

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County
Court of General Sessions
Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2011-187128

STATE OF SOUTH CAROLINA.

Petitioner,

v.

RICHARD BRANDON LEWIS.

Respondent.

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

INDEX

INDEX.....i

CERTIFICATE OF COUNSEL.....1

ISSUE PRESENTED.....2

STATEMENT OF CASE.....3

ARGUMENT

The record contains substantial circumstantial evidence reasonably tending to prove the guilt of the accused and the Court of Appeals erred in reversing the trial court's denial of the motion for directed verdict.....4

CONCLUSION.....21

CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioner certifies that the Petition for Rehearing was made and ruled on by Court of Appeals on June 20, 2013.

ISSUE PRESENTED

Did the Court of Appeals err in reversing the trial court's denial of the motion for directed verdict when the record contains substantial circumstantial evidence reasonably tending to prove the guilt of the accused?

STATEMENT OF THE CASE

Respondent Richard Brandon Lewis was indicted for homicide by child abuse (10-GS-30-1930) and aiding and abetting homicide by child abuse (10-GS-30-1929). He was jointly tried with co-defendant Ashley N. Hepburn who also faced charges of homicide by child abuse and aiding and abetting homicide by child abuse. Respondent Lewis and Hepburn came to trial with separate counsel on February 22, 2011, before the Honorable Frank R. Addy, Jr., and a jury. On March 3, 2011, Respondent Lewis was found guilty of aiding and abetting homicide by child abuse and Hepburn was found guilty of homicide by child abuse. (App. p. 1196). Respondent Lewis was sentenced to imprisonment for a term of ten (10) years suspended upon the service of seven years.

Respondent Lewis appealed and, after full briefing and oral argument, the South Carolina Court of Appeals reversed the conviction and sentence. State v. Lewis, 403 S.C. 345, 743 S.E.2d 124 (2013). The State submitted a timely Petition for Rehearing. Respondent Lewis made Return to the Petition for Rehearing and the State submitted a Reply to the Return to Petition for Rehearing. The South Carolina Court of Appeals denied rehearing by order dated June 20, 2013. This Petition for Writ of Certiorari by the State follows.

ARGUMENT

The record contains substantial circumstantial evidence reasonably tending to prove the guilt of the accused and the Court of Appeals erred in reversing the trial court's denial of the motion for directed verdict.

Respondent Lewis was charged, along with his co-defendant Ashley Hepburn, with homicide by child abuse and aiding and abetting homicide by child abuse. After a jury trial, Lewis was convicted of aiding and abetting homicide by child abuse and Hepburn was convicted of homicide by child abuse¹. At trial, Respondent Lewis moved for a directed verdict of acquittal at the close of the State's case and at the conclusion of all evidence arguing there was no evidence Lewis and Hepburn worked together, concocted a story, or assisted each other in any manner to support the charge of aiding and abetting homicide by child abuse. (App. 568-569; 1098). The State responded with argument that aiding and abetting homicide by child abuse includes acts or omissions and that Lewis concealed critical information about the nature of the victim's condition in response to requests preventing the victim from receiving appropriate medical treatment necessary within the critical time frame resulting in the victim's death. (App 571-572; 575-576). The trial court denied the motions. (App. 579-580; 1100).

¹ Ashley Hepburn's appeal is currently pending before this Court.

On appeal to the Court of Appeals, Lewis argued the State failed to establish that he took any affirmative action to aid Hepburn in causing the victim's death and that he cannot be guilty of aiding and abetting by omission and, alternatively, that the State failed to prove he knowingly committed an act of omission. In its opinion reversing the trial court's denial of the directed verdict motion, the South Carolina Court of Appeals concluded there was no evidence to support the charge of aiding and abetting homicide by child abuse and that the trial court erred in failing to grant a directed verdict in Lewis' favor. The Court concluded the State failed to present evidence to establish that Lewis knowingly aided and abetted Hepburn and that the State failed to show aiding and abetting by an overt act. State v. Lewis, 403 S.C. 345, 743 S.E.2d 124 (2013).

