

**STATE OF LOUISIANA  
COURT OF APPEAL, THIRD CIRCUIT**

**03-946**

**STATE OF LOUISIANA**

**VERSUS**

**DILLON JAMES MERRITT**

THIBODEAUX, C.J., dissenting in part.

The majority errs in affirming the Defendant's convictions on Counts 2 and 4.

The Defendant was convicted of causing A.R. unjustifiable pain and suffering by refusing to allow A.R. to receive necessary treatment. The tenuous evidence in this record simply does not support a conviction. K.R., the victim's mother, did not think the child needed emergency treatment. While the majority is correct that emergency treatment is not an element of the offense, what is significant is that the mother felt A.R.'s condition did not warrant medical attention. Deputy Polk thought that A.R. was uninjured; the deputy did not observe any visible signs of injuries or trauma. Ms. Matthews called the Department of Social Services only *after* Deputy Polk advised her to stay away from the Merritt residence. One is left to wonder why Ms. Matthews did not call the Department of Social Services before if she felt that A.R. was in distress and in need of medical care. The likely inference, I think, is clear. She was unhappy with being told to stay away from the Merritt residence. She, therefore, initiated the call because of her discontent with being excluded, not because of a genuine concern for the child's welfare. The reasonable

thing to do, if she felt A.R. was in distress and pain, would have been to call for assistance immediately upon leaving the Merritt residence.

While subsequent actions did indeed disclose the need for medical attention, we cannot view this discovery in a vacuum. While hindsight is helpful, we cannot convict on what was later discovered under these circumstances. As *State v. Cortez*, 96-859 (La.App. 3 Cir. 12/18/96), 687 So.2d 515, 522, observed, “a bad judgment call falls woefully short of equaling intentional mistreatment or criminal negligence and, without more, does not give rise to a charge under this statute [La.R.S. 14:93]” because

[i]n order to prove criminally negligent mistreatment, the state must show that [the defendant’s] conduct was so far below that expected of a reasonably careful person that it must be considered a gross deviation. The state attempted to prove this through circumstantial evidence, which requires the state to exclude all reasonable hypotheses of innocence on the part of [the defendant].

*Id.* at 520.

The circumstantial evidence in this case does not rise to the level of showing a “gross deviation” from a reasonably careful person’s conduct. The majority was wrong in affirming this conviction.

With respect to Count 2, without the indisputably inadmissible hearsay testimony, was there, as the majority observes, “sufficient, independent and uncontradicted evidence to sustain a conviction” beyond a reasonable doubt? Was Dr. Springer’s inadmissible testimony harmless such that a conviction on Count 2 which charged that the Defendant inflicted A.R. unjustifiable pain and suffering by causing a spiral fracture of the leg supported by sufficient independent evidence? No one saw the Defendant injure A.R.’s leg at any time. A.R.’s sister was the only person in the room with her on June 11, 2001, the date on which they were jumping around in bed when A.R.’s sister claims she was hurt. Dr. Collins testified that A.R. was a product

of neglect and abuse which resulted in the leg injury. Dr. Collins did not, indeed he could not, say from whom the injury occurred. Nor did the State rule out the possibility of an accidental injury with the evidence presented. Once the testimony of Dr. Springer is extricated from consideration, we are left with evidence that is woefully insufficient to uphold a conviction. I cannot say that the guilty verdict on Count 4 in this trial was surely unattributable to the error. *See State v. Johnson*, 94-1379 (La. 11/27/95), 664 So.2d 94; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078; La.Code Crim.P. art. 921.

I would reverse the convictions on Counts 2 and 4 and remand for the imposition of concurrent sentences on Counts 1 and 3. *See State v. Ste. Marie*, 97-168 (La.App. 3 Cir. 4/18/01), 801 So.2d 424, *writ denied*, 02-1117 (La. 12/19/02), 835 So.2d 1288.

For the foregoing reasons, I respectfully dissent.