

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

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S.C. Supreme Court

THE STATE,

PETITIONER,

v.

RICHARD BRANDON LEWIS,

RESPONDENT.

APPENDIX
VOLUME 3 OF 3

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1 Q Let me ask you, I am going to show you defendant's
2 exhibit 2 and ask you if you recognize that?

3 A Yes sir, it was a statement taken from Brandon Lewis.

4 Q And that was taken about, shortly before noon?

5 A Yes, sir.

6 Q Did you subsequently have an occasion to show that
7 statement to Ashley Hepburn?

8 A I did.

9 Q And about what time was that?

10 A It was late in the afternoon.

11 Q And did you let her read it?

12 A I did.

13 Q And did she make any comments after you read it?

14 A She did.

15 Q After she read it?

16 A She did.

17 Q And what was that comment?

18 A She said, oh my god all of this is true but I don't
19 remember hurting my baby.

20 Q Oh my god all of this is true but I don't remember
21 hurting my baby?

22 A Yes, sir.

23 Q Did you ask any other questions about that?

24 A I have talked to her about sometimes when you have a
25 real traumatic experience your mind will forget things and

1 block things out. And Ms. Hepburn then asked me if I
2 thought she had hurt her baby and just didn't remember it.
3 And I told her I thought she would have remembered it and
4 needed to tell me. And she raised her voice at me and
5 stated that she didn't hurt her baby. Said that twice and
6 then I terminated the interview.

7 Q You terminated the interview at that point?

8 A Yes, sir.

9 Q Thank you.

10 CROSS-EXAMINATION

11 By Ms. Mayes:

12 Q Good morning, Investigator Plaxico. Just to kind of
13 go back over your involvement in the case and you
14 testified previously and now we are talking about the full
15 content of some statements that were made to you. Your
16 first contact with Mr. Lewis was at Self Hospital, right?

17 A Correct.

18 Q So, at Self Hospital I think that is when you and
19 Investigator Blackmon went down there to try to get
20 information from both Ashley Hepburn and Brandon Lewis?

21 A That is correct.

22 Q And y'all show up at Self and at some point Ashley is
23 brought out to the parking lot?

24 A Yes, ma'am.

25 Q To speak with yourself and Investigator Blackmon, is

1 that correct?

2 A That is correct.

3 Q And in the parking lot she indicates that she doesn't
4 know, she didn't have any information to add about what
5 could have happened to the baby?

6 A Correct.

7 Q And then at some point y'all have contact with Mr.
8 Lewis as did Deputy Garrison?

9 A Yes, ma'am.

10 Q And the only thing he had to inform law enforcement
11 of at that point is that everybody else had been asleep in
12 the house and he was up watching a movie and at some point
13 he had gone to check on the child and found her
14 unresponsive?

15 A Yes, ma'am.

16 Q And he did also indicate that the child had been
17 healthy earlier in the evening while he was there?

18 A That is correct.

19 Q And so time goes by, Dr. Curry is involved, Chaplain,
20 Alex Brown is involved in speaking with all of these
21 people and then Ashley goes on to Greenville Memorial and
22 the officers ask, you guys ask her to come on back to, ask
23 him to come on back to Laurens County Sheriffs Office to
24 add more information?

25 A Correct.

1 Q All right. So, let me ask you this, at this point
2 was it clear that between Ashley Hepburn and Brandon Lewis
3 law enforcement was not getting an accurate story?

4 A Yes, ma'am.

5 Q And at this point it was clear that this was a case
6 of child abuse based on the information you would receive
7 from Dr. Curry and other medical personnel?

8 A Yes, ma'am.

9 Q So he comes back, well he comes on down to the
10 sheriffs department and he waives his Miranda rights about
11 a little after 6:00 a.m., he waives his Miranda rights and
12 he gives the first written statement to Investigator
13 Blackmon?

14 A That is correct.

15 Q Let me give you a chance to look at this. He waives
16 his Miranda rights here at 6:24, correct?

17 A Yes, ma'am.

18 MR. WISE: Your Honor, that officer was not present
19 when that statement was given. I don't know how he can
20 make any opinion on the statement, about any statement.

21 MS. MAYES: I can clarify, Your Honor.

22 THE COURT: All right.

23 Q Investigator Plaxico, at what point, of course you
24 were at Self Hospital and had contact with Mr. Lewis and
25 then you were also at the sheriffs department because you

1 were the investigator on call that night, right?

2 A Yes, ma'am.

3 Q So you were also at the sheriffs department when he
4 came down there?

5 A Yes, ma'am.

6 Q Roughly sometime between 5:00 and 6:00 a.m.,
7 somewhere around there?

8 A Yes, ma'am.

9 Q And you are still present at the law enforcement
10 office?

11 A Yes, ma'am.

12 Q Throughout that morning on into the early morning
13 hours what degree of contact were you having with Mr.
14 Lewis as well as with other investigators in the case and
15 trying to get to more information about what had happened
16 to Victim ?

17 A I was in and out during his questioning and
18 statement. I don't really know what he was saying at the
19 time, you know, when the investigators finished his first
20 statement we did talk some.

21 Q And I believe after he waived Miranda rights and he
22 gave this first written statement, this is State's exhibit
23 30, this written statement where again he was reiterating
24 that he was watching a movie and everybody was asleep and
25 the child had been healthy and then a little while later

1 he mysteriously finds the child unconscious. You had an
2 opportunity to review this statement, correct?

3 A I did.

4 Q And upon reviewing this statement did you make it
5 clear to Mr. Lewis or did you make it clear to the other
6 investigators that that statement did not coincide with
7 what medical personnel had indicated?

8 A Yes ma'am, we felt like there was more there to be
9 told.

10 Q And so that statement is 6:42 a.m., correct?

11 A Yes, ma'am.

12 Q And ultimately the typed statement where he
13 implicates Ms. Hepburn was at 11:56 a.m., correct?

14 A Yes, ma'am.

15 Q So, a little over five hours?

16 A Yes, ma'am.

17 Q So for about five hours he was still down at the
18 sheriffs department trying to tell y'all that story about
19 how nobody knew anything, the child had just been found
20 that way?

21 A Yes, ma'am.

22 Q Now, after that statement that implicated Ms. Hepburn
23 ultimately she was arrested, correct?

24 A Correct.

25 Q And somewhere around the timeframe of him giving that

1 final statement to law enforcement and the ongoing
2 investigation you went to his home to try and see if there
3 was still even more information in addition to the typed
4 written statement that he can add, correct?

5 A Yes, ma'am.

6 Q Even considering the typed written statement which is
7 his final statement, is it the position of law enforcement
8 that he still was withholding information?

9 MR. WISE: Your Honor, I would object to that
10 question.

11 THE COURT: Sustained.

12 MS. MAYES: Yes sir, Your Honor.

13 Q Pursuant to the investigation did you find it
14 necessary to still attempt to followup with more
15 information with Mr. Lewis?

16 A That is correct.

17 Q All right. And so you show up at his house and as
18 soon as you enter the house he flees out the back door or
19 the side door, correct?

20 A The front door.

21 Q Okay. And it takes a while to find him, the family
22 rounds him up, brings him in and at that point he tells
23 you he has nothing further to add, correct?

24 A Correct.

25 Q And then some point the next day or a few days later

1 you get information that he is at the Laurens County
2 Hospital, correct?

3 A Correct.

4 Q And he was at the Laurens County Hospital because of
5 a suicide attempt?

6 A Yes, ma'am.

7 Q And you went to that location to have contact with
8 him as well?

9 A I did.

10 Q And throughout this investigation, Lieutenant
11 Plaxico, have you stayed in contact with the State Law
12 Enforcement Division?

13 A I have.

14 Q So y'all had worked together as law enforcement
15 agencies in this case?

16 A Yes, ma'am.

17 Q Now, I know you mentioned the contact you had with
18 Mr. Lewis beginning at Self Hospital and then continuing
19 throughout the five hours he was at the sheriffs
20 department. Can you kind of go back and reiterate also
21 the contact that you had with Ms. Hepburn along the way?

22 A Yes, ma'am. During the day we went to Greenville
23 Hospital and I talked to Ms. Hepburn there and, you know,
24 asked her to come down to the sheriffs department for an
25 interview and she did.

1 Q So, your first contact with Ms. Hepburn had been at
2 Self?

3 A It was.

4 Q And then at some point you were able to make it up to
5 Greenville Memorial to have further contact with her as
6 well?

7 A Yes, ma'am.

8 Q And when you were at Greenville Hospital was she
9 willing to come back to Laurens County and speak with
10 y'all?

11 A Yes ma'am, she came on her own.

12 Q Okay. And the interviews that were done at the
13 Laurens County Sheriffs Department, in your opinion were
14 they freely and voluntarily given?

15 A Yes, ma'am.

16 Q Based on your contact with Ms. Hepburn?

17 A Yes, ma'am.

18 Q And also just prior to your interview with Ms.
19 Hepburn do you know what other officers or agencies were
20 involved in interviewing Ms. Hepburn?

21 A There were two investigators from the Laurens County
22 Sheriffs Department, Mr. Franklin and Mr. Burns and then
23 there were two SLED agents interviewed her.

24 Q And the two SLED agents include Agent Casey Kirkland?

25 A Yes, ma'am.

1 Q And Agent Sara Hurt and that was in relation to a
2 child fatality?

3 A Correct.

4 Q Task Force?

5 A Yes, ma'am.

6 Q And they had come in at your request?

7 A They did.

8 Q So, the SLED agents had interviewed Ms. Hepburn just
9 prior or sometime before your interview with Ms. Hepburn,
10 is that correct?

11 A Correct.

12 Q And that is the interview you told us about just a
13 moment ago where she made the verbal statement?

14 A It is.

15 Q After reviewing the statement of Mr. Lewis?

16 A Correct.

17 Q At any point in the interview with Ms. Hepburn do you
18 recall if she implicated Mr. Lewis?

19 A She did not.

20 Q Nothing further.

21 THE COURT: Mr. Able.

22 CROSS-EXAMINATION

23 By Mr. Able:

24 Q Lieutenant Plaxico, you initially spoke to Ashley
25 Hepburn at Self Regional Hospital in Greenwood, correct?

1 A That is correct.

2 Q And that took place on the early morning hours of
3 October 13th of 2009?

4 A Correct.

5 Q You spoke to Mr. Lewis at the hospital as well?

6 A Correct.

7 Q And it was Mr. Lewis who told he had found Victim
8 unconscious?

9 A It is.

10 Q Mr. Lewis at that time gave no indication that
11 Victim had been injured at any time earlier in the night,
12 did he?

13 A No, sir.

14 Q Now, when you spoke to Mr. Lewis at the hospital,
15 that was when Mr. Dee Deal was present, you, Ben Blackmon
16 and Dee Deal?

17 A I don't remember Dee Deal being there.

18 Q But during that interview with Mr. Lewis at the
19 hospital he told you that Ashley had put the baby in the
20 bed around 10:30?

21 A Yes, sir.

22 Q And then he related that Ashley had gone to bed with
23 Owen, after putting Audrina down to bed?

24 A That is correct.

25 Q She and Owen then went and got in the bed together?

1 A That is correct.

2 Q And Owen was in the bed across the hall from Victim
3 with his mother?

4 A Correct.

5 Q And Mr. Lewis told you he was watching TV and that
6 everyone else in the house was asleep, didn't he?

7 A Correct.

8 Q He told you everybody else, Mr. Crumley, Ms. Doris
9 Davis, Ashley and Owen were all in the bed asleep?

10 A Correct.

11 Q He was the only one awake?

12 A Correct.

13 Q He told you that later in the evening he had checked
14 on Victim and she was fine, that was around 11:00
15 o'clock?

16 A That is correct.

17 Q Then he told you he went back to watching television?

18 A Correct.

19 Q He told you he later had gone to try and wake Ashley
20 up to see if she wanted something to eat and to watch
21 television?

22 A Correct.

23 Q He told you that morning that he said that Ashley
24 told him no, she didn't want anything and she went back to
25 sleep?

1 A Correct.

2 Q Then he said he went and got himself something to eat
3 and went back to watching TV?

4 A Correct.

5 Q Then later around 1:30 he found Victim unconscious?

6 A That is correct.

7 Q At that time he didn't say anything at all to you or
8 Mr. Blackmon about hearing any footsteps or hearing any
9 noises about a baby being shaken or anything like that,
10 did he?

11 A That's correct.

12 Q Now, after talking to Mr. Lewis at the hospital that
13 was when he was taken to the Laurens County Sheriffs
14 Office to be interviewed?

15 A That is correct.

16 Q That was the first interview by Mr. Ben Blackmon?

17 A Correct.

18 Q And that was at 6:42 a.m. on October 13th of 2009?

19 A That's correct.

20 Q You reviewed that statement?

21 A I have.

22 Q You know what the content of it is?

23 A Yes, sir.

24 Q And the content of it is what he had told you earlier
25 that morning at Self Memorial Hospital?

1 A That's correct.

2 Q At that point there was no change in his story?

3 A No, sir.

4 Q Were you present when he spoke to Officer Garrison?

5 A No, sir.

6 Q Were you present when he spoke to Chaplain Brown?

7 A No, sir.

8 Q Were you present when he, when I say I mean Mr.

9 Lewis, were you present when Mr. Lewis spoke to Dr. Curry?

10 A No, sir.

11 Q So you weren't present when he related that same

12 story to any of those persons?

13 A No, sir.

14 Q Now, Officer, do you know Ms. Carol Starnes?

15 A I do.

16 Q Brandon's grandmother?

17 A I do.

18 Q How do you know her?

19 A I have been knowing her since I was a little boy,
20 they used to live down the street from a place my daddy
21 owned.

22 Q And from your investigation, Officer, in this case
23 there is no physical evidence of any nature that would
24 indicate Ashley Hepburn harmed that child, is it?

25 A Correct.

1 Q There is no physical evidence that would indicate
2 that Ashley Hepburn caused the death of that child?

3 A Correct.

4 Q And that is what you determine as a lead investigator
5 on this case?

6 A Yes, sir.

7 Q Now, you never obtained a written statement from
8 Ashley Hepburn, did you?

9 A Did not.

10 Q There were never any tape recordings or video
11 recordings made of any interview with Ashley Hepburn?

12 A That's correct.

13 Q Now, as to the, you have got the statements. As to
14 the second statement which has been marked as defendant's
15 exhibit number 2. It says in there that Mr. Lewis relates
16 the sounds of hearing the footsteps across the floor and
17 then what he describes as the sounds of a baby being
18 shaken and some more footsteps, correct?

19 A Correct.

20 Q And it is your contention that when you showed that
21 to Ashley the evening of October 13th of 2009 that she
22 said, oh my god all that is true but I don't remember
23 hurting my baby?

24 A That is correct.

25 Q And when she made that statement nobody else was

1 present during the interview with Ashley?

2 A No, sir.

3 Q And the previous interview she said, with Officer
4 Franklin and, Officer Franklin and Mr. Jim Burns were
5 together when they interviewed her?

6 A Correct.

7 Q And then they had the two SLED agents, Ms. Kirkland
8 and, Agent Kirkland and Agent Hurt together when they
9 interviewed her?

10 A Correct.

11 Q But you didn't have anybody there with you when you
12 spoke to Ashley?

13 A I did not.

14 Q Nobody else heard her make those statements?

15 A No, sir.

16 Q Nobody can testify that they heard those statements?

17 A No, sir.

18 Q There, you didn't take any notes?

19 A No, sir.

20 Q You didn't put anything in writing?

21 A No, sir.

22 Q You made no notes about any of the conversation?

23 A That is correct.

24 Q Now, Officer, you had prepared a supplemental report
25 concerning your interview of Ashley Hepburn, didn't you?

1 A Correct.

2 Q And the first supplemental report you prepared was
3 done on October, it was dated October 19th of 2009?

4 A That is correct.

5 Q Now, the first incident or incident report in this
6 case, that was prepared on October 13th of 2009?

7 A That is correct.

8 Q And that was done by Officer Garrison?

9 A Yes, sir.

10 Q And you weren't present for that conversation?

11 A No, sir.

12 Q Now, as to the first supplemental report on October
13 19th of 2009, about half way down you had indicated that
14 Brandon had come back and given his second statement?

15 A Correct.

16 Q And it was after that second statement you said that
17 you interviewed Ashley and she stated that she had done
18 nothing to the child, that she had just woke up to her
19 boyfriend yelling for help?

20 A That is correct.

21 Q So that was after Mr. Lewis had given not just the
22 first statement but the second statement that has been
23 marked as defendant's exhibit number 2?

24 A Correct.

25 Q You went and spoke to her at that time and you

1 prepared in your supplemental report dated October 19th of
2 2009 then an investigating officer interviewed Ashley and
3 she stated that she had done nothing to the child, that
4 she had just woke up to her boyfriend yelling for help?

5 A That is correct.

6 Q There is nothing else in any of that statement about
7 Ashley saying anything else?

8 A That is correct.

9 Q And then you prepared a second supplemental report?

10 A Correct.

11 Q Now, before you prepared that second report October
12 of 2010 you had testified at a DSS hearing?

13 A I had.

14 Q And that was the first time you indicated anything
15 about Ashley saying this about, oh my god all of this is
16 true?

17 A That is correct.

18 Q Again, you didn't make any writings or
19 contemporaneous notes at the time?

20 A No, sir.

21 Q It wasn't recorded?

22 A No, sir.

23 Q It wasn't videotaped?

24 A No, sir.

25 Q You just said in May of 2010 at that hearing this is

1 what she said?

2 A Correct.

3 Q And you didn't say that in the case-in-chief by DSS,
4 you didn't say on cross-examination by me, you said it at
5 the very end when you were being cross-examined by Mr.
6 Wise?

7 A That is correct.

8 Q Now, on the second report you prepared that was dated
9 October 11th of 2010?

10 A Correct.

11 Q And that report was prepared 363 days after your
12 report, the initial report of October the 13th of 2009?

13 A Correct.

14 Q And you interviewed Ashley you are saying on October
15 13th of 2010?

16 A That is correct.

17 Q And so this second report of October 11th of 2010 was
18 prepared 357 days after the first supplemental report
19 where you said she didn't say anything?

20 A That's correct.

21 Q So the second supplemental report, you come back
22 almost a year later and include in that report these
23 statements that you attribute to Ms. Ashley Hepburn as she
24 said, oh my god all of this is true but I don't remember
25 hurting my baby?

1 A That is correct.

2 Q Now, when Mr. Burns and Mr. Franklin interviewed
3 Ashley on October 13th of 2009, they didn't obtain a
4 written statement?

5 A They did not.

6 Q And then she was subsequently interviewed that same
7 afternoon by Agent Kirkland and Agent Hurt?

8 A That is correct.

9 Q And they didn't obtain a written statement?

10 A No, sir.

11 Q She had told them pretty much the same series of
12 events, the same history that she related to everybody
13 else that day, correct?

14 A Correct.

15 Q They didn't obtain a written statement, they made
16 notes?

17 A That is correct.

18 Q You were aware that they had prepared a memorandum of
19 those notes?

20 A I am not, I was not.

21 Q Now, in your report of October 11th of 2010 you say
22 Ashley Hepburn was interviewed by Franklin and Burns on
23 which no statement was given but she did sign her waiver
24 of rights. Ashley Hepburn was interviewed by SLED agents
25 Casey Kirkland and Sara Hurt. Now, Casey Kirkland's name

1 changed between the time of, the beginning of this
2 investigation to her current name as Kirkland, correct?

3 A Yes.

4 Q So, in your report that you made a year later you
5 included the name, the name changed to Casey Kirkland?

6 A I did.

7 Q I believe she got divorced and her name changed?

8 A I did.

9 Q Now, in that report, your testimony just now was that
10 you allowed Ashley to read Brandon's second statement?

11 A That is correct.

12 Q Which has been marked as defendant's exhibit number 2
13 and that is when she made this statement?

14 A That is correct.

15 Q There is nothing in your, that report that you
16 prepared a year later saying that you allowed Ashley to
17 read Brandon's statement, is it?

18 A That is correct.

19 Q You didn't obtain any written statement?

20 A No, sir.

21 Q No one ever obtained a statement from her?

22 A No, sir.

23 Q It goes on to say that Ashley Hepburn was then
24 interviewed by Plaxico at which time she started crying
25 and said, oh my god all of this is true but I don't

1 remember hurting my baby. Ashley asked Plaxico, do you
2 think I did this to my baby, I don't remember it. Plaxico
3 then replied, I think you remember and need just to tell
4 me what happened. And Ashley raised her voice saying I
5 wouldn't hurt my baby, I wouldn't hurt my baby?

6 A Correct.

7 Q And you terminated the interview?

8 A I did.

9 Q You released her to go home?

10 A Yes sir, she left the building.

11 Q She left the building?

12 A She did.

13 Q And she had just told you all of that was true?

14 A Correct.

15 Q And you didn't arrest her?

16 A I did not.

17 Q Now, Officer, on January the 13th of 2010 there was a
18 preliminary hearing held in this case, correct?

19 A Correct.

20 Q And I asked you at that preliminary hearing on
21 October the 13th of 2010, what evidence do you have that
22 says my client was involved with the shaking of this baby
23 other than anything, anything other than the statement of
24 Richard Brandon Lewis. Do you remember that?

25 A I do.

1 Q And what was your answer?

2 A I didn't have anything else.

3 Q You told me, at this time nothing; correct?

4 A Correct.

5 Q You didn't say anything about a statement being made
6 by Ashley Hepburn?

7 A I did not.

8 Q You didn't say anything her supposedly saying, oh my
9 god all of this is true?

10 A Correct.

11 Q You didn't tell me anything about her saying, I don't
12 remember hurting my baby?

13 A Correct.

14 Q And the time of that preliminary hearing, January
15 13th of 2010, that was only three months after this
16 incident, correct?

17 A Correct.

18 Q And it wasn't until May of 2010 that you ever made
19 mention of those statements?

20 A Correct.

21 Q You told me there was no evidence that Ms. Hepburn
22 was involved with these injuries to Victim except the
23 second statement of Richard Brandon Lewis?

24 A Correct.

25 Q And that statement was given some five hours after he

1 had given his first statement?

2 A Correct.

3 Q And that was the reason that you arrested my client
4 was based solely upon this statement of Richard Brandon
5 Lewis?

6 A It was.

7 Q And there were only two people to blame that night,
8 weren't there?

9 A Correct.

10 Q Him or her?

11 A Correct.

12 Q And you would expect him to blame her, wouldn't you?

13 A Correct.

14 Q Thank you.

15 THE COURT: Mr. Wise?

16 REDIRECT EXAMINATION

17 By Mr. Wise:

18 Q Officer Plaxico, how common is it to show another
19 person's statement to see their reaction to it?

20 A We do it quite often.

21 Q Is that a good investigative technique?

22 A It is.

23 Q And you got to talk to Brandon several days after he
24 gave that statement, didn't you?

25 A I did.

1 Q At his grandmother's house?

2 A Yes, sir.

3 Q And he answered all of your questions?

4 A He did.

5 Q And I think we also discussed earlier, did you ever
6 ask to see him again after that, did you ever ask to talk
7 to him again after you talked to him at his grandmother's
8 house?

9 A Yes, I went to see him one time after that.

10 Q One time after that?

11 A Yes, sir.

12 Q So two times?

13 A Yes, sir.

14 Q Did he tell you anything that would justify getting a
15 warrant on him?

16 A No, sir.

17 Q And are you also aware that he testified at a DSS
18 hearing?

19 A I am.

20 Q Did you learn that he said anything in May of 2010
21 that would justify getting a warrant on him?

22 A No, sir.

23 Q And the statement that Ashley was giving was, was it
24 the same statement that Brandon said originally at the
25 hospital or the same facts?

1 A Pretty much.

2 Q When you were talking to Ms. Hepburn she was pretty
3 much saying what Brandon had said at the hospital?

4 A Yes, sir.

5 Q And he was the first one to say something at the
6 hospital?

7 A Yes sir, I think we talked to him first.

8 Q All right. Thank you.

9 RECROSS-EXAMINATION

10 By Ms. Mayes:

11 Q Mr. Able was asking you about physical evidence that
12 conclusively ties Ms. Hepburn to the crime. Is there any
13 physical evidence which conclusively ties either Mr. Lewis
14 or Ms. Hepburn to the crime?

15 A No, ma'am.

16 Q All right. And does the fact that there isn't
17 conclusive physical evidence such as fingerprints mean
18 that nobody can ever be arrested?

19 A That's correct.

20 Q In other words, does that mean you can't prosecute a
21 case just because you don't have fingerprints?

22 A You have to go with what you have got at the time.

23 Q Thank you, nothing further.

24 RECROSS-EXAMINATION

25 By Mr. Able:

1 Q And what you had at the time was this statement?

2 A That is correct.

3 Q Of Richard Brandon Lewis?

4 A Yes, sir.

5 Q And subsequently he was arrested?

6 A He was.

7 Q Mr. Lewis?

8 A He was.

9 Q By SLED?

10 A Correct.

11 Q And the second time you had gone to visit him, well
12 the first time was when he ran out the door at his
13 grandmother's house?

14 A Correct.

15 Q And the second time was when you went to see him at
16 the hospital when he tried to kill himself the day after
17 Victim died?

18 A Correct.

19 Q Thank you.

20 REDIRECT EXAMINATION

21 By Mr. Wise:

22 Q And you also, did you also have an admission from Ms.
23 Hepburn?

24 A Sir?

25 Q When you made the decision to arrest somebody did you

1 also have an admission from Ms. Hepburn?

2 A The only thing I had was Mr. Lewis' statement and
3 what she said to me.

4 Q What she said to you, is that an admission from her?

5 A It was.

6 Q Thank you.

7 THE COURT: Thank you, sir, you can step down. Mr.
8 Wise, call your next witness.

9 MR. WISE: We call Agent Kirkland.

10 THE COURT: Agent, I will remind you that you are
11 still under oath from your previous testimony. Again,
12 ladies and gentlemen of the jury, I anticipate that Mr.
13 Wise will elicit testimony about previous statements you
14 heard earlier in this trial. Again, at the time that
15 statement was heard by you you had not heard the full
16 statement due to the rules of evidence. At this point in
17 the trial it is proper for you to receive or to hear the
18 full statement based upon the rules of evidence. No one
19 is trying to prevent you from hearing the full statement
20 earlier in the trial, it is simply a matter of law that
21 those statements could not come in at that point and time
22 based on the rules of evidence. You may proceed, Mr.
23 Wise.

24 DIRECT EXAMINATION

25 By Mr. Wise:

1 Q Agent Kirkland, you interviewed Ms. Hepburn, did you
2 not?

3 A Yes, sir.

4 Q Did you obtain a written statement from her?

5 A No, sir.

6 Q Did you try to obtain a written statement from her?

7 A Yes, sir.

8 Q Did you ask her for one?

9 A Yes, sir.

10 Q Did she give you one?

11 A No, sir.

12 Q Did she give a reason for refusing?

13 A She was very defensive.

14 Q Excuse me?

15 A She was defensive during the interview.

16 Q Turn your notes, if you would please, and look at the
17 bottom of the second page of your notes, the very last
18 line that begins with Brandon. Do you see that?

19 A Yes, sir.

20 Q What was the question that preceded that?

21 A At that time I was asking who was in the house and
22 went through each person in the house, what they were
23 doing. And I asked about Brandon, about what was Brandon
24 doing.

25 Q So you asked her what was Brandon doing?

- 1 A Yes, sir.
- 2 Q What was her response to that?
- 3 A Brandon was watching TV during it all.
- 4 Q During it all?
- 5 A Yes, sir.
- 6 Q Was that words that she put in?
- 7 A That is what I wrote down.
- 8 Q That wasn't your interpretation of anything she said?
- 9 A No, sir.
- 10 Q All right. Did she also tell you, what did she tell
- 11 you about Daniel Hepburn?
- 12 A That she doesn't put it past their father to do this
- 13 and that the dad, Daniel, resented her for the divorce and
- 14 he has aggressive behavior.
- 15 Q And did you accuse Mr. Hepburn of being involved in
- 16 this?
- 17 A No, sir. I had spoke with him previously at the
- 18 hospital and knew that he had not seen or had not been
- 19 around the children in four to five days.
- 20 Q Thank you.

21 CROSS-EXAMINATION

22 By Ms. Mayes:

- 23 Q Agent Kirkland, just to go back to where you fit in
- 24 the timeline of your contact with Ms. Hepburn, sometime
- 25 after she left Self Hospital she went to Greenville

1 Memorial, correct?

2 A Yes.

3 Q And you also had the opportunity to be at Greenville
4 Memorial on the early morning hours or into the noon hours
5 of October 13th of 2009, correct?

6 A Correct.

7 Q And for what purpose were you at Greenville Memorial?

8 A I was contacted by Lieutenant Plaxico to assist and
9 I, myself and Agent Hurt went to Greenville Memorial
10 Hospital, photographed the victim, [Victim] Hepburn, while
11 she was in the hospital room in ICU and spoke with
12 physicians.

13 Q So are you talking about these photographs of [Victim]
14 that we have seen before, this being State's exhibit
15 number 7?

16 A Correct.

17 Q And in these photographs that depict the stomach
18 bruises as well as other bruises, they were taken by you
19 and Agent Hurt?

20 A Correct.

21 Q Do your notes or does your information reflect what
22 time those photographs were taken?

23 A On my goldenrod I document what time, it was around
24 1:00.

25 Q So it was around 1:00 p.m., correct?

1 A Correct.

2 Q So if EMS was called at 1:20 a.m. in the early
3 morning hours, we are talking about little less than
4 twelve hours later, correct?

5 A Correct.

6 Q So you photographed Victim and was Plaxico,
7 Lieutenant Plaxico also at Greenville Memorial?

8 A Yes.

9 Q And at some point the decision was made to ask Ms.
10 Hepburn to come back to the, or come down to the sheriffs
11 department in order for additional interviews to take
12 place, correct?

13 A Correct.

14 Q So, she leaves Greenville Memorial and voluntarily
15 comes to the sheriffs department?

16 A Yes.

17 Q And you and Agent Hurt also arrive at the sheriffs
18 department?

19 A Yes, we came in after she did.

20 Q And at some point Lieutenant Plaxico is also back at
21 the sheriffs department after leaving Greenville Memorial,
22 correct?

23 A Correct.

24 Q So, she gets down there to the sheriffs department
25 and at what is called, what is noted as 15:55 she has been

1 read her Miranda warnings or Miranda rights, what time
2 would that be in civilian time?

3 A 3:55 p.m.

4 Q So by 3:55 she is back here at the, well she is at
5 the sheriffs department, she waives her Miranda rights and
6 then she has contact with you and Agent Hurt, correct?

7 A Correct.

8 Q Now, when you go about the interview, how do you
9 approach it in terms of needing certain information,
10 everything that may have occurred that night of the
11 incident?

12 A When we do interviews involving child abuse or if the
13 child is already deceased by that time, we normally go
14 back twenty-four hours from when the child was presented
15 to the ER or if we found the deceased at the home. At
16 that time we want every detail, the mother or whoever we
17 are interviewing can give us, what the child ate, what the
18 child plays with, who was around the child, when the child
19 went to the bathroom and then we try to find holes in the
20 story to go back and we will do follow-up questions. And
21 then at that time we need to know who was in the house and
22 what were they doing.

23 Q And just to clarify, you were with the special
24 victim's unit at the State Law Enforcement Division?

25 A Yes.

1 Q Is this the first child homicide case you had
2 investigated?

3 A No, ma'am.

4 Q So, you had experience investigating a homicide of
5 children, correct?

6 A Correct.

7 Q And that also includes cases of abuse of head injury
8 such as Victim ?

9 A Yes.

10 Q So, you are trying to find out who is in the home in
11 the last twenty-four hours, and what did Ms. Hepburn tell
12 you in that regard?

13 A That it was her, Ashley Hepburn, Brandon Lewis, her
14 mom, Doris and her mom's boyfriend, David Crumley.

15 Q And did you also ask questions concerning Victim
16 health and whether she had been in a normal state of
17 health up to the point that she was found by Mr. Lewis?

18 A Yes, she was fine, she ate earlier that day, she was
19 playing with her brother, Owen.

20 Q And then Ms. Hepburn reported to you that her mom and
21 Mr. Crumley had gone to bed even before Ms. Hepburn
22 arrived, correct?

23 A Correct.

24 Q So, then it is her and Mr. Lewis and the two-year-old
25 in the home with Victim , correct?

1 A Correct.

2 Q Now, at any point during this interview did she
3 implicate the codefendant, Brandon Lewis?

4 A No, ma'am.

5 Q Would she have had the opportunity to do so?

6 A Yes. I asked, you know, who was in the home and at
7 that time trying to figure out what everybody was doing,
8 Doris and David were asleep. She didn't know who could
9 have done it. She never said Brandon, she said she didn't
10 put it past Daniel, doesn't put it past their father to do
11 this.

12 Q So, when you are asking her who could have done it,
13 she did not implicate Mr. Lewis and instead implicates the
14 biological father who had not had contact with the child
15 in over four days, correct?

16 A Correct.

17 Q And did you make it clear to Ms. Hepburn that you
18 were investigating not only her injuries that night but
19 any previous injuries?

20 A Yes.

21 Q How did you make that clear?

22 A We wanted to know if the child had had any previous
23 injuries prior to this event, had she been to the doctor
24 and I believe, that is when she said that, had the slight
25 bruise on the chin and a bruise on the stomach.

1 Q All right. And at any point did she implicate Mr.
2 Lewis on the bruise on the chin or the bruise on the
3 stomach?

4 A No.

5 Q And did she report anything to you about Victim
6 being afraid to be around Mr. Lewis?

7 A No.

8 Q Did she ask you to talk to her family members who
9 could corroborate that Victim was afraid to be around Mr.
10 Lewis?

11 A No.

12 Q So at this point and time she had not implicated him
13 in any way, is that correct?

14 A Correct.

15 Q Now, can you force someone to give you a written
16 statement during the course of a law enforcement
17 interview?

18 A No, ma'am.

19 Q Why or why not?

20 A It is their legal right, they don't have to write a
21 statement.

22 Q All right. Was she aware she had the opportunity to
23 provide a written statement?

24 A Yes.

25 Q But instead she participated in a verbal interview,

1 correct?

2 A Correct and I took notes and then at that time we had
3 the opportunity to write a memorandum of the interview
4 based off of our written notes.

5 Q And how would you describe her demeanor during the
6 course of the interview?

7 A She was calm and then she would yell out at, towards
8 us and then we would calm her back down and then she would
9 yell out, she was very defensive.

10 Q And after your interview with Ms. Hepburn did you see
11 anyone else having contact with her?

12 A Lieutenant Plaxico went in right after we did.

13 Q And he had contact with her one on one?

14 A Yes, with the door cracked.

15 Q Nothing further.

16 CROSS-EXAMINATION

17 By Mr. Able:

18 Q Now, Agent, you said my client was defensive. During
19 the interview you were accusing her of hurting her baby,
20 weren't you?

21 A No, sir. I was asking questions to get information
22 regarding her child's injuries that she was in the
23 hospital for.

24 Q You didn't say to her that she was the one who did
25 it, that she needed to confess to it?

1 A No.

2 Q Now, you said about, she had the opportunity to
3 provide a written statement, that is not in your
4 memorandum, is it?

5 A No, sir.

6 Q You didn't put anything in there about y'all had
7 provided her a memorandum, offered to have her write a
8 statement that she refused?

9 A No sir, when we write a memorandum interview, there
10 is not a statement that is written to go along with it.

11 Q Okay. But I am saying, you didn't put that in your
12 memorandum from your notes. Your notes don't reflect that
13 you offered to have her write a written statement and that
14 she refused to do that?

15 A No, sir.

16 Q Now, as it concerns the statement, you are saying,
17 Ashley stated that Brandon was watching TV during all of
18 this. She had told you also, Ashley stated that when she
19 went to her room to read two books to Owen and she fell,
20 and they both fell asleep in the bed, correct?

21 A Are you on the memorandum?

22 Q I am sorry?

23 A Where on the memorandum?

24 Q Oh, I am sorry. Second page, fifth line down about
25 half way through. It says Ashley stated that she then

1 went to her room to read two books to Owen and they both
2 fell asleep in the bed?

3 A Yes, sir.

4 Q Ashley stated that Brandon asked her if she wanted to
5 watch Congo and if she wanted any food that his
6 grandmother made and she fell asleep again?

7 A Yes, sir.

8 Q So, she was telling you she was asleep?

9 A Yes, sir.

10 Q Throughout this whole thing, correct, that is the
11 only statement she ever made, she was asleep?

12 A Correct.

13 Q Except Brandon had woke her up, like a lot of the
14 testimony has been revealed, Brandon woke her up to see if
15 she wanted to come watch a movie and eat some food?