The State respectfully submits that the Court of Appeals erred in its ruling and that the record, when viewed in the light most favorable to the State, contains substantial circumstantial evidence reasonably tending to prove Lewis' guilt of the statutory offense of aiding and abetting homicide by child abuse or from which guilt may be fairly and logically deduced, and that the trial court properly denied Lewis' motion for directed verdict. State v. Smith, 359 S.C. 481, 490 S.E.2d 888 (Ct. App. 2004). The State submits that the Court of Appeals committed an error of law when it determined that an overt act was a prerequisite to the statutory offense of aiding and abetting homicide by child abuse and, as noted by the dissent in this case, when it opined that the State failed to establish the requisite intent. Specifically, the State submits that the record contains evidence reasonably tending to prove that Lewis heard the infliction of injury and abuse by Hepburn from the adjoining room and, through omission, allowed physical injury to be inflicted upon the child victim. The evidence also establishes that Lewis failed to immediately respond to the victim when he knew she had been shaken by Hepburn but allowed her to languish in her crib before taking any action to check on her or summon assistance or medical care for her. The

record also establishes that there was an attempt to clean the victim's blood to cover up the infliction of injury. Moreover, and after finding the victim lifeless, Lewis, through overt act as well as omission, intentionally concealed information about what he heard transpire and the victim's medical history and status and by overt act affirmatively misled medical care responders and providers when the information was requested preventing the victim from receiving timely and adequate medical intervention, resulting in the victim's death.

Trial Testimony

During marital difficulty, Co-defendant Ashley Hepburn, her son and her infant daughter (victim) were living at her mother's home when the victim was heinously injured -- the day of October 12, 2009 and early morning of October 13, 2009. (ROA. pp. 300-306; p. 321; pp. 606-633; p. 651; pp. 843-846). Lewis was seeing Hepburn regularly. Lewis recalled an afternoon difficulty with Hepburn on October 12 starting with pillow play, Lewis calling Hepburn a bitch, and Hepburn slapping Lewis in the face. Lewis described Hepburn's attitude that day as "stressed." Hepburn had anticipated but not gotten a job she needed and did not get much sleep the night before. Lewis left about 5:00 PM. He returned about 8:30 when Hepburn's mother and her boyfriend David Crumley were asleep and after Hepburn requested his assistance with the children. (ROA. pp. 94-104; pp. 111-112;126; pp. 843-855; p. 892-893). They had another difficulty around 10:00 PM when Hepburn's son accidentally hit Lewis in the face and refused to follow Hepburn's directive to tell Lewis that he [the son] was sorry. Lewis told Hepburn, in substance, that if her son "didn't listen to her now he wasn't ever going to listen to her." Later, her son did not want to brush his teeth. Hepburn "yanked him up by the arm" - which Lewis had never seen by Hepburn - and spanked him in the bathroom. Lewis could hear her popping him at

least four or five times from another room. The spanking made the son cry "pretty hard" and made Lewis "avoid" Hepburn. Lewis felt responsible for Hepburn's "whipping" her son by saying something to Hepburn earlier. Lewis entertained himself with television in the living room; after football, he asked whether Hepburn wanted to watch the movie "Congo" - she did not. This was about 11:00. Hepburn was in her room in bed with her son. The victim was in her crib in her bedroom across the hall from Hepburn and sharing an adjoining wall with the living room where Lewis sat. (ROA. pp. 856-861; p. 896-897; 906). Lewis checked on the victim through her cracked door. He looked in, and she popped up her head. He knew that she was fine. Later, at 12:45 AM, he heard her cry; she was teething. Lewis heard Hepburn stomp into the victim's room, and he actually felt her footsteps. The victim cried and then cried louder. Lewis heard "short pauses in between her cry and it just, it sounded to [Lewis] like she could have been shaken."¹ Then the crying stopped. Hepburn left the victim's room and went back to her own room. Lewis thought that Hepburn was "agitated" and waited about ten minutes before asking her whether she wanted some food. She did not. Despite what he heard and knowing the sounds were not routine, he checked on Hepburn but not the victim. (App. 911; 940; 956 - 960). Lewis ate, used the bathroom, and got ready for bed. He checked on the victim at 1:20 AM and saw she was in a strange position in the crib - face down with her head against the bars. She was limp, barely breathing, and her mouth was bleeding. Lewis ran, carrying the child to Hepburn, and thought it odd that Hepburn did not immediately check on her child. Lewis, from his own experience, thought it was a seizure. They awakened Hepburn's mother and her mother's boyfriend called

