

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Laurens County
Honorable Robert Addy, Jr., Judge
Appellate Court № 2011-187128

Decision № 5132

The State,

Respondent,

vs.

Richard Brandon Lewis,

Appellant.

Return to Petition for Rehearing

The State in the Petition for Rehearing, fails to distinguish between the crimes of homicide by child abuse, aiding and abetting homicide by child abuse and accessory after the fact to the crime of homicide by child abuse. The jury acquitted Mr. Lewis of homicide by child abuse and therefore the jury resolved any factual scenario that would support that crime in favor of Mr. Lewis.

At oral argument in this case this Court asked the State if at the trial below the state proved any overt act by Richard Brandon Lewis which aided or abetted the crime of homicide by child abuse. The State did not have an answer This question was important. The South Carolina courts have held that the state must prove an overt act before a person can be found guilty of accomplice liability. *See, State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010); *State v. Austin*, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)("[T]o find guilt for a crime a person must . . . be

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present at the scene of the crime and intentionally, or through a common design aid, abet or assist in the commission of that crime through some *overt* act.)(emphasis added) In its petition for rehearing, the state has again failed to state any overt act which Mr. Lewis committed that would make him guilty of aiding and abetting homicide by child abuse.

The State in the petition for rehearing argues because South Carolina Code § 16-3-85 permits a conviction for a person who “allows to be inflicted upon the child physical injury” or who “fails to supply the child with adequate food, clothing, shelter, or health care” and the record has some evidence that Mr. Lewis violated one or both of these, the ruling of this court was not correct. What the State does not acknowledge is that a violation of either one of those provisions would make Mr. Lewis guilty of homicide by child abuse and not aiding and abetting homicide by child abuse. He was acquitted of homicide by child abuse.

The State goes at great length to show that Mr. Lewis failed to tell the doctors and other medical personnel what he knew about the actions of Ashley Hepburn on the morning of this incident. The State has three problems with this approach. First, no testimony exists that establishes that if Mr. Lewis had promptly reported what he knew concerning Mrs. Hepburn, the result would have been any different. Second, such an act by Mr. Lewis, if it did have an impact on the outcome, would have made him guilty of homicide by child abuse and not aiding and abetting. Third, those actions by Mr. Lewis would have made him guilty of accessory after the fact to homicide by child abuse.

The State has contended on page 4 of the Petition for Rehearing that this Court might have overlooked the fact that Dr. Curry found the injury to be non-accidental trauma and Mr. Lewis and Mrs. Hepburn told the same story and did not mention any actions by the mother.

This action by Mr. Lewis might have made him guilty of accessory after the fact, but does not make him guilty of aiding and abetting homicide by child abuse. In fact, in the Petition for Rehearing the State has never attempted to differentiate between the facts sufficient to convict Mr. Lewis of aiding and abetting and the facts that would make Mr. Lewis guilty of accessory after the fact.

On page 5 of the Petition for Rehearing, the State makes reference to Mr. Lewis and Mrs. Hepburn having either a tacit or overt agreement to keep information from the authorities. Again, the State does not explain how this "agreement" makes Mr. Lewis guilty of aiding and abetting homicide by child abuse as opposed to accessory after the fact. In addition, the record does not support any conclusion that Mr. Lewis and Mrs. Hepburn had any agreement, tacit or overt.

The mere fact that the child would have immediately shown symptoms of the injury, page 6 of petition, simply does not make Mr. Lewis guilty of the crime of aiding and abetting homicide by child abuse. If he failed to render aid, he is guilty of homicide by child abuse. But the State has failed to show that even if aid had immediately been given to the child, the result would have been different.

On page 7 of the petition, the State seems to argue that because Mr. Lewis was in the house and heard Mrs. Hepburn stomp down the hall he is somehow guilty of aiding and abetting homicide by child abuse. Again, even assuming Mr. Lewis had a duty toward the child, if he failed to prevent the actions of Mrs. Hepburn, then he was guilty of homicide by child abuse and not aiding and abetting homicide by child abuse.

The State is in error when they contend that the present case is similar to the

decision in *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (2004). In the *Smith* case the appellant did not attempt to distinguish in any meaningful way the difference between homicide by child abuse and aiding and abetting homicide by child abuse. Mr. Smith was convicted of homicide by child abuse because the evidence showed that he was at least present when the child was shaken and did not prevent the injury.¹ Under the facts of the case, the jury could have also found Mr. Smith guilty of actually injuring the child and therefore he was guilty of homicide by child abuse. In the present case, the jury acquitted Mr. Lewis of homicide by child abuse and therefore found he did not cause the injuries and did not fail to render aid. The jury findings in the *Smith* case established that Mr. Smith did in fact either harm the child or failed to render aid.

To be convicted of aiding and abetting homicide by child abuse, the state must prove Richard Brandon Lewis did an overt act to aid in the commission of the crime. The State has not in its brief, at oral argument or in its petition for rehearing stated a single act on the part of Mr. Lewis that would constitute aiding and abetting the crime of homicide by child abuse.

¹ The decision does not indicate that the appellant ever raised the issue of whether he had a duty to protect the child when he was not the natural parent or guardian. In addition, the court was not asked to address the issue of whether a defendant can be convicted of both homicide by child abuse and aiding and abetting homicide by child abuse.

CONCLUSION

As the State has not called the attention of this court to any fact that was either overlooked and wrongfully found, the decision of this Court reversing the conviction of Richard Brandon Lewis for aiding and abetting homicide by child abuse should be affirmed.

June 6, 2013



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LAURENS COUNTY
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Honorable Robert Addy, Jr., Circuit Court Judge

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State of South Carolina Respondent,

vs

Richard Brandon Lewis Appellant

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 6, 2013, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the Return to Petition for Rehearing in the above case addressed to Salley Elliott, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 6 day

of June, 2013.

Mary Jane Hartley (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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