16 A Correct.

17 Q So, she said she was asleep and she was saying, Mr.
18 Wise asked you a moment ago about the statement, Ashley
19 stated that Brandon was watching TV during all of this.
20 She was saying that he was the only one up, correct?

21 A She said he was watching TV.

22 Q But your statement says Ashley stated that Brandon
23 was watching TV during all of this?

24 A Yes.

25 Q And that he was the only one up. Is there anything

1 in there to indicate anybody else was up?

2 A No, sir.

3 Q Now, we are talking about the father. You had asked
4 Ashley about if her mother could have done this, didn't
5 you?

6 A I asked about anybody in the house.

7 Q You asked about Mr. Crumley, if he could have done
8 it?

9 A Correct.

10 Q You asked if the father was capable of doing it?

11 A I asked if Brandon, Doris, David and herself and then
12 I said if they did not do it who else could have done it.

13 Q And that is when she said something about the father?

14 A Correct.

15 Q Now, your notes don't reveal any of the questions you
16 asked, do they?

17 A No sir, I write my answers or her answers.

18 Q You just write down answers?

19 A Correct.

20 Q You don't have a list of questions to match up those
21 answers to?

22 A We have normal questions that we ask for any child
23 that passes away or is abused and from there, depending on
24 the answers we are giving we follow-up with other
25 questions.

1 Q I am saying, from the notes that I have been
2 provided, you don't have questions to those answers?

3 A No, sir.

4 Q And this interview took place on October 13th of
5 2009, 6:00 o'clock a.m.

6 A 6:00 p.m.

7 Q I am sorry, 6:00 p.m.

8 A Yes, sir.

9 Q Your memorandum of the interview was not prepared
10 from your notes until April 7th of 2010?

11 A Correct, I had my notes at that time.

12 Q You had your notes but not the questions?

13 A Correct, I didn't write the questions. I don't ever
14 put the questions in a memorandum of an interview.

15 Q Now, your interview as not taped?

16 A No, sir.

17 Q Your interview was not videoed?

18 A No, sir.

19 Q You are going off your notes from October 13th of
20 2009 and prepared your memo some five, six months after
21 that?

22 A Yes, sir.

23 Q Now, didn't she tell you that Brandon was the only
24 one up?

25 A She said that he was watching TV.

1 Q Okay. And that, that would have meant that he was
2 the only one who could have done this, correct?

3 A She never came out and said that he was the only one
4 that could have done this.

5 Q Well, what I am saying is is that she was in the bed
6 asleep and Brandon was watching TV?

7 A Correct.

8 Q And you don't interpret that to mean that he was the
9 only one who could have done it?

10 A No sir, I don't interpret their words.

11 Q She told you that though, didn't she?

12 A She told me that Brandon was watching TV and that she
13 was in the bed asleep as well as her mother and her
14 mother's boyfriend were asleep.

15 Q And you are going off those notes you made?

16 A Yes, sir.

17 Q My point is, there was nothing in your notes or in
18 your memorandum where Ashley said Doris Davis couldn't
19 have done this, David Crumley couldn't have done this,
20 Brandon Lewis couldn't have done this?

21 A No sir, when I followed up with the questions, I said
22 if Doris couldn't have done it, David couldn't have done
23 it and Brandon or yourself who could have because she at
24 that time, she had said that Brandon, I mean her mother,
25 she never saw her mother or her mother's boyfriend come

1 out of their bedroom.

2 Q And she did say that Brandon Lewis was watching
3 television?

4 A She said he was watching TV during all of this.

5 Q And she was in the bed asleep?

6 A Yes, sir.

7 Q Thank you, that is all I have.

8 REDIRECT EXAMINATION

9 By Mr. Wise:

10 Q When you talk about the types of questions that are
11 asked when you are conducting an interview like this.

12 A Sir, repeat that, I am sorry.

13 Q What are you talking about the type of questions you
14 ask people when you are being interviewed?

15 A We ask open questions. Can you start at the
16 beginning of, at this time I told her to start at 8:00
17 a.m. on October the 12th which was the day before the
18 child was found.

19 Q And what are open questions, how would you describe
20 those generally?

21 A They are not leading, it is not an answer that I
22 expect. I don't ask the question with the answer in there
23 that I expect.

24 Q You don't ask questions in which you expect the
25 person just to agree with your statement?

1 A Correct.

2 Q You let them speak?

3 A Yes.

4 Q Did she ever tell you that she thought Brandon was
5 watching TV during it all?

6 A She stated that Brandon was watching TV during it
7 all.

8 Q Did she say that, did she say how she knew that?

9 A No, sir.

10 Q You say she was, at the time, yelling at you?

11 A Yes, sir.

12 Q Raising her voice?

13 A Yes, sir.

14 Q Is that what you mean by defensive or was defensive,
15 something else?

16 A That way.

17 Q Did you ever look at her and accuse her of injuring
18 her child?

19 A No, sir.

20 Q Thank you.

21 RECROSS-EXAMINATION

22 By Ms. Mayes:

23 Q Agent Kirkland, the memorandum that has been
24 discussed by Mr. Able, what is that based on?

25 A My written notes.

1 Q And are your written notes taken contemporaneously
2 with the interview with Ms. Hepburn?

3 A Yes, ma'am.

4 Q In other words, as you ask a question and she
5 provides an answer you write it down, correct?

6 A Correct.

7 Q And that includes everything from what happened that
8 morning when y'all got up to what did you eat?

9 A Correct.

10 Q All the way to whether Victim had preexisting
11 bruises and who could have done this?

12 A Correct.

13 Q All right. And the memorandum that has been
14 mentioned, is that fair and accurate or fair and correct
15 representation of your notes?

16 A Yes, ma'am.

17 MR. ABLE: Objection, Your Honor.

18 THE COURT: What was the question?

19 MS. MAYES: Yes sir, Your Honor, at this time the
20 State is offering the memorandum pursuant to rule 106,
21 under the rule of completeness. I think there have been
22 portions offered from both defense counsel and at this
23 time I believe that full context of the memorandum of the
24 interview should be considered.

25 THE COURT: Let me see that, if I may.

1 MR. WISE: Under Rule 106, I think we should actually
2 enter a copy of the handwritten notes and the memorandum.

3 MS. MAYES: I have no objection to that.

4 THE COURT: Do you have any objection to the notes.

5 MR. ABLE: I mean she has testified from them, there
6 is no need to have the memorandum and the notes.

7 THE COURT: Let me look at it, if I may. Y'all come
8 up here.

9 (Whereupon, a bench conference was held in the
10 presence of the jury but out of the hearing of the
11 jury.)

12 THE COURT: Ms. Mayes, you can continue. You can go
13 ahead and mark that if you want, we will need a clean copy
14 of the actual typed statement.

15 MR. ABLE: Judge, that is over my objection.

16 THE COURT: Subject to your objection. State's 66
17 and 67 is admitted into evidence.

18 (Whereupon, State's Exhibit 66 and 67 was admitted
19 into evidence.)

20 Q Agent Kirkland, identify State's exhibit number 67?

21 A Yes. It is the memorandum of the interview that I
22 took or that I typed from the interview of Ashley Hepburn
23 on October 13th of 2009.

24 Q And State's exhibit 66?

25 A They are my handwritten notes from the interview of

1 Daniel Hepburn on October 13th at 1:30 as well as my
2 handwritten notes from the interview of Ashley Hepburn on
3 October 13th at 6:00 p.m.

4 Q State's exhibit 66, if you could identify that?

5 A My handwritten notes from the interview of Ashley
6 Hepburn on October the 13th starting at 6:00 p.m.

7 Q And are those the same notes that you ultimately used
8 to prepare the written memorandum?

9 A Yes.

10 Q And I believe that is the written memorandum that is
11 now in evidence?

12 A Correct.

13 Q State's exhibit 67?

14 A Yes.

15 Q If you could, refer to the last page of your
16 handwritten notes and there is some text written upside
17 down, what is that text?

18 A Here?

19 Q Right.

20 A That was notes that I was taking, that was at the end
21 of the interview.

22 Q In reference to what?

23 A Questions that were being asked to Ashley.

24 Q Okay. About what specific topic?

25 A Previous injuries and how Victim was that day.

1 Q Now, what other information is written upside down?

2 A That Ashley's mother is on antidepressant every day.

3 Q All right. So, just to clarify, that is a reference
4 to Ashley's mother, Doris Davis and not to Ashley herself,
5 correct?

6 A Correct.

7 Q Nothing further.

8 MR. ABLE: Nothing further.

9 MR. WISE: Nothing further.

10 THE COURT: Ladies and gentlemen, we will take a ten
11 minute break. Don't discuss the case and will have you
12 back in about ten minutes.

13 (Whereupon, the jury was excused from open court for
14 a break.)

15 THE COURT: We will take a short break.

16 (Whereupon, a short break was taken.)

17 THE COURT: Before we bring the jury back in let's go
18 ahead and address the objection, Mr. Able needs to have an
19 opportunity to address the objection that he had to the
20 introduction of the last two exhibits, the typed statement
21 as well as the Agent's notes. Anything else you need to
22 put on the record about that, Mr. Able?

23 MR. ABLE: No sir, just my position that she had
24 testified before from those, not the notes but the
25 memorandum. On earlier testimony I think it was all in

1 her testimony. I didn't see a necessity of putting it in.

2 THE COURT: I understand. At the very least I
3 believe that is probably cumulative evidence but your
4 objection is noted. I also had mentioned to you at
5 sidebar that we had, about thirty minutes ago, that there
6 was and you had informed me that it would not be your
7 intention to seek a jury charge concerning the
8 voluntariness of your client's statements to law
9 enforcement at this particular point and time. The charge
10 being along the lines that the jury would have to find
11 that beyond a reasonable doubt that your client's will is
12 not overborn, et cetera, et cetera, is that correct?

13 MR. ABLE: That is correct, Your Honor.

14 THE COURT: Very good. Let's have the jury, please.
15 (Whereupon, the jury came into open court at
16 approximately 10:52 a.m.)

17 MR. ABLE: Judge, can we approach?

18 THE COURT: Yes.

19 (Whereupon, a bench conference was held in the
20 presence of the jury but out of the hearing of the
21 jury.)

22 THE COURT: Ladies and gentlemen, I am going to have
23 to ask you to step back out again, I apologize. There has
24 been a matter between the time I called for you and you
25 came out here, a matter arose that I have to discuss. If

1 you will, adjourn and don't discuss the case.

2 (Whereupon, the jury was excused from open court.)

3 THE COURT: The jury is out. At sidebar Mr. Able
4 informed me and I have a copy of the physician's records
5 here with me. One of the diagnosis, having a discharged
6 diagnosis, or Axis I, diagnosis is adjustment disorder
7 with depressed mood as well as cannabis abuse. Mr. Wise
8 has an issue with the cannabis abuse being referred to.

9 MR. WISE: I do, Your Honor, and the reason is this.
10 You know, I objected to the comment about his being,
11 attempted to take his life in the first place. Everybody
12 had the discovery, these medical records. There wasn't a
13 scintilla of evidence, scintilla of evidence in those
14 medical records that says that he did anything to harm
15 this child. What they are going to argue is that he
16 attempted to kill himself because he killed the child.
17 That is not in keeping with the testimony of Dr. Hill who
18 was given reason and explanations for his depression,
19 based upon her interview and analysis of the situation.
20 And the idea of cannabis abuse which has nothing to do
21 with this trial, no one has even said they were smoking
22 marijuana on the night in question, no one has said that
23 cannabis abuse would cause someone to batter a child. It
24 is so over prejudicial that it is simply not probative of
25 anything and certainly more prejudicial than probative.

1 Dr. Hill talked about his depression and what she learned
2 from the history of it, I think is inappropriate to refute
3 the inference that they are going to make that he killed
4 himself because he harmed the child.

5 THE COURT: Page two of the report also indicates,
6 "reports occasional marijuana use, is unwilling to
7 quantitate frequency of use." The second page also
8 references a, "past arrest for possession of marijuana".

9 MR. WISE: I think several years ago he ended up in
10 the PTI program.

11 THE COURT: Mr. Able, for what purpose do you want to
12 go down this road.

13 MR. ABLE: Judge, I think as you have already noted,
14 it is part of a diagnosis. I think if Mr. Wise is going
15 to put this doctor up and say, this was his diagnosis I
16 don't think we can just say this was part of it, if they
17 want part of it to come in I think all of it has to come
18 in. That is part of why he was there, that is part of the
19 Doctor's diagnosis.

20 MR. WISE: That may be part of what was diagnosed,
21 but it wasn't the part of why he was there. He was there
22 for the depression arousing our of this incident which
23 they are going to infer because he harmed the child when
24 everybody knows there is nothing in the record at the
25 hospital that says that. So, I have got to refute that

1 impression.

2 THE COURT: It is my understanding that, would I be
3 correct in saying that there was no indication of
4 marijuana use on this particular evening, on the evening
5 or at any time preceding the evening which would have
6 affected his mental state at the time the incident took
7 place.

8 MR. WISE: That is correct. The statement from the
9 officers, they were asked that and both of them denied
10 marijuana use, I know Mr. Lewis did.

11 THE COURT: Now, the obvious question is to what
12 extent the prior marijuana use could have affected him and
13 rendered him more or less susceptible to depression or may
14 have affected his mental state in such a way as to, to
15 cause him to theoretically shake the child.

16 MR. WISE: And if someone has an expert that can say
17 that it does that then I would guess it would be
18 admissible if they have got an expert to say that.
19 Without an expert to say that certainly it is prejudicial
20 and probative. I don't think you will find an expert that
21 says that.

22 THE COURT: Are you representing to the Court, Mr.
23 Wise, that you have spoken to the doctor and the doctor
24 has told you that cannabis abuse did not factor into the
25 incidences or his mental state?

1 MR. WISE: I don't think she has an opinion one way
2 or the other. I have talked to her but I didn't ask her
3 that specific question. I will be happy to call her up
4 here and ask her.

5 THE COURT: She is probably the only person in the
6 court house right now who would be qualified to answer
7 that question and that is key to me ruling upon Mr.
8 Wise's, I am sorry, Mr. Able's, at least proffer that
9 testimony and see what she has to say. If we could have
10 the doctor to come on up.

11 MR. WISE: Your Honor, I assume with this little
12 hearing we can dispense with the qualifications?

13 THE COURT: Right, we can.

14 Vernetta Hill Jacobs, being
15 first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 By Mr. Wise:

18 Q Dr. Jacobs, you were the psychiatrist that saw
19 Brandon Lewis at the V.A. hospital?

20 A Yes, I was.

21 Q And I believe you were sitting in the courtroom
22 during our little discussion we had?

23 A Yes.

24 Q To what affect did marijuana use, prior use or
25 whatever have, do you have an opinion as to what affect it

1 may have had on causing anything that would result in
2 abusive behavior of a child?

3 A I won't be able to clearly state that and the reason
4 is is that he was unwillingly to tell me how frequently he
5 used marijuana. And so because of that I can't really
6 make a determination as to how marijuana may have
7 contributed to his depression, he did not want to discuss
8 it.

9 Q Okay. Let's back up a minute. So you are unable to
10 determine whether or not it affects his depression,
11 correct?

12 A Right.

13 Q What about the possibility, are you qualified or is
14 anybody qualified to talk about whether or not marijuana
15 would cause aggressive reaction?

16 A I can talk about the affects of marijuana.

17 Q Okay.

18 A Yes, I can. Marijuana is a psychoactive substance
19 that can affect the brain. It can lead to episodes of
20 agitation, it can lead to a motivation, it can lead to
21 symptoms that can mimic depression. And it could possibly
22 have had an affect but I can't say specifically to this
23 person.

24 Q Can you make a determination, the last time marijuana
25 was used by Mr. Lewis?

1 A No, he was unwilling to discuss marijuana and I
2 documented that in my notes.

3 Q All right.

4 THE COURT: Ms. Mayes?

5 MS. MAYES: No questions, Your Honor.

6 THE COURT: Mr. Able?

7 MR. ABLE: No questions, Your Honor.

8 THE COURT: Thank you, doctor, you can step down.

9 Mr. Able?

10 MR. ABLE: Judge, I think it is clear based upon the
11 doctor's testimony that it could have played a role, his
12 cannabis abuse could have played a role in his actions
13 that night. And based upon that we think we would be
14 allowed to get into it.

15 THE COURT: Mr. Wise?

16 MR. WISE: I don't think the testimony shows it is
17 going to be a player role in the activities that night.
18 Obviously, it could play a role in the cause of his
19 depression which that creates another issue.

20 THE COURT: Mr. Wise, the discussions with the
21 doctor, maybe I should have asked her while she was up
22 here but what is the significance of an Axis I diagnosis.

23 MR. WISE: Judge, you have a bigger background on
24 that than I do. We can ask her again.

25 THE COURT: Ma'am, come on back up. Just so the

1 record is clear for purposes of appeal, explain to the
2 Court, if you will, the significance of an Axis I
3 diagnosis as well as the other axis that psychiatrists
4 will describe in a psychotic occasion, please, Doctor.

5 A In my evaluation of this, of any patient I review
6 mood, psychotic, substance and anxiety disorders. And I
7 make a determination as to what diagnosis may be present
8 from the interview and I document all of that information
9 on an Axis I. The purpose of this is it helps a provider
10 to know how to accurately provide treatment for patients
11 and what to look for in the future in terms of the
12 condition itself and improvement.

13 THE COURT: And, Doctor, is it possible for any given
14 patient who presents psychotic symptoms and psychiatric
15 problems to have multiple Axis I diagnosis?

16 A Yes, it is.

17 THE COURT: So, in your experience, especially with
18 these occurring disorders or patients who are suffering
19 from substance abuse as well as mental illness, how common
20 is it to see a patient suffering from both mental
21 illnesses as well as substance disorder?

22 A Very common.

23 THE COURT: And what percentage of patients would you
24 estimate who suffer from disorders of that nature?

25 A Probably around the nature of fifty to sixty percent

1 of patients.

2 THE COURT: So between half or over half of the
3 patients that you see would have a substance abuse
4 component that would be mentioned in an Axis I diagnosis
5 as well as a psychiatric diagnosis?

6 A That is correct.

7 THE COURT: And here is the chicken or the egg
8 question, to what extent do substance abuse diagnosis play
9 into or would have an affect on psychiatric diagnosis
10 which is made?

11 A That is a chicken or egg question. For this
12 particular individual, because of the background that he
13 had, the childhood that he had that, was very traumatic, he
14 would be predisposed to having episodes of depression. A
15 lot of times in order to deal with depression or even
16 because of environmental exposures a person may use
17 substances as well. It is known that substances can
18 worsen psychiatric disorders. But for this particular
19 individual what came first, I can't really say.

20 THE COURT: But based upon his background and his
21 childhood it would be to a reasonable degree of medical
22 certainty you could state it would be expected for at
23 least, for some more common that perhaps Mr. Lewis would
24 in fact suffer from psychiatric illness such as
25 depression?

1 A Yes.

2 THE COURT: And is it also common to find that people
3 self-medicate from time to time with substances in an
4 effort to address the side affects of their psychiatric
5 problem?

6 A Yes.

7 THE COURT: Do you believe that that is a reasonable
8 possibility in this case with respect to Mr. Lewis'
9 marijuana use?

10 A It is a reasonable possibility.

11 THE COURT: Ms. Mayes, questions?

12 MS. MAYES: No sir, Your Honor.

13 THE COURT: Mr. Able?

14 MR. ABLE: No, sir.

15 THE COURT: Mr. Wise?

16 MR. WISE: None, Your Honor.

17 THE COURT: You may step down. Here is what is
18 concerning me, in all honesty under 403 analysis I do find
19 that it would be, under 401 analysis certainly this is
20 evidence which is relevant to a degree, has some degree of
21 relevance. The Court is conscious of the fact that there
22 has already been questions asked of Mr. Lewis when he was
23 on the stand concerning his cocaine use. Had that
24 question not been asked I would be more inclined to
25 perhaps permit some level of discussion of this but even

1 though I have instructed the jury to disregard and even
2 though I have taken Mr. Wise's motion for a mistrial under
3 advisement, due to that question I believe if we ventured
4 down this road the prejudicial effect of any reference to
5 marijuana use especially there is absolutely, no evidence
6 whatsoever that marijuana played any role in this
7 particular crime. I believe any reference to its use or
8 the Axis I diagnosis of cannabis abuse, I believe that the
9 prejudicial effect of that testimony would outweigh any
10 probative value. I am also swayed, of course, by the
11 testimony of the Doctor in her statement that obviously
12 substance abuse is fairly common in folks, who are
13 suffering from mental illness, and necessarily in my
14 experience would have to elicit substances and it could
15 also be alcohol, it could be prescription medication, it
16 can be over the counter medication. In rare occasions I
17 have heard have attempted to be used to medicate or self
18 medicate for psychiatric symptoms. For those reasons
19 because there seems to be a falsity of evidence linking up
20 any Axis I cannabis abuse diagnosis with the depression
21 diagnosis under 403 I find that that evidence will be
22 excluded. Your objection is noted for the record, Mr.
23 Able.

24 MR. ABLE: Yes, sir.

25 THE COURT: Let's bring the jury in. The record

1 should also reflect that it would be speculative based
2 upon the Doctor's testimony as to whether or not one
3 caused the other.

4 (Whereupon, the jury came into open court at
5 approximately 11:11.)

6 THE COURT: Let the record reflect the jury is
7 present. Mr. Wise, you may continue.

8 MR. WISE: Call Dr. Vernetta Hill Jacobs.

9 Vernetta Hill Jacobs, being
10 first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 By Mr. Wise:

13 Q State your name, please.

14 A Dr. Vernetta Hill Jacobs.

15 Q Dr. Jacobs, where are you employed?

16 A Dorn V.A. Medical Center.

17 Q And how long have you been employed there?

18 A Just over three years.

19 Q Can you give us your educational background?

20 A I completed high school, Rock Hill High School in
21 South Carolina. I completed graduate school at Spelman
22 College in Atlanta, Georgia. And then I completed medical
23 school at Medical University of South Carolina in
24 Charleston, South Carolina. I completed residency at
25 Medical University of South Carolina in Charleston, South

1 Carolina.

2 Q Did you have a specialty field?

3 A General psychiatry.

4 Q And are you a member of any national boards or
5 organizations?

6 A The American Board of Psychiatry and Neurology, I am
7 a Diplomat of that organization.

8 Q And is that a recognized group?

9 A Right. It certifies me in psychiatry.

10 MR. WISE: I would like to qualify this witness as an
11 expert in the field of psychiatry.

12 THE COURT: Any objections?

13 MR. ABLE: No objection.

14 MS. MAYES: No objection, Your Honor.

15 THE COURT: Ladies and gentlemen of the jury, again,
16 normally a person can't testify or give opinion testimony.
17 Usually when a person testifies they have to relate to you
18 something that they observed personally through one of
19 their five senses. An exception exist for a person who is
20 qualified in a particular area of expertise due to
21 training or experience and in this case this witness, the
22 Doctor has been qualified as an expert in the field of
23 general psychiatry therefore she will be permitted to give
24 you her opinion testimony in that field. It does not mean.
25 that you must accept it but it is evidence for you to

1 consider and give it whatever weight you deem is
2 appropriate. You may continue, Mr. Wise.

3 Q Dr. Jacobs, did you have an occasion, well November
4 20th of 2009 to have a patient, Richard Brandon Lewis?

5 A I believe it was October of 2009, if I am not
6 mistaken, but yes.

7 Q How long was he there at the Dorn facility?

8 A Just under a week.

9 Q What was he there for?

10 A He had attempted suicide by taking an overdose of
11 medications. He was taken to an ER and that ER called
12 Dorn V.A. and requested admission for him.

13 Q And what were you treating him for?

14 A Adjustment disorder.

15 Q And is that commonly called depression?

16 A Adjustment disorders can have a different diagnosis
17 such as depression or anxiety or conduct. But
18 specifically for him his diagnosis was adjustment disorder
19 with depressed mood.

20 Q And did you have, during the course of your seeing
21 him as a patient did you learn the source of the
22 depression?

23 A Could you repeat the question.

24 Q During the time you saw him as a patient did you
25 learn from him the source of his depression?

1 A We talked about it.

2 Q And what was that?

3 A He talked about the events that took place prior to
4 taking the overdose. He described being in a relationship
5 and the death of a child recently occurring and he felt
6 overwhelmed by the situation and attempted suicide.

7 Q And what was he feeling overwhelmed about?

8 A He talked about having to testify against his
9 girlfriend regarding the death of the child.

10 Q How did he view his girlfriend at that time and her
11 child who died and her other sibling?

12 A He described them as his family. He indicated that he
13 was in love with his girlfriend and that he felt very
14 close to the family.

15 Q Did you learn anything about his personal family
16 background?

17 A In discussion we talked briefly about his background,
18 his childhood.

19 Q And did he come from a stable family or unstable
20 family?

21 A It appeared that his background was very chaotic,
22 very traumatic.

23 Q And did you learn how long he had been seeing Ms.
24 Hepburn?

25 A He indicated five months.

1 Q Was that, what was your opinion about his attachment
2 to her and her children after just five months?

3 A My initial observation is that, that was a very short
4 period of time in which to become so attached to this
5 relationship and to this family.

6 Q With his family background would that have, how would
7 that factor in to his becoming attached to that family?

8 A That is not uncommon in situations of trauma in
9 childhood.

10 Q And why is that?

11 A A lot of times because of the instability of the
12 childhood a person may want to strive to have stability in
13 later life. And so he appeared to be trying to create a
14 happy family scenario.

15 Q Based upon what you observed and talked to him how
16 would he react to having to testify against the woman he
17 said he was in love with?

18 A Very overwhelmed, overwhelmed to the point that he
19 attempted suicide.

20 Q All right. Is that common or uncommon for people in
21 that situation to react very emotionally to that type?

22 A It is common to react in such a way that, the loss of
23 the relationship would have been very overwhelming to him
24 and he could react in a very emotional way as a result of
25 that.

1 Q Thank you. Answer any questions they may have.

2 THE COURT: Ms. Mayes.

3 CROSS-EXAMINATION

4 By Ms. Mayes:

5 Q Good morning, Dr. Hill.

6 A Good morning.

7 Q Just to clarify, you do have the records with you
8 today that reflect some of the sessions you had with Mr.
9 Lewis?

10 A Yes.

11 Q I want to refer you to the session that you had with
12 him on October 21st. So October 21st, were you ever given
13 any information about the date in which the child was
14 killed?

15 A No.

16 Q [Victim] Hepburn?

17 A No.

18 Q [Victim] Hepburn's death occurred or injuries occurred
19 on October 13th of 2009. And ultimately her death
20 occurred on October 17th of 2009 at Greenville Memorial
21 Hospital. So, if you saw Mr. Lewis on the 21st that would
22 be approximately four days after [Victim] death, correct?

23 A Yes.

24 Q And what had happened is he took an overdose, I
25 believe on the 18th and then after the overdose was being

1 treated at the Laurens County Hospital, they referred him
2 on to the V.A. Hospital for inpatient care, correct?

3 A That is correct.

4 Q And you were one of the staff physicians at the V.A.
5 Hospital in Columbia, correct?

6 A Yes.

7 Q And it is pretty routine after a suicide attempt that
8 somebody would be referred for inpatient treatment?

9 A That is routine, yes.

10 Q And that is to watch them and monitor them concerning
11 any future behavior, correct?

12 A That is correct.

13 Q So, he comes in and y'all are basically trying to
14 find out what is wrong with him and what might have led to
15 him taking an overdose, correct?

16 A Yes.

17 Q And all of the information that you would get would
18 come directly from him, correct?

19 A That is correct.

20 Q So, whatever he tells you is what you document?

21 A Right.

22 Q And in this particular case, according to your notes,
23 on October, it looks like the note is dated October 21st
24 of 2009 but during the course of, according to what was
25 upsetting, he reported that his girlfriend had recently

1 been arrested for allegedly causing the death of her
2 sixteen month old daughter, correct?

3 A That is what he told me.

4 Q And he stated on the night of the event he was at the
5 home of his girlfriend?

6 A Yes.

7 Q And he also stated that they had argued earlier about
8 his girlfriend spanking her son?

9 A Yes.

10 Q And he reported that the baby was fussy due to
11 teething. He states that he saw her stomp from her room
12 into the room where the baby was fussy, correct?

13 A Yes.

14 Q And the fact that this is in your dictation would
15 indicate that that information came directly from Mr.
16 Lewis, correct?

17 A Yes.

18 Q Okay. Then he went on to report that he had found
19 the child lifeless and that his girlfriend had gone to the
20 bathroom after he told her the baby was lifeless. And he
21 reported that the baby was taken to the hospital?

22 A Yes.

23 Q And then he reported that the baby died. And he went
24 on to tell you about being questioned by the police
25 regarding the events of that evening, correct?

1 A Yes.

2 Q And when he was telling you about that he never, he
3 never mentioned at any point any of the history about him
4 providing false information to police, did he?

5 A No, he didn't tell me that.

6 Q And he didn't go into any details with you about the
7 fact that he had withheld information or given false
8 information to the medical providers when they were trying
9 to treat the baby, correct?

10 A Correct.

11 Q So, he went on to describe that he loves his
12 girlfriend and he was overwhelmed because of these
13 relationship problems they were having, correct?

14 A Yes.

15 Q And I think ultimately when you reach a diagnosis
16 about the condition that they are in, one of the diagnosis
17 that you mentioned concerning Mr. Lewis was his legal
18 issues, relationship issues?

19 A Yes.

20 Q So, no doubt it was his relationship with Ms. Hepburn
21 and the legal issues surrounding that that was causing him
22 depression?

23 A Yes.

24 Q And this information that he gives you, it is not a
25 situation where you are not an investigator, you are there

1 to treat him, correct?

2 A That is correct.

3 Q So, it is not a situation where you have the police
4 find or really investigate the information that he gives
5 you?

6 A Right.

7 Q It is pretty much whether it is true or false,
8 whatever spin a patient might put on is how it is
9 documented, correct?

10 A Right, I did not ask any specific questions about the
11 incident.

12 Q And in this particular case he stated that he loved
13 his girlfriend and was stressed about her being arrested
14 and that is even after he has reported to you that
15 according to him she killed her daughter, correct?

16 A Yes.

17 Q Nothing further.

18 CROSS-EXAMINATION

19 By Mr. Able:

20 Q Now, Doctor, what did you report as his chaotic, he
21 had a chaotic childhood?

22 A Yes, he talked to me about his father killing his
23 grandfather, his mother shooting his father. He talked
24 about his father being in prison and ultimately being
25 released from prison and how that was difficult for him to

1 deal with.

2 Q And it was your understanding that he was trying to
3 create a family with his girlfriend and her children?

4 A Yes.

5 Q Now, as far as about the part, well, you are there to
6 listen, correct?

7 A I am there to provide treatment for the episode of
8 the suicide attempt that led him to be hospitalized.

9 Q And you listen to what he has to say?

10 A That is correct.

11 Q And it is all his story?

12 A Right.

13 Q You don't interject anything, you let him tell what
14 happened?

15 A Right and I don't ask specific details.

16 Q And he stated to you that he saw his girlfriend stomp
17 into the room where the baby was, correct?

18 A That is what he told me.

19 Q And he didn't say anything about hearing, he said he
20 saw?

21 A Yes.

22 Q Now, he told you, let me ask you this way. He could
23 be overwhelmed, just as overwhelmed about the fact that he
24 caused the injury to this child that he is telling you his
25 girlfriend caused the injuries to the child, couldn't he?

1 A Yes, that is possible.

2 Q He could have been overwhelmed by the fact that he
3 was a suspect in that case, couldn't he?

4 A Yes.

5 Q All of those, those things could have led to his
6 possible suicide, his attempt to suicide that he had
7 caused these injuries to this child and he was a suspect?

8 A Yes.

9 Q So all you hear is what he has to say?

10 A That is correct.

11 Q Did he tell you he had given any conflicting
12 statements on the morning of October 13th of 2009 to law
13 enforcement?

14 A He didn't volunteer that.

15 Q And he didn't volunteer that he had given statements
16 where he didn't implicate his girlfriend?

17 A No, he didn't tell me any of that.

18 Q That is all.

19 REDIRECT EXAMINATION

20 By Mr. Wise:

21 Q Dr. Jacobs, was what he told you consistent with that
22 you saw in him when he was before you as far as his
23 depression and so forth?

24 A It is possible.

25 Q Now, you are not gathering investigative information,

1 you said?

2 A That is correct.

3 Q And whether he saw her enter the room or heard her
4 enter the room would not really change your analysis in
5 any way?

6 A Not at all.

7 Q Based upon your observation of him, was he close to
8 or was he emotionally attached to Ashley Hepburn?

9 A Yes, he was.

10 Q Very much emotionally attached to her?

11 A Yes.

12 Q Would it surprise you then that when initially
13 interviewed by the police he would say nothing negative
14 about Ashley Hepburn?

15 MR. ABLE: Judge, I don't think this is redirect.

16 MR. WISE: They went to the conflicting statements on
17 all of the cross-examination, both of them did.

18 THE COURT: Overruled.

19 Q Would it surprise you that he would give a statement
20 to the police that did not say anything negative about
21 her?

22 A It would probably surprise me some.

23 Q Would he, with his relationship toward her would he
24 want to protect her?

25 A He would probably want to protect her.

1 Q Initially anyway?

2 A Yes.

3 Q Thank you.

4 RECROSS-EXAMINATION

5 By Ms. Mayes:

6 Q And, Dr. Hill Jacobs, when he is talking about the
7 fact that his feelings for his girlfriend were so strong,
8 like in a situation like this where he has indicated that
9 his relationship with his girlfriend and the fact that she
10 has been arrested and all of the legal fallout from that
11 led to his suicide attempt, in a situation like this he
12 would go as far as to lie to protect her, correct?

13 A It is possible, yes.

14 Q Nothing further.

15 RECROSS-EXAMINATION

16 By Mr. Able:

17 Q The same respect, Doctor, he would lie to protect
18 himself too, wouldn't he?

19 A That is a natural instinct.

20 Q Thank you.

21 THE COURT: Doctor, you can step down. No objection
22 that this witness can be excused?

23 MR. ABLE: No objection.

24 MS. MAYES: No objection.

25 THE COURT: Thank you so much for coming, have a good

1 day. Mr. Wise.

2 MR. WISE: That is defendant's, Richard Brandon Lewis
3 rests.

4 THE COURT: Any motions to address before anything in
5 reply?

6 MS. MAYES: No, sir.

7 THE COURT: Anything in reply?

8 MS. MAYES: No reply from the State, Your Honor.

9 THE COURT: Mr. Able.

10 MR. ABLE: Yes, sir.

11 THE COURT: Call your first witness, Mr. Able.

12 MR. ABLE: Ashley Hepburn.

13 THE COURT: You are still under oath from your
14 testimony earlier. So do consider yourself under oath.

15 DIRECT EXAMINATION

16 By Mr. Able:

17 Q Now, Ashley, when you had an opportunity to be with
18 Lieutenant Plaxico on October 13th that was down at the
19 sheriffs office, correct?

20 A Correct.

21 Q And did he show you what has been marked as
22 defendant's exhibit number 2, the second voluntary
23 statement of Richard Brandon Lewis?

24 A Yes, he did.

25 Q Did you have an opportunity to read it?

1 A I had an opportunity to skim over it.

2 Q What did you tell Officer Plaxico about that
3 statement?

4 A I went through and pointed out certain things that I
5 found to be true such as, I took my son to brush his teeth
6 and we watched football for a little while, certain things
7 like that.

8 Q What did you say to him about giving Owen an intense
9 spanking?

10 A I said that I did not give him an intense spanking.

11 Q What did you say about, what did you tell him about
12 your having told him that day?

13 A I told him that I went to bed with my son that night
14 and I didn't get up after that.

15 Q What did you tell him about the statement that you
16 had gotten up, that Mr. Lewis had heard footsteps coming
17 from where you were, you went into the room, he heard the
18 sounds of the baby and heard footsteps stomping out. What
19 did you tell Lieutenant Plaxico concerning that portion of
20 the statement.

21 A I told him that that was not true.

22 Q At any point in that conversation did you tell him,
23 oh my god all of this is true?

24 A No, I did not.

25 Q Did you at any point tell Lieutenant Plaxico, I don't

1 remember hurting my baby?