¹ On cross examination Lewis again described the crying, "I just remember hearing breaks in her voice and pauses and it just sounds different than the way she would normally cry." (ROA. p. 957, lines 3-12).

EMS at 1:30 AM. (ROA. pp. 27-31; pp. 861-867; pp. 906-914; 940; 966). Lewis reported to the boyfriend Crumley that he just found the victim "that way."

Lewis acknowledged he was questioned about "shaken baby" at Greenwood Hospital. Later, after riding with officers to Laurens, making a statement (State's Exhibit No. 30; ROA p.903) on October 13, at 6:42 AM, and talking to his grandmother, Lewis admitted in a second statement (Defense Exhibit No. 2), at 11:56 AM on October 13, 2009, that he had heard crying as though the victim were being shaken. (ROA. pp. 872-876; p. 903; pp. 909-912; SROA pp. 2-3; p.991; pp. 997-998). Lewis claimed he did not know, at the time, that the victim was being harmed; had he known, he would have stopped Hepburn. (ROA. p. 882 line 23-p. 883, line 19). Lewis also said he loved Hepburn; he did not tell the truth since he did not want to believe that she could hurt the victim and did not want to get her into trouble. (ROA. pp. 916-917). He admitted that he did not report what he heard occur between the victim and Hepburn to officers because he was protecting Hepburn from being accused of child abuse. (ROA 874). Looking back on hearing the stomping footsteps, he knew that [Hepburn] shook the victim. (ROA. p. 913, line 25-p.914). He also admitted his attempt to communicate with Hepburn by cell phone before being interviewed by officers. (ROA p.915).

Lewis thought that when an officer (Plaxico) came to the house on September 14, 2009, he might be arrested, and he fled. (ROA. p. 538; p. 916). The day after the victim died, Lewis was treated in Laurens and then at a VA hospital for an attempted suicide. (ROA. pp. 918-919).

Lewis affirmed that Hepburn had consistently given the same story: she was asleep from the time that she and her son lay down until he came into the room with the victim. (ROA. pp. 970-971). To his knowledge, Hepburn never gave a written statement to the police. (ROA. p. 973, lines 11-15).

EMS dispatcher Thompson received a 911 call at approximately 1:30 A.M. on October 13, 2009, reporting that the 16 month old victim was breathing but unresponsive. Lewis was present in the room when the 911 call was made and could be heard in the background. (ROA p. 104 - 106; 127). Lewis provided information about finding the victim in her crib and the victim's condition when she was found. (ROA p. 105 - 106).

Paramedic Calvin Duckett testified that he responded to the scene at approximately 1:40 AM and, upon questioning the adult occupants of the home, was told the victim was breathing and had a pulse but was unresponsive. Duckett requested a medical history and asked about allergies. Duckett was told the victim was normal when put to bed but was later inexplicably found unresponsive. Lewis was present during this exchange about the victim's condition and request for information about the victim's history of injuries or illnesses for treatment purposes. Lewis stood silent while the responders were informed the victim was normal when put to bed and was inexplicably found to be unresponsive without cause when Lewis later checked on her. The inquiry was obviously being made by EMS to determine the cause of the victim's condition and in order to provide appropriate medical care and treatment. Duckett administered Benadryl believing the victim might be suffering from a possible allergic reaction. The victim was transported to the hospital in Greenwood. (ROA pp. 38 - 44)

Hospital Chaplain Brown confirmed that Lewis spoke first and was the "talker" about the victim. Lewis reported in Hepburn's presence that he was the only person awake and found the victim unresponsive in her crib when he checked on her after watching television. Brown characterized Hepburn and Lewis as "collected, and united on the "story." (ROA p. 149 - 150).

