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Case Number 364,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TAHA EL-ABBADI,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 364, 2022
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED EL-ABBADI'S REQUEST FOR INSTRUCTIONS ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.

The State's one significant concession along with its one important observation narrows this Court's task tremendously. First, the State concedes that

> [m]anslaughter carries the same *mens rea* as murder by abuse or neglect in the first degree, but the amount of behavior that it encompasses is broader than murder by abuse or neglect; it is not limited to acts of abuse or neglect. The same is true for criminally negligent homicide and murder by abuse or neglect second degree. Both require a *mens rea* of criminal negligence, but criminally negligent homicide is not limited to acts of abuse or neglect.[1]

This concession is consistent with what El-Abbadi said in his Opening Brief about Manslaughter: it "requires proof, beyond reasonable doubt, that the defendant 'recklessly cause[d] the death of another person [which includes children].' This offense 'is a relatively broad offense covering a wide range of conduct' while Murder by Abuse '(because of the additional elements) is a narrower offense covering the specific type of conduct engaged in by the defendant.'"[2] Manslaughter criminalizes all reckless homicide, but each degree of Murder by Neglect identifies "certain actions

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[1] Ans. Br. at pp. 23-24.

[2] Op. Br. at p. 16-17 (quoting 11 *Del.C.* §632 and *State v. Lancaster*, 631 A.2d 453, 471 (Md. Ct. App. 1993)).

which rise to a greater degree of offense and warrant a more substantial punishment."[3] As the State recognizes, the same principle applies to Criminally Negligent Homicide and Murder by Neglect Second Degree.

"[A]n offense may be a lesser included offense even though an element of [that] offense is phrased differently and may be committed in a broader array of factual circumstances so long as the narrower element contained in the greater offense cannot be committed without committing the broader element in the lesser included offense."[4] Here, as the State acknowledges, "neglect" for purposes of Murder by Neglect First or Second Degree cannot be committed without committing the broader element of criminal negligence contained within Manslaughter or Criminally Negligent Homicide.[5] Thus, Manslaughter and Criminally Negligent Homicide are lesser included offenses of the respective degrees of Murder by Neglect.

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[3] *State v. Cochran*, 239 P.3d 793, 795–96 (Ct. App. 2010). This Court has similarly found that Murder Second Degree is a lesser included offense of Felony Murder even though both offenses require 'reckless causation' because Murder Second requires proof "that the defendant's actions indicated a 'cruel, wicked, and depraved indifference for human life." See *Deshields v. State*, 879 A.2d 591, 593-94 (Del. 2005); *Weber v. State*, 457 A.2d 674, 687-88 (Del. 1983).

[4] *State v. Miller*, 841 N.W.2d 583, 589 (Iowa 2014). See 11 *Del.C.* § 206 (b) (defining a lesser included offense in part as one that "involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission").

[5] 11 *Del.C.* §231(d) defines "negligence," generally, as occurring when a "person fails to exercise the standard of care which a reasonable person

If, as the State asserts, the Superior Court truly understood that "the element differing between each of the two sets of charges-manslaughter and murder by abuse or neglect first degree and criminally negligent homicide and murder by abuse or neglect second degree- is whether El-Abbadi committed an act of abuse or neglect[,]"[6] the court would have recognized the need for argument regarding whether the facts supported a lesser-included instruction on offenses that did not include the narrower definition of neglect. Yet, as the State acknowledges, the trial court failed to conduct a proper analysis.

As the State concedes, when seeking a lesser-included-offense instruction, a defendant satisfies his obligation to present "some evidence that would allow the jury rationally to acquit [him] on the greater charge and convict on the lesser charge[,]" if he presents "any evidence fairly tending to bear upon the lesser included offence, even if the evidence is weak. [And, c]onflicting testimony regarding the element distinguishing the two offenses generally satisfies this standard."[7] Had the court conducted a proper

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would observe in the situation." A defendant acts with "criminal negligence" when he fails to perceive a risk "that the element exists or will result from his conduct" and that failure "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." 11 *Del.C.*§ 231(a). These definitions are broader than that defined for purposes of the Murder by Neglect statutes.

[6] Ans. Br. at p. 24.

analysis, it would have found that the evidence in the record warranted a lesser-included instruction. Here, there are a myriad of scenarios a reasonable juror could have found to have existed that land outside the scope of Murder by Neglect but within the scope of Manslaughter or Criminally Negligent Homicide. [8]

Naturally, the State offers only the scenarios it believes support its claim that no rational trier of fact could find, under any version of events placed in the record, El-Abbadi acted negligently beyond the acts contained within the narrow definition of negligence for purposes of the Murder by Neglect offenses. However, given the evidence regarding Alverez's conduct and anger towards Julian over the weekend and on the morning before she left him with El-Abbadi, a jury could have rationally concluded, for example, either: 1) Julian's injuries occurred prior to or while he was in Alverez's care, custody and/or control and that El-Abbadi was unaware that the injuries, leading to the progressively worsening condition, required more medical attention than his administration of ibuprofen or other medicine to Julian; or 2) any delay in treatment that doctors testified contributed to Julian's death was the result of Alverez's neglect after El-Abbadi returned

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[7] Ans. Br. at p. 22 (quoting *Clark v. State*, 65 A.3d 571, 582 (Del. 2013) (internal citations and quotation marks omitted).
[8] Ans. Br. at p. 24.