2 A No, I did not.

3 Q What did you tell Lieutenant Plaxico when he had
4 asked you if you had hurt **Victim** that night?

5 A I told him very clearly that I did not hurt my baby
6 and would not hurt my baby.

7 Q Were you upset?

8 A Very upset.

9 Q Would you say that in a loud tone?

10 A I was being accused of hurting my baby so yes.

11 Q So, parts of that statement are true?

12 A Parts of it.

13 Q Parts of it are not true?

14 A Parts of it are not true.

15 Q And you made that clear to Lieutenant Plaxico that
16 night?

17 A I did.

18 Q Now, where did you go that night. After you left the
19 sheriffs office where did you go?

20 A Initially I tried to go by the hospital.

21 Q Back up to Greenville?

22 A Correct.

23 Q And after that where did you go?

24 A To my dad's house.

25 Q And when were you arrested?

1 A Friday the 17th, I believe.

2 Q Now, in talking to Agent Kirkland, you were
3 interviewed that same day by her and Agent Hurt, I
4 believe?

5 A Correct.

6 Q Did you offer to write a statement?

7 A I did.

8 Q And why did you not write a statement?

9 A I was informed--

10 Q -- by who?

11 A Lieutenant Plaxico that if I were not to say in the
12 statement that I hurt my baby that they were not going to
13 accept my statement.

14 Q Did you offer to write that statement?

15 A I did.

16 Q And what would you have said in that statement?

17 A I would have told them that I knew that that night I
18 went to sleep with my son and put my daughter down to
19 sleep and Brandon was the only one up that night.

20 Q Since October 13th of 2009 have you said anything
21 different other than you didn't hurt your baby?

22 A No, I have not.

23 Q That is all I have.

24 CROSS-EXAMINATION

25 By Ms. Mayes:

1 Q Ms. Hepburn, you said that that statement was made to
2 you by Lieutenant Plaxico, correct?

3 A Correct.

4 Q Lieutenant Plaxico was not even in the room when you
5 were interviewed by Agents Kirkland and Hurt, correct?

6 A It was after they interviewed me that he interviewed
7 me, correct.

8 Q When you say that you didn't have the opportunity to
9 provide a written statement you are referring to the final
10 interview that you had with Lieutenant Plaxico, correct?

11 A Correct.

12 Q Nothing further.

13 CROSS-EXAMINATION

14 By Mr. Wise:

15 Q You were interviewed by Agent Kirkland earlier?

16 A Correct.

17 Q And then did you give a written statement to Agent
18 Kirkland?

19 A No, I did not.

20 Q Did she ask you to give her a written statement?

21 A No, she did not.

22 Q So, she just took an interview from you, signed the
23 Miranda warnings and never asked you to write down a
24 written statement?

25 A Correct.

1 Q Is that right?

2 A Correct.

3 Q And you say since October 13th you have never said
4 anything different, right?

5 A Correct.

6 Q Well, since about October the 14th you have never
7 said anything about this case, have you?

8 A Correct.

9 Q Thank you.

10 MR. ABLE: Nothing further.

11 THE COURT: Ma'am, you can step down, thank you very
12 much. Anything further?

13 MR. ABLE: No, sir.

14 MR. WISE: Nothing further.

15 THE COURT: Ladies and gentlemen of the jury, I am
16 going to have to ask you to adjourn for a few moments.
17 There are some matters that I need to take up with the
18 attorneys involved in this case. We will have you back
19 shortly. Don't discuss the case.

20 (Whereupon, the jury was excused from open court.)

21 THE COURT: The jury is out. I want to take up with
22 y'all in a moment and I am going to email you the proposed
23 jury charges. I see Mr. Able does not have a computer so
24 Madam Clerk I am going to send these to you as well and
25 print them out for Mr. Able. And, Ms. Mayes, can you

1 access your email?

2 MS. MAYES: Yes sir, Your Honor. We have no
3 objection to any of the proposed charges from the Court.

4 THE COURT: Mr. Wise, on your email this morning you
5 asked for an intent charge of some kind. I have taken the
6 intent charge from the bench book as well as the one from
7 State versus McKnight which I believe you should have
8 intimate familiarity with.

9 MR. WISE: I have heard about it.

10 THE COURT: And merged those two in a way so I am
11 going to be sending that to you as well. I did have one
12 question and I have not sent the charges yet to you. But
13 with regard to the actual charge of homicide by child
14 abuse, there are three types of conduct which could rise
15 to that abuse. I only see potentially two that would
16 apply. There is no issue in this case on abandonment so I
17 was not going to instruct the jury on abandonment of the
18 child.

19 MR. WISE: Your Honor, it would seem to me, we could
20 probably dismiss the jury and come back about 1:00 or
21 1:30.

22 THE COURT: I was going to bring them out and dismiss
23 them in just a second, I just want to make sure that I
24 have got this, that I have got a copy of this printed off.
25 I will go ahead and email this to y'all and Ms. Lancaster.

1 As I was saying, the homicide by child abuse charge, it
2 would appear the only two potential acts which could
3 constitute based on the evidence of this case or which
4 could support a verdict based on the evidence which has
5 been presented in this case will be, the first, inflicted
6 or allowed to inflict physical injury on a child which
7 caused the child's death or failing to supply the child
8 with healthcare would be the only one to be implicated
9 under this section. Clothing or shelter is not in play.
10 This failure caused the physical injury or condition which
11 caused the death. I was about to eliminate the second one
12 but perhaps there was some evidence in which a reasonable
13 juror to conclude that there was a failure to provide
14 timely healthcare.

15 MS. MAYES: Yes sir, Your Honor, that is the State's
16 position and that is included in our argument. As to C,
17 abandonment of child, we have no objection to that not
18 being charged.

19 MR. WISE: I don't really see the failure to give
20 healthcare because no doctor even remotely testified that
21 if the child got to the hospital thirty minutes earlier
22 the child would have survived, not a chance of survival
23 even or would not have died. All the testimony was that
24 this was instantaneous and very severe from the beginning.

25 MS. MAYES: Your Honor, the testimony from the

1 physicians is that the symptoms would be immediate however
2 there was testimony from Dr. Ward that the hypoxia or
3 swelling from the brain condition set in because she did
4 not receive immediate resuscitation.

5 THE COURT: There is some evidence in which a
6 reasonable jury could conclude the earlier to provide
7 health care to the child, the timeliness of the health
8 care that was provided.

9 MR. WISE: In that case then, as far as Brandon Lewis
10 is concerned I don't think there is a duty on his part to
11 provide health care, it is all on the mother's part. He
12 is not the father, he was not a guardian, he was not
13 anything other than someone who had been told earlier in
14 that same day don't discipline my children.

15 MS. MAYES: Your Honor, that is actually the State's,
16 one of the State's objections that I had mentioned
17 earlier, that the State had an objection to two of the
18 requests for charge for Mr. Wise. As to the first charge,
19 charge number one, no objection to that. As to charge
20 number two, the implication of this charge is that there
21 should be some type of legal duty and that is not this
22 statute. There is another statute out there called
23 unlawful conduct towards a child that applies to people
24 who do have charge of custody. That is not this
25 situation, he is not charged under that statute. The

1 homicide by child abuse statute specifically states that
2 it applies to any person, there is no role to find, no
3 requirement for parental duty or even legal duty. And it
4 is exactly for this type of situation where you could have
5 several people in a home, a child critically injured and
6 basically the law does not support the idea that they can
7 all turn their head and do nothing.

8 MR. WISE: Actually the statute, it says nothing
9 about who is responsible, it doesn't say anybody with
10 connection with the child. As I pointed in my email,
11 under the State's theory, if I go to a grocery store
12 tomorrow and see a woman or man unmercifully beating their
13 child in the grocery store, if I don't act I am guilty of
14 unlawful conduct toward a child, that is not the law.

15 THE COURT: Because this discussion will take a while
16 I will bring the jury in to excuse them so they will have
17 enough time to get something to eat. Bring the jury in,
18 please.

19 (Whereupon, the jury came into open court at
20 approximately 11:45 a.m.)

21 THE COURT: The record will reflect that the jury is
22 back. Ladies and gentlemen of the jury, we have some
23 additional work to do, I see no reason for you to wait
24 back there. When you return from your lunch break, I
25 would ask you to return by 1:15. At that time you will

1 have an opportunity to hear the arguments of counsel and
2 you will receive my charge of the law. It is not time to
3 start talking about the case, please do not discuss the
4 case. You are excused and see you back at 1:15.

5 (Whereupon, the jury is excused from open court for a
6 lunch break.)

7 THE COURT: Mr. Wise, you have the floor again.

8 MR. WISE: Your Honor, there has to be some duty on
9 the part of the defendant in a child, homicide by child
10 abuse case or whatever. The failure to act is so broad it
11 makes it unconstitutional, no one knows when they would
12 cross the line. It is easy to tell somebody you crossed
13 the line when the facts are such that any reasonable
14 person would know there is a duty. But here where he is
15 an occasional visitor at night sitting there, you know, he
16 has no duty, he has no idea when he crosses the line and
17 that is the problem with it. If I am a visitor in
18 somebody's home and they all of a sudden get up and start
19 accusing the child, morally maybe I should do something
20 but legally or as far as criminal prosecution is concerned
21 unless I take some affirmative action to encourage that
22 action by the person I am under no duty to intervene and
23 stop it.

24 THE COURT: Ms. Mayes, what do you say to that.

25 MS. MAYES: Yes sir, Your Honor, this particular

1 statute does not require a legal duty and it is for
2 exactly this situation where there have been cases in the
3 past where a boyfriend or an occasional visitor is
4 involved with the child and ultimately the child is killed
5 and you have more than one person involved and more than
6 one person charged. Now the unlawful conduct statute is
7 completely different. That one has a duty put into it, I
8 believe that is--

9 THE COURT: Which section are you referring to, are
10 you referring to 16-3-95 or are you referring to something
11 under the--

12 MS. MAYES: The children's code, yes sir, it is under
13 the children's code. I believe it is recently recodified.
14 But I mentioned that solely because Mr. Wise had given
15 that example earlier that if he were in the grocery store
16 he could be charged unlawful conduct towards a child if he
17 saw someone injure a child. And that is not the case,
18 that statute is completely different and does have a duty
19 built in. That is 63-5-70. But the homicide by child
20 abuse statute is different. This statute is meant to be
21 broad, it is meant to apply to a person is guilty of
22 homicide by child abuse without any legal duty or
23 responsibility to the child. And the example Mr. Wise is
24 correct. If he is not a resident of the home, that he is
25 a visitor to the home and he gains knowledge that the

1 child has been critically injured and there is a
2 substantial risk of death, yes, at that point it is not a
3 question of duty, it is a question of under this
4 particular statute. It would apply to him and could
5 potentially apply to him and any other participants in the
6 homicide of that child due to child abuse and neglect.

7 MR. WISE: If that is an interpretation then I move
8 to quash, it is a little late to quash the indictment but
9 I move to dismiss the charges against Brandon Lewis on the
10 grounds that he is faced of a statute that is so vague
11 that he knows not when--

12 THE COURT: I am looking at the homicide by child
13 abuse statute and there are two kinds of conduct. The
14 first subsection as I read it, criminalizes one who
15 actively participates in inflicting the abuse or neglect
16 on the child. The second subsection, under subsection
17 (a), addresses situations where one aids or abets another
18 person to commit child abuse or neglect. I have given and
19 I will be giving a mere presence instruction to the jury
20 as applies to Mr. Lewis based upon these facts, I cannot
21 find that the statute that he is charged with is over
22 broad or that the statute does not cover potentially the
23 conduct that Mr. Lewis engaged in. There has been
24 testimony that he was, of course, the boyfriend or the
25 significant other of Ms. Hepburn. He obviously at

1 different points and times, I believe Mr. Wise, you have,
2 indicated through your own witnesses that he has
3 undertaken certain activities at least at the birthday
4 party as well as the night in question where he acted in
5 loco parentis towards the children. I would assume that
6 certain responsibilities that would naturally flow to one
7 who has a close relationship with the child, with the
8 children. I believe that the statute would apply to your
9 client but your objections and your constitutional
10 reservations are noted.

11 MR. WISE: Clearly if he attacked the child it
12 applies, we are not going to talk about that case. The
13 only theory then by which the subsection (b) or subsection
14 (2) would apply is because he didn't go in there when he
15 heard something. I think that is unduly broad application
16 of this law.

17 THE COURT: Ms. Mayes, I would ask that you address
18 that because I do have some hesitation on the aiding and
19 abetting. Where does the aiding and abetting come from,
20 where is there evidence that Mr. Lewis aided and abetted
21 in the abuse of the child. And I realize this is a
22 circumstantial case so if you could lay out the State's
23 case for aiding and abetting.

24 MS. MAYES: Yes sir, Your Honor. I will begin by the
25 fact that Mr. Lewis has given multiple inconsistent

1 statements. First there is the statement that he was the
2 only one up and during the time that the child was
3 injured, second is the statement that he heard his
4 girlfriend go into the baby's room and according to him
5 stomp into the room and shake the child and she was
6 crying, her voice was breaking as if she was being shaken
7 according to him. And at that point the crying and the
8 voice breaking suddenly stopped and he heard not another
9 sound from the child. He heard his girlfriend stomp back
10 to the room and according to him up to fifteen minutes
11 transpired between that event which he described as
12 occurring at 12:45 a.m. and then ultimately when EMS was
13 called at approximately 1:20 a.m. after he claims, after,
14 not doing anything for some period of time and checking on
15 the girlfriend he then went into the child's room and
16 discovered her lifeless. Now, we also have a situation
17 where the State's position is that at some point someone
18 attempted to provide some type of aid or clean up this
19 child. There is blood and saliva on a white towel that,
20 according to Ms. Hepburn, was kept in the bathroom yet
21 neither defendant has acknowledged going into the bathroom
22 and taking out that white towel and attempting to clean up
23 the child or provide some type of aid to the child prior
24 to calling or prior to the arrival of EMS or even calling
25 911. And both of them deny knowledge as to how the towel

1 with the child's blood on it and saliva on it got into the
2 crib. So, at some point they call 911, EMS arrives and
3 Mr. Lewis begins giving the false story about not knowing
4 how she was injured, not relating any information about
5 Ms. Hepburn possibly abusing the child and that that was
6 the last time he heard from the child. And withholding
7 that information, Your Honor, the State contends was
8 critical to her healthcare. The doctor had no idea that
9 the child had a head injury, she was originally being
10 treated for a possible allergy, she was given Benadryl.
11 The doctor took on her own, after her arrival at the
12 emergency room to diagnose the retinal hemorrhages and
13 then sent the child to CT's out of an abundance of caution
14 and it was determined that she had a massive head bleed.
15 It was also the testimony of Dr. Ward that hypoxia or
16 cerebral edema had set in which was catastrophic
17 ultimately to the child's condition. He testified that
18 that type of hypoxia, cerebral edema most commonly would
19 occur in this situation because the child was not rendered
20 medical assistance or went some period of time without
21 receiving medical assistance. And in this particular case
22 Mr. Lewis withheld the information about when he had last
23 heard the victim or about Ms. Hepburn's, hearing Ms.
24 Hepburn go into the room or any possible injuries that she
25 may have inflicted on the infant. He withheld that

1 information as we now know for hours and hours and hours
2 even as the child was transferred to the pediatric
3 intensive unit in Greenville, he was still being
4 interviewed by law enforcement and withholding that
5 information which the State's position is that, he never
6 provided the adequate medical history which is essential
7 healthcare to this child, he nor Ms. Hepburn.

8 THE COURT: All right.

9 MR. WISE: That talks about accessory after the fact.
10 None of that talks about aiding and abetting in the
11 commission of the crime. Assuming for the moment,
12 although there is not a scintilla of evidence in this case
13 or in the case that I am getting ready to cite, assuming
14 for the moment that she injured the child, he then went
15 and got the towel and wiped the child off and left it in
16 the crib, that is accessory after the fact, that is not
17 aiding and abetting in the commission of the act.

18 MS. MAYES: Your honor, the child was still alive,
19 that is the key point here, this is not a deceased child
20 and somebody finds the body and it is accessory after the
21 fact. This child was still alive, she was still
22 breathing, she was still in desperate need of adequate
23 healthcare and medical assistance. And it is the State's
24 position that both Mr. Lewis and Ms. Hepburn failed her in
25 that regard. As far as the aiding and abetting it

1 includes advancing the crime and in this particular case.
2 by withholding information both from law enforcement and
3 from medical personnel about the true and accurate events
4 of that night, what he himself knew about the child's
5 condition, what he knew about may have led to her critical
6 injuries and the failure to relay that information as the
7 State contends is part of advancing the crime of child
8 abuse and neglect which ultimately led to her death four
9 days later.

10 THE COURT: I do find that there is some evidence
11 from which for the finders of fact to reasonably conclude
12 that Mr. Lewis is guilty of aiding and abetting and
13 homicide by child abuse. I will charge the jury on aiding
14 and abetting with regard to Mr. Lewis. Number three, Ms.
15 Mayes.

16 MS. MAYES: We would just ask for the basis of the
17 charge or any cite in reference to the charge, it is just
18 a charge I am not familiar with.

19 THE COURT: Do you have a case that you focused from.

20 MR. WISE: Many times I try to operate on the theory
21 that the law should be original. Let me get my third
22 charge back up. It makes sense, Your Honor. It simply
23 makes sense. If the State argues she killed this child
24 and then her, you don't believe that and Brandon Lewis
25 killed this child then I think the inability of the State

1 to point out which one is a factor the jury can consider
2 of determining whether or not of a reasonable doubt. It
3 basically it is, it basically says to me, to the jury, you
4 can't flip a coin. If you have to flip a coin then there
5 is a reasonable doubt. So if the State argues two
6 positions that are inconsistent with each other the State
7 in essence and I think is asking the jury to flip a coin.
8 But to tell you there is a precise case out there that
9 says that, no there is not.

10 THE COURT: Perhaps you would care to cite, United
11 States, Smith versus G-R-O-O-S-E, Missouri Attorney
12 General, the proposition that due to the process of laws
13 forbids the State from using any inconsistent theories to
14 secure convictions against two or more defendants for
15 prosecutions for the same offense arising out of the same
16 event.

17 MR. WISE: But that was what we argued earlier but
18 was not based upon a jury charge. We had argued earlier
19 that under judicial estoppel that they couldn't do it
20 because it violated due process. And that was denied, the
21 same principle would apply I think to the jury charge.

22 THE COURT: I think that this is different, what I
23 was getting at or what I thought your request to charge
24 number three was getting at were due process concerns with
25 the State taking the position that there is evidence

1 indicating both defendants could have committed this crime
2 yet it appears only one of them could have in fact, would
3 have committed the crime. Is that what you are getting
4 at? .

5 MR. WISE: That is what I am getting at. What is the
6 cite for that case?

7 THE COURT: 205, F3d, 1045.

8 MR. WISE: 1045?

9 THE COURT: 1045.

10 MR. WISE: That would be the basic principle of it,
11 yes.

12 THE COURT: : There is also perhaps U.S. of America
13 versus Paul, this is 217 F3d, 989 which appears to
14 indicate that where, in that case we are dealing with a
15 homicide where the prosecutor in two separate trials
16 argued at both trials that the defendants on trial pulled
17 the trigger. One of them at appeals and argued to the
18 prosecution and that case had inconsistent actions. And
19 in that case the Court held that, "when it cannot be
20 determined of two defendants guns caused a fatal wound
21 neither defendant could have been convicted under either
22 theory. The prosecutions argument at both trials that the
23 defendant on trial pulled the trigger is not factually
24 inconsistent thus because there was evidence that
25 supported both theories and could have been convicted

1 under aiding and abetting under either theory we find no
2 error." Ms. Mayes, assuming for a moment the State, the
3 Court has an issue with the State bringing charges against
4 both which, I think you would agree only one individual
5 could have, in all likelihood only one individual
6 inflicted the injuries here. Normally it is much more
7 prominent that the State to have a clear target in any
8 sort of prosecution and having a much clearer theory of
9 which defendant was primarily culpable. Am I correct that
10 in this case the State is not entirely sure who shook the
11 baby?

12 MS. MAYES: Well, Your Honor, there is more involved
13 than just the shaking as well because there were impact
14 injuries which the testimony has supported would have been
15 multiple. So we have a situation where according to this
16 statute it covers acts and omissions and inflicting and
17 allowing to be inflicted. So, it is a situation where it
18 is more broad I would propose than perhaps some of the
19 other statutes such as a general murder statute. But it
20 is one where if hypothetically Mr. Lewis inflicted the
21 injuries the implication would be or the State's argument
22 would be that the injuries were allowed to be inflicted
23 because of Ms. Hepburn's proximity. And secondarily if
24 Ms. Hepburn inflicted the injuries there are acts and
25 omissions which cover Mr. Lewis as well. And ultimately

1 County?

2 MS. MAYES: Yes sir, Your Honor. And in that
3 particular case which was 2004 both defendants were
4 convicted of homicide by child abuse and both were
5 convicted of aiding and abetting homicide by child abuse.
6 But since then, within the past, I believe six weeks, a
7 new decision has come down and that decision is also State
8 versus Smith, that is a Court of Appeals decision. That
9 was a homicide by child abuse charge where he was not even
10 charged or indicted for aiding and abetting but the Court
11 submitted aiding and abetting as a lesser included offense
12 and it went to the jury and they ultimately convicted him
13 of aiding and abetting. That would be our concern at this
14 point. That case does seem to imply that aiding and
15 abetting may be a lesser included offense. If that
16 situation, the result of this most recent Court of Appeals
17 decision and I would agree that a defendant can be guilty
18 of homicide by child abuse or aiding and abetting and the
19 second, homicide by child abuse or aiding and abetting,
20 could be both homicide, could be both aiding and abetting
21 but I am not sure if it could be both even though the
22 Smith case from 2004 did support both being convicted on
23 both charges.

24 THE COURT: So you believe it is either or
25 proposition with regarding to the current state of the law

1 and this case you cited from six weeks ago, the Court is
2 unfamiliar with.

3 MS. MAYES: Right, I believe I have that case, Your
4 Honor.

5 THE COURT: So you believe it is either or with
6 regard to both defendants?

7 MS. MAYES: I am going to submit that particular case
8 to the Court and let the Court make that determination,
9 Your Honor, that is a Court of Appeals decision. And I
10 don't believe that it has been addressed any further since
11 that time. This is State versus Wesley Smith, this is
12 only the advance sheet, the published advance sheet.

13 MR. WISE: January of this year?

14 MS. MAYES: Yes, January the 26th.

15 MR. WISE: My opinion is of the Smith case is they
16 have a real problem with the South Carolina Supreme Court
17 holding that aiding and abetting is a lessor included of
18 the actual act. I mean that is to me a stretch.

19 THE COURT: Let's address it this way. Mr. Able, Mr.
20 Wise, do y'all desire a lessor included charge?

21 MR. WISE: I don't.

22 MR. ABLE: No, sir.

23 THE COURT: I assumed that will be your position.
24 All right, basically the job of the jury is to find the
25 facts in this particular case and certainly there is

1 evidence which reasonable minds could conclude that based
2 upon how they view the evidence and how they judge
3 credibility. There is evidence that would support Ms.
4 Hepburn being the principle. There is evidence which
5 would support Mr. Lewis being the principle. And I am
6 using the principle in general terms here which meaning
7 the person who factually injured the child. And it is the
8 jury's job to find the facts and that will be their task
9 in this particular case. Unless you cite me something a
10 little bit more compelling, Mr. Wise, I am inclined to not
11 charge your request to charge number three. I am also
12 concerned that it may be a charge on the facts by this
13 Court but although that is not as much a concern to the
14 Court, it is basically the jury's job to find the facts
15 and that is their sole province. The State's evidence is
16 what it is. I don't believe it is proper for the Court to
17 necessarily charge your request to charge number three.
18 Do you have any request, Mr. Able?

19 MR. ABLE: No, sir.

20 THE COURT: Have you had a chance to review--

21 MS. MAYES: No objection, Your Honor.

22 THE COURT: All right. I typically, I have been
23 sending the jury charge back to the jury on most cases. I
24 know Judge Keesley has been doing, I believe Judge Hyman
25 who also does this as well as some other judges.

1 MR. WISE: I am requesting that you send twelve
2 copies.

3 THE COURT: Twelve copies.

4 MR. WISE: Each individual juror could, the fear I
5 have, the law out there, let me put it that way, it is a
6 little wavy. But I think if you send twelve copies then
7 you don't have a problem with somebody becoming the keeper
8 of the law so to speak. That each individual can read it
9 and I just have a feeling that some juror who is not as
10 assertive as some other juror not wanting to say, well,
11 let me read that.

12 THE COURT: Does anybody have a problem with me
13 sending back twelve copies?

14 MS. MAYES: No sir, Your Honor.

15 MR. ABLE: No objection.

16 THE COURT: I will send back twelve copies. We will
17 be at ease for about an hour.

18 MR. WISE: For the record we would like to make a
19 motion for a directed verdict. Which in essence we have
20 discussed but without formally doing it. And on behalf of
21 Richard Brandon Lewis I move for a directed verdict first
22 on the aiding and abetting on the ground that there is
23 really no substantial circumstantial evidence to establish
24 aiding and abetting in this matter. And then on the other
25 one, I think the substitutive charge of homicide by child

1 abuse I think taking the evidence in light of the most
2 favorable for the State, again, there is no substantial
3 circumstantial evidence that Richard Brandon Lewis did
4 anything other than what he said in his second statement
5 about hearing her footsteps down the hall.

6 MR. ABLE: Judge, I would renew my motion for
7 directed verdict, on behalf of Ashley Hepburn. Addressing
8 the issue of the aiding and abetting, again it would be our
9 position that there is no substantial circumstantial
10 evidence that would indicate that she is guilty of that
11 crime and that she aided or abetted anyone of any nature.
12 As to the homicide by child abuse, there doesn't appear I
13 believe from the record that there is substantial
14 circumstantial evidence to find that she had committed
15 that crime and we would move for a directed verdict on
16 those grounds.

17 THE COURT: Any comment, Ms. Mayes?

18 MS. MAYES: Yes sir, Your Honor. As the State has
19 previously indicated in reference to the charge, we do
20 believe that there is substantial circumstantial evidence
21 concerning the involvement of both defendants by an act or
22 omission. As to the aiding and abetting the participation
23 of each at some point along the way in knowingly allowing
24 these events to occur which led to the death of Victim by
25 child abuse and neglect.

1 THE COURT: In light most favorable to the State, at
2 this point and time gentlemen, I would deny your motions,
3 very well argued however. I have forwarded the charge to
4 you.

5 MR. WISE: A couple of other matters?

6 THE COURT: Sure.

7 MR. WISE: First of all, I would request the State be
8 required to open fully on the law and the facts. I think
9 the Court is aware of my position on that. I would say
10 that if any case ever pries out for the State to open
11 fully on the law and the facts this is the one. As we sit
12 here today, after a week of trial and ready to start
13 closing arguments I am still somewhat at a loss to
14 understand exactly what the State's theory is going to be,
15 in this case as to which one of these defendant's actually
16 committed this crime. To require us to open and then the
17 State gets to present its theory after we have presented
18 ours, for us to have no rebuttal to that I think clearly
19 would be unduly prejudicial and violate the due process
20 clause of the United States Constitution and the State
21 Constitution. This case of all cases that I have ever
22 been involved in is, I think, the one that in order to
23 have a fair closing argument where they have the burden of
24 proof and then reply to us, they should be required to
25 fully open on the law and the facts and then reply only to

1 the matters that we bring up and not closing arguments.

2 THE COURT: Do you join in that motion?

3 MR. ABLE: Judge, I would join in that motion based
4 upon the due process clause and the Federal Constitution
5 and the State Constitution. I believe it would only be
6 fair.

7 THE COURT: Ms. Mayes, your position.

8 MS. MAYES: Yes sir, Your Honor. Both defendants,
9 Ms. Hepburn and Mr. Lewis have provided evidence in this
10 case by the witnesses. They have both testified as well
11 as providing evidence through documents. And with that
12 being the law the State is entitled to last closing.

13 MR. WISE: The question, as you know, whether that is
14 the law. Because originally in this State the State fully
15 opened on the law and the facts and then they changed it
16 in conjunction with the civil rule. When the civil rule
17 was changed and the plaintiff didn't have to open, then
18 when the civil rule came back the plaintiff had to open
19 fully on the law. I just never has migrated over to the,
20 back the way it used to be in State court.

21 THE COURT: I understand your position, Mr. Wise.
22 Perhaps rectifying that law, if that is in fact the law,
23 is for another Court, it is not for this Court. Your
24 motion is denied, Mr. Able and Mr. Wise.

25 MR. WISE: Then one final matter.

1 THE COURT: Yes.

2 MR. WISE: I would also move to prohibit the State
3 from arguing in any respect that the obligation of the
4 jury is to find the truth because that is not their
5 function. Their function is whether or not they have
6 proven this case beyond a reasonable doubt as to Brandon
7 Lewis and whether or not they have proven beyond a
8 reasonable doubt as to Ashley Hepburn. If the jury truly
9 knows not wherein the truth lies a proper verdict is not
10 guilty. And to tell the jury that they have to find the
11 truth basically tells them they have to decide which
12 defendant told the truth on the stand and that is not
13 their function and I think it is misleading to the jury to
14 instruct them that they are to tell the truth. There are
15 some South Carolina Supreme Court cases that talk about
16 Judges really should refrain from telling the jury their
17 function is to find the truth. And I think in this
18 particular case the State should be prohibited from
19 arguing that because it does that, put the jury in the
20 position of one or the other and that is not the true
21 criteria here. That is one of the disadvantages of trying
22 these two cases together, with the argument by the State
23 that the jury is to find the truth. The jury really sits
24 there and says, well, we have to convict one of them.
25 Well, they don't, they can actually acquit both of them

1 because they don't know what the truth is.

2 MR. ABLE: Judge, I would join in that motion as
3 well.

4 THE COURT: Thank you, Mr. Able. Ms. Mayes.

5 MS. MAYES: Yes sir, Your Honor. I believe the
6 Court's charge to the jury will state that they are the
7 sole and exclusive judge of the facts in the case and with
8 them being the judge of the facts in the case it is their,
9 it is within their province to determine the credibility
10 of the witnesses. And in evaluating the credibility of
11 the witnesses that is ultimately a determination as to who
12 they believe may be telling the truth. And I believe your
13 charge on credibility of the witnesses talks about the
14 fact that they may believe all of the testimony or part of
15 the testimony or none of the testimony. So, I do believe
16 it would be proper for me to address that they are the
17 finders of fact at some point during closing arguments and
18 they, it is within their province to determine the
19 credibility and the truthfulness of witnesses which may
20 lead them to ultimately their determination.

21 THE COURT: That is fair game. I don't think that
22 you should argue, you have to convict. I do tend to agree
23 that there might be overstepping the line a little bit if
24 you were to agree or if you were to argue, ladies and
25 gentlemen of the jury, one of them did it, convict one of

1 them. I don't think that is going to be your argument, is
2 it, Ms. Mayes?

3 MS. MAYES: That is correct, Your Honor. In other
4 words, you mean are we going to single out a defendant or
5 we are going to state that they must convict a defendant.
6 No sir, Your Honor, the State's position is that both
7 defendants could be obviously found not guilty but both
8 defendants could also be found guilty of aiding and
9 abetting homicide by child abuse without a finding as to
10 homicide by child abuse. Without a finding as to guilt
11 for either defendant on the homicide by child abuse
12 charge.

13 THE COURT: Here is how we are going to address this.
14 Mr. Wise and Mr. Able, if you feel that at any point her
15 argument crosses that line alert me at that moment and
16 time and I will make a ruling at that moment and time.
17 But I am hesitant to tell any lawyer that you must argue
18 this or you must not argue this. We are talking about
19 reasonable doubt here, there is certainly evidence, based
20 upon how they view the evidence and that is solely a
21 province for them to determine. It is obviously the
22 possibility that they can find reasonable doubt as to both
23 defendants. Similarly there is the possibility that they
24 can convict either or both of the defendants of some of
25 the charges.

1 MR. WISE: Then I have my final one. Now, this is
2 probably going to be quicker. I would actually require
3 the State to elect as to which defendant they are going to
4 seek a verdict for homicide by child abuse against.
5 Because as the Court has pointed out I don't think it can
6 be both.

7 THE COURT: How is that inconsistent with your prior
8 argument.

9 MR. WISE: How is that inconsistent?

10 THE COURT: How is that consistent, rather, with your
11 prior argument you just made.

12 MR. WISE: I think it is very consistent because I
13 think the State can't argue inconsistent positions and
14 that makes it easier for them not to argue these
15 inconsistent positions if they are required to elect.

16 THE COURT: Ms. Mayes?

17 MS. MAYES: Yes, Your Honor. And I believe Smith,
18 the 2004 Smith, the State versus Chad Smith, the Horry
19 County case is on point here. Both of those defendants
20 were convicted of homicide by child abuse and this is a
21 situation where the State's position is ultimately both
22 could because it includes acts or omissions. And the jury
23 is going to sort through all of the facts and all of the
24 evidence to consider exactly what role each of these had
25 ultimately in the child's death. So, I do not believe the

1 State has to elect between seeking a homicide by child
2 abuse conviction against either. I believe the jury can
3 find them both guilty of homicide by child abuse just as
4 they could find them both guilty of aiding and abetting
5 homicide by child abuse.

6 THE COURT: All right. Mr. Able, you join in Mr.
7 Wise's motion?

8 MR. ABLE: Yes, sir.

9 THE COURT: The motion is denied. Thank you. We are
10 at ease for forty-five minutes.

11 (Whereupon, a lunch break was taken.)

12 THE COURT: We are back on the record. Anything
13 before we bring the jury out, Ms. Mayes?

14 MS. MAYES: Yes sir, Your Honor. We just need an
15 equipment check.

16 THE COURT: Yes, ma'am. Do you have anything, Mr.
17 Able?

18 MR. ABLE: No, sir.

19 THE COURT: Mr. Wise?

20 MR. WISE: The only one I had, Your Honor, is what I
21 mentioned earlier, where you say evidence. I think that
22 you should also put in lack of evidence or tell the jury
23 at the very least that every time you say evidence that
24 means lack of evidence also.

25 THE COURT: I will consider doing something like

1 that. I will have some time to think about that.

2 MR. WISE: There is one other too, Your Honor. You
3 get the words, defendants. I am trying to get to it now.
4 It is toward the very end. Under intent, in order to
5 establish criminal liability with respect to the charges
6 against the defendants the State must prove the defendants
7 acted with extreme indifference.

8 THE COURT: So you would request that I strike the 8
9 and make that singular.

10 MR. WISE: At the bottom of page 11 and also at the
11 top of 12, yes.

12 MS. MAYES: I have no objection to that, Your Honor.

13 THE COURT: Mr. Able?

14 MR. ABLE: No objection.

15 THE COURT: I will do that on the copies.

16 MR. WISE: When you refer to on page 12, the first,
17 second, third, forth line. Conscious of knowing, failure
18 to exercise ordinary due care, I don't think extreme
19 indifference is a failure to exercise ordinary or due
20 care. I think it should basically be stricken.

21 THE COURT: What is the State's position, Ms. Mayes?

22 MS. MAYES: That is on what page, Your Honor?

23 THE COURT: On page 12 where it talks about extreme
24 indifference.

25 MS. MAYES: I believe that is from the Holder Case, I

1 believe.

2 MR. WISE: I don't know why they left that in there
3 like that but the big issue is whether or not ordinary
4 negligence was qualified for it.

5 MS. MAYES: I will leave that up to the Court's
6 discretion, Your Honor.

7 MR. ABLE: Judge, we would join in Mr. Wise's motion.

8 THE COURT: The State has no preference one or the
9 other, Ms. Mayes?

10 MS. MAYES: Which portion would it be, stricken in
11 its entirety?

12 THE COURT: Mr. Wise, striking for a conscious or
13 knowing failure to exercise ordinary or due care?

14 MS. MAYES: I believe McKnight has been upheld by the
15 Supreme Court as well. The State would prefer to leave it
16 in.

17 MR. WISE: Are you taking it from the first McKnight
18 care or the second one. There are two McKnight cases. I
19 think that is McKnight versus the case, the PCR case.

20 THE COURT: You are right. What is the State's
21 position?

22 MS. MAYES: We would prefer to leave it in if it is
23 from a Supreme Court decision.

24 THE COURT: This language is from State v. McKnight,
25 the 3, 2.

1 MR. WISE: I think they changed that in McKnight
2 versus State.

3 THE COURT: Do you have a cite for that case?

4 MR. WISE: 378 SC 333, 661 SE2d 354. It says there
5 that McKnight argues that counsel improperly charged the
6 jury, the Court had improperly charged the jury that,
7 negligence, recklessness or mere indifference. When a
8 conviction of homicide by child abuse requires a finding
9 of extreme indifference. They said it was not deficient
10 in that.

11 THE COURT: Say again.

12 MR. WISE: They said it was not deficient in failure
13 to that, I apologize.

14 THE COURT: It would require criminal negligence
15 which would be akin or recklessness, correct?

16 MR. WISE: That is correct. They kind of talk like
17 negligence is okay and then they said that a subsequent
18 charge by the Judge was improper.