Medical Trial Testimony

About 2:00 AM, October 13, 2009, Dr. Michelle Curry, emergency room physician at Self

Regional Hospital in Greenwood, found the sixteen month old victim limp and unresponsive with shallow and weak respirations but a good pulse and blood pressure. She described the victim as critically ill. EMT's had initially considered an allergic reaction and administered Benadryl. She spoke with EMS personnel and learned EMS received very little information about the child other than no history of falls, trauma or illness was reported. Dr. Curry's examination revealed bruises to the abdomen, upper and lower back, shoulder, legs, head, forehead, jawline and chin (probably inflicted over days) and retinal hemorrhages consistent with non-accidental trauma. A CAT scan demonstrated a life threatening subdural hematoma containing enough blood to push the brain across to the opposite side of the skull. (ROA. pp. 52-59; p. 63; p. 87). The doctor thought that the injury had occurred shortly after the child's most recent meal and when she was in her usual state of health. (ROA. p. 63). The unresponsiveness and limpness would have affected the victim either immediately or within two hours of the initial injury. (ROA. p. 79, lines 5-14). Dr. Curry told Hepburn that her child had suffered **non-accidental trauma** and repeatedly questioned Hepburn and Lewis. Neither one offered an explanation for the child's injuries such as a significant fall or significant injury such as a motor vehicle accident - although Dr. Curry remembered Hepburn's "repeatedly saying how could this happen and kind of questioning what had happened." (ROA. pp. 60-62; p. 65; p. 684, lines 13-22). In the face of the doctor's shocking finding, the family - including Hepburn and Lewis - offered the benign scenario of a normal child in her crib by about 10:30 PM and Lewis' subsequently and inexplicably finding her limp and unresponsive. (ROA. pp. 60-62; p. 78). Dr. Curry spoke with Lewis separately but Hepburn entered the room during the exchange. Lewis specifically informed Dr. Curry that he was watching television while everyone else in the home slept and that he simply found the victim unresponsive when he checked on her. Neither Lewis nor Hepburn offered an explanation for the victim's

condition despite repeated inquiry. (ROA p. 65) In the face of Dr. Curry's findings of non-accidental trauma and despite repeated questioning of Lewis and Hepburn, Lewis and confirmed the account that Hepburn put the victim to bed at 10:30, that the Hepburn then went to bed, and that the victim was a little fussy but was otherwise normal at that time. They also affirmed that Lewis checked on the victim at 1:30 A.M. after watching television and found the victim limp and unresponsive and EMS was contacted. (ROA p. 83). The record reflects that Lewis failed to report to Dr. Curry or any of the medical responders or treatment providers that he was aware the mother was stressed or agitated because she did not get an anticipated job, that she reacted angrily and physically against Lewis and her other child earlier in the evening, or that he heard and felt the mother stomp angrily into the victim's bedroom in response to the victim's whimpering or that the victim began to cry louder and harder once the mother entered the room or that this was followed by loud, broken cries from the victim as though the victim was being shaken. (ROA. 872-76; 903; 909-12; 991; 944- 948; 997 - 998; SROA 2-3; 991).

