a theory

or a possible cause. To say, as this Court appears to do, that a possible cause of death is substantial circumstantial evidence is to ignore the requirement of *Jackson v. Virginia,* 443 U.S. 307 (1979). The state is not permitted simply to produce some evidence by which the conviction could be possible. It must do more. The civil rule that if there is a scintilla of evidence the case must be submitted to the jury, is, after *Jackson*, not applicable to a criminal case. In *Jackson*, the United States Supreme Court specifically held that a modicum of evidence was not sufficient to convict in a criminal case. A modicum would be evidence that permits a jury to convict under a mere possibility that the state proved the case. This would also violate the due process clauses mentioned above. The substantial circumstantial evidence must make the guilt of the accused more probable than not, and not merely possible. A fifty-fifty chance of being guilty is not proof beyond a reasonable doubt.

This Court has said in this opinion, and in numerous others, the obligation of this Court in a circumstantial evidence case is not to weigh the evidence, but to determine if there is substantial circumstantial evidence to sustain the verdict which is more than a modicum some weighing of evidence is required. No court can perform this task without to some extent weighing the evidence. The majority of this Court listed several theories by which the morphine could have reached Alexis through breast milk. The State, however failed in its proof that this did in fact happen in this case. In keeping with the burden of proving its case, the State is not permitted to ask the jury to leap from could it happen to the result the state desires without proving that it in fact did happen. What this Court has approved in this case is for a jury to conclude that a mother taking morphine while breast feeding can give her child a level of .52 through breast milk when no scientific study or expert supports such a conclusion and all the

scientific evidence is that it is impossible. To permit a jury to make such a scientific conclusion without some scientific evidence to support that conclusion violates the "some evidence" requirement of *Jackson* and violates the due process clauses of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

10. This Court failed to recognize the State failed to prove Stephanie Greene acted with reckless indifference to the consequences of her action. This Court has said concerning extreme indifference "Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof." *State v. McKnight*, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). The record in this case does not contain facts where such extreme indifference can be found. The record establishes that except for one prescription, Ms. Greene filled all of her prescriptions at the same pharmacy. Rec. on App. at 313, l 17 to 316, l 13. This is the recommenced procedure. This does not show extreme indifference or recklessness.

If a woman were to actively look for information on the taking of morphine while breast feeding, she would have learned it is safe to do so. All the experts agreed on this. Taking morphine while breast feeding is not a reckless act. With no reported case of even a toxic level being found in a child, the act could only be negligent at worst. The fact that Ms. Greene hid her morphine prescriptions from some doctors does not change the way morphine acts within the human body. As noted earlier there is no black box warning about the use of morphine while breast feeding. Simply put, there is no evidence in this case that would have told Ms. Greene that

taking morphine while breast feeding had the potential of causing the death of her child. To have a doctor say that she would not have prescribed morphine had she known Ms. Greene was breast feeding, does change all the medical evidence that morphine is safe to take while breast feeding. No study published by any medical authority would have warned Ms. Greene that she was in fact creating a substantial risk of death for her minor child by taking morphine while she was breast feeding.

The focus of the opinion on the conduct of Ms. Greene to hide her morphine usage while she was pregnant and breast feeding is simply not relevant to the issue of did Ms. Greene have any reason to know that breast feeding while taking morphine created a high risk of the death of her child. The reason it is not relevant is, as noted earlier, no study and no expert says there is such a risk. Ms. Greene cannot be expected to have more knowledge than that which is known in the medical community or the medical experts in this case.

CONCLUSION

For the foregoing reasons this Court should rehear this matter and issue an opinion reversinng the conviction for the reasons set forth in this Petition.

June 5, 2018

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Stephanie I. Greene

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Hon. Joseph Derham Cole, Circuit Court Judge

Case No. 2014-000764
Lower Court Case No. 2011GS4205758

The State,.....Respondent,

vs.

Stephanie Irene Greene.....Appellant.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 5, 2018, she did deposit in the United States Mail with proper postage affixed thereto, one copy of the Petition for Rehearing in the above case addressed to David Spencer, S.C. Attorney General Office, P.O. Box 11549, Columbia, SC 29211.

Sandy Traynham

Sworn to and Subscribed
before me this 5th day
of June, 2018.

C R Wise

Notary Public for South Carolina
My Commission Expires: 12/7/2019