19 THE COURT: It was the erroneous supplemental charge
20 to the jury. But that otherwise, my reading of it is that
21 the intent charge which is the standard charge was
22 acceptable or the initial charge. Is that correct, Mr.
23 Wise. I actually pulled the, in the standard charge, if
24 you were to go to the next paragraph where it starts,
25 criminal intent must be proven by the State beyond a

1 reasonable doubt. I actually pulled the next sentence
2 that appears in the standard charges because that did
3 reference negligence and I agree with you, I didn't want
4 there being this impression on behalf of the jury that we
5 are dealing with a preponderance or negligent under the
6 civil law. I have got criminal intent as a mental state,
7 a conscious wrongdoing. I will on page 13 eliminate that
8 last sentence which precedes the charge, homicide by child
9 abuse or neglect. I neglected to do that. That is where
10 it says criminal intent to arise from action or failure to
11 act. I will strike, it may arise from negligence,
12 recklessness or an indifference from duty or consequences
13 considered by the law to be the equivalent of criminal
14 intent. Would you agree that it would perhaps be proper
15 to strike that?

16 MR. WISE: Right. It goes back to the negligence.

17 MR. ABLE: Where are we at?

18 THE COURT: Page 13, the sentence that immediately
19 precedes the bold type, homicide by child abuse, neglect.
20 Is there any objection to me, because we have already made
21 twelve copies per your request, just me to penciling in
22 through?

23 MR. WISE: That is fine.

24 THE COURT: I will do that for all the copies. As a
25 whole, I believe the charge conveys what the proper mental

1 state is so I am going to leave the portion in the first
2 paragraph about the conscious or knowing failure to
3 exercise ordinary due care. That does appear to still be
4 the law. If they have an issue with that we will address
5 it at that point and time. Is that acceptable, Mr. Wise?

6 MR. WISE: That is fine.

7 THE COURT: All right. Bring the jury in, please.

8 (Whereupon, the jury came into open court at
9 approximately 1:26 p.m.)

10 THE COURT: Let the record reflect the jury is
11 present. Ladies and gentlemen of the jury, we have
12 reached that portion of the trial where the attorneys will
13 be giving you their final argument or their final
14 summation. I remind you that the argument of counsel is
15 not evidence in this case. You must judge the evidence
16 based upon the testimony that you have heard from the
17 sworn witnesses from this witness stand as well as any
18 exhibits or other evidence which has been introduced.
19 Additionally it is customary that the attorneys may make
20 reference to certain facts which they believe have been
21 proven in this case or evidence of which has come in in
22 this case. If any assertions by the attorneys concerning
23 facts, that they assert there is a fact in evidence which
24 reflects what your recollection of what that fact is you
25 are to go with your recollection because you are the sole

1 judges of the facts in the case. So, if the lawyers say
2 something about the facts and your recollection is
3 different you are free to and you should rely upon your
4 recollection of what those facts are. Again, the argument
5 of counsel is not evidence in this case. It is however
6 their contention as to what they believe the facts have
7 proven are failed to prove in this case therefore you
8 should pay close attention to the argument of counsel.
9 Ms. Mayes will open the law which will then be followed by
10 the closing argument by Mr. Able on behalf of Ms. Hepburn
11 and then Mr. Wise on behalf of Mr. Lewis. Ms. Mayes will
12 then have an opportunity to get back up and deliver her
13 final summation. With that, Ms. Mayes, you are recognized
14 for your closing argument, ma'am.

15 MS. MAYES: Thank you, Your Honor, may it please the
16 Court.

17 THE COURT: Yes, ma'am.

18 MS. MAYES: Ladies and gentlemen, I would like to
19 start by asking you to consider whether these defendants,
20 Ashley Hepburn and Brandon Lewis have told the full truth
21 about what happened that night to Victim . And I submit
22 absolutely not. What we have heard, what we have spent
23 the last seven days hearing including your testimony on
24 the stand, does it include the full truth. I submit it
25 does not. And the State's position and both of the

1 defendants, Ashley Hepburn and Brandon Lewis were involved
2 in the events of the night of October 13th of 2009, early
3 morning hours that ultimately led to the death of Victim
4 Hepburn by child abuse and neglect. And this portion is
5 fairly brief because the stage where we are right now
6 requires me to address the law. So, we are going to talk
7 about the law in this particular case and then when I am
8 done both Mr. Able and Mr. Wise will address you on behalf
9 of their clients. And let me start by saying when we talk
10 about homicide by child abuse we are talking about a
11 completely different type of crime than murder because
12 murder is one of those crimes that requires what we call
13 malice aforethought, it requires like premeditation. That
14 is not what this case is and I submit that is why they
15 have separate statutes on homicide by child abuse.
16 Homicide by child abuse is one of these crimes that is a
17 secret crime. It is not a crime that happened on a video
18 camera inside of a convenient store where somebody goes
19 into the store and robs it and catches them right there on
20 the video tape. These are secret crimes that happen
21 behind closed doors because it involves child abuse. And
22 it does not require that only one person be involved. In
23 a case like this it includes act and omission. And that
24 is what I am going to address at this point. Homicide by
25 child abuse and I will start by saying that in this

1 particular case Ashley Hepburn and Brandon Lewis are
2 charged equally. Both are charged with homicide by child
3 abuse and both are charged with aiding and abetting
4 homicide by child abuse. And at the end of the case the
5 Judge will charge you on exactly what the different forms
6 of the verdict are. But you, the jury, have the ultimate
7 right to determine whether one or both are guilty by
8 homicide by child abuse and whether one or both are guilty
9 of aiding and abetting homicide by child abuse or whether
10 one and both are not guilty of any crimes. When we talk
11 about the first charge as to both defendants, the charge
12 is homicide by child abuse. And the element, what the
13 State is required to prove is that the death of a child
14 under the age of eleven has occurred due to child abuse or
15 neglect. And while the action was committing child abuse
16 or neglect under circumstances manifesting an extreme
17 indifference to human life. And I submit in this case
18 that it has been proven beyond a reasonable doubt that
19 Audrina died as a result of child abuse, abuse of head
20 trauma as all of the doctors put it. Her homicide
21 determined by Dr. Ward in Greenville and ultimately him
22 agreeing with all the other physicians that this was a
23 clear cut case of child abuse, abuse of head trauma and
24 **Victim** would of had a sudden immediate onset of symptoms.
25 And we know that she was healthy into the late hours of

1 October 12th and we know that her death was caused while
2 she was in the care of Ashley Hepburn and Brandon Lewis.
3 Now child abuse or neglect, it includes an act or omission
4 by any person which causes harm to the child's physical
5 health or welfare. So again we are talking about an act
6 or omission meaning failure to act. So in a situation
7 where one person is the actor and the other person allows
8 the injuries to be inflicted that makes both an actor and
9 a person who allows the injuries to be inflicted by
10 failure to act guilty under this particular statute, child
11 abuse and neglect. Harm, harm occurs when a person
12 inflicts or allows to be inflicted upon the child's
13 physical injury. So, again this is not a situation where
14 only one person can be guilty and that is the person who
15 inflicts the injury. This is a situation where according
16 to this statute it covers both the person who inflicts the
17 injury and the person who allows the injury to be
18 inflicted. Harm also includes a separate definition. So,
19 it can be inflicting or allowing injury to be inflicted or
20 it can be the failure to supply the child with adequate
21 food, clothing, shelter or what is relevant in this case,
22 health care. And the failure to do so causes a physical
23 injury or condition resulting in death. In this
24 particular case did Victim Hepburn get adequate health
25 care. You heard the testimony from Dr. Ward that a

1 contributing cause of her death was hypoxia, swelling of
2 the brain, cerebral edema. His testimony was that
3 although she would of been almost immediately unconscious,
4 had a sudden onset of symptoms that would of been apparent
5 to any caregiver, that when a child goes for a long period
6 of time without medical assistance or significant period
7 of time without medical assistance that that is the result
8 of hypoxia and cerebral edema that he saw in Victim
9 case. So, we are talking about a situation I submit where
10 Victim did not get immediate medical assistance,
11 immediately after she was injured. And then when
12 ultimately EMS was called what happened, these two
13 defendants sat down there at Self Hospital in Greenwood
14 going along with this story that Victim was just found
15 this way and neither one of them knows anything. That was
16 their story and they were sticking to it. And you heard
17 the testimony of the Chaplin, Alex Brown. He goes into
18 the family room and he is trying to find out what happened
19 just like Dr. Curry was. They are desperate to find out
20 what could of happened, they are desperate to save
21 Victim life. And they sit in there telling even the
22 Chaplin, we don't know what happened. Brandon Lewis says
23 I was just watching a movie, I don't know anything. And
24 Ashley Hepburn goes along with his story, she was asleep
25 the whole time, never heard anything, never saw anything.

1 Ladies and gentlemen, is that believable, is that
2 credible. I submit it absolutely is not. You heard the
3 testimony of Ashley Hepburn that she hears everything in
4 the house on any other night. She hears the footsteps of
5 Brandon Lewis. Her daughter hears the footsteps of
6 Brandon Lewis, it can wake them up any other night except
7 this night. You heard the testimony about the fact that
8 her room is five feet, six feet away from Victim room.
9 Heard the testimony that the door was open. You heard
10 testimony that she can be in there reading a book and she
11 can hear Victim say mama. You heard the testimony that
12 she can come inside the kitchen door, completely farther
13 part of the house, she can hear Victim saying mama. Her
14 testimony in this courtroom was that on this night she
15 heard nothing, saw nothing, noticed nothing, not credible.
16 You heard the testimony of Brandon Lewis, first that he
17 was watching a movie, he doesn't know anything. That was
18 his first statement to law enforcement, that he admits was
19 a lie. The same story he was telling Dr. Curry, the
20 emergency room physician that he was trying to save
21 Victim life. The same story he is telling the
22 Chaplain, the same story he even told law enforcement for
23 hours and hours and hours. According to him that lie was
24 to protect Ashley Hepburn. But ultimately that lie was
25 also to protect himself because their story was we don't

1 know anything, we just found her this way. Did Victim
2 Hepburn get adequate health care, I submit she did not,
3 not when the people she is relying on the most to help her
4 that night was lying and ultimately extreme indifference
5 to human life. Can there be any question that this child
6 being beaten with multiple points of impact to the head in
7 addition to rapid acceleration and deceleration forces to
8 the brain, that were so severe it caused her eyes to bleed
9 out, her vision to completely and immediately impaired,
10 covered in bruises, sixteen months old. There is no doubt
11 that is extreme indifference in a life.

12 The second charge before you for consideration is
13 aiding and abetting homicide by child abuse. This is when
14 the actor knowingly aids and abets another person to
15 commit child abuse or neglect. And that child abuse and
16 neglect results in the death of a child under the age of
17 eleven, knowingly aides and abets another person. Again,
18 knowingly aiding and abetting another person to commit an
19 act or omission resulting in harm. And once again that
20 harm can be inflicting or allowing to be inflicted injury
21 or the failure to supply proper health care. And in this
22 particular case it is for your consideration whether one
23 or both committed the act of aiding and abetting to the
24 other. And in this particular case, you heard the
25 testimony of Brandon Lewis, he lied knowingly, he lied

1 with the full understanding of what he heard that night
2 and the decision not to report it, according to him
3 because he wanted to protect his codefendant. That was
4 far more important that night than Audrina's life. So for
5 your consideration as to the charge of aiding and
6 abetting. Now, the Judge is going to give you a charge on
7 some other factors of law that he is going to address at
8 the final point in the case but I want to touch on those
9 briefly. When we talk about the charge you will get from
10 the Judge in addition to the homicide by child abuse and
11 the aiding and abetting, first of all he will charge you
12 on what we call circumstantial evidence. Well, what does
13 that mean, does that mean that because there are
14 circumstantial evidence in this case that it is not good
15 evidence. No, absolutely not. That is not the law in the
16 State of South Carolina, it is not the law in the United
17 States. There are two types of evidence, direct evidence
18 and circumstantial evidence. Direct evidence, like I
19 mentioned before, it is one of those cases where you are
20 in a 7-11 and there is a video camera right up there on
21 the ceiling. And if someone comes in and commits a
22 robbery that video camera is playing and it captures it.
23 And you can come into the courtroom and you can show that
24 videotape to the jury, and you can see it with your own
25 eyes. That is direct evidence. But a case like this is

1 different. Circumstantial evidence is good evidence under
2 the law. And circumstantial evidence is when there is a
3 chain of events and the chain of events is like a separate
4 length in a chain and together they form a picture of the
5 crime that was committed. And in this case there is no
6 question that Victim was killed that night, killed that
7 night while in the care of these two defendants. And I
8 submit both of them know full well what happened to
9 Victim, both were involved. As to reasonable doubt which
10 the Judge will charge you on. A reasonable doubt does not
11 mean that the State has the burden of proving a case
12 beyond every doubt, beyond any doubt. Reasonable doubt
13 means that the State has the burden of proving a case that
14 leaves you firmly convinced of the guilt of one or in this
15 case both defendants as to the charge of homicide by child
16 abuse or aiding and abetting homicide by child abuse. You
17 will also get a charge that mere presence at the scene of
18 a crime does not amount to guilt. And I submit that
19 particular charge does not apply in this case because this
20 isn't a situation where one of them was merely present and
21 knows nothing, saw nothing, heard nothing, has nothing to
22 add. That is not the situation here. They were more than
23 merely present at the scene. Also I want to address the
24 fact that when we talk about homicide by child abuse who
25 does it apply to. Does it apply to any person, yes. In



1 South Carolina under South Carolina law it does. Homicide
2 by child abuse does not mean that it only applies to a
3 parent or it only applies to a step parent who has a legal
4 duty and responsibility to a child. Homicide by child
5 abuse and aiding and abetting homicide by child abuse can
6 apply to any person, not just a parent such as Ashley
7 Hepburn but also someone like Brandon Lewis who was in the
8 home regardless of the fact that he is not legally a
9 parent. And that, ladies and gentlemen, is the law and I
10 will step down now and allow defense counsel to address
11 you and I will address you at the final portion of this
12 case concerning the specific facts for you.

13 THE COURT: Thank you, Ms. Mayes. You are
14 recognized, Mr. Able.

15 MR. ABLE: Thank you, Judge.

16 THE COURT: Yes, sir.

17 MR. ABLE: Good afternoon. I would like to thank
18 each of you for being here over the past week and not just
19 from myself but from my client, Ashley Hepburn. This is
20 an important day. It is not an unusual thing in this
21 world that people get tried by a jury, usually people get
22 tried by Judges in other countries. This is something
23 that is unique here and it is the best system that we have
24 to determine these type cases. Now, when we started this
25 last week, last Wednesday I told each of you as a jury it

1 was your job to decide what the facts were in this case.
2 There is one fact that is indispute, one fact that we
3 learned yesterday that doesn't have to be decided. And
4 that fact is Richard Brandon Lewis is a liar, he said so.
5 He told us that, he sat right there in that chair and
6 related to us that he tells lies. The trouble with Mr.
7 Lewis is being able to know when he is telling a lie and
8 when he is not telling a lie. I submit to you, ladies and
9 gentlemen, that when Mr. Lewis gave that second statement,
10 that is the point of contention here, that is the issue.
11 Now, when he gave that second statement he was telling a
12 lie. Not all of it is false, now we know that because
13 parts of it he related before. The morning of October the
14 13th, parts of it he told, this is what happened, these
15 are the secrets of events. But when he sat there on
16 October 13th at 11:52 or whatever it was in the morning
17 the portion of that statement that he gave about hearing
18 footsteps, about hearing the sounds of a baby being shaken
19 were not true. He had spoken to no less than six people
20 that morning before giving that second statement. He had
21 gone to the hospital on October the 13th of 2009, he said
22 he spoke to Officer Garrison. He spoke to Chaplin Brown,
23 He spoke to Dr. Curry, he spoke to Officer Plaxico and
24 Blackmon and we heard he spoke to the DSS worker, Dee
25 Deal. He spoke to all of those people at Self Hospital

1 before he was ever brought to the Laurens County Sheriffs
2 office to give a formal statement. Now, Mr. Lewis
3 testified yesterday from that stand, when he spoke to
4 Officer Garrison he told him several things and this is
5 what he said he told Officer Garrison. Number one, that
6 Ashley and Owen had gone to bed. Number two, that he was
7 the only person awake in that home. Three, that he was
8 the last person to have contact with Victim. Four, he
9 found Victim and when he found her he took her to her
10 mother that was still asleep in the other bedroom. He
11 said nothing to Officer Garrison about any footsteps, he
12 said nothing to Officer Garrison about hearing any noises,
13 that is what he said and that is what Officer Garrison
14 testified to. Mr. Lewis testified yesterday that when he
15 spoke to Chaplin Brown at the hospital he told him the
16 same things. Ashley and Owen were asleep in the bed, he
17 was the only one awake in the home, he found Victim and
18 had last contact with her and when he found her he took
19 her to her mother. But he did add one other thing for
20 Chaplin Brown, he added that baby doesn't like me but I
21 love her. What kind of person says that about a sixteen
22 month old baby, what kind of person would even verbalize
23 that statement, that a sixteen month old baby doesn't like
24 me. And he added that and it caused Chaplin Brown to have
25 some concerns. We heard Dr. Michelle Curry testify last

1 That is why he changed his story. His earlier mistake was
2 telling the truth all of those times before. Now, when
3 you read that statement and you go over it in the jury
4 room just look at how unbelievable it is. He hears these
5 loud footsteps, he hears what he says Victim starts
6 crying as if being shaken. And then he says he sat there.
7 I asked him yesterday, what does it sound like to hear a
8 baby being shaken, what does that sound like. You heard
9 Dr. Crosswell yesterday, last week, she is an expert. I
10 asked her, what does that sound like, Doctor. She didn't
11 know, she said she didn't know about any studies about
12 anything like that. But his statement was I heard what
13 sounded like a baby being shaken but he couldn't tell us
14 what that sounded like yesterday. But there he was
15 writing the statement, while dictating a statement saying
16 that is what it was. He was wanting to tie back to what
17 Dr. Curry was talking about at the ER room, he wanted to
18 put something in there to make it sound right. He wanted
19 to put something in there to make it sound like it was
20 something he did hear but he couldn't tell what it sounded
21 like. He hears all of this, this is in his second
22 statement, he hears all of this, the footsteps, the
23 crying, the shaking is what he says he hears, the alleged
24 shaking. Now, what does he do. He sat there, that is his
25 story, I sat there. I submit to you, that is

1 unbelievable. Anybody would of gotten up and gone in
2 there and said, what is going on, why is Victim crying,
3 why am I hearing these sounds I have never heard before.
4 It is not believable, ladies and gentlemen. What does he
5 give, after hearing what he says he heard, when he does
6 get up what does he do. He comes out of that den, he
7 walks around into the eating area, passes through the
8 kitchen, comes into the foyer, you have got Ashley's room,
9 Victim room and the bathroom right there. What does he
10 do. Does he do what any rational person would do, any
11 level headed person who says I heard that. No. Instead
12 of turning left he turns right and he goes into Ashley's
13 bedroom and says do you want to watch a movie with me. Do
14 you want some hash my grandmother sent over here. That is
15 unbelievable. And then he leaves that room, he walks out
16 of the bedroom and walks straight into Victim room to
17 investigate, would anybody else I submit to you would have
18 gone in there and said what was going in here, let me go
19 find out. Is that what he did? He turned left and went
20 got him a plate of food and sat down and watched a movie.
21 He described what he says he heard, he sat down and
22 watched a movie after checking on his girlfriend. It is
23 unbelievable, ladies and gentlemen. You can't believe
24 that. And in his statement, his second statement he goes
25 on to say I noticed that there was blood on the outside of

1 Audrina's mouth. Now, let's think about that a minute.
2 He said he noticed on the outside of the child's mouth, he
3 is the only person to have said that. He is the only
4 person who has said that. Ashley testified, I asked her
5 about it specifically. I said do you remember seeing
6 blood on that child's mouth, on Victim V mouth. She said
7 it looked red, but no, she didn't see any blood. Doris
8 Davis, the grandmother, gave the child two quick breaths,
9 she put her mouth to that baby's mouth, did she see blood,
10 no. The EMS worker, Mr. Duckett, Calvin Duckett, he never
11 mentioned about seeing blood on the outside of the child's
12 mouth. Richard Brandon Lewis saw the blood on the outside
13 of the child's mouth. And you went in there and got
14 scared and you got that towel and you wiped that blood off
15 before taking that child to Ashley. That is how that
16 towel wound up in that crib. Never did Ashley say
17 anything about that towel. He got scared, he knew what he
18 had done, he hurt that baby and he is going to try to
19 cover it up. Mr. Lewis was the only one that saw that
20 blood and he was the only one who could of gotten that
21 towel and wiped that blood off before giving that child to
22 the mother who then went and woke up. He had been in that
23 room, he had gone in that room not to check on Victim
24 There is a picture that you are going to be submitted with
25 or you will have in the jury room with you, excuse me one

1 moment. State's exhibit 62, it is a picture from the
2 doorway into the bedroom of the children, it shows the
3 crib and the bumper pad. It would of been very hard for
4 him to see in that room that night and see that baby given
5 the way of the bed's position and the way that bumper pad
6 is so high up. That is not something he had in his
7 statements either. He said I saw her laying horizontally,
8 I stuck my head in that time and I saw her laying
9 horizontally in the bed. There was low light, he never
10 put any of that in the statements. But you will have that
11 photograph with you. He went in that room that night with
12 intent on hurting this child. He was mad, he was upset,
13 Ashley and he had argued, she had told him you are not the
14 father of these children, you will not tell me how to
15 raise my children, you will not tell me how to discipline
16 my children, you will not discipline my children. He was
17 mad, he told her, he said, he testified yesterday, he is a
18 better parent. He was telling her what she was going to
19 do and they got upset. He was mad. He was also jealous,
20 he was jealous of those children. You heard Ashley
21 testify that he would often ask her what about you and
22 Daniel, are y'all going to get back together, are y'all
23 going to reconcile. Are your feelings greater for Daniel
24 than they are for me. And every time he looked at
25 Victim blue eyes he saw that. He was jealous of those

1 children because Ashley Hepburn put her children before
2 him. He went in that room with the intent of hurting that
3 baby and he did. But it went too far, he got scared, I
4 have got to cover this up. He knew what he was doing. He
5 knew that mother across the hall knew he had to make up a
6 story. And he took that child in there and what did he
7 say, I think she had a seizure. Why would he of said
8 that. You find a baby in that condition, in that shape
9 and the first thing you want to say is I think she had a
10 seizure. He was calm, Ashley testified he was calm. I
11 think she had a seizure. He was trying to offer an
12 explanation when he was trying to give the child to the
13 mother about what he thought was wrong with the child.
14 Instead of saying we have got to get help for her, we have
15 got to find out, we have got to get her to a doctor, we
16 have got to get EMS. He is trying to offer an explanation
17 of what he had done. He was trying to offer an
18 explanation so what he could tell everybody. I think she
19 had a seizure. And he didn't normally tell Ashley that,
20 he told David Crumley that, he told Doris Davis that. I
21 think she had a seizure. But he knew what he had done, he
22 knew what he had done.

23 Now, let's look at the State's case for a little bit.
24 Now, the State has brought up several different things
25 about a chipped tooth, the bruise on the forehead and this

1 petechiae. And they want you to believe that Victim had
2 been abused prior to October 13th of 2009. About the
3 chipped tooth, you heard Ms. Davenport's testimony,
4 Ashley's grandmother. She had the child over at her
5 house. Victim was learning how to pull up, was getting up
6 on her legs. One of these little plastic swimming pools
7 and she flips over, she pulls herself up and flips over
8 and hits herself square in the face. Ms. Davenport didn't
9 think much about it, she wiped off the blood and put the
10 baby back in the water and she started playing. But when
11 Ashley got there she looked at her child and said, Memaw,
12 Victim has got a broke tooth. Children fall down, every
13 doctor that was up here last week, every expert, Dr.
14 Croswell, the expert in child abuse said sixteen months
15 olds learning to walk fall. And where do they fall,
16 forehead, face, elbows, shins, she fell over and chipped
17 her tooth playing in a swimming pool. Now, you heard
18 about Ashley's attempts to get it repaired. She wanted to
19 find a doctor who could do it without having to traumatize
20 the child, without having to strap the child down, could
21 put her to sleep and correct that problem. She didn't try
22 to hide it. If she had wanted, if she had caused that
23 injury she could of said, well, I am not going to allow
24 you to have visitation, Daniel. I am not going to bring
25 Victim over to see you. She didn't do that. She took

1 the child to see her father, she took Owen to see his
2 father, she took them over there so they could visit. She
3 didn't try to hide it. There is no evidence that that
4 chipped tooth was caused by abuse. There has also been
5 talk about the bruise to the forehead. Doris Davis,
6 Ashley's mother testified that when Ashley found the baby
7 in the crib with the bruise, she had gotten up from a nap
8 Ashley immediately brought the child in there and said
9 what is this. There is a bruise on Audrina's forehead,
10 what do you think caused this, mama. Ashley testified she
11 got in the car and went to Walmart and tried to find some
12 pads to put on the rail of the crib so it wouldn't happen
13 again. Again, all the experts testified, the State's
14 witnesses, just like the chipped tooth, the State's
15 witnesses testified babies fall down. Dr. Croswell
16 testified that the bump to the forehead, that is not
17 indicative of child abuse, when babies fall they hit their
18 foreheads. There is no evidence that bruise to the
19 forehead was caused by any type of abuse. Then they raise
20 the issue about the petechial rash around Victim neck.
21 September the 11th of 2009, she took the child to the
22 doctor, she had the well baby checkup. She had the well
23 baby checkup scheduled that day and the day before she
24 found that rash, excuse me, I am sorry. The day before
25 she had found that rash on the child's neck, she knew she

1 had a doctor's appointment on September 11th and she took
2 the child to the doctor. She said it appeared to be one
3 type of rash but the nurse told her, no, it is different.
4 The one on the trunk appears to be viral and then got to
5 the petechiae. Well, Dr. Philpott last week testified
6 that petechial rashes can be viral. Viruses can cause
7 those, she said a whole lot of things can cause those.
8 But about that rash, Ashley took **Victim** to the doctor,
9 not once on September the 11th of 2009, but when she took
10 the child in she saw Nurse Wolkekette. Nurse Wolkekette
11 said if it gets worse we want you to come back. If you
12 think it is spreading bring her back so we can see her
13 again. Now, Nurse Wolkekette, if you recall, when we
14 called her as a witness said that the petechial rash could
15 be caused by a stressful cough and or her opinion it was a
16 stressful cough or irritated skin. She didn't have any
17 concerns about child abuse and she told you if she thought
18 it was child abuse she would of reported it as she is
19 required to do by state law. But Ashley was told if it
20 gets worse come back and see us. What did she do.
21 September 12th, Saturday she was sitting in that doctors
22 office saying I think it is worse. She saw Dr. Pike and
23 Nurse Platt at that time over the period of that six day
24 period, no less than two nurses and no less than two
25 doctors looked at that rash. On the second day she went

1 they told her again if it gets worse come back to see us.
2 That was Saturday, the 12th. She was back in that office
3 on September the 16th of 2009 saying look at my baby
4 again, it is not any better, tell me what this is, tell me
5 what is wrong with her. She had three doctors visits in
6 six days. Dr. Philpott testified that Ashley appeared
7 concerned about, that she and Victim acted appropriately
8 within each other. It was Dr. Philpott who testified,
9 Victim reached for her mother. They interacted
10 appropriately. Both Nurse Wolkekette and Dr. Philpott
11 testified, had they believed at any time that any of this,
12 that rash was a result of any abuse they would have
13 alerted the authorities. They looked at it, they couldn't
14 tell what it was. They even set up a test for the 17th,
15 September the 17th to go to Self Memorial to have a test.
16 done there to help try to determine what was going on.
17 Did Ashley try to hide that, did she try to keep the child
18 away saying, oh, I don't want anybody to see this on the
19 child. No, she took Victim and Owen to their father's
20 home for a visit and asked Daniel, you need to take
21 Vi Victim to the hospital tomorrow so she can have a test,
22 so we can figure out what this is. She didn't try to hide
23 the fact. She took the child to the doctor, that is what
24 you would expect a caring, loving mother to do is when a
25 doctor says that it gets worse bring your child back, that

1 is what you would expect a mother to do. That is what you
2 would expect Ashley Hepburn to do and that is what she
3 did. There is no evidence that the bruise to the
4 forehead, that the bruise to the forehead or that rash or
5 the chipped tooth were caused by abuse. Now, in their
6 case the State also wants to lead you to believe that the
7 bruises on [Victim] while she was in the hospital were a
8 different color, they kept bringing that up, these bruises
9 were a different color, trying to indicate that they were
10 old bruises and new bruises. You heard Dr. Seigler and
11 Dr. Croswell, both State's witnesses, both experts, they
12 both testified you can't date bruises by their color or
13 appearance. They both said that. Dr. Seigler even
14 testified when I cross-examined him, the bruises may have
15 been inflicted at the same time as the injury that caused
16 [Victim] death. He couldn't tell you, they can't tell
17 when a bruise, depending upon what color it is, they can't
18 tell how old that bruise is. That is the experts that the
19 State called. The State then wants to keep raising this
20 issue about fingernails. Ashley may of had fingernails,
21 there is a photograph of her the summer of 2009 showing
22 she had fingernails. And she told you she had had an
23 event to go to. But there is no evidence that she had
24 fingernails. As a matter of fact, you heard Dr. Ward who
25 is a pathologist I believe, he performed the autopsy. He

1 testified that the injuries to [Victim] back were caused
2 by fingernails but he couldn't tell how long they were.
3 He even told Ms. Mayes on direct examination that they
4 wouldn't have to be long, they wouldn't have to be long to
5 cause those type injuries. Again, that was the State's
6 expert. And Agent Kirkland testified that her
7 investigation was not depending as to whether or not
8 Ashley Hepburn had long fingernails on that day of October
9 the 13th of 2009. And it didn't matter because Dr. Ward
10 had said it could of been long fingernails, it could of
11 been short fingernails. As a matter of fact when Ms.
12 Mayes was questioning one of the experts she was asking
13 about fingernails, they started talking about right hand
14 versus left hand. Ashley is left handed. Ms. Mayes asked
15 the doctor, can you tell from the blow, can you tell from
16 the injuries to this child if it was a left handed or
17 right handed person. No, he couldn't. Could you tell if
18 it was a man or a woman. No, you couldn't. The
19 fingernails, left hand, right hand, the experts don't
20 know. Those were the State's witnesses. That is what the
21 State produced for you.

22 Now, let's talk a few minutes about some of these
23 State's witnesses. You had Mr. Duckett, Calvin Duckett,
24 the EMS driver. What did he describe. He described
25 [Victim] condition when he picked her up, when he got

1 there in the ambulance and they took her to the hospital.
2 And these are all the State's witnesses. You heard from
3 Dr. Michelle Curry from the hospital, what did she tell
4 you about this. She described [Victim] condition, she
5 related Mr. Lewis' statement that he was the only one
6 awake in that house. Dr. Curry related that Mr. Lewis'
7 statement that Ashley Hepburn was asleep and that he took
8 the child to her. Dr. Curry related Ms. Hepburn's
9 statements that she had put the child in the bed, the baby
10 was fine and that she had gone to bed with Owen and was
11 only awakened and was awakened by Mr. Lewis when he
12 brought the child to her. You heard David Crumley, Ms.
13 Doris Davis' boyfriend, Ms. Davis being Ashley's mother.
14 Mr. Crumley testified that on the evening of October the
15 12th of 2009 the baby was fine. They sat there and they
16 ate dinner but that was both Mr. Crumley and Ms. Davis'
17 testimony. The baby was fine the night before. The baby
18 sat there and had dinner, the baby played with her
19 brother, the baby was crawling trying to walk. Ms. Davis
20 picked the baby up and picked [Victim] up and carried her
21 into the bathroom to get a bath. [Victim] was fine that
22 night. And they both, Mr. Crumley and Ms. Davis related
23 that they were awakened by the screams of Ashley screaming
24 for help for [Victim]. The State called Alexander Brown,
25 the Chaplain from Self Memorial. He related that Mr.

1 Lewis' statement that he was the only person awake in the
2 house. That Ashley Hepburn and all others were asleep.
3 He also said that Mr. Lewis never said anything about Ms.
4 Hepburn doing anything except being in bed. We heard from
5 the medical experts, Dr. Seigler, Dr. Croswell, Dr.
6 Johnson and Dr. Philpott. And Dr. Seigler, the attending
7 physician, he described her injuries. He said that the
8 head injuries were not old and he said, again, like I said
9 before that the bruises may have occurred at the same
10 time. Dr. Croswell who interviewed and talked with Ashley
11 at the Greenville Hospital reported the history of events
12 as Ashley gave them to her. Mr. Lewis was awake and found
13 Audrina and Ms. Hepburn was asleep and she talked about
14 the condition of the child and her injuries. Now, when I
15 spoke to Mr. Lewis yesterday, when I cross-examined him I
16 asked him on the morning of October the 13th he was at the
17 sheriffs office giving his first statement. It doesn't
18 say anything about hearing footsteps, it doesn't say
19 anything about hearing babies being shaken or a baby being
20 shaken, nothing like that in there. It is the same thing
21 that he basically told everybody that morning up to that
22 last statement. Ashley Hepburn, well Mr. Lewis was taken
23 from Self Regional Hospital to the Laurens County Sheriffs
24 Office where he gave this statement. Ashley Hepburn had
25 left Self Regional Hospital and went home, put on some

1 shoes because she had ran out of the house with no shoes
2 or socks on, she was in her bed clothes. And she went to
3 Greenville Hospital, Greenville Memorial. And she was
4 relating to Dr. Crosswell at that time while Brandon Lewis
5 was down there relating this statement, Ashley Hepburn was
6 in Greenville talking to the doctors, talking to Dr.
7 Croswell, relating the same history. She was telling the
8 same thing that Brandon Lewis was telling down here, she
9 was telling the truth just as he was at that time. Dr.
10 Philpott described the rash, the child had been taken to
11 the doctor by the mother three times. She also testified
12 that she didn't make a diagnosis of child abuse. She said
13 that was part of the differential diagnosis basically
14 meaning we need to look at this, we need to figure out
15 what the problem is. She doesn't say this was child
16 abuse. We have to go through, a differential diagnosis
17 she testified is just a matter of elimination. That
18 diagnosis was never made and you heard her say that if she
19 had thought that she would have reported it. Dr. Philpott
20 and nurse Wolkekette both testified that that type rash
21 could be caused by a cough. Nurse Wolkekette said it was
22 her opinion that it was caused by a stressful cough or
23 irritation of the skin. You heard from Ben Blackmon who
24 took the first statement from Mr. Lewis which I just
25 referred to and in that statement Mr. Lewis again said he

1 was the only one up in the house and that Ashley was
2 asleep. And he gave that statement at the same time she
3 was in Greenville giving her statement to Dr. Croswell.
4 We heard from Dee Deal, I have already discussed what he
5 told Dee Deal. We heard from Calvin Hill from DSS, from
6 the Department of Social Services and Mr. Hill said,
7 Ashley said she had gone to bed and left Brandon up. We
8 heard from the SLED DNA analyst, basically Ms. Brown, Ms.
9 Simmons and Mr. Fitts who basically said you would expect
10 to find the mother's DNA in a child's crib, you would
11 expect to find the mother's DNA in a child's room and on a
12 child's things because the mother has access to all of
13 those things. You would expect that from being in a
14 child's room. We heard from Officer Garrison basically
15 telling the same story that Brandon had told everybody
16 that morning, I have already gone over that, heard from
17 Officer Plaxico. And we also heard from Agent Kirkland
18 about the statement that she had taken or the notes she
19 had taken and made into a memorandum as to her statement
20 from Ashley that Ashley said she was asleep and that Mr.
21 Lewis was the only one awake. The only thing in the
22 State's case-in-chief that they were able to prove or not
23 to prove but they were able to show was that Ashley had
24 gone to bed, Mr. Lewis was the only one awake. Mr. Lewis
25 took Victim to Ashley and woke her up, that is her proof.