Pediatrician Robert Seigler saw the victim in the Greenville Memorial Pediatric Intensive Care Unit about 6:00 AM on October 13, 2009. When admitted, the victim was on life support. Dr. Seigler found acute subdural and retinal bleeding and severe brain injury which, in the absence of another explanation, indicated non-accidental traumatic brain injury consistent with child abuse. (ROA. pp. 169-172; pp. 177-178). The doctor observed twenty-eight bruises, including bruises to the abdomen, under the angle of the jaw, and clavicle that were atypical locations for accidental bruises. (ROA. p. 180; pp. 189-192). The victim's symptoms would have been virtually immediate to her severe injury and were inconsistent with a child who appeared normal. (ROA. p. 195, line 18 - p. 196, line 5). CAT scans taken over a period of time to determine whether brain swelling was occurring revealed progressively greater swelling to the victim's brain which

was ultimately cutting off the blood supply to the victim's brain. (ROA pp. 174 - 76). Dr. Seigler testified that while bleeding from the brain injury was bad, it was the swelling of the brain that was a matter of greater concern. (ROA p. 174-76). Dr. Seigler's opinion that swelling of the brain arises from an injury to the brain **coupled with** a lack of adequate oxygen to the brain over a period of time. (176). Seigler explained when children receive brain injuries of the type suffered by the victim; they often do not receive immediate resuscitation. Dr. Seigler testified that the lack of resuscitation **near the time of the injury** causes the child to experience difficulty breathing leading to a reduction in the oxygen level in the brain and resulting in brain damage. (ROA p. 176) He described the condition as one involving the injury **combined with the lack of immediate resuscitation.** (176) In an effort to treat the brain injury, Seigler placed the victim on a breathing machine, administered blood pressure and anti-seizure medication, and used cooling blankets to protect the victim's brain. (193). However, his efforts were not successful. Seigler stated that the only medical history provided was that the victim was fine when put to bed but was later inexplicably found with the symptoms described. (ROA p. 195).

Forensic pediatrician Dr. Mary-Fran Crosswell evaluated the victim on October 13, 2009. She found significant brain injury including bleeding within the skull and between the two lobes of the brain and significant swelling pushing aside normal brain structures. She found her findings most consistent with abusive head trauma. The significant forces that had been applied to the brain and, as part of that, the eyes were consistent with a fall from several stories, more than a story high. (ROA. p. 204; p. 207; p. 209; p. 213, line 18 - p. 214, line 8).

Pediatric ophthalmologist Dr. Anthony Johnson examined the victim on October 14 and found retinal hemorrhages "too numerous to count in both eyes" that were consistent with injury from severe shaking. Accidental injuries to children from being ejected from a car or a fall from

even a ten story building did not result in such extensive retinal hemorrhage. (ROA. pp. 244-245; p. 248, line 16 - p. 249, line 2; p. 253. lines 1-17). The victim's extensive injuries would have been immediate and very obvious to an observer. (ROA. p. 252, lines 1-14).

Dr. Michael Ward performed the autopsy October 19, 2009. In light of the child's history, her injuries were consistent with non-accidental head injury, child abuse, and they would have been almost immediately apparent. (ROA. p. 355; pp. 359-361; pp. 372-373). There were three distinct areas of impact to the skull, and there could have been more. (ROA. pp. 375-376). The head injuries were the cause of the victim's death, and her death was a homicide. (ROA. p. 363).

The record also includes the testimony from all of the medical treatment providers establishing that the trauma from the victim's head injury was so severe that the victim would have exhibited symptoms immediately after the injury and would not appear normal. (ROA pp. 79; 195-96; 211; 251-52; 355; 359-361; 372-373).