Julian to her care, custody and/or control. In either of these cases, a jury could find that El-Abbadi's conduct did not fit the "narrow" definition of negligence but that he did not exercise the standard of care which a reasonable person would observe in the situation or that he failed to perceive a risk "that the element exists or will result from his conduct" and that failure was a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[9]

Alverez was angry with Julian due to his potty training issues, she left early the morning of Julian's death and, atypically, chose not to send either child to day care. The State was unable to establish what actually caused Julian's injury or how it was caused. Its case against El-Abbadi was based on observations of Julian on surveillance videos and witness testimony. Based on what appeared to be Julian's worsening appearance throughout the day, the State claimed that Julian was injured between 11:46 a.m. and 3:00 p.m. It was during that timeframe that El-Abbadi had a FaceTime call with Alverez, Julian's mother. According to Alverez, she was worried about Julian at this point. Yet, she chose not to come home and, in fact, asked El-Abbadi to babysit longer. When she did come home hours later and Julian

[9] 11 *Del.C.* § 231 (a).

was in her care, she chose to wait about an hour before contacting anyone for help.

Had the jury been given the option, it could have chosen to return a verdict that would more accurately reflect a rejection of Alverez's credibility. While El-Abbadi may have failed to perceive a risk which was a gross deviation from the standard of care, the jury could have found, as yet another option, that the man with an 11th grade education did seek advice of the child's mother who was not concerned.[10]

Accordingly, the court should have provided an instruction for the lesser-included offenses. Its failure to do so requires this Court to reverse El-Abbadi's conviction.

[10] A701-704.

II. THE TRIAL COURT VIOLATED EL-ABBADI'S RIGHTS TO CONFRONTATION, CROSS-EXAMINATION AND TO PRESENT A DEFENSE WHEN IT PRECLUDED CROSS-EXAMINATION OF A STATE WITNESS AND DIRECT EXAMINATION OF EL-ABBADI ON AN ISSUE THAT WENT DIRECTLY TO THE HEART OF HIS DEFENSE.

The State serves a plate full of icing and a few crumbs of cake. As an initial matter, the State claims that El-Abbadi's arguments must be reviewed for plain error.[11] The record is clear - there was a disagreement over the admission of testimony on multiple occasions following timely objections.[12] Moreover, the trial judge was given the opportunity to consider the objections on the record and take remedial action.[13] Finally, even under plain error review, the errors complained of are of such a fundamental and constitutional nature that a miscarriage of justice resulted.[14]

It is astonishing that the State advances the position that the evidence barred by the court on cross-examination "was neither exculpatory, nor material."[15] More importantly, the State never even attempts to respond to El-Abbadi's challenge that based on his testimony, the jury could have

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[11] Ans. Br. at p. 31.
[12] A201-202; A530.
[13] *Hastings v. State*, 289 A.3d 1264, 1270 (Del. 2023).
[14] *Evans v. State*, 77 A.3d 271 (Del. 2013).
[15] Ans. Br. at p. 32. "The complete denial of access to an area properly subject to cross-examination infringes on the Sixth Amendment right of confrontation, and constitutes reversible error." *United States v. Rosario Fuentez*, 231 F.3d 700, 704 (10th Cir. 2000).

acquitted him of Murder by Neglect First or Second Degree and found him guilty of either Manslaughter or Criminally Negligent Homicide.[16] Perhaps sensing that it could be effective, the State wholly ignores that arguments I. & II. must be read *in pari materia*. Barring appropriate cross-examination of Dr. Deutch, and improperly striking El-Abbadi's explanation for Alverez's decision to delay medical treatment after Julian was back in her care was fatal to El-Abbadi's defense. Had the proper lesser included offense instructions been provided, a rational trier of fact could have acquitted El-Abbadi of Murder by Neglect First or Second and, instead, convicted him of Manslaughter or Criminally Negligent Homicide based on a reduced level of *mens rea*.

The State's final line of argument is perhaps the most dubious of all. It claims that the judge did not restrict El-Abbadi's cross-examination of Alvarez and that counsel did not question her about the prior neglect towards Julian.[17] This assertion simply fails to properly recognize that three days earlier, the judge prevented him from cross examining Dr. Deutch on her testimony regarding Alvarez's previous neglect.[18] Therefore, the court had

[16] Op. Br. at p. 25.
[17] Ans. Br. at p. 33.
[18] A184.

already made its ruling as to restricting this critical area of cross-examination before Alvarez took the stand on the fifth day of trial.[19]

In these circumstances, this Court cannot have "'a sure conviction' that... limitations on cross-examination did not prejudice the defendant'; nor can [it] say that it is 'highly probable' that the... errors did not contribute to [the] jury's'" verdict.[20] Therefore, El-Abbadi respectfully submits that his convictions must be reversed.

[19] A408.
[20] *United States v. Chandler*, 326 F.3d 210, 225 (3d Cir. 2003).

CONCLUSION

For the reasons and upon the authorities cited herein, El-Abbadi's conviction must be reversed.

Respectfully submitted,

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