1 Now, or course that didn't end it. You heard from the
2 defendants as well. You heard from Mr. Lewis and I am not
3 going to go back into all the things that I just spoke
4 about of Mr. Lewis and what he testified to. But you
5 heard from Lieutenant Plaxico this morning, you heard him
6 say that when he spoke to Ashley on October the 13th of
7 2009 down here at the Laurens County Sheriffs Office that
8 he allowed Ashley to look at that statement of Richard
9 Brandon Lewis I believe is marked as defendant's exhibit
10 number 2. And he allowed her to read that statement and
11 she made the statement, "Oh my god all of this is true but
12 I don't remember hurting my baby." Now, ladies and
13 gentlemen, as I asked Mr. Plaxico this morning, when I
14 first talked with him about this case in December of '09
15 there was a preliminary hearing and I got to ask him
16 questions. And the last question, one of the last
17 questions I asked him is what evidence do you have other
18 than Mr. Lewis' statement that my client was involved
19 causing the injuries to Victim Hepburn. In December of
20 2009, less than three months after he interviewed Ashley
21 Hepburn on October the 13th of 2009 he said nothing, that
22 he had no other evidence other than the statement of
23 Richard Brandon Lewis. He said nothing, he testified to
24 that this morning. He didn't make any mention at that
25 preliminary hearing about hearing any, about, I am sorry,

1 he didn't make any mention at the preliminary hearing
2 about Ashley making any statements to him about saying, oh
3 my god all of this is true. He never said that. As a
4 matter of fact on October, subsequent to October 13th, I
5 think it was dated October 19th he went back, Mr. Plaxico
6 and he made a supplemental report where he said they had
7 gotten the second statement from Richard Brandon Lewis and
8 he went and he interviewed Ashley on the 13th and the only
9 thing that she told him was I didn't hurt my baby. That
10 was October 18th, I believe, 18th, 19th, somewhere in
11 there, 2009. He made a supplemental report saying when I
12 interviewed Ashley all she told me was she didn't hurt her
13 baby. And in November of 2009 I had talked to him at the
14 preliminary hearing and he said is the only thing I have
15 that connects Ashley Hepburn to this is the statement of
16 Richard Brandon Lewis. He didn't say anything about her
17 making these statements. He didn't say anything about it
18 until May of 2010 at the DSS hearing. He doesn't, then he
19 doesn't bother to even make a report about it until a year
20 after the incident. October, I can't remember, October of
21 2009, 2010. He waits a year to put in writing this
22 statement and Ashley Hepburn, after reading that statement
23 that Richard Brandon Lewis prepared, said, oh my god all
24 of this is true. He didn't even put that in writing until
25 a year after it was supposedly said. He had no notes, he

1 had no video, he had no recording and he makes that
2 statement. I think the thing that is important here is
3 after this so called statement, this supposed Ashley
4 Hepburn confessing, basically saying, oh my god all of
5 this is true, everything in this statement is true. A
6 statement that says that I stomped across the house, I
7 shook my baby and then I stomped back and got in the bed
8 and went back to sleep. After she supposedly made this
9 statement confessing to that did Lieutenant Plaxico put
10 handcuffs on her, no. Did he take her to jail, no. She
11 left, he released her. He let her go. You as the jury
12 can weigh that, you as the jury can decide the credibility
13 of the witnesses who have testified. You can weigh the
14 credibility of each witness up here to determine their
15 credibility. I submit to you, ladies and gentlemen, that
16 that is not credible. If that young girl over there had
17 made those statements, oh my god all this is true, she
18 would of been arrested right that moment. She would not
19 have been allowed to leave. What happened again was what
20 was in that first supplemental report that Officer Plaxico
21 testified to, he went and spoke to Ashley Hepburn, she
22 said she didn't hurt her baby. That was it. That was the
23 first supplemental report in October of 2009, not October
24 of 2010. That is all he mentioned, was that he had talked
25 to her and she said she didn't do anything to hurt her

1 child. Now, the State's position will probably say, well,
2 why didn't she say all of it was lies, this second
3 statement. Why didn't she say everything contained in
4 there is all lies. Well, it wasn't. You heard Ashley
5 testify, it wasn't all lies. There were parts in there
6 that were true. And she said I looked at it and I said I
7 put Victim to bed, that is true. Owen and I went to bed,
8 that is true. Richard Brandon Lewis came in my room, that
9 is true. Richard Brandon Lewis brought my baby to me
10 holding her in his arms, that is true. But I submit to
11 you she never said, oh my god all of this is true. That
12 is not true. She told him what was the truth and it was
13 not until, as I said, eight months later that he ever
14 mentioned anything, Officer Plaxico ever mentioned
15 anything about this statement, this declaration, all of
16 this is true in the statement. I submit to you that
17 didn't happen that way. Ladies and gentlemen I submit to
18 you that in the early hours of October the 13th of 2009
19 what happened is just as Mr. Lewis said to everyone before
20 that second statement. Ashley had gone to bed, Ashley was
21 asleep with Owen in that bed, she had previously had put
22 Victim down, Audrina was in her room. He, Richard
23 Brandon Lewis was the only one awake. He is the only one
24 who could of done this to this child. Mr. Lewis caused
25 the death of that child while her mother laid in the bed

1 asleep in her room with Owen.

2 Now, as the Solicitor has already gone over with you,
3 she has talked about the elements of homicide by child
4 abuse and those elements are, causing the death of a child
5 under the age of eleven while committing child abuse and
6 neglect under circumstances showing extreme indifference
7 of human life. The only evidence, ladies and gentlemen,
8 they have to prove anything that my client did are the
9 statements of Richard Brandon Lewis. That is it, that is
10 the only thing tieing her to this is what that man said.
11 He is a liar, he told us that. She is also charged with
12 aiding and abetting homicide by child abuse which is
13 knowingly aiding and abetting another person to commit
14 abuse or neglect of a child under the age of eleven and
15 the abuse or neglect results in the death of a child.
16 Again, all we have left are the unbelievable statements of
17 Richard Brandon Lewis. The Judge is going to charge you
18 about reasonable doubt and I want you to listen to his
19 charge, I am not going to go through all of that. But he
20 will charge you that reasonable doubt is a doubt in which
21 you can give a reason and he will charge you that it is
22 the burden of the State to prove that Ashley Hepburn
23 committed both of these crimes and it is their burden of
24 proof to prove each element of the crime beyond a
25 reasonable doubt. Ladies and gentlemen, there sits

1 reasonable doubt as to the guilt of Ashley Hepburn.
2 Richard Brandon Lewis is the reasonable doubt. Richard
3 Brandon Lewis told the truth the early morning hours of
4 October 13th of 2009. The only reason he changed his
5 story was to save himself. I believe that once you have,
6 had an opportunity to hear the charge from the Judge and
7 you take the evidence that has been submitted in this case
8 and you apply that evidence to the facts as you find them
9 you will find that Ashley Hepburn did not commit the
10 crimes of homicide by child abuse or aiding and abetting
11 homicide by child abuse. You will find that Richard
12 Brandon Lewis is the one that is responsible for the
13 injuries to this child, **Victim** Hepburn. And that only
14 Richard Brandon Lewis caused the injuries that led to that
15 child's death. Thank you.

16 THE COURT: Thank you, Mr. Able. Ladies and
17 gentlemen of the jury, do you need a break? I am getting
18 a couple of head nods there. We are going to take five
19 minutes and allow you to use the restroom and don't
20 discuss the case yet. See you back here in about five
21 minutes. Thank you.

22 (Whereupon, the jury was excused from open court for
23 a break.)

24 THE COURT: We will take a five minute break.

25 (Whereupon, a short break was taken.)

1 THE COURT: Let's get the jury in, please.

2 (Whereupon, the jury came into open court at
3 approximately 3:00 p.m.)

4 THE COURT: The record should reflect that the jury
5 is back. We are continuing with the final argument of
6 counsel. Mr. Wise, you are recognized for your argument,
7 sir.

8 MR. WISE: Mr. Foreman and ladies and gentlemen of
9 the jury, if you go into the jury room and say to yourself
10 and say among yourself, you know, Richard Brandon Lewis is
11 probably guilty, he probably shook that child, she died.
12 What should your verdict be, your verdict should be not
13 guilty because when we talk about proof beyond a
14 reasonable doubt we are not talking about what probably
15 happened, what might of happened, what could of happened,
16 what possibly happened that morning of October the 13th of
17 2009, it is the highest standard known to man short of an
18 absolute certainty. It is the standard by which we go out
19 and brag to people about our criminal justice system. And
20 we have said that that standard is there to protect the
21 defendant and that is partly true but it is also to
22 protect y'all. When the State comes in here and says we
23 are going to prove this case beyond any and all reasonable
24 doubt you don't go to bed two days from now, two weeks
25 from now or two months from now and say, did I make the

1 right decision. Because when it is that high of a
2 standard you know the right decision and that is what
3 proof beyond a reasonable doubt is all about in a
4 nutshell. Spent 40 years doing this, argued reasonable
5 doubt, give illustrations to the jury, like a couple of
6 football games last fall is really what I think truly
7 illustrates what it is about. They have instant replay
8 for football. You have all seen the cameras when you
9 watch football, they will stop and have instant replay.
10 And the announcers will tell you this, they will say the
11 question is, is it in-controversial, incontrovertible
12 evidence that the call on the field is wrong. And if that
13 evidence doesn't meet that standard, if they look at that
14 video replay and the call on the field stands then you see
15 them look at the replay, you have seen the replay being
16 thrown on the screen and you say, well, I wouldn't have
17 necessarily made the same call. That is what reasonable
18 doubt is about. The call on the field is not guilty.
19 That is the call that the State then has to come in here
20 and prove there is incontrovertible evidence. You may say
21 I would of made a different call, you may say it is close,
22 you may say it is questionable but until it reaches that
23 pure standard they cannot prove in this case beyond any
24 and all reasonable doubt. That standard by which you must
25 judge the defendant.

1 Now, let's talk briefly about Richard Brandon Lewis'
2 statement or Richard Brandon Lewis in this case. Mr. Able
3 made much to do about his statement given by Brandon Lewis
4 on October the 13th. Read this statement carefully, what
5 you will see in this statement is a complete absence, a
6 complete absence of any negative comment about the woman
7 that Brandon Lewis was in love with, Ashley Hepburn.
8 Nothing, it doesn't say a word in here about the fact that
9 she had been up all night before, that is uncontroverted
10 in this case, she admitted it. It doesn't say a word in
11 here about the fact that they had had an argument that
12 day. That would put her in a negative light, she admitted
13 it. It doesn't say a word in here about spanking Owen.
14 For the first time in her life, not a word in here of it
15 had there ever been something bad about it. His purpose
16 here was to cover up for anything she did because he was
17 in love with her. He came from a home, as you learned
18 from Dr. Jacobs, it wasn't the best in the world. He
19 looked at her and her two children as his family, his
20 world, the way he was going to be. And then it came
21 crashing down and he didn't say a word about her, bad
22 about her. When you are in love with someone you don't
23 turn it off like a faucet, if they do things that
24 disappoint you no matter how serious you don't turn that
25 feeling off like a faucet, it stays there and it builds on

1 you. And he stayed there at the police station mainly
2 because the police said we don't think we have got the
3 complete truth yet. Let's let him stay around. They even
4 went and got his grandmother to come into the room with
5 him and talk to him. And his grandmother didn't tell him
6 what to say, she didn't know the facts. But she gave him
7 some good advice his grandmother should have. She said,
8 Brandon, if you know anything tell them. If you know
9 anything tell them. Still upset, still emotional, that is
10 when he knew he had to follow his grandmother's advice and
11 he did. He called the officers back in, the officers came
12 back in and then he gave them this statement. And in here
13 he does talk negatively about her. He does talk about the
14 argument they had, he does talk about her spanking Owen
15 and he does talk about hearing her footsteps stomping down
16 the hall into that child's bedroom. That is the truth and
17 that is the truth that also caused Richard Brandon Lewis
18 to almost take his life. Several days later he tried.
19 His psychiatrist comes in here and tells you he was upset
20 over this loss, it was tremendous to him. With his
21 background, his family background it would of been a
22 bigger loss than most people. He was upset about
23 testifying about it. If Richard Brandon Lewis had said so
24 much as a scintilla of evidence in that, several touchings
25 from his psychiatrist that had said he had inflicted any

1 harm whatsoever on this child you would of heard it, you
2 would of heard it. She is talking to him when he is
3 depressed, when he is down, and he has literally been on
4 the verge of suicide and not one syllable comes out of his
5 mouth that he harmed that child in any way. The only
6 thing that came out of his mouth once, I am having to
7 testify against the woman I love. Now, what did Brandon
8 do after that. He gives a statement to the police, after
9 this statement he is interviewed twice more by Officer
10 Plaxico and nothing new came out. And then what did he
11 do. He goes and sits down for three hours, for three
12 hours in a room with a table, Bryan Able, Ms. Hepburn, him
13 and myself and a court reporter and answers every single
14 question Bryan Able wanted to ask for three hours, for
15 three hours he is grilled and for three hours he answered
16 those questions under oath. He did not run from his
17 responsibility. And then what does he do. There was a
18 DSS hearing involved in this case. Again Bryan Able is
19 there, Ashley Hepburn is there, Daniel Hepburn is there,
20 Brandon Lewis is there and I am there. And what happens
21 in that hearing. The Department of Social Services
22 lawyer, Laura Hock, stands up and says, I call Richard
23 Brandon Lewis. And he testifies, he testifies, he answers
24 all of her questions, he answers every single question she
25 has about this incident and he gets to be cross-examined

1 again by Bryan Able and answers his questions. He did
2 what he was suppose to do in answering those questions.
3 And how much incidences is there in his testimony between
4 those two events, zilch, none, zero, call it what you want
5 to and I will tell you how you know. Because never once,
6 never once did anybody in this courtroom pick up the
7 transcript from either of those two hearings and say,
8 didn't you say something different at those hearings.
9 Didn't you say this at that hearing and you are saying
10 this now. They did it with those two statements, you saw
11 it ad nauseam because obviously they are different. But
12 not once did anybody catch him in any contradiction in his
13 testimony from his depositions, to his testimony at the
14 OSS hearing, his testimony today. So, we will point out
15 one little thing though, it was represented to you,
16 closing argument and during the trial that he made up for
17 the first time on this stand that the statement that he
18 had jerked Owen, excuse me, that Ashley Hepburn had jerked
19 Owen up by the arm and carried him into the bathroom to
20 give him a spanking. Represented to you and it was made
21 up on the stand. As you recall, when we got back up on
22 redirect I had Mr. Lewis from page 63 of the transcript,
23 of the deposition where he stated at that point she jerked
24 Owen up by the arm. That was not something that was made
25 up on the stand today. He testified and it is something

1 that was there on March of 2010. Obviously law
2 enforcement is not going to question Brandon extensively
3 as we did in this courtroom or the depositions or the
4 testimony in the DSS hearing. Those are going to be much
5 more thorough, they didn't get all the complete details,
6 if they had asked him about it they would of. And it is
7 quite obvious if they had wanted to sit down and ask him
8 more questions they could had. That is what Richard
9 Brandon Lewis has done to cooperate with this. And his
10 reward for it was to cause him a semester at Clemson when
11 he got arrested eleven months after the incident, eleven
12 months after the incident they decide, whoops, we need to
13 arrest Brandon Lewis also. That you can consider. Now,
14 Mr. Able gives opening statements, gives a statement in
15 closing arguments and he talks about his theory of Brandon
16 Lewis causing all of this and it goes on until he gets to
17 one point. And then he gets to the idea that all of a
18 sudden he was mad and that is what did it. Where is the
19 evidence that he was mad, where is the evidence he was
20 upset, where is the evidence that he was in the least bit
21 angry that night. It does not exist. And there is an old
22 phrase and I wish I could remember the Latin phrase, it
23 translates to this and it says that which is not proven
24 and that which does not exist are the same. If it is not
25 proven he was mad and he was upset and he was in a

1 terrible mood that night then it doesn't exist in this
2 courtroom. Because there was no testimony about it.
3 There is no testimony about it, there is no rhyme or
4 reason why Richard Brandon Lewis sitting there watching
5 television would decide and go into that child's room and
6 shake that child to cause that child to die. Nothing in
7 this case. Now, there are a few pieces of evidence that
8 we need to look carefully at in this case. Actually we
9 may even lower it down to one. The testimony from Ashley
10 Hepburn was and kind of common, she gave Audrina a bottle
11 before she went to bed that night. Come in the next
12 morning, there is no bottle in the crib, there is no
13 bottle on the floor, there is no bottle in the child's
14 room where they take the pictures, there is no bottle
15 there. There is only one baby bottle in that house found
16 by anybody with SLED when they went in, it is in Ashley
17 Hepburn's bedroom. Ashley Hepburn's bedroom and her
18 explanation, the other bottle was on the table in the
19 other room and I saw it but I don't know where it is now.
20 And her explanation for this, oh, that was from the
21 previous afternoon and I just never got around to cleaning
22 it up. I never got around to cleaning it up, that is the
23 bottle that was in Audrina's crib that night. They talked
24 about Brandon seeing blood on the lip, the tongue was cut,
25 there should of been blood on the lip. Everybody admits

1 the tongue was cut, I believe the medics even admitted
2 saying they saw blood on the lip. The tongue was cut,
3 there is no disputing that fact and should have been blood
4 there. The other thing about Richard Brandon Lewis you
5 need to remember he was arrested unexpectedly in September
6 of last year. Agent Kirkland knowing the facts of this
7 case checked his fingernails, they were non-existence,
8 they were gone, he had fingernails but they were very,
9 very short. Because she knew that that was a mark on the
10 back of the child that was consistent with a fingernail,
11 where someone would grab the child with their fingers and
12 squeeze and shake. Now, I have sat here for a week and I
13 have said to myself, what is the State's theory of this
14 case. What is the State's theory going to be as to how to
15 convict Brandon Lewis and Ashley Hepburn. And I finally
16 concluded and actually did not conclude it until today,
17 that the State's theory is going to be that Ashley Hepburn
18 shook that child until she died. And the reason I say
19 that it has to be, it is the only thing that hits with
20 some of the other things that the State wants you to buy
21 in this case. And what they want you to buy is that
22 Brandon Lewis has some culpability in this and if they
23 come up here and argue to you or try to convince you that
24 Brandon Lewis shook that child until she died then that
25 woman is not guilty. Because that woman did not do

1 anything, if that theory is correct, except wake up, get
2 the child medical help and go to the hospital and never
3 told the first untruth about this incident. The State's
4 theory is that Brandon Lewis shook this child until she
5 died and the State has to ask you to turn her loose but
6 they are not going to do that because they are going to
7 contend that she shook the child and therefore what is the
8 responsibility of Richard Brandon Lewis. They say that
9 Richard Brandon Lewis' responsibility was that he gave
10 this false statement to the police and he told the
11 personnel at the hospital that night, did not tell him he
12 thought maybe the child had been shaken, didn't tell them
13 that and therefore that is why he is liable because he did
14 not assist in helping the child be taken care of. There
15 is not a scintilla of evidence in this case that says that
16 Brandon Lewis had said when you first got to Self Hospital
17 she shook, that child that would of been any different
18 result, there is not a scintilla of evidence in this case,
19 not a scintilla. If you go back to the night at the time
20 of the incident when he says he heard the child crying
21 differently which he then believed to be shaken, at the
22 time he heard it he didn't know about shaking, that was
23 told to him at the hospital by the hospital personnel.
24 Looking back at what he heard that is what he concluded
25 and that is what his testimony was, that is correct.

1 Looking back at what he heard that is what he was looking
2 for. So if he at the time of the incident simply heard
3 Ashley Hepburn disciplining her child there is no
4 culpability on the part of Brandon Lewis because he is not
5 entitled to interfere with the discipline, she had already
6 fussed at him early that day about doing it. There is no
7 knowledge that this child has been seriously injured so
8 there is no duty on his part at that point to do anything.
9 And there is not a scintilla of evidence that if he had
10 told DSS, not DSS, the EMS people at the scene that I
11 heard Ashley Hepburn walking, stomping to her room and I
12 heard the child crying differently that there would of
13 been any other outcome than the tragic outcome that came
14 about. And unless his actions caused there to be a tragic
15 outcome that otherwise would not have occurred he has
16 committed no crime.

17 Now, let's talk about the testimony of Ashley
18 Hepburn. I think it can be summed up in three words.
19 Confusion, excuse me, confession, admission and
20 manipulation. When she got on the stand she testified
21 Officer Plaxico read her the statement of Brandon Lewis.
22 There is something interesting about the scenario of her
23 testimony if you didn't notice. I asked her, did Officer
24 Plaxico ask you to read this statement and then, what did
25 you tell him. Well, I told him this part was correct and

1 this part was correct. And in her direct testimony before
2 she got the reply that is all she said, she told him it
3 was correct about I think them having an argument and it
4 was correct about spanking Owen and all of that. That was
5 it. Now, let's step back a moment and look at this a
6 little more objectively. If a mother whose child is in
7 critical condition in the hospital, in intensive care, on
8 life support is given a statement in which a person
9 accuses her in that statement of stomping into the room
10 and shaking the child and stomping out your first reaction
11 would not be to say it is correct about spanking Owen, it
12 is correct about us having an argument; it is correct
13 about what was television. Your first reaction would be
14 to say, that statement is wrong, that statement saying
15 what I did is wrong, wrong, wrong. That would of been
16 your first reaction, that would of been any human being's
17 first reaction but it wasn't her's according to her
18 testimony on the stand. She said part of this is right,
19 this part is right. Then she gets back on the stand today
20 and for the first time today says and then I told Officer
21 Plaxico this part is wrong. He has got it reversed. If
22 she truly was in sense and knew that was wrong the first
23 thing she would of said is this is wrong, I did not stomp
24 in that room and the rest wouldn't make a hill of beans.
25 Because she was being accused of injuring her child. She

1 didn't say that. Then she wants to get up here and say
2 that when Officer Plaxico says, oh my god all of this is
3 true. Well, he is not telling the truth and I am going to
4 tell you, that admission is a confession, it is a
5 confession by Ashley Hepburn that she did this crime. And
6 if that confession is true Brandon Lewis didn't do it. In
7 order to convict Brandon Lewis you have to find beyond a
8 reasonable doubt that that confession did not happen, you
9 don't have to find it did happen, you have to find it did
10 not happen. You have to be willing to say beyond any and
11 all reasonable doubt what Officer Plaxico said is not
12 true. Because the Judge will tell you that if you have
13 any doubt about the testimony you are to resolve that
14 doubt in favor of the defendant. So, if you have any
15 doubt about Officer Plaxico's testimony you have to
16 resolve that doubt. The thing about Brandon Lewis, you
17 have to conclude beyond a reasonable doubt that testimony
18 is just a flat lie. You have an admission, admission.
19 Officer Kirkland gets on the stand and says did you talk
20 to her. Yes, I did. What were you doing. Well, I was
21 asking her open questions, called open ended questions
22 which means questions like, what happened next, what did
23 you do, what did you see, what did you hear, what did so
24 and so do, those are open questions. Leading questions
25 are things that you can imply the answer. You shut the

1 door, didn't you. That is a leading question, basically
2 telling the person you shut the door. She asked open
3 ended questions so the person can just freely answer. And
4 she asked the question, what was Brandon doing and the
5 answer was, wasn't I don't know, I think he was watching
6 television. It wasn't, Brandon told me he was watching
7 television. It wasn't, I don't know, I was asleep. What
8 was Brandon doing. Her answer to Major Kirkland was,
9 Brandon was watching TV during it all, during it all, that
10 is the only other implication you can have from that. And
11 one reason we know that is the only implication you can
12 have from that, she denies making the statement. She says
13 Agent Kirkland was wrong, she didn't say that. And in
14 order and that in an essence, while not necessarily a
15 confession is a strong admission in that Richard Brandon
16 Lewis is not guilty. And again in order to convict
17 Richard Brandon Lewis you have to say beyond a reasonable
18 doubt, Agent Kirkland is wrong, Agent Kirkland did not
19 copy that statement down right, Agent Kirkland
20 misinterpreted what she said. And there is no evidence to
21 back that up. And then when you weigh into that, Agent
22 Kirkland's statement that her attitude was angry,
23 defensive, yelling at her while she is asking open ended
24 questions trying to find out what happened to her
25 daughter. She is yelling at Agent Kirkland. That isn't

1 normal. And then when Agent Kirkland says would you give
2 us a written statement she says no, I won't. Your
3 daughter is in the hospital in critical condition, I will
4 not give you a written statement. And she said Agent
5 Kirkland never said that to her. She didn't say that, was
6 Agent Kirkland wrong about that too, wrong about this,
7 wrong about that. And then what even gets more amazing
8 about these admissions, Agent Kirkland asked a very open
9 ended question and the open ended question was basically,
10 do you know who did it. Her answer was, doesn't put it
11 past their father to do this. In other words, doesn't put
12 it past Daniel Hepburn to do this. Daniel Hepburn hadn't
13 been around these children in three or four days. But she
14 had so much hatred or whatever it is in her heart for
15 Daniel Hepburn that she wants to blame it on him. She
16 doesn't blame it on Brandon, she wants to blame it on him
17 saying he has resented her for the divorce. It makes no
18 sense that anybody would say that. I don't know if it
19 surprised y'all, somewhat surprised me. During the course
20 of the testimony it was learned that since this incident
21 that Daniel Hepburn and Ashley Hepburn had been seeing
22 each other and having sex together, since this incident in
23 the last several months. She was only trying to
24 manipulate Daniel Hepburn. And I will say that because
25 Daniel Hepburn made a statement on the stand when he

1 testified that was very harmful to her, very harmful. He
2 says that he noticed marks on **Victim** neck, had been
3 told by medical personnel that those could of been caused
4 by some choking marks. So, when he talks to Ashley again
5 he asked her, is **Victim** wearing a necklace or a bib or
6 something. And what was her remark, I didn't choke her.
7 That is what Daniel Hepburn said, I didn't choke her. She
8 had to know Daniel was going to say that. Now, she denies
9 Daniel Hepburn, she denies on the stand that she ever told
10 Daniel Hepburn that. So, I guess Daniel Hepburn is also a
11 person that is not telling the truth in this case
12 according to Ashley Hepburn. I didn't choke her. She
13 said I never told him that. Well, I assume her little
14 tress with Daniel Hepburn was important that he wouldn't
15 say that on the stand but it didn't work out. She tried
16 to manipulate it and it didn't work. He came up here and
17 he told the truth as he recalled it. Now, let's look at
18 her testimony. She has a Facebook comment in which she
19 says I hate and HATE is in capital letters, being at home.
20 I hate being at home. And how long has she hated being at
21 home, well I can give you a guess. I would say she has
22 hated being at home since she was in Washington, the State
23 of Washington about a year earlier. Because in the State
24 of Washington she was complaining that she had no help
25 with the two children, that she needed help with the two

1 children. She wasn't working but she needed help with the
2 two children, she didn't want to be pinned up at home with
3 the two children. How many people, how many mothers had
4 to raise more than two children without any outside help,
5 with no problem. And then she says, well, really what I
6 meant is I needed the family. That is not what she said
7 earlier. She said I needed help. And she couldn't say a
8 single thing that she needed help for except to dump those
9 children off with somebody while she left the house
10 because she hated being at home. She was in the State of
11 Washington and she didn't like being at home. And then we
12 find out that she had been up all night the night before,
13 for what purpose. Basically I think she said I wasn't
14 working so it didn't matter. I am sorry, you have got a
15 full time job, you are raising two children. They are
16 asleep and you need to be. What purpose was she up all
17 night. It wasn't that she was sick, it wasn't that
18 something else happened to cause her to be up all night.
19 She never would say, she just decided to stay up all
20 night. She also had missed an opportunity to have a good
21 job with Skypes. It looked like she was going to have it
22 and lost it at the last minute. So, you lose your job and
23 you are up all night. That is going to create some stress
24 in somebody. What did we find out what happened the next
25 day. One she said she was happy and in a good mood and

1 yet for the first time in her life she struck Owen, for
2 the first time in her life she struck Owen. She got in an
3 argument with Brandon that day. He went home and they
4 talked later and he came back. She was stressed that day,
5 there is no question about it. Now, the injuries to this
6 child scientifically cannot be established beyond a
7 reasonable doubt as to whether it was caused by a person
8 right handed or left handed. The injuries to this child
9 scientifically cannot be established beyond a reasonable
10 doubt as to whether it was caused by a person of a left
11 hand or a right hand. That is correct. But we do know
12 that the injury to the right side of the child's head is
13 consistent with a hand or any other similar type blunt
14 trauma, a hand. We do know that if someone is facing that
15 child and they were to lead with their dominant hand the
16 person who struck that blow would be left handed, we do
17 know that. We do know that only one of these two people
18 is left handed. We do know that. And I am sure Mr. Able,
19 when he got up and did cross-examination, he said you
20 could do it with your right hand, couldn't you, if you
21 came up from behind. Yes, it is possible to do with the
22 right hand if you came up from behind. But is it likely,
23 is it reasonable, is it the most plausible explanation.
24 But the person that inflicted the blow to the head is left
25 handed, more than likely, more than likely. Second, the

1 bruise along the jaw of Victim is consistent with a
2 thumb, consistent, could have been. If you grab a child
3 so that you leave a thumb mark on the left side you are
4 left handed. You are left handed if you grab that child
5 on the jaw and shake it, you are left handed. So, those
6 facts are facts that you have to consider in determining
7 whether or not Brandon Lewis, a right handed person,
8 committed this crime. And then she gets on the stand and
9 very proudly says in answering her questions from Mr. Able
10 that I have not given an inconsistent statement in this
11 matter. And then I asked her if she had ever given a
12 statement in this matter since October the 14th of 2009
13 and she says no. So, of course, she has never given an
14 inconsistent statement. Brandon Lewis is out there
15 answering her lawyers questions ad nauseam. She is not
16 saying a word. While Brandon Lewis, he is testifying to
17 the Department of Social Services she is not saying a
18 word. He stepped up on the plate when his grandmother
19 said, tell them what you know. And he has stepped up to
20 the plate since then and remains so. I am going to talk a
21 little bit about comments that were made by the State.
22 They talk about this being a secret crime. If you ever
23 have a more tragic case than this in your life, this is as
24 tragic as a case gets. But for the purpose of analyzing
25 the evidence in this case it cannot be based upon emotion,

1 it has to be based upon whether or not the State has
2 produced evidence on this stand, from these witnesses to
3 convince you beyond any and all reasonable doubt that
4 Richard Brandon Lewis is the one that shook that child and
5 caused that child's death. The fact that it may be
6 difficult does not lesson the State's burden of proof, it
7 does not lesson your obligation, not only to Victim but
8 to Richard Brandon Lewis and to the State of South
9 Carolina to look at this evidence hard and to look at this
10 evidence in the matter that you should be. This is an
11 emotional case, it should be a emotional case. If it
12 weren't I would worry about you frankly. But that does
13 not lesson the burden on the State in this case. And then
14 they are going to say that mere presence doesn't apply in
15 this case. The Judge will charge you mere presence,
16 listen to what he says. He does not say mere presence but
17 if you saw something you are guilty or if you heard
18 something you are guilty. He says mere presence, there is
19 no exceptions to it. If you are merely present and don't
20 do anything to actively participate in the crime you are
21 not guilty regardless of what you saw, heard, on that
22 particular time. Mere presence is not sufficient and that
23 is the most the State can have in this case. He talks
24 about the fact that Ashley Hepburn was up in Greenville
25 giving her statement and Brandon Lewis was down in Laurens

1 at 6:42 giving his statement and they were exactly the
2 same. This is exactly the same statement that Brandon
3 Lewis gave to the hospital personnel at the time that
4 Ashley Hepburn was standing next to him and they were
5 talking to them. She knew what Brandon Lewis would say or
6 thought she knew until his grandmother talked to him. So,
7 what does that mean, the fact that she can remember what
8 he said when they got to the hospital when she is in
9 Greenville, that is all that means. It doesn't mean that
10 she was giving a statement independent of him. She had
11 heard everything. There is absolutely no motivation on
12 the part of Brandon Lewis ever did anything to harm those
13 children. If you recall back on August the 22nd there was
14 a party. Brandon was there, he was the primary caretaker
15 to the children, he took care of them, he fed them,
16 carried them to the swings and everything, he played with
17 them. There was no jealousy on his part, there was no
18 resentment. The psychologist said if anything these
19 children were the family he had been seeking. These
20 children were his life even after just five months. These
21 children were important to him, they were not a
22 hinderance, they were not in the way, they were not a
23 burden. There is no evidence of that whatsoever in this
24 case and it shouldn't be. Now, the defense made a nice
25 presentation, pictures of Victim, playing and walking

1 with her mother, with her brother. I am sure that Susan
2 Smith had produced the same pictures before that
3 inexplicable--

4 MR. ABLE: Objection, Judge. I don't think it is
5 relevant in this case.

6 THE COURT: Mr. Wise, if you can avoid perhaps fact
7 specific illusions to other cases. That might be proper.

8 MR. WISE: Okay. No one is saying that Ashley
9 Hepburn had always been a mean mother; no one is saying
10 that Ashley Hepburn had neglected her children for years.
11 All that is being said is that on October the 13th of 2009
12 her life got to the point where she lost control. And
13 unfortunately that was the tragic ending to it. I think
14 if you look at all of this testimony and consider
15 everything the question you have to answer from my
16 perspective what did Richard Brandon Lewis do to make him
17 guilty whatsoever. I am sure he heard a sound that he
18 later learned to be like shaking baby. Yes, he did not
19 tell the police the complete truth when he was at the
20 hospital. But the second act did not cause any injury to
21 this child, the cause of death to the child. The first
22 act you would have to find beyond any and all reasonable
23 doubt that he knew that child was being hurt and he had a
24 duty to go in there and stop it and he didn't. And that
25 is not the testimony in this case either. The testimony

1 that he never believed that she would hurt the children.
2 He never believed, he didn't want to believe. He
3 unfortunately later had to accept that is what happened.
4 Simply because he doesn't believe something is happening
5 doesn't mean he is guilty of any act as the result of any
6 injury to this child. And also even if you concluded that
7 he knew or should have known that child was being injured,
8 can you conclude, not that there is some evidence but can
9 you conclude beyond any and all reasonable doubt that that
10 child would be alive today if he had immediately walked
11 into that room and called EMS. The evidence in this case,
12 the injury to that child unfortunately say that is not
13 likely to have happened, that is not likely to have
14 happened. And you certainly cannot say beyond any and all
15 reasonable doubt **Victim** would of been alive today had he
16 done that. Richard Brandon Lewis is not guilty, Richard
17 Brandon Lewis is guilty of falling in love with somebody
18 that he wanted to start a family with, there is no
19 question about that, got emotionally involved with her.
20 That is all he had. He was only trying to protect the
21 woman he loved with his first statement. There is not a
22 scintilla of bad words about her at all, not the first
23 word. Only when his grandmother said, son, if you know
24 something you got to tell it. And since that moment he
25 has been a cooperative witness that the State really

1 needed. The proper verdict in this case is not guilty for
2 Richard Brandon Lewis. The State hasn't proven it, the
3 State has not proven it. Thank you.