Applicable Law

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." State v. Mann, 560 S.E.2d 776, 781 (N.C. 2002). "Substantial evidence" is evidence that is existing and real, not just seeming or imaginary. State v. McAvoy, 417 S.E.2d 489 (N.C. 1992). For review of an agency's

decision under the APA, “substantial evidence” is evidence that, in context of the whole record, a reasonable mind would accept to support the agency's action. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

Lewis was convicted of the statutory offense of aiding and abetting homicide by child abuse. Our legislature provided for criminal liability for this statutory offense by **act or omission** by any person, to include the principal and the aider and abettor. See S.C. Code Ann. Section 16-3-85. The statute specifically provides for criminal responsibility for one who inflicts injury **or allows injury to be inflicted**, both the principal and aider and abettor. S.C. Code Ann. Section 16-3-85(B)(2)(a). To be guilty of an offense as an aider or abettor the accused must be chargeable with knowledge of the principal’s criminal conduct, and mere presence at the scene is not sufficient to establish guilt as an aider or abettor. State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578 (2010). To aid and abet, the accused must assist, facilitate the commission of the crime, promote the accomplishment of the crime, help in advancing or bringing the crime about, encourage, counsel or incite the commission of the crime. Sate v. Smith, 359 S.C. 481, 597 S.C.2d 888 (Ct. App. 2008). An attempt to run away is evidence of guilty knowledge and intent. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982). Flight - wherever it occurs - is the consummate act of evasion, and while flight is not necessarily indicative of wrongdoing, it suggests wrongdoing. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). “[E]vidence of a suicide attempt is probative of a defendant’s consciousness of guilt and is generally admissible for whatever value the jury decides to give it.” State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011).

Discussion

The statute in question makes it clear that child abuse can be committed by either an act or

omission. State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (2004). It also makes clear that harm may occur when a person commits physical injury or allows physical injury to occur. It further makes clear that harm may occur when a person fails to provide health care to the child and the failure causes physical injury or condition resulting in death. The State submits that just as in Smith, Lewis and Hepburn were the only two individuals in proximity to the victim at the time the injury. Both Lewis and Hepburn reported to medical care providers that the victim had not fallen or hit her head and that they were not aware of what would have caused the victim's condition. Just as in the Smith case, the severity of the victim's injury was immediately and readily apparent. Just as in Smith, Lewis and Hepburn engaged in a cover-up of what occurred to the victim by repeatedly denying they knew what would have caused the victim's condition, ultimately resulting in the inability of first responders and treatment providers to provide the proper medical treatment leading to the victim's death. Additionally, in this case, Lewis failed to respond to the victim after he was aware the injury had been inflicted such that timely health care was not summoned for her. The State also submits that the evidence of flight and suicide are significant and that both matters were tied to the crime and were proper for consideration as evidence of consciousness of guilt. State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011).

In regard to the finding of the Court of Appeals that the State failed to present evidence of the requisite mental state for aiding and abetting, the State submits that, consistent with the dissent in this case, the circumstantial evidence presented at trial was sufficient to deny the directed verdict motion. It has been recognized that the State will rarely have proof of intent by direct proof but will necessarily rely on facts and circumstances from which intent must be inferred. See State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001).

The evidence reflects that Lewis knew Hepburn had not gotten needed employment. He knew

about the pillow play difficulty. He knew Hepburn's son accidentally hit him in the face and declined Hepburn's attempt to have him [her son] offer an apology. Lewis knew that he [Lewis] had opportunely apprised Hepburn that if her son "didn't listen to her now he wasn't ever going to listen to her." Later, Hepburn's son did not want to brush his teeth, and Hepburn "yanked him up by the arm" and spanked him. He attributed Hepburn's imposing the corporal discipline to himself - saying something to her earlier. Witnessing the discipline caused him to afterward avoid Hepburn. Later after hearing the victim cry faintly apparently in response to teething, hearing and feeling Hepburn's footsteps toward the crying victim, and then hearing the child's aberrant crying, Lewis declined to respond. He declined to respond even though, earlier, he had purportedly checked on the child, and Hepburn's earlier disciplining her son - that Lewis thought he had instigated - concerned Lewis. Lewis knew Hepburn was uncharacteristically agitated. Hepburn's earlier discipline had concerned Lewis enough to avoid Hepburn - something quite beyond the ability of her infant daughter in her crib. Lewis instigated, abetted, and witnessed Hepburn's disciplinary outburst against her son, and heard and felt Hepburn's disciplinary outburst against her infant daughter. Further, Lewis knew the cause of the victim being limp and unresponsive and participated in thwarting responders and the physician (ROA. p. 39, lines 3-12; p. 60, line 4 - p. 62, line 9) until its inevitable medical discovery - thus, insuring either delaying aid in resuscitation or preventing medical assistance for the still living victim and aiding Hepburn in the child abuse that resulted in the victim's death. Hepburn's testimony attributed criminal responsibility to Lewis; Lewis' testimony attributed criminal responsibility to Hepburn and to himself in that he knowingly aided and abetted Hepburn to commit child abuse, and the child abuse resulted in the infant's death. Lewis confirmed his role in knowingly aiding and abetting Hepburn to commit child abuse that resulted in the death of the victim both by his flight from the police, and attempted suicide. The record demonstrates relevant evidence necessary to persuade a rational juror to accept a conclusion - that Lewis aided and abetted the commission of child abuse that resulted in the death of the victim - and the court's denial of the

motion for directed verdict should be affirmed and the Court of Appeals must be reversed.

Lewis' act of repeatedly withholding information when asked and providing false information about the victim's injuries, medical condition, and medical history were affirmative overt acts taken by Lewis' which advanced the crime which was ongoing at the time. The failure to provide adequate health is an action separate supporting the conviction which is separate from or in addition to the infliction of injury.

The evidence taken in the light most favorable to the State reflects that Lewis heard the mother stomp into the victim's room and shake the victim until she stopped crying. Lewis delayed some time (from 12:45 AM to 1:20 AM) before checking on the victim after hearing the altercation. The victim was found unresponsive in her crib and obviously was in desperate need of medical assistance, including resuscitation. There was testimony revealing that there might have been an attempt to cover up evidence of the injury. A towel with blood was found at the scene and appeared to have been used to clean the victim or the area. Lewis affirmatively withheld information about the injuries and what he knew when asked critical questions by responders, medical care providers, and others. Lewis also provided false information about not knowing how the victim was injured or that the victim had even sustained an injury. The correct information was crucial to the victim's medical care and treatment and ultimately led to her death. Lewis advanced the crime of homicide by child abuse by failing to relay information and offering false information about the victim's injuries and medical history resulting in an initial treatment for an allergic reaction rather than that needed for the injury sustained, including resuscitation to deliver needed oxygen to the victim's brain. The acts committed by Lewis extended to the time medical care and treatment appropriate for the injury should have been provided. Lewis was more than a by-stander but actively participated in advancing this crime, including the false words spoken, information concealed, and support provided to protect the mother while medical treatment for the child was critical. This evidence was sufficient to withstand the directed verdict motion.

The common law advanced by Lewis and relied upon by the Court of Appeals is not applicable. Our legislature made it clear that one may not stand by and allow a child to be killed. For policy reasons, South Carolina law defines aiding and abetting homicide by child abuse in this manner because it is the legislature's intent is to protect innocent and helpless children from this crime that frequently occurs in secret. Criminal liability though omission by an aider and abettor is necessarily created by S.C. Code Ann section 16-3-85. See State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004). "Aid and Abet" was defined in Smith as comprehending "all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance, if necessary." Smith at 491, 597 S.C.2d at 894. In Smith, the court dealt with the same issue of a boyfriend of the victim's mother challenging his conviction for aiding and abetting homicide by child abuse. Smith argued that his mere presence at the scene was insufficient to prove his guilt as the principal or an aider and abettor to homicide by child abuse. The decision was predicated upon the provisions of the statute respecting "omission" and "allows to be inflicted" to affirm Smith's conviction for aiding and abetting. It was noted in Smith that the mother and the boyfriend were the only two persons with the victim when the injuries occurred and "the injury to [the victim] was severe and would cause immediate neurological problems which would have been fairly obvious to [the mother] and [boyfriend]." Id. at 491, S.E.2d at 894. There was no evidence of an overt act committed by Smith but the court concluded that there was sufficient circumstantial evidence to support a conviction for aiding and abetting homicide by child abuse by way of either omission or allowing physical injury to be inflicted resulting in the child's death. Similar to Smith, Lewis was constructively present, heard the injuries being inflicted, was in a position to aid and prevent the injuries but failed to act. He was also in a position to thereafter secure immediate and proper health or medical care for the victim to prevent her death but did not. Instead, Lewis thwarted efforts to provide appropriate medical care by intentionally concealing critical information necessary to prompt life-saving medical treatment for the victim and to protect Hepburn. As in