4 THE COURT: Thank you, Mr. Wise. Ms. Mayes, your
5 closing.

6 MS. MAYES: Yes sir, Your Honor, may it please the
7 Court. Ladies and gentlemen, at the outset one of the
8 things when we all first met here last week for opening
9 arguments is what this case was really about is broken
10 trust. And that is still the case because here **Victim**
11 was failed by the people that she should of been able to
12 rely on to protect her the most, to keep her from harm.
13 That didn't happen so here we are and as I have stated
14 earlier, it is a situation where according to the State
15 and the evidence presented and the evidence proven beyond
16 a reasonable doubt, both of these defendants are involved,
17 Ashley Hepburn and Brandon Lewis. Now, this is not a
18 situation where we can come in and say, as Mr. Wise has
19 suggested, well the theory that this statement must be
20 completely one-hundred percent true. It doesn't work that
21 way. The State doesn't adopt a theory when it comes from
22 two people who are not and have not told the truth. And I
23 submit that the problem here is that even after both of
24 these defendants have taken the stand we still have not
25 gotten the full truth about what happened to **Victim**

1 Because from the beginning they were interlocked together
2 in lies and knowledge and they had a story and they were
3 going along with it down there at the hospital with the
4 Chaplain and Mr. Lewis was telling the whole story about
5 how he was up and he was watching a movie and Ms. Hepburn
6 was asleep and she is nodding her head and she is going
7 along with it. And that was going to work for a while and
8 then Mr. Lewis found himself in a whole lot of trouble
9 once he was down at the law enforcement office hours and
10 hours later still trying to tell that story, the story
11 that you have got here in the written statement. And it
12 obviously was false. They knew it was false because they
13 had talked to the doctors way back at Self who knew right
14 away, thank goodness right away, Dr. Currie had recognized
15 retinal hemorrhages and had a chance to save Victim . Not
16 because of any help she got from these two but because due
17 to her training and her experience down there at the
18 emergency room, when that child came in and they are
19 giving this ridiculous story about how we just found her
20 this way or Brandon Lewis saying I just found her this way
21 and mom saying I am asleep and I heard nothing, saw
22 nothing, know nothing right then the red flags went off.
23 She sees this child with bruises, she looks in her eyes
24 and right away she diagnosed retinal hemorrhages. She saw
25 those retinal hemorrhages and knew this could be child

1 abuse. And minutes, precious minutes were going by and
2 they are still not telling the truth, they are still
3 sticking to this story. Dr. Currie on her own said, let's
4 get her to CT, not because anybody had suggested head
5 injury, they certainly hadn't. Brandon Lewis had
6 certainly not said a word about hearing her cry and then
7 hearing it sound as if she had been shaken and then
8 hearing nothing but silence for minutes and minutes and
9 minutes and minutes before he ever went to check on her
10 and for EMS to ever come. So, none of that was said.
11 This doctor on her own run CT's suspecting a head injury
12 and it is confirmed that she is right. EMS did their
13 best, they see a swollen tongue and they are thinking it
14 could be an allergy, they give her Benadryl. They had no
15 idea what could of happened because they are not getting
16 the truth. And so once Dr. Currie sees the CT results and
17 realizes it is a massive subdural hematoma, massive head
18 bleeding, her life is on the line, it is a critical
19 condition, she is transferred to Greenville Memorial.
20 Even then the truth wasn't coming out. And that is the
21 real tragedy here, ladies and gentlemen. One person may
22 have done it, both of them covered it up, both of them had
23 knowledge. That is where we get into the whole aiding and
24 abetting scenario. So, let's talk a little about the
25 situation that led us to this. Did it just happen out of

1 the blue, did somebody just snap that night and for no
2 reason at all go into Victim room and harm her this
3 way, absolutely not. As I said before, child abuse, yes,
4 it is a secret crime because it happens in homes and it
5 happens behind closed doors of a home. It doesn't happen
6 out in front of people. But with that said it is not a
7 silent crime, this didn't happen in dead silence. This
8 child was abused in that room, she was hit. And what
9 brought it on. In all likelihood she was crying, she
10 needed something, she needed her bottle or she needed her
11 mom, she needed something and that is how they acted out
12 towards her. She was beaten to death and it wasn't quiet.
13 Dr. Ward reported to you there were at least three
14 different locations impact in her head alone and in
15 addition to that she was grabbed on the body, she was
16 beaten, she was clawed. This did not happen in silence.
17 And the people in proximity to that crime knew it. Let's
18 talk a little bit about the inconsistencies we have heard
19 along the way starting with Ms. Hepburn. First of all,
20 there were prior injuries to Victim and you have heard a
21 lot about that. But the bottom line is this bruise out of
22 her own mouth when she is describing it to other people
23 who are investigating this case, she called it a
24 fingerprint bruise, a bruise that she was never able to
25 explain, she just woke up that way. Yes, kids fall, kids

1 have accidents. But it had gotten to the point where the
2 injuries that **Victim** had could no longer be passed off as
3 just accidents, things that just happen normally to
4 toddlers. And let's talk about the lies. This particular
5 injury, the stomach bruise. One of the first things that
6 happened when EMS got there that night and you heard the
7 testimony from Calvin Duckett, EMS worker. One of the
8 first things he did when he got there was he immediately
9 cut her onesie off, cut onesie off to see what might be
10 going on. And one of the first things he sees is that
11 abdominal bruise. And it is big and it is prominent
12 because it had been there, that bruise wasn't part of that
13 night. That particular bruise was not fresh and who
14 admitted that, Ashley Hepburn. She admitted that to SLED.
15 She had a chin bruises and a stomach bruise. And then she
16 gets on the stand and says, oh, no, no, no. I just meant
17 I was only, I thought I was only being asked about the
18 injuries that I saw in the hospital. Well, that is
19 ridiculous. She knew about that bruise and EMS told you
20 they saw that stomach bruise right when they cut her
21 onesie off. And they also noted seeing the chin bruise as
22 well. And they talked about those bruises being different
23 colors. And you know, the good thing about being jurors
24 is, even though an expert like a doctor can't come in and
25 say that bruise is exactly three days old because they

1 can't do that. What you as jurors get to do is rely on
2 your own common sense, the common sense that you have
3 always had with you as a mom, as a grandmom, as a parent
4 and you know when you see a bruise that has been there and
5 you know how bruises progress with age. And then when
6 Ashley Hepburn was talking to these doctors who needed to
7 know about Victim final night, tell me about it when
8 you last saw Victim, tell me what condition she was in.
9 And you know you get all of these changing stories. On
10 the 911 call both of them are in there together, both of
11 them are in there together talking to the 911 dispatcher
12 and Mr. Crumley makes the call and he says to them, well,
13 what time did you last see her, what time did she go to
14 bed. And you can hear the two of them talking and the
15 answer that they give to him is 11:30, really, 11:30
16 because after that all of a sudden everybody changed the
17 time. That call was fresh and so at that point they were
18 saying 11:30 and then all of a sudden things started to
19 back up. And so Ashley Hepburn talks to the doctor at the
20 ER, she talks to different people who wanted to know what
21 has happened to Victim and she never mentions going in
22 her room to give her Orajel until she gets to Greenville
23 and talks to Dr. Croswell. So before that it was just,
24 well, I put her to bed and Brandon, he was up and he came
25 in and asked me if I wanted to watch a movie and she

1 talked about Victim being fussy because she was teething.
2 But she didn't mention that Orjel and going in there to
3 give her that Orjel until finally she was with Dr.
4 Croswell. She said she gave her the Orjel and then that
5 was that. And it wasn't until she testified that for the
6 first time she is now saying, well, the Orjel wasn't the
7 last time I saw my daughter that night. The last time I
8 saw my daughter that night was when I had gone into her
9 room later to get a book and I saw her turn and look at me
10 and I knew she was okay. How in the world would she have
11 left that out of her history when these doctors want to
12 know when was Victim last okay. This is too many missing
13 pieces, too many changing stories going on here, too many
14 excuses to try to explain away what the evidence is. Then
15 Dr. Croswell mentioned that according to her notes she
16 spoke with Ashley directly. In fact Brandon Lewis was not
17 even at Greenville Hospital. Dr. Croswell was getting all
18 of her stories from Ashley directly. She talked about
19 giving Audrina the Orjel, she talked about the fact that
20 she had put her bed around 10:30 and then she talked about
21 waking up and finding Brandon holding Victim. And she
22 also noted there was blood on her mouth and tongue. So,
23 then Ashley takes the stand and says, well, I never saw
24 the blood on her mouth or tongue. I just got that
25 information from Mr. Lewis. Too many inconsistencies.

1 Then we have, I submit the most inconsistent aspect of
2 all, that according to Ms. Hepburn she is sleeping here in
3 this room with the door open and her daughter is directly
4 across the hall. This is the same home where she has
5 talked about hearing footsteps all the time, footsteps
6 that wake her up, being able to hear her daughter from
7 virtually anywhere in the house even when her daughter
8 only says mama. But on this night she claimed she heard
9 nothing, she saw nothing, she saw no one enter the room,
10 she saw no one come out of the room, she never heard a
11 footstep, she never heard her daughter crying and she
12 never heard a sound. She claims she knows absolutely
13 nothing until Brandon Lewis found her daughter. That,
14 ladies and gentlemen, is not credible. They haven't told
15 the full story, they haven't told the truth. Then in
16 addition to that aspect of the story completely not
17 fitting any of the evidence or what we know happened based
18 on what the doctors have described, we also have the
19 bathroom where according to Ashley the white towel is
20 kept. That same white towel that ended up in Victim
21 crib when the search warrant was served with Victim
22 blood in at least two locations mixed with saliva. Now,
23 why would blood be mixed with saliva, because something
24 had wiped her mouth with it after she is bleeding. And
25 yet both of these defendants say I have no idea where that

1 white towel came from, I don't know anything about it. It
2 is not credible. And then according to Ms. Hepburn is the
3 testimony about the mysterious missing bottle. Now, that
4 bottle is interesting because when she saw the photograph
5 of the bottle in her room she stated that bottle must be
6 left over from lunch. Here we go, State's exhibit 38.
7 Her testimony to explain this bottle is that must of been
8 left over from lunch. And according to her Audrina's last
9 bottle was a bottle that was in her room. And then all of
10 a sudden it mysteriously disappeared according to Ms.
11 Hepburn. According to Ms. Hepburn the mysterious bottle
12 was placed somewhere on a dresser in her room and than all
13 of a sudden, I am sorry, in Audrina's room and than all of
14 a sudden when the search warrant is executed the
15 mysterious missing bottle can't be located. She has no
16 explanation for where it went even though her own mother
17 said she never went in the baby's room and did anything
18 with the evidence, so did Mr. Crumley. Why would they go
19 in that baby's room and move a bottle around, they
20 wouldn't. Again, this bottle found in Ms. Hepburn's room
21 in all likelihood, I submit, was Victim last bottle.
22 There was more to this story than they have told. We talk
23 about the injuries to Victim, as I mentioned before, this
24 is far more than just going in a child's room and in a
25 heated moment a parent shakes the child. This was rapid

1 acceleration, deceleration injuries but there was also
2 impact injuries. As noted by Dr. Ward there were at least
3 three different impact injuries, at least one of which is
4 here. And then on her back you can see abrasion marks.
5 And you see them again here in addition to injuries on her
6 back, stomach and then the older stomach bruise. Here you
7 can see them slightly better in a pattern formation, here,
8 here, here and here. And you heard the testimony from Dr.
9 Ward, these are consistent with claw marks, fingernail
10 marks where somebody dug into the top of her shoulder with
11 fingernails. And here once the autopsy was performed her
12 bruises were more prominent and it was apparent the
13 pattern of bruising along her neck, the lower jaw in
14 addition to claw marks that could be seen if this
15 photograph were reversed and you were looking at her back.
16 Here again she is grabbed by the shoulders, she has marks
17 in the back and then abrasions here which were much more
18 prominent at autopsy. Brandon Lewis stated, first of all,
19 he knew nothing, he lied to everybody there was to lie to.
20 He lied to EMS, he lied at the hospital to Dr. Currie, he
21 lied to law enforcement. He told so many lies he couldn't
22 even keep up with them all. He lied, lied, lied because
23 he knew more just as Ms. Hepburn lied as well. Both of
24 them knew more. And you as the jury, you are the finders
25 of fact, you determine the credibility of the witnesses

1 that you heard from, you determine who is telling part of
2 the truth, what is mostly the truth, you make that
3 determination as to what happened to Victim that night.
4 And ultimately, I submit, to Brandon Lewis' testimony,
5 consider that. Let's talk about aiding and abetting, it
6 is aiding and abetting not only to cover up a crime but to
7 do so to advance the commission of the crime. And if his
8 testimony is the truth then that is exactly what he was
9 doing. He was covering up this crime even as Victim was
10 fighting for her life because he wanted to protect Ashley
11 Hepburn. Assisting her, helping her in the worst way
12 possible, in a way that gave Victim no chance at all.
13 She has already laid there for how long, how long until
14 somebody got her help. And even when she got help people
15 she relied on was still lying. Audrina would be two and a
16 half years old today. She could be two and a half, she
17 should be two and a half, her life was taken from her.
18 This crime calls out for justice, this crime cries out for
19 justice. You have before you the most noble of
20 opportunities, the chance to strike back against injustice
21 and deliver a verdict that is fair and true and just. The
22 correct verdict as to both defendants, they were both
23 involved and they both have guilt. Thank you.

24 THE COURT: Thank you, Ms. Mayes.

25 Ladies and gentlemen of the jury, it is my obligation

1 to charge as to the law that applies in this case and it
2 will take me approximately fifteen to twenty minutes to
3 read this to you. Do you need a break at this time or
4 does anyone need a break. There is no one nodding or
5 raising their hand so we will go forward with the charge
6 at this point and time.

7 Now, ladies and gentlemen, the way that this is
8 traditionally done is the Judge would read to the jury the
9 law that applies in any particular case. It has been my
10 experience that perhaps it is unreasonable to expect a
11 jury to take in eighteen pages of law that I read to you
12 just by me saying it. So, I made copies of the charge
13 that I am about to read to you, I made twelve copies of
14 them or rather the Clerk has so you will have that in the
15 jury room and just follow my instructions with regard to
16 those jury charges that you will have with you in the
17 event that you have need to refer to them.

18 Now, ladies and gentlemen of the jury, the
19 indictments in this case charge the defendants with two
20 offenses, homicide by child abuse and aiding and abetting
21 homicide by child abuse. I remind you that the fact that
22 the defendants were arrested, charged and indicted in this
23 case is not evidence in this case and cannot be considered
24 by you as evidence of guilt in this case, nor does it
25 create any presumption or inference of guilt. These

1 documents, these indictments are simply the formal written
2 instruments which contain the charges made against the
3 defendants. It is the formal document by which these
4 cases are brought into court.

5 Now, ladies and gentlemen, in this case I charge you
6 that there are two defendants each of whom is charged with
7 homicide by child abuse and aiding and abetting homicide
8 by child abuse. The case of each defendant and the
9 evidence and the law concerning that defendant should be
10 considered separately and individually. Your verdict does
11 not have to be the same for both defendants. The fact
12 that you may find one defendant guilty or not guilty
13 should not control your verdict as to the other defendant.
14 Where more than one person is charged with a crime, if the
15 evidence warrants it, you may convict one and acquit the
16 other, or you may acquit both, or you may convict both.
17 It will depend upon your view of the testimony and
18 evidence. You must take each defendant and consider the
19 evidence as to that defendant and my instructions to you
20 on the law. You will then write a separate verdict of
21 guilty or not guilty for each individual defendant for
22 each charge that that defendant is facing.

23 Now, ladies and gentlemen, the defendants in this
24 case have plead not guilty to the indictments and that
25 puts the burden on the State to prove the defendants

1 guilty. A person charged with committing a criminal
2 offense in South Carolina is never required to prove
3 himself or herself innocent.

4 I charge you that it is an important rule of the law
5 that the defendant in a criminal trial, no matter what the
6 seriousness of the crime charged will always be presumed
7 to be innocent of the crime for which the indictment was
8 issued unless guilt has been proven by evidence satisfying
9 you of that guilt beyond a reasonable doubt. This
10 presumption of innocence does not end when you begin your
11 deliberations, but it accompanies the defendant throughout
12 the trial until you reach a verdict of guilt based upon
13 the evidence satisfying you of that guilt beyond a
14 reasonable doubt.

15 Ladies and gentlemen, the presumption of innocence is
16 like a robe of righteousness placed about the shoulder of
17 each of the defendants. This robe remains with the
18 defendants until it has been stripped from the defendants
19 by evidence satisfying you of their guilt beyond a
20 reasonable doubt. The presumption of innocence is not a
21 mere legal theory. It is not just a legal phrase. It is
22 a substantial right to which every defendant is entitled
23 unless you, the jury, are satisfied from the evidence of
24 the defendant's guilt beyond a reasonable doubt.

25 What is a reasonable doubt in the law? Ladies and

1 gentlemen, a reasonable doubt is the kind of doubt that
2 would cause a reasonable person to hesitate to act. The
3 State has the burden of proving the defendant's guilt
4 beyond a reasonable doubt. Some of you may have served as
5 jurors in civil cases where you were told that it was only
6 necessary to prove that a fact is more likely true than
7 not true, such as by the greater weight or the
8 preponderance of the evidence. In criminal trials, ladies
9 and gentlemen, the State's proof must be more powerful
10 than that. It must be beyond a reasonable doubt. Proof
11 beyond a reasonable doubt is proof that leaves you firmly
12 convinced of the defendant's guilt. Now, ladies and
13 gentlemen, there are very few things in this world that we
14 know with absolute certainty, and in criminal cases the
15 law does not require proof that overcomes every possible
16 doubt. If based upon your consideration of the evidence,
17 or the lack thereof, I am sorry, correction. If based
18 upon your consideration of the evidence you are firmly
19 convinced that the defendant is guilty of the crime
20 charged you must find the defendant guilty. If on the
21 other hand, you think there is a real possibility that the
22 defendant is not guilty you must give the defendant the
23 benefit of the doubt and find him or her not guilty.

24 Ladies and gentlemen of the jury, I remind you that
25 during this trial you and I have certain duties to

1 perform. As the trial Judge it is my responsibility to
2 preside over the trial of this case. And I also have the
3 duty to rule on the admissibility of the evidence offered
4 during this trial. You are to consider only the competent
5 evidence before you. If there was any testimony ordered
6 stricken from the record in this case you must disregard
7 that testimony. You are to consider only the testimony
8 which has been presented from the witness stand, any
9 exhibits which have been made a part of the record in this
10 case and any stipulations of counsel.

11 I have the additional duty to charge you the law
12 applicable to this case. As the presiding Judge I am the
13 sole Judge of the law in this case. And it is your duty
14 as jurors to accept and follow and apply the law as I now
15 state it to you. If you already have any idea as to what
16 the law is or what the law ought to be and it doesn't
17 purport or agree with what I now tell you the law is you
18 must abandon this idea because you are sworn to accept and
19 apply the law as I state it to you now.

20 Ladies and gentlemen, in every case tried in this
21 court before a jury the jury becomes the sole and
22 exclusive judges of the facts in a case. A trial Judge
23 cannot intimate, state, comment on or make any statement
24 to a trial jury about the facts in a case. Since you the
25 jury are the sole judge of the facts in this case you are

1 not to infer from what I have said during the progress of
2 this trial in ruling on admissibility of evidence or
3 otherwise or anything that I say now during the course of
4 this instruction to you that I have any opinion about the
5 facts in this case. Ladies and gentlemen, the law does
6 not allow me to have an opinion about the facts in this
7 case and I do not have an opinion concerning the facts of
8 the case. This is an area solely for your consideration.
9 This is a matter solely for you, the jury, to determine.
10 As jurors, it is your duty to determine the effect, value,
11 weight and truth of the evidence presented during this
12 trial.

13 Ladies and gentlemen, there are two types of evidence
14 which are generally presented during a trial, direct
15 evidence and circumstantial evidence. Direct evidence is
16 the testimony of a person who claims to have actual
17 knowledge of a fact, such as an eyewitness. It is
18 evidence which immediately establishes the main fact to be
19 proved. Circumstantial evidence is proof of a chain of
20 facts and circumstances indicating the existence of a
21 fact. It is evidence which immediately establishes
22 collateral facts from which the main fact may be inferred.
23 Circumstantial evidence is based on inference and not on
24 personal knowledge or observation. Ladies and gentlemen,
25 the law makes absolutely no distinction between the weight

1 or value to be given to either direct or circumstantial
2 evidence. Nor is a greater degree of certainty required
3 of circumstantial evidence than of direct evidence. You
4 should weigh all of the evidence in the case. After
5 weighing all the evidence if you are not convinced of the
6 guilt of the defendants beyond a reasonable doubt you must
7 find them not guilty.

8 Necessarily, you must determine the credibility of
9 witnesses who have testified in this case. Credibility,
10 ladies and gentlemen, simply means believability. It
11 becomes part of your duty as jurors to analyze and to
12 evaluate the evidence and determine which evidence
13 convinces you of its truth. In determining the
14 believability of a witness, witnesses who have testified
15 in this case you may believe one witness over several
16 witnesses or several witnesses over one witness. You may
17 believe a part of the testimony of a witness and reject
18 the remaining part of the testimony of that same witness.
19 You may believe the testimony of a witness in its entirety
20 or reject the testimony of a witness in its entirety. You
21 may consider whether any witness has exhibited to you any
22 interest, bias, prejudice, or other motive in this case.
23 You may also consider the appearance and manner of a
24 witness while they are on the witness stand.

25 Ladies and gentlemen, the rules of evidence normally

1 do not permit witnesses to testify to opinions or
2 conclusions. An exception to this rule exists for
3 witnesses we call expert witnesses. A witness who by
4 education and experience has become an expert in some art,
5 science, profession or calling may state an opinion as to
6 relevant and material matter in which the witness claims
7 to be an expert and may also state the reasons for their
8 opinion. You should consider any expert opinion received
9 in evidence in this case like you would any other
10 evidence, give it the weight you think it deserves. If
11 you decide that the opinion of the expert witness is not
12 based on sufficient education and experience or if you
13 conclude that the reasons given in support of the opinion
14 are not sound or that the opinion is outweighed by other
15 evidence you may disregard the opinion entirely. An
16 expert witnesses testimony is to be given no greater
17 weight than that of other witnesses simply because the
18 witness is an expert. Further you are not required to
19 accept an expert's opinion even though it is not
20 contradicted.

21 Now, as I said a moment ago, ladies and gentlemen, I
22 will give you a copy of these instructions in written
23 form. During your deliberations you can refer to the
24 instructions to guide your decision-making. You must
25 consider the instructions as a whole and not follow some

1 and ignore others. When you are done I would ask that you
2 return all twelve copies of these instructions to the
3 Court at the time that your verdict is rendered.
4 Additionally, ladies and gentlemen, on the copies that you
5 have on page 13 you will notice that a section was blacked
6 out, it is still possible to see what is written there.
7 The reason I have blocked that out, blacked that out was
8 that was erroneously put in there before I asked the Clerk
9 to make twelve copies for me. Instead of asking her,
10 instead of asking her to make an additional twelve copies
11 I just told her or told my Clerk to black out that
12 portion. So the portion which is blackened out on page 13
13 or struck through, you are not to consider that because
14 that was simply erroneously inserted in there in my
15 initial draft on the charge to you.

16 Now, ladies and gentlemen, in order to establish
17 criminal liability with respect to the charges against the
18 defendant the State must prove that the defendant acted
19 with extreme indifference, not just acted, disregarding
20 the risk which a person's conduct has created or a
21 conscious or knowing failure to exercise ordinary or due
22 care. Extreme indifference is a mental state akin to
23 criminal intent characterized by a deliberate act
24 culminating in death.

25 Criminal intent must be proven by the State beyond a

1 reasonable doubt. Criminal intent is always a matter that
2 must be determined by the jury from the circumstances
3 surrounding the situation. There is no way to prove
4 intent to a mathematical certainty. There is no way
5 medical science can dissect a person's brain and determine
6 what the person had in mind. So, the law says that
7 criminal intent may be inferred from the circumstances
8 shown to have existed. This is how you make a
9 determination of whether or not the element requiring
10 intent was present. It is not necessary to establish
11 intent by direct and positive evidence but intent may be
12 established by inference in the same way as any other fact
13 by taking into consideration the acts of the parties and
14 all the facts and circumstances of the case. Ladies and
15 gentlemen, criminal intent is a mental state, a conscious
16 wrongdoing. It is up to you to determine what the
17 defendants intended to do based upon the circumstances
18 shown to have existed. Criminal intent can arise from
19 action or a failure to act.

20 Now in this case, ladies and gentlemen, the
21 defendants are charged with homicide by child abuse. The
22 State must prove beyond a reasonable doubt that the
23 defendant caused the death of a child under the age of
24 eleven while committing child abuse or neglect. Child
25 abuse or neglect is an act or failure to act which causes

1 harm to the child's physical health or welfare. Harm to
2 the child's physical health or welfare means that the
3 defendant either inflicted, or allowed to be inflicted
4 physical injury on the child which caused the child's
5 death or failed to supply the child with health care and
6 this failure caused a physical injury or condition which
7 caused death. The State must also prove beyond a
8 reasonable doubt that the death occurred under
9 circumstances showing an extreme indifference to human
10 life.

11 In this case, ladies and gentlemen, both defendants
12 are also charged with aiding and abetting homicide by
13 child abuse. To convict either of the defendants of this
14 charge the State must prove beyond a reasonable doubt that
15 the defendant knowingly aided and abetted another person
16 to commit child abuse or neglect which resulted in the
17 death of a child under the age of eleven. To be liable as
18 an accomplice otherwise known as aiding or abetting the
19 defendant must have knowledge of the principal's criminal
20 conduct. Mere presence at the scene of the crime is not
21 sufficient to establish guilt as an accomplice. Aid means
22 to help, to promote the course or accomplishment of, to
23 give support to or to give assistance to. Abet means to
24 encourage or appear to favor or support. Intentionally
25 means willfully; intending the result which actually

1 occurs; not accidentally or involuntary.

2 Again, ladies and gentlemen, mere presence at the
3 scene is not sufficient to prove someone guilty of a
4 crime. A defendant's presence where a crime is being
5 committed or mere association with a person who commits a
6 crime does not make a defendant an accomplice or an aider
7 and abettor of the person committing the crime.

8 The burden is on the State to prove every element of
9 the crime charged. If you find after reviewing all the
10 evidence that the State has only proven that the defendant
11 was merely present at the scene of a crime and that they
12 have not proven beyond a reasonable doubt any other
13 participation in the crime then you must find the
14 defendant not guilty. The law is that proof of being at
15 the scene of the crime is not sufficient to find someone
16 guilty.

17 Ladies and gentlemen, I have prepared two verdict
18 forms and there are several possible verdicts which you
19 may find with respect to this case with respect to each
20 defendant. There is one verdict form for Ashley Hepburn
21 and there is a second one for Richard Brandon Lewis. Both
22 verdict forms state that you may find either, Mr. Lewis or
23 Ms. Hepburn guilty of homicide by child abuse or not
24 guilty of homicide by child abuse or guilty of aiding and
25 abetting homicide by child abuse or not guilty of aiding

1 and abetting homicide by child abuse. Ladies and
2 gentlemen, there is no significance whatsoever in the way
3 that I state the possible verdicts, it is simply that one
4 has to be stated first.

5 Ladies and gentlemen, your verdict must be a
6 unanimous one with respect to every charge and each
7 defendant. I remind you, ladies and gentlemen, that you
8 have no enemies to punish, you have no friends to reward
9 in this case. Mr. Foreperson, when the jury agrees
10 unanimously on a verdict I would ask that you initial in
11 the blank indicating next to the jurys verdict with
12 respect to the charge. There are two choices, they are
13 not guilty or guilty. This is pretty self explanatory.
14 Once you have considered all the evidence and rendered
15 your unanimous verdict as a jury you would sign your name,
16 Mr. Foreman at the very bottom where it is indicated after
17 initialing in the appropriate blanks, knock on the door
18 and let the bailiff know that you have reached a verdict
19 and then we will receive you shortly back in the
20 courtroom. Now, I ask that you return to the jury room
21 but please don't begin your deliberations until you are
22 instructed to do so by the Clerk or the bailiff. There
23 are some matters that I need to discuss with the attorneys
24 to make sure that I have charged you on everything that
25 they want me to charge you on that applies in this

1 particular case. Your cue to begin your deliberations
2 will be receipt of the verdict forms as well as all the
3 evidence and my asking the bailiff to bring out two
4 alternates out of the courtroom or out of the jury room.
5 That will be your cue to begin your deliberations. If
6 there is nothing else that I need to tell you you will
7 then receive, like I said, these forms and the evidence
8 and we will pull the alternates out. With that I would
9 ask that you retire again to the jury room, don't start
10 talking about the case yet. I will let you know when you
11 can start talking about it. I anticipate that I will not
12 have to bring you out but in the event I missed something
13 in terms of the charge on the law I will bring you out and
14 charge you. If you will adjourn to the jury room for just
15 a moment, don't talk about the case.

16 (Whereupon, the jury is excused from open court.)

17 THE COURT: The jury is out, exceptions or additions
18 from the State?

19 MS. MAYES: None from the State, Your Honor.

20 THE COURT: Mr. Able?

21 MR. ABLE: None, Your Honor.

22 THE COURT: Mr. Wise?

23 MR. WISE: Subject to my position and the little, at
24 one point you told the jury evidence or lack thereof and
25 then you took it back.

1 THE COURT: That is because I was talking about
2 evidence of lack thereof in terms of a guilt verdict.
3 That is what I was running into. If you find the evidence
4 that the verdict of guilt it is your duty, bla, bla, bla.

5 MR. WISE: All right. I agree with that. I missed
6 the context in which it was done. Secondly, I also would
7 request, I know the Courts are against me on this. But
8 what the heck. The old circumstantial evidence charge
9 where you, the jury is instructed to seek an alternative
10 explanation other than the guilt of the defendant. I have
11 sent your clerk my request to charge on that so he can
12 print it out and make it a part of the record.

13 THE COURT: All right.

14 MR. WISE: I realize the Courts have changed since
15 then.

16 THE COURT: Yes, sir. I believe when you raised
17 that, Mr. Wise, if you were to raise it you would need to
18 argue against precedence.

19 MR. WISE: That is correct.

20 THE COURT: Your objection is noted. Your request to
21 charge is noted. I declined to charge it. If y'all can
22 take a look at the exhibits and make sure that we know
23 what is back there.

24 (Whereupon, the court reporter and attorneys went
25 over the exhibits.)

1 (Whereupon, the jury started deliberations at
2 approximately 4:40 p.m.)

3 (Whereupon, the alternates were excused from the
4 trial of the case.)

5 THE COURT: Bring the jury in, we have a question.

6 (Whereupon, the jury came into open court at
7 approximately 5:42 p.m.)

8 THE COURT: Let the record reflect that the jury is
9 back in the courtroom. Mr. Foreman, I received your
10 questions for me, 1 through 4. And I am going to answer
11 in turn. The first question asked, if you could have a
12 court reporter's transcript of the case.. Unfortunately it
13 takes a good bit of time for the court reporter to
14 actually make a transcript. If you need to rehear any
15 testimony, any specific testimony simply let us know the
16 witness that was involved and that portion of the
17 testimony that you are interested in hearing and we can
18 make arrangements to have that played back for you audibly
19 or for the court reporter to read her notes back. So a
20 transcript is simply not available at this point and time.

21 Can you have the bumper pad, towel, blanket, et
22 cetera and that be brought to the jury room or do we have
23 to rely on the photos. Those items weren't introduced
24 into evidence and it can't, they can't be introduced at
25 this particular point and time. So, unfortunately I can't

1 let you take those back to the jury room. You will need
2 to rely on the photos and your recollection of the
3 testimony concerning those items in trying to answer
4 whatever question or issue that you have concerning that.

5 Same answer for question number three where you asked
6 if the flip chart with the notes that Ms. Mayes used, if
7 that was available to you. It is not, it was merely a
8 demonstrative piece of equipment that Ms. Mayes employed.
9 So I can't send that back as well under the law.

10 Number four, can we have a list of both the
11 prosecutions and the defense attorneys witnesses. Simply
12 an ordered list of who was heard. We are preparing that
13 for you right now and we will have for you momentarily.
14 So, that is the answer to your questions and I will have
15 that list back for you shortly. If you need to, you need
16 any further guidance or you need to rehear something or
17 whatever do what you have done, send a note to me and we
18 will try and accommodate anything legally we can. If you
19 will return to your jury room and continue to deliberate
20 and we will have that list for you in a few moments.

21 (Whereupon, the jury continues deliberations at
22 approximately 5:45 p.m.)

23 (Whereupon, Court's Exhibit nos 10, 11, 12, 13 and 14
24 were marked for identification only.)

25 THE COURT: I have received a communication from the

1 jury, it basically states that, it speaks for itself.
2 They are tired and they feel somewhat spent from today's
3 proceeding. They want to stop for the evening and I have
4 spoken to counsel about this and there is no objection to
5 going ahead and adjourning for the evening and I will have
6 them back here tomorrow morning at 9:00 o'clock. Is that
7 acceptable with everyone. Ms. Mayes?

8 MS. MAYES: Yes sir, Your Honor.

9 MR. ABLE: Yes, sir.

10 MR. WISE: Yes, sir.

11 THE COURT: Very good. Bring the jury in, please.

12 (Whereupon, the jury came into open court at
13 approximately 6:50 p.m.)

14 (Whereupon, Court's Exhibit 15 was marked for
15 identification only.)

16 THE COURT: The record will reflect the jury is
17 present in the courtroom. Ladies and gentlemen and Mr.
18 Foreperson, I have received your communication and I
19 concur. I have shared it with counsel and they concur.
20 So, we will call it a night tonight and I would ask that
21 you be back in the jury room tomorrow morning at 9:00
22 o'clock to resume. You can't talk about this case with
23 anyone. If anyone attempts to contact you or anything
24 like that you report it to me immediately. Report it to
25 law enforcement immediately but nobody's going to do

1 that. It is very important that you not view any, I don't
2 think there are going to be any news reports about this or
3 anything in the papers tomorrow. But should you happen to
4 cross something you are not to read it, you are not to see
5 it, you are not to listen to it. You must base your
6 decision in this case solely upon the evidence that you
7 have received here as well as the testimony and the
8 exhibits. I bid you a good evening and I will see you
9 tomorrow morning at 9:00 o'clock.

10 (Whereupon, the jury was excused from open court for
11 the evening.)

12 THE COURT: The jury is out, we will need to make
13 arrangements to have any evidence or exhibits secured for
14 the evening. Anything before we break for the night?

15 MS. MAYES: Nothing from the State.

16 MR. ABLE: No, sir.

17 MR. WISE: No, sir.

18 THE COURT: We will see you at 9:00 o'clock in the
19 morning.

20 (Whereupon, the trial will resume the next morning at
21 9:00 o'clock.)

22 March 3, 2011

23 (Whereupon, the jury started deliberations at
24 approximately 9:05 p.m.)

25 THE COURT: We are back on the record. Counsel for

1 the defendants are present, counsel for the State is
2 present. I have received a note from the jury which I
3 have shared with counsel in chambers. The jury is
4 requesting to hear the 911 audio again and they are also
5 requesting to see the testimony of both defendants. I
6 have spoken to counsel in chambers about how we are going
7 to address this. I will bring the jury out in a few
8 moments and we will play the audio tape for them and I
9 will explain to them that at this point there is no
10 transcript. And that we can only play the testimony of
11 the defendants which will last between five and a half to
12 six hours. And then I will instruct them to return and
13 resume deliberating and invite them to send another
14 message out if there is anything further that we can do.
15 Bring the jury in, please.

16 (Whereupon, the jury came into open court at
17 approximately 10:05 a.m.)

18 THE COURT: The record will reflect the jury is
19 present in the courtroom. Ladies and gentlemen and Mr.
20 Foreperson, I have received your note and your request.
21 Your first request you are asking to rehear the 911 audio
22 tape again and it took us a few moments to get that set
23 back up and that is the reason for the delay. We will
24 play that for you momentarily. Your second request is,
25 you express the desire to see the testimonies of both

1 defendants. Unfortunately, well I am interpreting this as
2 an indication that you want to see a transcript of the
3 testimonies of the defendants. At this point and time,
4 ladies and gentlemen, there is no transcript available, it
5 takes a great deal of time for the court reporter to check
6 her notes and to review the dictation that she has taken
7 and then compare it against any audio that she has taken.
8 So, it takes a good deal of time to prepare a transcript
9 and the only thing we could do would be to play the
10 testimony of the defendants again which would last between
11 five and a half to six hours. So, what we will do is
12 simply play the audio tapes, the 911 audio tapes for you
13 at this point and time. And after they are played I would
14 ask you to return to the jury room and continue your
15 deliberations. And of course if there is anything further
16 that you need from us or want from us just send out a note
17 letting us know what it is that you want to do or what you
18 need or what you feel like you need to assist in your
19 deliberations. We will be more than happy to try to
20 accommodate that as much as possible. If it was possible
21 to send the transcript back I would do it but it takes
22 time for the court reporter to prepare a true transcript
23 that is certain as to all the testimony that was taken.
24 So, with that, Mr. Hammack, if you will go ahead and play
25 the audio tape of the 911 call, please.

1 (Whereupon, the 911 tape was played starting at 10:09
2 a.m to 10:11 a.m.)

3 THE COURT: That concludes the 911 tape. If you need
4 to hear it again just let me know. I see a head nodding,
5 would you like to hear it again?

6 FOREPERSON: Yes, sir.

7 THE COURT: No objection to playing it again?

8 MS. MAYES: No, sir.

9 MR. ABLE: No, sir.

10 MR. WISE: No, sir.

11 THE COURT: We can play the 911 tape again.

12 (Whereupon, the 911 tape was played starting at 10:11
13 to 10:13 a.m.)

14 THE COURT: Ladies and gentlemen, that again
15 concludes the 911 tape. If you would resume your
16 deliberations at this point and time and if you need
17 anything further from us send a note out and we will make
18 every effort to accommodate anything that we can.

19 (Whereupon, Court's Exhibit 16 was marked for
20 identification only.)

21 (Whereupon, the jury continued deliberations at
22 approximately 10:14 a.m.)

23 THE COURT: All right, ladies and gentlemen, I am
24 informed that the jury has reached a verdict and before I
25 bring the jury out I just have a couple of quick remarks.