Smith, Lewis aided and abetted by omission or failing to prevent the injuries.

Lewis also aided and abetted Hepburn through affirmative acts as well as omission after the infliction of injury as argued above. The distinctions drawn by the Court of Appeals between Smith and the facts of this case are not dispositive. As stressed by the State, this was not a crime of silence. Lewis was more than merely present. He aided and abetted when he failed to prevent the victim's injury. Lewis' own testimony provided evidence of his knowledge of Hepburn's abuse and also establishes that he assisted, facilitated, and helped to thereafter advance the crime. Lewis admitted that he heard the injuries being inflicted, knew the victim was being shaken, allowed the mother's attacks on the victim to continue until the victim stopped crying and failed to intervene. This evidence alone was sufficient to withstand the motion for directed verdict. An overt act was not necessary under the provisions of the statute or in this Court's decision in Smith. However, Lewis thereafter engaged in overt acts to cover up the physical injuries through concealment and false statements in the face of probing questions for medical treatment purposes and thereby also caused harm to the child by preventing the critical medical care, including timely resuscitation, the victim desperately needed to avoid death. Lewis admitted these acts and omissions even though he knew the victim was in the hospital fighting for her life and that he did so to aid and protect the Hepburn. (ROA.902-917; 947-48). Along with Hepburn, Lewis affirmatively concealed the truth even though he understood that it was important for medical personnel to know what he heard. (902 - 919). The record reflects that Lewis and Hepburn either tacitly or overtly agreed to conceal this information about the Hepburn's actions from the medical team responding to and treating the victim. Lewis and Hepburn were interlocked to conceal the truth and thwart efforts of medical responders to discover the cause of the victim's condition and treat it, thereby advancing the crime. David Crumley confirmed, along with others that the only information Lewis provided from the outset was that he simply found the victim unresponsive in her crib and had no possible explanation for the victim's condition despite being questioned at the Greenwood hospital about "shaken baby."

(State's Exh. 30).

The trial court properly denied the motion for directed verdict and the decision of the Court of Appeals must be reversed.


CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BY: 
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ATTORNEYS FOR PETITIONER

August 21, 2013

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
The Honorable Robert Addy, Jr., Circuit Court Judge

Appellate Case No: 2011-187128

THE STATE,

PETITIONER,

v.

RICHARD BRANDON LEWIS,

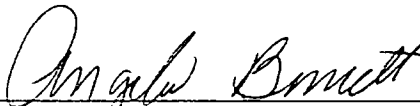
RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett certify that I have served the Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to C. Rauch Wise, Esquire, 305 Main Street, Greenwood, South Carolina 29646.

I further certify that all parties required by Rule to be served have been served.

This 21st day of August, 2013.


ANGELA BENNETT
Administrative Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

August 21, 2013

RECEIVED

AUG 21 2013

SC Court of Appeals

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

RE: State v. Richard Brandon Lewis
Appellate Case No: 2011-187128

Dear Mr. Shearouse:

Please find enclosed the original and two (2) copies of the appendix and original and six (6) copies of the Petition for Writ of Certiorari along with proof of service in the above mentioned case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: The Honorable Jenny A. Kitchings
C. Rauch Wise, Esquire