1 I think that everyone here can agree and appreciate that
2 the death of this child is nothing but short of an
3 absolute tragedy. The only way that the tragedy of her
4 death would be critical accounted would be for those in
5 attendance, if you were to fail to observe the solidity of
6 this particular occasion. I have got no idea what the
7 verdict is, ladies and gentlemen, I am told that the jury
8 has reached a verdict. Of course, if you feel that you
9 are not going to be able to control your emotions or
10 control yourself or that your emotions would compel you in
11 some way to act out or speak out or cry out or offer any
12 disparaging comments or otherwise disrupt these
13 proceedings I would invite you to leave at this time. I
14 am warning you, I am not going to tolerate any sort of
15 breach of decorum or any audible disruptions to these
16 proceedings. If after the verdict is returned you find
17 yourself unable to comply with these instructions, if you
18 feel an emotion overtaking you I would encourage you to
19 simply step outside until you have a chance to compose
20 yourself. This jury has worked hard. Obviously this is
21 not a sporting event, there are to be no cheers, there are
22 to be no boos, there are to be no disruptions at any time
23 when the verdict is received. There are additional
24 deputies that I have asked to be present just as a
25 precaution and to assist the court in maintaining proper

1 decorum to these proceedings. I trust everyone's behavior
2 over the last two weeks will prove their presence here is
3 quite supportless so I anticipate you will not have need
4 for them but I ask them nonetheless to join us. Anything
5 before I bring the jury out from the State, Ms. Mayes?

6 MS. MAYES: Nothing from the State, Your Honor.

7 THE COURT: Mr. Able?

8 MR. ABLE: No, sir.

9 THE COURT: Mr. Wise.

10 MR. WISE: No, sir.

11 THE COURT: Bring the jury in, please.

12 (Whereupon, the jury came into open court with the
13 verdict at approximately 4:00 p.m.)

14 THE COURT: The record should reflect that the jury
15 is present with us. The defendants are present, Ms. Mayes
16 is present on behalf of the State. Mr. Foreperson, I am
17 informed that the jury has reached a verdict, is that
18 correct?

19 FOREPERSON: Yes, sir.

20 THE COURT: And all twelve of you have agreed?

21 FOREPERSON: Yes, sir.

22 THE COURT: If you will hand the verdict to the
23 bailiff, please.

24 (Whereupon, the bailiff handed the verdict form to
25 the Court.)

1 THE COURT: Madam Clerk, if you will publish the
2 verdict. Mr. Able, Mr. Wise, if you will ask your clients
3 to please rise.

4 CLERK OF COURT: Your Honor, in the case of the State
5 of South Carolina versus Ashley Nicole Hepburn, case
6 number 2010-GS-30-1773 and 1774. We the jury in the above
7 captioned case on the charge of homicide by child abuse
8 unanimously find Ashley Nicole Hepburn guilty.

9 In the case of the State of South Carolina versus
10 Richard Brandon Lewis, case number 2010-GS-30-1929 and
11 1930. We the jury in the above captioned case on the
12 charge of aiding and abetting homicide by child abuse
13 unanimously find Richard Brandon Lewis guilty. Signed by
14 the foreperson on both cases, David Corley, March 3rd,
15 2011.

16 THE COURT: Thank you, Madam Clerk.

17 CLERK OF COURT: Ladies and gentlemen, if that be
18 your verdict please indicate by raising your right hand.

19 (Whereupon, all jurors raised their hand.)

20 THE COURT: Let the record reflect that all twelve
21 jurors did indicate by raising their right hand that this
22 was their verdict. Anything before we discharge the jury,
23 Mr. Able?

24 MR. WISE: I would request the jury to be polled.

25 THE COURT: Madam Clerk, if you will poll the jury,

1 please.

2 CLERK OF COURT: Ladies and gentlemen, the verdict
3 that I just have published was the verdict you reached in
4 the jury room. I ask you, was it your verdict then and is
5 it your verdict now. When I call your name if you will
6 answer yes or no.

7 THE CLERK: David J. Corley.

8 JUROR: Yes.

9 THE CLERK: Russell M. Conner.

10 JUROR: Yes.

11 THE CLERK: Mary Parsons.

12 JUROR: Yes.

13 THE CLERK: Brian S. Landford.

14 JUROR: Yes.

15 THE CLERK: Patti S. Brown.

16 JUROR: Yes.

17 THE CLERK: Sara D. Barksdale.

18 JUROR: Yes.

19 THE CLERK: Shirley K. Medlin.

20 JUROR: Yes.

21 THE CLERK: Richard Detroia.

22 JUROR: Yes.

23 THE CLERK: Joyce Lance Lowry.

24 JUROR: Yes.

25 THE CLERK: Freddie W. Payne.

1 JUROR: Yes.

2 THE CLERK: Charnessa Latimore.

3 JUROR: Yes.

4 THE CLERK: Stephen Patton.

5 JUROR: Yes.

6 THE CLERK: Thank you.

7 THE COURT: Anything further before we discharge the
8 jury, Mr. Able?

9 MR. ABLE: No, sir.

10 MR. WISE: No, sir.

11 THE COURT: Y'all may have a seat. Ladies and
12 gentlemen of the jury, I know that this has been a very
13 difficult two weeks for you. I know it has been very
14 difficult for all concerned here. I want to thank you for
15 your consciousness, I want to thank you for the way you
16 paid attention, I want to thank you for your courtesy,
17 your promptness every day that we have been through this
18 together. I will tell you what I tell every jury, it is
19 your right to say what you want to about these proceedings
20 and it is your right to comment on or to say anything that
21 you may want to say to whomever you say. The tradition in
22 South Carolina is different that what happens in the jury
23 room stays in the jury room, whether you choose to follow
24 that tradition or not it is your business entirely. I
25 tell you this much, if you want to speak to somebody or if

1 you were to be contacted by someone who wants to speak to
2 you, if you want to talk to them you are free to do so.
3 If you don't want to talk to them, however, and they
4 persist and asking to speak to you you report that to the
5 Clerk of Court and she will immediately contact me and we
6 will deal with it. So, if there are any problems you
7 contact me immediately. Ladies and gentlemen of the jury,
8 I want to thank you for your consciousness, I want to
9 thank you for the difficult decision that y'all had to
10 make in this case. I understand that this was not an easy
11 case for anyone to sit through or for anyone to observe.
12 Than you very much for your service and no one has any
13 right to criticize your verdict under any circumstances.
14 With that you are excused and if you wish to remain what I
15 would ask that you do is simply exit out here, give the
16 bailiff your juror badges and we can make arrangements for
17 one of the rows in the courtroom to be made available to
18 you. You will just need to come around to the back and we
19 will make sure there is somebody there that can show you
20 which row you want to stay. With that I once again invite
21 you to return to the jury room and collect any items that
22 you may have and you have to leave the exhibits as well as
23 my instructions to you back there. Go ahead and collect
24 your personal belongings. And if you want to stay you are
25 welcome to do so. If not thank you very much for coming!

1 The Clerk does have your checks and she will disperse
2 those to you back there. Thank you all very much. The
3 jury is excused.

4 (Whereupon, the jury was excused from the trial of
5 the case at approximately 4:07 p.m.)

6 THE COURT: Ms. Mayes, I will need you to prepare
7 some sentencing sheets and we will take a brief break for
8 about five or ten minutes or so and then we will proceed
9 with sentencing if there is no objection. We will be at
10 ease for a few moments.

11 (Whereupon, a short break was taken.)

12 THE COURT: Ms. Mayes, are you ready to proceed or do
13 you need another moment?

14 MS. MAYES: The State is ready, Your Honor.

15 THE COURT: At this point any motions from the
16 defense, Mr. Able, Mr. Wise?

17 MR. ABLE: Judge, we would, on behalf of Ms. Hepburn
18 I move for a new trial on the basis that the evidence was
19 insufficient to support the jury's verdict.

20 THE COURT: Thank you, Mr. Able. Mr. Wise?

21 MR. WISE: Your Honor, on behalf of Brandon Lewis I
22 would request that a new trial be granted on the grounds
23 that there was no evidence, there is no substantial
24 circumstantial evidence supporting a verdict of aiding and
25 abetting in this case. I don't, quite frankly, understand

1 why it went to the jury in the first place or how the jury
2 arrived at aiding and abetting in this case. As the jury
3 believed that she is the one that shook the child and
4 killed the child, his sole actions all occurred after the
5 act occurred. All of that would be guilty of accessory
6 after the fact and the State so chose to charge him with
7 that but they did not. The slight window at best is the
8 way to put it, that his not telling EMS personnel that he
9 heard her stomp into the room certainly cannot be said if
10 there is credible evidence in this record or substantial
11 circumstantial evidence in this record that would justify
12 an aiding and abetting for not telling what he thought
13 happened to the child in that room. In order to convict
14 him of aiding and abetting under the State's theory there
15 has to be substantial evidence that from the moment she
16 shook the child he knew something that he did not report
17 or should have reported and that caused the death of the
18 child. At best, at best you can only say it is
19 speculative that had the incident been reported even
20 thirty minutes earlier this child would have lived. There
21 is certainly no substantial evidence in this record in
22 this case to say any, that any actions of Brandon Lewis in
23 this case caused that child to die beyond a reasonable
24 doubt, by which a jury could determine a reasonable doubt.
25 I think the State's theory and the State's argument

1 blended or confused the jury with accessory after the fact
2 and aiding and abetting the commission of the crime. The
3 crime was committed when she shook the child. He was not
4 present, he did not aid and abet. There is not a
5 scintilla of evidence of that in his record. The only way
6 aiding and abetting can come into this record is by which
7 there was allegedly some act he did that caused further
8 injury to the child. And not a single medical person
9 testified that had, that had been reported even an hour
10 earlier than it was, that it would have been any result
11 different than this. So, I think the jury's verdict was
12 based upon misapprehension of the law, that not telling
13 the police the truth after the act was guilty of aiding
14 and abetting and was not based upon an accurate assessment
15 of the facts because there was nothing in the record by
16 which a reasonable jury could conclude that any of his
17 actions caused any sort of injury to this child.

18 THE COURT: Thank you, Mr. Wise. Ms. Mayes, what is
19 the State's position.

20 MS. MAYES: Your Honor, the State's position is that
21 there is sufficient evidence in the record to support that
22 the child was living and receiving medical treatment at
23 the point that Mr. Lewis was aiding and abetting Ashley
24 Hepburn in the act of child abuse or neglect by concealing
25 the crime, helping to advance the crime or promote the

1 crime by covering it up.

2 THE COURT: Gentlemen, I appreciate your motions.
3 Mr. Able, your motion for a new trial is denied. Mr.
4 Wise, Mr. Lewis' motion for a new trial, based on a lack
5 of substantial evidence is similarly denied.

6 MR. WISE: We also request that a new trial be
7 granted on the failure for the Court to charge any duty on
8 his behalf before the jury could convict him of any aiding
9 and abetting also. And of course, the other grounds that,
10 the failure to grant a mistrial on the grounds of his
11 being asked about the cocaine usage which was not proper.
12 And the comment by the Chaplain from Self Memorial
13 Hospital, it was a statement of a person of a guilty
14 conscious. I think when you look at the closeness of this
15 issue, at the very least, those little small things I
16 think easily could have persuaded the jury notwithstanding
17 Your Honor's instructions to the contrary, easily
18 persuaded the jury that that was what tipped the scales in
19 this particular case.

20 THE COURT: With regard to the failure to charge
21 concerning duty, Mr. Wise, I believe the record is
22 adequately protected on that particular question. I will
23 deny your motion on those grounds. And with regard to the
24 improper comments that the Court ruled were improper,
25 obviously curative instructions were provided at the time

1 the comments or the question was asked by Mr. Able as well
2 as at the time the statement from the pastor at the
3 hospital was elicited. I am quite certain beyond any
4 doubt that those instructions were sufficient to cure any
5 prejudice to your client. I was quite impressed with the
6 professionalism and dedication of that jury and it was
7 quite evident they took their obligations very seriously
8 and followed my instructions throughout the course of this
9 trial. I am satisfied that the jury instructions were
10 sufficient to cure any prejudice to your client and your
11 motion on those grounds are denied. Are there any further
12 motions from Mr. Able or Mr. Wise at this point?

13 MR. ABLE: No, sir.

14 MR. WISE: No, sir.

15 THE COURT: Ms. Mayes, if you have any member of the
16 family that wishes to offer any statements I will be more
17 than happy to receive those at this particular time. And
18 I will turn to the the defense for any issues of
19 mitigation. Specifically if the Court or if, the Court
20 can receive the benefit of any information, Ms. Mayes,
21 that you might have with regard to subsection (d), that is
22 the, 16-3-85. There are certain areas or certain things
23 that the Court must consider in aggravation and in
24 mitigation. I will be more than happy to hear anything or
25 any statements that you may have along those lines and

1 certainly we will receive.

2 MS. MAYES: Yes sir, Your Honor. Nothing in
3 aggravation beyond what the Court has already heard.
4 There are two family members which would like to address
5 the Court. The father of Victim Daniel Hepburn and also
6 her grandmother, Rita Hepburn Ebel.

7 THE COURT: Your victim's advocate would care to come
8 forward and just sort of stand over here at the side.
9 State your name, sir.

10 MR. HEPBURN: Daniel Hepburn.

11 THE COURT: Thank you, Mr. Hepburn, yes sir.

12 MR. HEPBURN: I would like to start by saying thank
13 you for everything that you have done here. You guys did
14 a great job on everything. I felt one way about this
15 before it started. Honestly it is hard to believe that
16 Ashley could have done anything. Watching her on the
17 stand lie changed my mind completely and then watching
18 Brandon Lewis get up on the stand and able to look me in
19 the eye and tell the truth made a big difference. And
20 seeing now what the truth is on this takes a huge burden
21 off of me. As far as concerns to Ms. Hepburn I couldn't
22 believe that she could ever do anything like this but
23 after seeing the evidence I see it now and I don't feel
24 she should be shown any leniency on anything in that
25 regard. With Mr. Lewis, in the situation he was in, I

1 know he was wrong in the aiding and abetting and I can see
2 that but in the same respect I could say what I would have
3 done in that situation as well. I would have no arguments
4 if he walked out today. I have nothing against him. With
5 Ashley, I hope she never comes out of prison. And that is
6 all I have to say, thank you.

7 THE COURT: Yes, ma'am.

8 MS. RITA HEPBURN: Thank you, Your Honor, we
9 shouldn't have to be here today, my granddaughter should
10 be turning three in June. My grandson should have his
11 little sissy to play and grow up with instead of visiting
12 her at her grave side and leave her toys to leave for her
13 because she might want to play with them. That is what he
14 tells me when we go to visit her. I agree with my son,
15 Ashley's, her temper got in the way this time and she went
16 too far and I want her to sit in jail every day for the
17 rest of her life and think of what she did to Victim
18 Claire. And Brandon, I believe Brandon now, before I
19 didn't know the whole story and he should have got up and
20 done something sooner instead of leaving her sitting
21 there. And we shouldn't be here, my granddaughter, she
22 was born eleven weeks early, two pounds and nine ounces
23 and fought for her life to live. And then her last days
24 my son sat there with her in the hospital. And when the
25 doctor disconnected her from the tubes they said she would

1 live for about ten minutes. She went on for forty minutes
2 and then he sat there and rocked her and sang to her, you
3 are my sunshine. She did not want to leave this world,
4 she fought and had to tie her hand to the side of the bed
5 because she tried to pull the tubes out. So with that she
6 could not reach her hands, so she would scoot her little
7 self down with her one foot that was working to try to get
8 her mouth to her hands to pull those tubes out. Her
9 little body was at ninety-three degrees, she laid there so
10 cold in that bed and I could not do anything to get her
11 warm because they were trying to keep the swelling down.
12 There is no reason for this, she was an innocent baby with
13 bright blue eyes and a contagious smile that loved
14 everybody. She would go to a stranger in a heart beat if
15 they would put their hands out to her, she would go to
16 them and smile. And now we have been robbed of her life
17 as she was robbed of her life and we can never get it
18 back. Thank you.

19 THE COURT: Anything else from the State, Ms. Mayes?

20 MS. MAYES: Nothing from the State, Your Honor.

21 THE COURT: Neither of the defendants, I assume, have
22 a substantial prior criminal history?

23 MS. MAYES: That is correct, Your Honor.

24 THE COURT: All right. Mr. Able, I will refer to you
25 first. I will be happy to certainly hear anything that

1 you may want to offer in mitigation at this point and
2 time, any statements from your client or any family member
3 who is here on their behalf. I will be more than happy to
4 hear from you.

5 MR. ABLE: Yes, sir. As the Court has said, this
6 case is obviously a tragedy. While we respect the jury's
7 verdict, of course we don't agree with it. By all
8 indications Ashley Hepburn was a good mother to her
9 children. The incidences of October 13th, like I said, we
10 respect the jury's verdict but we don't agree with it.
11 But prior to that, given the verdict, prior to that all
12 indications that she was a good mother, she was a stay at
13 home mom, she took care of her children. I would ask the
14 Court to take into consideration her age, I would ask the
15 Court to take into consideration the fact that she has no
16 prior criminal history. I have known her now for a year
17 and a half and every time that I have spoken to her she
18 has expressed to me the love of her children. We would
19 ask the Court humbly and for the most lenient, merciful
20 sentence that you can give, given the fact that she has
21 been convicted of this crime. Judge, Ms. Hepburn informs
22 me that she doesn't wish to speak. If I could have a
23 chance to ask if any of her family members would like to
24 speak.

25 THE COURT: Any family members, anyone wants to speak

1 on her behalf I will be more than happy to hear from you.

2 MR. ABLE: This is David Tolley.

3 THE COURT: Mr. Tolley, I will be glad to hear from
4 you.

5 MR. TOLLEY: I respect the verdict that they gave, I
6 do not agree with it but I just don't think the evidence
7 in the case was strong enough to convict her of this.
8 But, again, I do respect that. She is a 23-year-old
9 mother of two, never before this night had this ever
10 occurred and only with the presence of Brandon Lewis.
11 But, again, I know we are not trying the trial, I am
12 asking you for leniency. She has a four-year-old son and
13 we are heart broke at this verdict. Again, she has never
14 given us any real trouble in her life. She has been a
15 good daughter and this is just a tragic circumstance we
16 find ourselves in and again we do disagree with that
17 verdict and ask that you be lenient and consider her age
18 and the fact that this is the only run in with the law at
19 any point and time. Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Tolley. Yes sir, what is
21 your name?

22 PASTOR: Your Honor, I am Ashley Hepburn's pastor as
23 well as David Tolley's pastor as well. Your Honor, I
24 would ask you to consider, we saw some of those
25 photographs that were here, maybe a couple of hundred or

1 so. My family actually went through about a thousand
2 photographs from their family that of course weren't
3 prepared for the purpose of a trial. And out of those
4 thousands of photographs that we looked at there was never
5 one case that we didn't find Ashley in a loving position
6 with the children that she has. I would ask you also to
7 consider I have been counseling with the family and with
8 her for the past year and have met with Ashley numerous
9 times, probably at least a dozen times and never once has
10 she spoken or tried to accuse anyone else of the crime.
11 But her testimony to me and as we met together as we just
12 went over the word of god together was always to seek the
13 truth and God's truth in this situation and never did she
14 speak poorly about anybody else associated with the trial
15 whatsoever. I would ask you also to consider that for the
16 past year she has been the target of scathy websites and
17 attack in the community here which she had to endure but
18 never once did she respond to the negative way to those
19 attacks that were raised against her which was just
20 unconscionable that someone would do that to a grieving
21 mother. Her children have played with my children and I
22 have had my children in her presence. I trust her that
23 much because of the person that I know that I have met
24 with for this long. So I ask you to consider all of those
25 things in your decision and render a decision that is

1 equitable in this case.

2 THE COURT: Thank you. Mr. Wise, I will be happy to
3 hear from you, sir.

4 MR. WISE: Your Honor, I think I am in a unique
5 position of telling the Court that actually the jury
6 believed my client. They believed that she shook that
7 child and killed her beyond a reasonable doubt. Had he
8 not come forward under the advice of his grandmother and
9 made the statement he did they may not have been in the
10 position to arrive at that conclusion. As I pointed out
11 here in the trial, he not only came forward at that point
12 but any time he was called upon to testify he did. He is
13 a young man that, if Mr. Hepburn said he is not sure he
14 wouldn't have done the same thing, he could not believe
15 that this woman would do this to her child and yes he lied
16 to the police originally and that is the sole basis as I
17 see it of any thing that they say he did wrong as far as
18 the aiding and abetting is concerned. The jury
19 deliberations have been probably one of more unusual and
20 unique experiences I have ever had in my life because
21 while the jury was out Daniel Hepburn came up and hugged
22 Brandon Lewis and said he understood. I would dare say
23 uniformly there is not a member of Daniel's family that
24 has not come up to me and expressed concern for Brandon
25 and concern for what the Court does with him. And I think

1 if you were to poll the family today they would not be
2 anxious to see him go to jail for his participation, in
3 what the jury found and participated in this to be frank
4 with you. The statute carries up to 20 years. It says it
5 has a minimum of 10, it does not have a provision in there
6 that says no part of which may be suspended nor probation
7 granted. It doesn't even have a provision that says nor
8 shall probation be granted. I think under the law that
9 this Court can grant what **Victim** family is now asking
10 for and that is for Brandon not to go to jail and I think,
11 as I say, it is not the way this trial started and if you
12 had told me at the beginning of this trial the
13 conversations we were having in the hall would be of that
14 nature I would frankly never have believed it. It is a
15 very forgiving on their part, Brandon is, they said some
16 things about him before this trial, they have all met and
17 just basically said, we forgive each other for what we
18 have said and what we thought. I think his role in this
19 case is extremely minimal, I don't think his role was
20 found by the jury caused any additional damage, injury to
21 **Victim**. He has a simple possession of marijuana charge
22 from years ago that went through PTI and that is it. He
23 has been anxious to proceed with his studies at Clemson
24 University. To be frank with the Court, the suicide
25 attempt in a weird sort of way may have been one of the

1 best things that happened to him mainly because he went to
2 see a psychiatrist and really got a lot of his thinking
3 together. Academically he was not a good student before
4 this incident. Academically now he is doing extremely
5 much better after the suicide attempt and after the
6 counseling. He is well on his way to making some decent
7 grades at Clemson and was making decent grades at Piedmont
8 Tech. He has absolute potential for being as much as he
9 wants to be. I can tell the Court personally, I think I
10 met Brandon about a year ago when he hired me shortly
11 before the DSS hearing, actually before the deposition was
12 given in March. The maturity I have seen him gain over
13 the past roughly eleven months has really to me been
14 surprising. If you had seen him eleven months ago, if the
15 jury had frankly seen him eleven months ago I am not sure
16 they would convict him of aiding and abetting because at
17 that point in his life he was a much meeker person, a
18 much, a person you could tell was easily dominated by
19 another individual. He has truly grown up several years
20 in the last eleven months. I think he is a perfect
21 candidate for a probationary sentence. I think the
22 statute allows you to give it. I think the family is not
23 going to oppose it, in fact I know the family will not
24 oppose it. They would encourage you to do it in that
25 respect as Mr. Hepburn did encourage you to do it when he

1 spoke. I think that is a proper disposition, I think the
2 Court should consider that had he not come forthrightly
3 when he did we may of had a different result in this
4 courtroom. And someone who did a tragic event may have
5 walked out the backdoor and because of Brandon Lewis that
6 didn't happen.

7 THE COURT: Thank you, Mr. Wise. Mr. Wise, does Mr.
8 Lewis care to address the Court?

9 MR. LEWIS: No, sir.

10 THE COURT: Does any member of his family would like
11 to speak on his behalf?

12 MR. JAMES LEWIS: I am James Lewis, I am his father.
13 I just would like to tell the family, we are grieving with
14 the loss that y'all have too. I know Brandon, he was so
15 much relieved yesterday when they told him that. He told
16 me that if he had to go to jail he could handle it, they
17 knew that he didn't do it. And I am proud of my son for
18 what, he might of made bad judgment, he is a better man
19 than I am and I pray that you take that.

20 THE COURT: Thank you, Mr. Lewis. Ms. Mayes, if you
21 will, I believe that the homicide by child abuse does
22 constitute eighty-five percent?

23 MS. MAYES: That is correct, Your Honor.

24 THE COURT: And the aiding and abetting?

25 MS. MAYES: That is also classified as violent,

1 eighty-five percent.

2 THE COURT: Plus eighty-five percent. Anything
3 further from anyone?

4 MR. WISE: I just would inquire to the Court as the
5 position of whether or not you can suspend the minimum 10,
6 I think you can.

7 THE COURT: I believe I could.

8 MR. WISE: Okay.

9 THE COURT: Would you concur with that, Ms. Mayes,
10 that it is possible to suspend the minimum?

11 MS. MAYES: Yes sir, Your Honor.

12 MR. ABLE: That is on both of them, I believe, Judge.

13 THE COURT: I think that might be correct.

14 MR. WISE: I think so. There is a case that clearly
15 gives the Court the authority to do that.

16 THE COURT: I am sorry, sir?

17 MR. WISE: There is a case that clearly gives the
18 Court authority to do that, the State versus Thomson.

19 THE COURT: I agree. All right. The provision of
20 law that we are concerned today in regards for the Court
21 to consider certain factors in mitigation and in
22 aggravation. And subsection (d), it states in sentencing
23 a person under the section the Judge must consider any
24 aggravating circumstances including but not limited to the
25 defendants past pattern of child abuse or neglect of the

1 child under the age of eleven as well as any mitigating
2 circumstances. The Court has taken into consideration a
3 number of factors in the sentences which I am imposing.
4 With regard to both Ms. Hepburn and Mr. Lewis, it would
5 appear that neither individual has a substantial prior
6 criminal history. All indications are that Ms. Hepburn
7 was a loving mother and a good mother up until this
8 particular incident. So I have taken that into account.
9 The potential sentence that Ms. Hepburn is facing is
10 between 20 years and life and she would have to serve
11 eighty-five percent of any sentence that this Court
12 imposes. Now, as far as Ms. Hepburn, I am sorry, Mr.
13 Lewis is concerned, obviously he has no prior criminal
14 history, no prior contact with this Court. I have taken
15 into account the fact that ultimately he did the right
16 thing after his grandmother spoke to him and tried to
17 mitigate his culpability in some way, shape or form.
18 Certainly those are mitigating circumstances and there is
19 no indication that either of these individuals have been
20 involved with any prior history of child abuse. I am
21 forced to conclude that for whatever reason, Ms. Hepburn,
22 something happened to you that night and for whatever
23 reason you violently shook that child. What affects me
24 more than anything else, however, is the testimony from
25 the physician who testified last week that stated that the

1 injuries that were inflicted on the child were worse than
2 as if a child had been dropped off a ten story building.
3 So, we are talking about some substantial force involved.
4 And more importantly, Ms. Hepburn, you and Mr. Lewis were
5 that child's first and last line of defense that night and
6 both of you failed and failed miserably and the child is
7 dead because of that. I sincerely believe that if you had
8 to do it all over again, if you could take back that
9 night, if you could do something different you would do it
10 in a heartbeat, you would do it in an absolute second. I
11 don't for one instance believe, Ms. Hepburn, that you
12 intended to kill your child. It is of course, however, it
13 has been established, however, that you did in fact kill
14 your child that night and those actions have to be
15 punished. Again, the sentence that you will have to
16 serve, you will have to serve eighty-five percent of that
17 sentence, Ms. Hepburn. It is the sentence of this Court
18 therefore that you be committed to the South Carolina
19 Department of corrections for 45 years. You are to
20 receive credit for the time that you have served in jail.

21 And, Mr. Lewis, it is the sentence of the Court that
22 you be committed to the South Carolina Department of
23 Corrections for 10 years, that is suspended upon the
24 service of 7 years. Good luck to both of you.

25 MR. WISE: Your Honor, on behalf of Mr. Lewis I would

1 like to move for an appeal and I will file a notice for an
2 intent to appeal tomorrow if you want to hear the
3 discussion on the appeal bond at that time.

4 THE COURT: If you wish to bring that up tomorrow I
5 will be more than happy to hear that issue tomorrow.

6 MR. ABLE: Just the same--

7 THE COURT: I will entertain that and file your
8 motions, gentlemen, and I will entertain that tomorrow. I
9 lose jurisdiction after tomorrow. These proceedings are
10 concluded. Ms. Mayes, you can have your people exit first
11 and then we will allow Mr. Lewis' family and then Ms.
12 Hepburn's.

13 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Robert Addy, Jr., Circuit Court Judge

Case No.10-GS-30-1929

State of South Carolina Respondent,

vs

Richard Brandon Lewis Appellant

FINAL BRIEF OF APPELLANT

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Statement of Issues Presented

Question I: Did the trial court err in failing to direct a verdict in favor of Brandon Lewis when no testimony existed that he aided, abetted, or assisted Ashley Hepburn in inflicting the injuries upon **Victim** Hepburn?

Question II: Did the trial court err in failing to charge the jury that the State had to prove that Brandon Lewis had a legal duty to protect **Victim** Hepburn before they could convict him of aiding and abetting homicide by child abuse?

Question III: Did the trial judge err in failing to declare a mistrial when a witness for the state testified, over the objection of the Defendant Brandon Lewis, that a statement by Mr. Lewis had "the possibility of guilt behind it?"

Question IV: Did the trial court err in failing to require the State to open fully on the law and the facts and then to reply to matters brought up in the closing argument of the defendants?

Statement of the Case

Procedural Facts

On September 18, 2010 the state arrested Brandon Lewis on the charge of homicide by child abuse and aiding an abetting homicide by child abuse in violation of S. C. Code § 16-3-85. He was tried along with the co-defendant, Ashley Hepburn, on February 22 to March 3, 2011 before the Honorable Frank Addy and a jury. Counsel for both defendants objected to trying the defendants together. Ms. Hepburn was convicted of homicide by child abuse. She was sentenced to 45 years in prison. He was convicted of aiding and abetting homicide by child abuse. He was sentenced to seven years in prison.

The Notice of Appeal was filed on March 4, 2011.

Factual History

Brandon Lewis started dating Ashley Hepburn in early 2009. They had previously dated for a short period of time in early 2008. Rec. on App. at 845, ll 13-22. Ms. Hepburn was married to Daniel Hepburn but was separated from him at the time she and Mr. Lewis dated. Ms. Hepburn had two children with Mr. Hepburn, Owen and Victim. She lived in Cross Hill with her mother Doris Davis and David Crumley, Ms. Davis' boyfriend. The relationship between Ms. Hepburn and Mr. Lewis progressed to the point he was staying at her house two or three nights a week. Rec. on App. at 846, ll 21-25 to 847, ll 1-5.

On October 12, 2009 Mr. Lewis came by the residence of Ms. Hepburn on his way home from school. While there, they had an argument that was described by Ms. Hepburn as playful and by Mr. Lewis as resulting in her slapping him for the first time in the relationship. Rec. on App. at 851, ll 9-23. After Mr. Lewis went to his grandmother's house, where he lived,

he talked to Ms. Hepburn on the phone. He later returned to the her home. Rec. on App. at 852, II 852, II 19-25 to 854, II 1-21

After Mr. Lewis returned to the residence, he helped Ms. Hepburn with the children in preparing them for bed. Victim was placed in her crib and Ms. Hepburn retired to her room to read to Owen. Rec. on App. at 673, II 3-23. Mr. Lewis stayed up to watch football and a movie. Ms. Davis and Mr. Crumley had retired before Mr. Lewis came back to the residence. The evidence is undisputed that both Ms. Davis and Mr. Crumley were in bed asleep during the events that led to these charges.

Later in the evening Mr. Lewis checked on Victim At that time she was fine. He also awoke Ms. Hepburn and asked her if she wanted to watch a movie. Ms. Hepburn declined. Ms. Hepburn had been up most, if not all, of the previous night. Rec. on App. at 747, II 12-25 to 748, II 1-2. She had only slept for a few hours on the afternoon before the events leading to the charges. Both she and Mr. Lewis also had recently lost an employment opportunity with a company in Greenwood, SC. Rec. on App. at 746, II 12-25 to 977, II 1-9.

While watching a movie, Mr. Lewis heard Victim cry and then heard Ms. Hepburn stomp down the hall to Victim room. He then heard a sound which he described as a baby being shaken. Rec. on App. at 861, II 7-13. This opinion was based upon information he learned at the hospital as to what happened to the child. He did not at the time perceive the incident to be a baby being shaken. Rec. on App. at 863, II 5-13; Rec. on App. at 956, II 9-11. As he testified, he did not believe that Ms. Hepburn would do anything to hurt her child. Rec. on App. at 914, II 4-6.

After hearing Ms. Hepburn stomp down the hall, he entered her room and asked

her if she wanted any barbecue his grandmother had prepared. She told him no. He heated the barbecue for himself. After eating he started to go to bed. Before he went to bed he checked on Victim . When he entered her room he noticed that she was lying in an unusual position. He described it as perpendicular in the crib rather than lying horizontal. Upon closer examinations when he picked her up, he noticed she was not breathing right and had some blood around her mouth. Rec. on App. at 863, ll 12-25 to 866, ll 1-15.

He then carried the child into Ms. Hepburn's room to notify her. Ms. Hepburn took the child from him. The cries of Mr. Lewis and Ms. Hepburn then awoke Ms. Davis and Mr. Crumley. Victim was placed on the floor in the living room, Mr. Crumley placed the call to 911. When asked, Mr. Lewis informed Mr. Cumley that he had found the child unresponsive and believed that she had a seizure. This opinion by Mr. Lewis was based upon the fact that he had previously suffered from a seizure that led to his discharge from the Navy. Rec. on App. at 842, ll 13-19; 867, ll 5-10.

EMS arrived at about 1:40 a.m. Rec. on App. at 31, ll 14-15. They transported Victim to Self Regional Hospital. The doctors immediately suspected a brain injury which was confirmed by a CAT scan. The doctors also suspected abusive head injury caused by Victim being shaken. They notified the Laurens Sheriff's office and the Department of Social Services. Rec. on App. at 63, ll 6-18; 209, ll 7-23.

During the early morning hours of the incident. Mr. Lewis told the doctors, the officers and the Department of Social Services that he had found the child unresponsive. He did not tell them that he had heard Ms. Hepburn stomp down the hall and into her room shortly before he found her. Ms. Hepburn was present during many of these conversations. Rec. on App. at 60,

ll 14-19.

The condition of the child was such that she was transferred to Greenville Memorial Hospital shortly after being examined. Rec. on App. at 59, ll 4-25. She survived for three days before being removed from life support. She then died. Before the child died, Ms. Hepburn had been charged with child abuse. This charged was changed to homicide by child abuse after the child died. On October 17, 2009, she was also charged with aiding and abetting homicide by child abuse.

At about 6:20 a.m. on the morning of the incident, law enforcement asked Mr. Lewis to come by the police station. Rec. on App. at 385, ll 12-17. He did and at that time gave the police a statement. The initial statement did not mention that he had heard Ms. Hepburn stomp down the hall. State's Exhibit 30. The officers, not believing they had received correct information from Mr. Lewis, asked him to stay at the sheriff's office. Mr. Lewis asked to see his grandmother, Ms. Carol Starnes. She had been trying to contact her grandson. She was ultimately contacted by law enforcement and came to the sheriff's office. She spoke with her grandson and urged him that if he knew anything about the case to tell the officers what he knew. Rec. on App. at 984, ll 24-25 to 985, ll 1-24. After talking with his grandmother, he gave the officers further information. Defendant's Exhibit 2.

At about 11:45 a.m. Mr. Lewis gave the officers additional information concerning the incident. He told them about the events of the evening. He advised the officers that he had heard Ms. Hepburn stomp down the hall and, based upon information he had learned at the hospital, believed that the sounds he had heard were those of **Victim** being shaken. After giving the officers this statement, Mr. Lewis was permitted to leave. He was not arrested until about 11

months later on September 18, 2010.

Ms. Hepburn testified that she had been asleep until she was awoken by Mr. Lewis.

She testified that she did not harm her child and that Brandon Lewis was the only person who could have harmed her child. Rec. on App. at 700, ll 3-5. She testified that Officer Robert Plexico, with the Laurens Sheriff's Department, showed her the second statement given by Brandon Lewis. Rec. on App. at 774, ll 14-25 to 775, ll 1-8. Officer Plexico testified that when the statement was shown to her, she stated "Oh my god it is true. I did not mean to hurt my child." Rec. on App. at 993, ll 18-19. She testified that when first shown the statement she stated that the statement concerning putting Owen to bed and the difficulty brushing his teeth were true. Rec. on App. at 774, ll 7-13. Contrary to two other officers she testified that she was not given the opportunity to give a written statement. Ms. Hepburn's testimony contradicted several other witness testimony, including that of her former husband Daniel Hepburn. SLED agent Casey Kirkland testified Ms. Ashley told her that Mr. Lewis was "watching TV during all of this." Rec. on App. at 1035, ll 2-7.

Prior to his arrest, Brandon Lewis was deposed by Bryan Able, the attorney for Ashley Hepburn in both her family court matter and her attorney in the criminal action. On May 18, 2010 he also testified as a witness for the South Carolina Department of Social Services when the state sought to place Ms. Hepburn's name on the central registry. He was again cross-examined by Mr. Able.

Ms. Hepburn blamed Mr. Lewis for the injuries and resulting death of her child and Mr. Lewis said Ms. Hepburn shook the child. Neither defendant testified that the other one aided or assisted or encouraged the other in shaking the child, causing any injuries to the child, or

denying the child health care.

Argument

Question I

Did the trial court err in failing to direct a verdict in favor of Brandon Lewis when no testimony existed that he aided, abetted, or assisted Ashley Hepburn in inflicting the injuries upon Audriann Hepburn?

a. The state never established Richard Brandon Lewis took any affirmative action to aid Ashley Hepburn in the commission of the crime.

By its verdict, the jury found that Brandon Lewis did not cause the injuries to **Victim** Hepburn that caused her death. They believed his testimony that Ashley Hepburn stomped down the hall, shook her child, and then returned to her bed. To convict Brandon Lewis of aiding and abetting homicide by child abuse, the state is required to produce credible evidence that Brandon Lewis “*knowingly* aids and abets another person to commit child abuse or neglect . . .” S. C. Code § 16-3-85 (A) (2)(emphasis added). This burden is not met by simply producing evidence that Mr. Lewis did some act that aided and abetted Ashley Hepburn in committing child abuse. The State must prove he committed an act that he knew aided and abetted an act of Ashley Hepburn in committing the act of child abuse.¹ Simply put there is no such evidence in this case.

The South Carolina child abuse act arguably does not contain a mens rea for a person that commits child abuse. The legislature did not use the word “knowingly” in defining child abuse. They did use the word “knowingly” in defining the requirement of what the state

¹ The jury found that Ms. Hepburn did an act that caused the death of her child. The question of whether aiding and abetting by Mr. Lewis can be committed by an act of omission will be discussed later.

must prove for one aiding and abetting the commission of the crime. The question is under this record, what evidence exists that shows Mr. Lewis knowingly aided and abetted the commission of the crime.

The medical testimony establishes that the minor child would have been symptomatic immediately upon receiving the injuries. The doctors at Self Regional Hospital quickly and correctly diagnosed what was wrong with the minor child. No medical testimony exists in this record that shows the child would have survived had she received treatment earlier or if someone had told the medical personnel at the hospital the child had been shaken.

Mr. Lewis did not tell the complete truth at the time he was asked by the medical personnel what happened to the child nor to law enforcement several hours later. Hiding the involvement of Ashley Hepburn in the incident may make Mr. Lewis guilty of accessory after the fact, but that fact does not make him guilty of aiding and abetting her in the commission of the crime of homicide by child abuse. At the time he made his incorrect statement, the crime had occurred. Covering up the crime does not aid, assist or abet one in the actual commission of the crime.

The South Carolina Supreme Court has held to establish liability under aiding and abetting the state must prove a defendant is "[p]resent 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.." *State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2008) (emphasis added)

The statute does not define the term "aiding and abetting" differently from the traditional definition that has been used by the courts. In fact, in *State v. Smith*, 391 S.C. 353, 705 S.E.2d 491 this court held that traditional law concerning the aiding and abetting applies to the

statute. Aiding and abetting means to aid in the commission of the crime and not to aid in the cover up of a crime.

The reliance by the State at trial upon *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (2004) is misplaced. This case is entirely different from *Smith* in several important respects. In *Smith* the defendants did not accuse each other of the crime. They both defended by saying the state has to prove which one of us did the crime.² The jury never had to make the decision as to which defendant was telling the truth. The facts proved that both defendants gave statements they were both with the child at the time the injury occurred. In addition, the evidence disclosed that the defendants had also engaged in covering up the crime. As both were present and neither testified, plus there was evidence of a cover-up, the jury had some evidence that either or both aided and abetted the crime.³

In this case each defendant accused the other of inflicting the injury that caused the injury. The jury determined that Ashley Hepburn actually inflicted the injury. The record in this case simply does not support any affirmative act by Mr. Lewis that aided or abetted Ms. Hepburn in causing the death of Victim Hepburn. If he sat in the chair watching television while he knew that Ashley Hepburn was shaking her child, he would not be guilty of aiding and abetting homicide by child abuse. He did not commit an overt act that furthered the crime.

If the jury concluded that Mr. Lewis knew Ms. Hepburn was shaking her child and

² The defendant was convicted of both homicide by child abuse and aiding and abetting homicide by child abuse. The defendant did not appeal the issue of whether the defendant could be convicted of both crimes. The case also indicates that neither party testified.

³ The defendant in *Smith* did not raise the issue of whether he had a duty to protect the child. Also the defendant in *Smith* did not raise the issue of whether aiding and abetting can be committed by an act of omission.

causing the injuries and that he had a legal duty to prevent that act, Mr. Lewis is not guilty of aiding and abetting but guilty of homicide by child abuse. This is so because the statute makes an act of omission the actual commission of homicide by child abuse. The statute does not make an act of omission an element of aiding and abetting the commission of the crime.

b. The state cannot prove that Richard Brandon Lewis was guilty of aiding and abetting homicide by child abuse by an act of omission.

As a general proposition when one aids and abets another in the commission of a crime, the aiding and abetting is done in an affirmative manner. One simply cannot aid and abet the commission of a crime by an act of omission. If the law were otherwise, then a charge of mere presence would have no meaning. If one is merely present when the crime is committed, then he neither aids nor abets another in the commission of a crime. This crime is no different.

The wording of the statute shows that an act of omission cannot make one guilty of aiding and abetting the commission of the crime of homicide by child abuse. The S. C. Code § 16-3-85(A)(1) defines "child abuse or neglect" as "an act or *omission* by any person which causes harm" (Emphasis added) If a person commits an act of omission which causes harm, and that person is under a legal duty to act, and the act of omission results in the death of the child, that person is guilty of homicide by child abuse.⁴ So, aiding and abetting simply cannot be committed by an act of omission. That would be actual child abuse. The statute and the case law require an affirmative act by the person that aids the commission of child abuse before a person is liable under the statute for aiding and abetting.

⁴ The issue of whether the statute as to an omission applies only when there is a legal duty, is discussed later.

Even if by some theory, an act of omission can create liability for aiding and abetting homicide by child abuse, the state never proved any act of omission by Brandon Lewis knowingly caused any harm to the minor child. The sole act of omission that may have been proven in this case is that Mr. Lewis watched television while Ms. Hepburn stomped into the child's room and shook her. Under those facts, the state has not proven that Mr. Lewis knew that Ms. Hepburn was going to commit the act of child abuse when she entered into the child's room. As there was no proof that Mr. Lewis knew Ms. Hepburn had in fact abused her child in the past, there was no reason for him to know she would do so on that night. Even assuming that he should have re-acted when he heard the sounds from the room, nothing in this record suggests that the unfortunate outcome for **Victim** Hepburn would have been different had he entered the room immediately after the shaking. Certainly not responding after being told by Ms. Ashley not to interfere with her disciplining her child, does not evidence a circumstance manifesting "an extreme indifference to human life" as required by S. C. Code § 16-3-85.

The state failed to prove any alleged aiding and abetting of homicide by child abuse because of any alleged overt act by Richard Brandon Lewis to assist Ashley Hepburn in failing to provide health care for Audrina Hepburn.

As to be discussed later, as a boy friend who stays over two or three nights, Richard Brandon Lewis had no legal duty to render medical aid for the minor child. The trial judge instructed the jury that they may find Mr. Lewis guilty for an alleged failure to provide health care. In this case, Mr. Lewis did in fact assist in providing health care as soon as he found the child to be injured. Secondly, if a person fails to provide health care for a child where there is a duty to do so, that person is guilty of homicide by child abuse and not aiding and abetting

homicide by child abuse. To be guilty of aiding and abetting homicide by child abuse under this provision, the state must prove that Mr. Lewis somehow did an overt act to assist Ashley Hepburn in failing to provide **Victim** Hepburn with health care. And under this record, what is that overt act? As discussed above, an act of omission is not sufficient to convict one of aiding and abetting.

If such an overt act can be found in the record, that does not end the inquiry. The state must then establish that the failure to render health care "causes a physical injury or condition resulting in the child's death." S.C. Code § 16-3-85 (B)(2)(b). There is no evidence in this case that any act by Ms. Hepburn failed to supply health care that caused a physical injury or condition that resulted in the death of Audrina Hepburn. And if there is no criminal action by the principle, then there can be no aiding and abetting by Mr. Lewis. The jury found that Ms. Hepburn caused the physical injury or condition. Mr. Lewis committed no overt act to assist Ms. Hepburn in failing to supply health care that caused the physical injury or condition.

The State argued that the death of **Victim** was caused by the failure of Mr. Lewis to obtain prompt medical care. The State argued "that when a child goes for a long period of time without medical assistance or significant period of time without medical assistance that that is the result of hypoxia and cerebral edema that we saw in **Victim**." Rec. on App. at 1108, 11 5-9. The State had early urged that the failure to provide medical care section of the statute is appropriate because the "testimony from Dr. Ward that the hypoxia or swelling from the brain condition set in because she did not receive immediate resuscitation." Rec. on App. at 1074, 11 2-4. Dr. Michael Ward never testified to such. He simply stated that a brain injury will cause the brain to swell. He never testified that had the child received medical treatment sooner she would have survived. Rec. on App. at 372, 11 11-23. If Brandon Lewis had immediately notified EMS after he heard

the baby being shaken, the record is devoid of any testimony that the result would have been different.

Question II

Did the trial court err in failing to charge the jury that the State had to prove that Brandon Lewis had a legal duty to protect Adrina Hepburn before they could convict him of aiding and abetting homicide by child abuse?

At the trial below, the State took the position that there was no need for the State to prove that the defendant Richard Brandon Lewis had any legal duty toward **Victim** Hepburn in order for the jury to convict Mr. Lewis of aiding and abetting homicide by child abuse or actual child abuse. In objecting to the requested Charge № 2 the state said "As to charge number two, the implication of this charge is that there should be some type of duty and that is not this statute." Rec. on App. at 1074, ll 19-22. The State further argued "This Statute is meant to be broad, it is meant to apply to a person [who] is guilty of homicide by child abuse without any legal duty or responsibility to the child."⁵ Rec. on App. at 1077, ll 20-23. As a result of these arguments, the trial judge did not inform the jury that they had to find that Mr. Lewis had a legal duty toward the child before they could convict him of aiding and abetting homicide by child abuse. In fact, in her closing argument, the attorney for the State argued that the law, as to an act of omission, applies to anyone. Rec. on App. at 1114, ll 1-9.

Under the facts as found by the jury in this case, Mr. Lewis did not cause the injury to the child that resulted in her death. In fact, the State in closing did not argue that Mr. Lewis

⁵ Under the State's theory, the legislature could eliminate the "mere presence rule" and pass a statute that everyone has the duty to prevent a crime when one occurs in their presence.

directly caused the death of the child. Rec. On App. at 1171 ll 4-11. The State in that argument simply said as a basis for convicting him of aiding and abetting "[H]e was simply covering up this crime" Rec. on App. at 1171, 19. That is not aiding and abetting.

The State contended that Mr. Lewis had a duty to protect the child and failed to do so when he did not stop Ashley Hepburn from shaking the child. Rec. on App. at 1114, ll 1-9. In the closing argument the State urged the jury to convict Mr. Lewis simply because he "was in the home regardless of the fact he is not legally a parent." Rec. on App. at 1114, ll 7-9. On this issue the state has simply argued an improper interpretation of the statute.

Criminal liability for an act of omission in permitting another to injure or kill a person can only arise when there is a duty on the part of the defendant to protect the person injured or killed. While morally anyone should take action to protect a child, the law requires that a duty to protect the person first must exist before one can be criminally liable. Such a duty cannot be found to apply to a boyfriend who stays only two or three nights a week. This principle dates from early case law in the United States and the English common law. *See, U.S. v. Sabhnani*, 599 F.3d 215 (2nd Cir. 2010); *Jones v. United States*, 308 F.2d 307 (D.C.Cir.1962); *People v. Beardsley*, 150 Mich. 206, 113 N.W.1128 (1907); *State v. Lisa*, 391 N.J.Super. 556, 919 A.2d 145 (2007); Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. LAW REV. 547 (1988)

"It is a long-established principle that criminal law generally regulates action, rather than omission, and that '[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act-a legal duty and not simply a moral duty.' " Wayne R. LaFare, *Substantive Criminal Law* 6.2 (2d ed.2008). This general principle, that omissions may serve as

the basis of criminal liability only if there is an affirmative duty to act, is equally applicable when the crime charged is aiding and abetting. *Sabhnani* at 237

The Supreme Court of Connecticut in *State v. Miranda*, 274 Conn. 727, 878 A.2d 1118 (2005) has adopted this position. In *Miranda* the court found that the defendant was more than a two or three night stay over boyfriend and had in fact "established a familial relationship with the victim's mother and her children and assumed the role of a father." *Id.* at 768. 878 A.2d at 1141. The court in *Miranda* found that the boyfriend had no legal duty to the child and therefore could not be criminally liable for the injuries inflicted by the mother of the child.

Even if this court were to adopt the position that if a non-parent, under certain circumstances, has assumed the duty of a parent and therefore can be held criminally liable for acts of omission, the trial judge failed to charge the jury that they could only convict Mr. Lewis for an act of omission if they found he had assumed a duty as to the minor child. See Defendant's Request to Charge No 2. Mr. Lewis specifically requested that the jury be required to make such a finding.

S. C. Code §16-3-85 does define "child abuse or neglect" as including an act of omission. But the statute cannot be interpreted to change the common law rule that first there must be a legal duty to the child before one can be criminally liable from an act of omission unless such intent is clearly expressed. Under the state's theory, a stranger watching a child being struck by a parent would be criminally liable for aiding and abetting homicide by child abuse if they did not intervene to stop the beating and the child died. No state in the union has so held. Under such a theory the statute would be unconstitutional as a violation of the due process clause of the Fifth Amendment to the Constitution of the United States of America and Article I, § 3 of the

Constitution of the State of South Carolina as being over broad. Under such a statute no citizen would know when they would be subject to criminal prosecution when they witness or know about a parent striking a child. Under the interpretation of the statute as urged by the State, is there any line that can be drawn so that a citizen knows that what they observe can result in their being criminally liable for the death of a child who is a stranger to the person?

Question III

Did the trial judge err in failing to declare a mistrial when a witness for the state testified, over the objection of the Defendant Brandon Lewis, that a statement by Mr. Lewis had "the possibility of guilt behind it?"

Alexander Brown was in a Chaplin training program at Self Regional Hospital when Victim Hepburn was taken to the emergency room. As part of his duties, he counseled with the families of people admitted to the emergency room. In this capacity, he counseled with the family of Victim Hepburn. Included in the conversation was Richard Brandon Lewis. Rec. on App. at 148, ll 12-19.

In direct examination, the State went into detail about Mr. Brown's background including the fact that he is a student at the Lutheran Theological Seminary in Gettysburg, Pennsylvania. He testified that he was employed at Self Regional Hospital as a Chaplin. He testified as to his role as Chaplin. Rec. on App. At 144, ll 6- 25 to 147, ll 1-7.

On cross examination by the attorney for Ashley Hepburn, he stated that Mr. Lewis made the statement concerning V Victim "the baby she doesn't like me, but I love her." He stated that the statement caused him concern. Rec. on App. at 153, ll 23-25 to 153, ll 1-12. Counsel for Ms. Hepburn then asked "Why did it cause you concern?" Rec. on App. at 153, l 12. As this

question called for an opinion, an objection was made by counsel for defendant. Mr. Alexander was not qualified as an expert and his opinion as to why it caused him concern would not be admissible as lay opinion testimony under Rule 701 of the South Carolina Rules of Evidence. Instead of sustaining the objection, the trial judge instructed counsel for Ms. Hepburn to "lay a foundation a little bit more about how long he worked there" Rec. on App. at 153, ll 22-23. Then Mr. Brown explained in detail his training as a counselor and that his supervisor is certified by the American Clinical Pastoral Education. He further stated that he had been making weekly analysis of conversations with different patients since he had been employed at Self Regional Hospital. Rec. on App. at 154, ll 1-25.

After listing these qualification, Mr. Able again asked the question to which counsel again objected on the grounds the witness was not qualified and that the testimony would be speculative. This time, after the jury had heard about his qualifications, the objection was overruled. In response to the question, the witness stated that the statement made by Mr. Lewis "appeared to be a statement that had the possibility of having guilt behind it." Rec. on App. at 155, ll 18-19. This time the objection was sustained. A request for a mistrial was denied. The trial judge gave a curative instruction.

What the jury heard was that a seminary student who had training with a counselor certified by American Clinical Pastoral Education and who had spent many months evaluating patient's responses, believed that Mr. Lewis was guilty. This was not an inadvertent statement. Counsel for Mr. Lewis made timely objections to the question before the answer was even given. The question shows that whatever the answer was to be given would not be admissible under any of the rules of evidence. Once the Chaplin for the hospital had said Mr. Lewis had a guilty

conscious, that fact simply could not be removed from the minds of the jurors. When Mr. Lewis testified the jury would receive his testimony with knowledge of the fact that the Chaplin had said he had a guilty conscious. No curative instruction could ever cure the prejudice.

As a general rule, "curative instructions usually cure any prejudice caused by the admission of incompetent evidence" *State v. Dawkins*, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989). But the rule is not rigid. By using the word "usually" the South Carolina Supreme Court has recognized that in some cases the curative instruction is not sufficient to cure the prejudice. This case is one of those cases.

First, there is no question but that the objected to statement is not admissible. Defense counsel raised a timely objection before the statement was made as the statement, regardless of what it was, would not be admissible under the rules of evidence. This was clear from the question asked. "Why did it concern you?" calls for an opinion. Generally opinion evidence is not admissible. Instead of sustaining the objection, the trial judge asked counsel for Ms. Hepburn to further qualify the witness as to his inadmissible statement. No qualification by any witness would ever have made the statement admissible.

The jury deliberated for one and a half days before reaching a verdict in this case. As noted earlier, the evidence against Mr. Lewis for aiding and abetting is slight at best. The fact that the Chaplin for the hospital believed Mr. Lewis had a "guilty conscious" while it may not have been used by the jury in arriving at their verdict, could easily have given the jury comfort in reaching the verdict that they did.

Question IV

Did the trial court err in failing to require the State to open fully on the law and the facts and then to reply to matters brought up in the closing argument of the defendants?

Prior to the closing arguments, counsel for Richard Brandon Lewis requested that the State be required to open fully on the law and the facts. This was based upon the Due Process Clause of both the State and Federal Constitutions. As counsel argued "I would say if any case [c]ries out for the State to open fully on the law and the facts this is the one." Rec. on App. at 1092, 11 10-11. Counsel noted that after a week of trial he was still not sure exactly what theory the government was using to convict his client. He noted that it was unfair for the defendants to be required to present their theory of the case and then the government presents theirs with no chance for either defendant to refute the government's theory. The trial judge did not abuse his discretion in denying this request, because as the trial judge felt compelled to follow the law established by the appellate courts of our state, he did not use any discretion.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury. The practice of the State opening only on the law and then closing fully on the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the state to open fully on the law and the facts. In *State v. Atterberry*, 129 S.C. 464, 124 S.C. 648 (1924) the Supreme Court held that the failure to require the state to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the

points made, and authorities cited by the opposite party.”⁶ In reversing the conviction of the defendant the Court said “The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant’s attorney’s were required to make their arguments. This was refused. This was error.” *Atterberry*, 129 S.C. at 471, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said “It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case.” *Id.* at 473, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again the defense counsel requested that the state be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry*, Rule 59 of the Circuit Court Rules had been changed to Rule 58 and the rule then read “The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party.” The Court in *Lee* concluded that “It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact.”⁷ *Lee*, 318, 178 S.E.2d at 656. Thus began the more recent

⁶ Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

⁷ Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

practice of requiring the state to open only on the law and not the facts.

Today Rule 43 (j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that "Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 1004 (internal citations omitted). The court further held "Application of these authorities to the facts at hand compels us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id.*

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. See, e.g. Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) but see, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008)). The treatise writers also support the requirement that the state open fully on the

law and evidence. See, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D Trial § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.⁸

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing.

CONCLUSION

For the reasons stated in Question I above this case should be remanded with directions to enter a verdict of not guilty. As to Question II-IV this matter should be reversed and a new trial ordered.

August 6, 2012



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⁸ The Florida Supreme Court also noted that forty-seven states follow the common law.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Robert Addy, Jr., Circuit Court Judge

Case No.10-GS-30-1929

State of South Carolina Respondent,

vs

Richard Brandon Lewis Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

August 6th, 2012



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

RICHARD BRANDON LEWIS,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in declining Lewis' motion for a directed verdict [aiding and abetting homicide by child abuse] when there was purportedly no evidence that he aided, abetted, or assisted Ashley Hepburn in inflicting injuries upon the victim? (Appellant's Statement of Issues Presented, Question I).
2. Did the court err in declining to charge that the state had to prove that Lewis had a legal duty to protect the victim before the jury could convict him of aiding and abetting homicide by child abuse? (Appellant's Statement of Issues Presented, Question II).
3. Did the court err in declining to declare a mistrial when a state's witness testified, over objection, that Lewis' statement had "the possibility of guilt behind it"? (Appellant's Statement of Issues Presented, Question III).
4. Did the court err in declining to require the state to open fully on the law and facts and then to [only] reply to matters brought up in defendants' closing arguments? (Appellant's Statement of Issues Presented, Question IV).

STATEMENT OF THE CASE

The defendant Richard Brandon Lewis faced charges of homicide by child abuse (10-GS-30-1930) and aiding and abetting homicide by child abuse (10-GS-30-1929). His jointly tried co-defendant Ashley N. Hepburn also faced charges of homicide by child abuse (10-GS-30-1773) and aiding and abetting homicide by child abuse (10-GS-30-1774). (ROA. pp. 24-25). The defendant and jointly tried co-defendant came to trial with their separate counsel on February 22, 2011 before the Honorable Frank R. Addy, Jr., Judge, and a jury. On March 3, 2011 the jury found defendant Richard Brandon Lewis guilty of aiding and abetting homicide by child abuse and found co-defendant Ashley N. Hepburn guilty of homicide by child abuse. (ROA. p. 1196). The court sentenced the defendant to imprisonment for a term of ten years suspended upon service of seven years and sentenced the co-defendant to imprisonment for a term of forty-five years. (ROA. pp. 1217-1218).

ARGUMENT

The record contains substantial circumstantial evidence reasonably tending to prove the guilt of the accused, and the case was properly submitted to the jury.

Did the court err in declining Lewis' motion for a directed verdict [aiding and abetting homicide by child abuse] when there was purportedly no evidence that he aided, abetted, or assisted Ashley Hepburn in inflicting injuries upon the victim? (Appellant's Statement of Issues Presented, Question 1). At the close of the evidence, Lewis noted the discussion about the jury charge which "in essence" addressed the trial evidence (ROA. p. 1071, line 21 - p. 1090, line 17) and moved for a directed verdict of acquittal on aiding and abetting homicide by child abuse on the ground that there was no substantial circumstantial evidence of the offense. The state maintained that there was evidence Lewis knowingly allowed events which led to the victim's death by abuse and neglect. The court denied the motion. (ROA. pp. 1090, line 18 - 1092, line 4). An examination of the record demonstrates the soundness of the trial judge's ruling.

Trial Testimony

During marital difficulty, Ms. 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). Co-defendant 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. Additionally, Hepburn had anticipated but not gotten a job she needed. Lewis left about 5:00 PM. He returned about 8:30 when Hepburn's mother and her boyfriend were asleep. (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 had 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. (ROA. pp. 856-860; p. 896). 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 faintly; she was teething. Lewis heard Hepburn stomp into the room, and he actually felt her footsteps. The victim cried a little, and "there were short pauses in between her cry and it just, it sounded to [Lewis] like she could have been shaken."¹ Then she was not crying. 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. Lewis ate, used the bathroom, and got ready for bed. Again, he checked on the victim and saw she was in a strange position in the crib - face down with her head against the bars. She was limp, barely

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).

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 and called EMS at 1:30 AM. (ROA. pp. 27-31; pp. 861-867; pp. 910-911).

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) 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). Looking back on hearing the stomping footsteps, he knew that [Hepburn] shook the victim. (ROA. p. 913, line 25-p.914).

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).

At the time of the victim's death, Hepburn personally cared for her children. She thought the victim was too young to discipline and did not discipline her. (ROA. pp. 632-633; p. 648). Lewis was around the children because the children were around her. The victim would cry and cling to her when Lewis was around, and Hepburn had asked Lewis not to go into the victim's room when the victim was sleeping. (ROA. pp. 651-653).

Hepburn recalled that Lewis joined the children and her after her mother and her mother's boyfriend were in their bedroom. When the victim went to bed, the child was fine. The evening continued with Lewis playing with Hepburn's son and getting angry, and Hepburn told Lewis not to tell her how to parent. Hepburn again looked in on the victim, and she was fine. Hepburn read to her son and went to sleep after 10:30, and Hepburn did not again check on the victim. (ROA. p. 661 - p. 675, line 4). Lewis awakened her asking whether she wanted food or a movie. She declined and went back to sleep. She later awakened to find Lewis in front of her, acting odd, really calm, holding the victim in his arms, and telling her that the victim was not acting right. In fact, the victim was limp, not responsive, and she never awakened. (ROA. p. 675, line 5 - p. 677).

Hepburn came to the point: Lewis was the only person who could have harmed the victim. (ROA. p. 700, lines 1-5).

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. EMT's had initially considered an allergic reaction and administered Benadryl. Dr. Curry's examination revealed bruises (probably inflicted over days) and retinal hemorrhages. 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 the co-defendants (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 both defendants - offered the benign scenario of a normal child in her crib by about 10:30 PM and Lewis' subsequently finding her limp and unresponsive. (ROA. pp. 60-62; p. 78).

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).

Forensic pediatrician Dr. Mary-Fran Croswell 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).

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).

To be guilty of an offense as an aider or abettor the participant 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).

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

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. And Hepburn's earlier discipline had concerned Lewis enough to avoid Hepburn - something quite beyond the ability of her infant daughter in her crib. Lewis knew then what he knew later. He instigated, abetted, and witnessed Hepburn's disciplinary outburst against her son, and he instigated, abetted, and witnessed 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 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 by his 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.

II.

The court soundly declined a jury charge that is not a correct statement of the law.

Did the court err in declining to charge that the state had to prove that Lewis had a legal duty to protect the victim before the jury could convict him of aiding and abetting homicide by child abuse? (Appellant's Statement of Issues Presented, Question II). Counsel says the court should have charged that the jury could only convict Lewis for an act of omission if they found he had assumed a duty as to the minor child. (IBOA p. 16) Pursuant to S.C. Code §16-3-85, the trial judge instructed the jury that the defendants were, in part, charged with aiding and abetting homicide by child abuse.

To convict either of the defendants of this charge the State must prove beyond a reasonable doubt that the defendant knowingly aided and abetted another person to commit child abuse or neglect which resulted in the death of a child under the age of eleven. To be liable as an accomplice otherwise known as aiding or abetting the defendant must have knowledge of the principal's criminal conduct. Mere presence at the scene of the crime is not sufficient to establish guilt as an accomplice. Aid means to help, to promote the course or accomplishment of, to give support to or to give assistance to. Abet means to encourage or appear to favor or support.

(ROA. p. 1182, lines 11-24). The state had earlier objected to defense counsel's proposed charge number two since it implied a legal duty toward the child as an element of the offense or as requisite to finding criminal liability. The state noted another statute proscribed unlawful conduct toward a child [S.C. Code §63-5-70], and it applied to people who have charge or custody of a child. In the present case, the defendants were not charged under that statute. (ROA. p. 1074, lines 15-25). The court noted defense counsel's objection and found that the statutory offense of homicide by child abuse was applicable to the defendant, and the

court would include a charge on mere presence in its jury instruction. (ROA. p. 1078, line 12 - p. 1079, line 10).

The substance of Lewis' argument may be that he was merely present, lacked legal responsibility for the victim, and did nothing to aid and abet Hepburn. The argument in part repeats his contention concerning the sufficiency of the evidence and wants merit. The applicable statute, S.C. Code §16-3-85, requires no legal responsibility for a victim. Rather, the statute proscribes causing the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life or knowingly aiding and abetting another person to commit child abuse or neglect, and the abuse or neglect results in the death of a child under the age of eleven. Contrary to Lewis' position, there is substantial circumstantial evidence that he knowingly aided and abetted Hepburn in committing child abuse, and the abuse or neglect resulted in the death of her infant daughter.

III.

The court gave a curative instruction and soundly declined to grant a mistrial.

Did the court err in declining to declare a mistrial when a state's witness testified, over objection, that Lewis' statement had "the possibility of guilt behind it"? (Appellant's Statement of Issues Presented, Question III).

Hepburn and Lewis talked to the emergency room chaplain at the same time, but Lewis was the talker. Lewis said that after initially checking on the victim, he watched television for about an hour and a half, again checked and found her sideways in her crib and unresponsive. In the middle of his narrative, Lewis commented the victim "didn't like him but he loved her." The chaplain thought the comment was odd, in the sense of incidental or unnecessary, and relayed it to the attending physician. (ROA. pp. 145-152; p. 164). The chaplain explained, on cross examination by Hepburn's counsel, he had asked nothing to "provokc" the comment. (ROA. p. 154, lines 14-21). Next, counsel elicited the chaplain's testimony of his knowing nothing about foul play, and "it appeared to be a statement that had the possibility of having guilt behind it." Lewis' counsel moved for a mistrial on the basis that the chaplain had testified to Lewis' guilty knowledge, and the "bell can't be unrung." Counsel also noted that the witness was unqualified to give such an opinion. The court said it would instruct the jury to disregard the comment and that [finding of fact] was solely for the jury. The court denied the motion for mistrial and found its curative instruction would be sufficient. (ROA. p. 155, line 13; SROA- p. 1).

The court's curative instruction to disregard Brown's comment clearly and forcefully addressed the matter raised by Lewis' counsel, and that is demonstrated by the instruction itself and the want of either a contemporaneous request for any additional charge or an

objection to the sufficiency of the court's instruction. (ROA. p. 158). "An instruction to disregard incompetent evidence . . . usually is deemed to have cured the error in its admission. . . . A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out." State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). There was no error.

IV.

The court applied state law and exercised sound discretion in controlling the order of summation to the jury.

Did the court err in declining to require the state to open fully on the law and facts and then to [only] reply to matters brought up in defendants' closing arguments? (Appellant's Statement of Issues Presented, Question IV). Lewis wanted the state to open fully on the law and facts. The defense would then offer rebuttal to state's argument. The state could reply only on matter raised by the defense. The state opposed the motion and claimed final closing argument in that both defendants testified. The court denied Lewis' motion. (ROA. pp. 1092-1093).

In criminal trials, the solicitor is entitled to open and close arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808 (1977). The right to open and close arguments is a substantial right, and the denial of this right constitutes reversible error. State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397 (Ct. App. 2005). In South Carolina, the solicitor is not required to open his closing argument with any argument on the facts, State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652 (1971), overruled on other grounds State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) but may do so as a matter of discretion. Rodgers.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, State v. Oglesby, 384 S.C. 289, 292, 681 S.E.2d 620, 622 (Ct. App. 2009). That discretion includes the presentation of closing arguments and should not be reversed absent an abuse of discretion. State v. Penland, 275 S.C. 537, 539, 273 S.E.2d 765 (1981); State v. Garlington, 90 S.C. 138, 21, 72 S.E. 564, 566 (1911). Contrary to Lewis' position (IBOA, p. 20), the trial

judge's following the appellate law of this State is not a failure to exercise discretion. The assignment of error demonstrates no error of law and no prejudice to the defendant.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

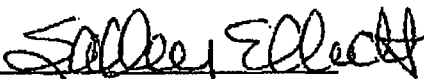
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ATTORNEYS FOR RESPONDENT

September 10, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County
Honorable Robert Addy, Jr., Judge

Appellate Court No: 2011-187128

THE STATE,

Respondent,

vs.

RICHARD BRANDON LEWIS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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Attorney General

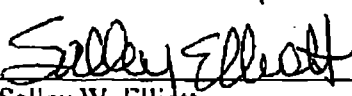
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Appeal From Laurens County
Honorable Robert Addy, Jr., Judge

Appellate Court No: 2011-187128

THE STATE,

Respondent,

vs.

RICHARD BRANDON LEWIS,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, 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 10th day of September, 2012.


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ATTORNEY FOR RESPONDENT

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Richard Brandon Lewis, Appellant.

Appellate Case No. 2011-187128

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5132
Heard February 5, 2013 – Filed May 15, 2013

REVERSED

C. Rauch Wise, of Greenwood, for Appellant.

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Attorney General John W. McIntosh, Senior Assistant
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Assistant Attorney General Harold M. Coombs, Jr., all of
Columbia; and Solicitor Jerry W. Peace of Greenwood,
for Respondent.

LOCKEMY, J.: Richard Brandon Lewis appeals his conviction of aiding and abetting homicide by child abuse (aiding and abetting). He argues the trial court erred in: (1) failing to direct a verdict in his favor on the charge of aiding and abetting; (2) failing to charge the jury that the State had to prove Lewis had a legal duty to protect [REDACTED] (Victim) before he could be convicted of aiding

and abetting; (3) not granting a mistrial after a witness testified a statement by Lewis had "the possibility of guilt behind it"; and (4) not requiring the State to open fully on the law and the facts. We reverse.

FACTS

Lewis began dating Ashley Hepburn, mother of Victim, in early 2009. Hepburn was separated from her husband, with whom she had two children, Victim and Owen.¹ Hepburn and her children lived with her mother, Doris Davis, and Davis's boyfriend, David Crumley.

Around 3:30 p.m. on October 12, 2009, Lewis stopped at Hepburn's home on his way back from class at Piedmont Technical College. Lewis stated Hepburn was upset about a withdrawn job offer, and they had an argument that was initially playful, but resulted in her slapping Lewis. Lewis left Hepburn's home after their fight and went to his grandmother's home, where he lived. However, he returned to Hepburn's home around 8:30 p.m. Davis and Crumley had retired to bed for the night when he returned. Hepburn told Lewis she was extremely tired and would not be good company, but he did not leave.

At some point in the evening, Owen accidentally hit Lewis while they were playing and then refused to apologize to Lewis. Lewis told Hepburn if Owen did not listen to her now, he was never going to listen to her, and a fight ensued about her parenting skills. Subsequently, Hepburn and Lewis began putting the children to bed. It took two attempts to put Victim to sleep because she was fussy. Then Owen refused to brush his teeth, and Hepburn spanked him, causing him to cry. Lewis said he felt responsible and guilty for the spanking because of his comments to Hepburn earlier, and so he went to the living room by himself to watch football. Hepburn went to her room with Owen where they laid in bed.

Later in the evening, Lewis checked on Victim and did not see anything out of the ordinary. He then went to Hepburn's room and asked if she wanted to watch a movie, but she declined. While watching the movie alone in the living room, Lewis heard Victim cry and thereafter heard Hepburn stomp down the hall to Victim's room. Victim continued crying for a few minutes before stopping. Lewis described the crying as being broken up with short pauses, "like she could have

¹ On the date of the incident, Victim was sixteen months old, and Owen was almost three years old.

been shaken," but in that moment he did not think anything had happened to Victim. After Hepburn returned to her room, Lewis went to her and asked if she wanted any food, but she did not, so he ate by himself and prepared for bed. He checked on Victim once more, but this time he noticed she was in an unusual position, facedown with her head against the bars of the crib. When he picked her up, he noticed she was not breathing properly and had blood around her mouth. He carried Victim into Hepburn's room and Hepburn took her from him. Davis and Crumley awoke to Lewis's and Hepburn's cries, and Crumley called 911. When questioned by Crumley, Lewis explained he had found Victim unresponsive and believed she had a seizure. His opinion stemmed from his personal experience with a seizure condition that resulted in his discharge from the navy.

Paramedics arrived at Hepburn's home around 1:40 a.m. and transported Victim to Self Regional Hospital (Self Regional). Dr. Michelle Curry suspected a brain injury, which was confirmed by a CAT scan. She also suspected the brain injury was caused by shaking, and the Laurens County Sheriff's Office (Sheriff's Office) and the Department of Social Services (DSS) were notified. Lewis told Dr. Curry he found Victim unresponsive but did not tell her Hepburn had stomped into Victim's room shortly before his discovery. Hepburn was present during his explanation to Dr. Curry, but she also stated Victim was simply found limp and unresponsive in her crib. Victim was transferred to Greenville Memorial Hospital where a pediatrician, Robert Seigler, determined the symptoms from her severe injury would have been immediately noticeable. Victim survived for three more days before being removed from life support and passing away.

Around 6:20 a.m. the morning of the incident, Lewis accepted law enforcement's request to come by the Sheriff's Office, and he gave a statement to Officer Ben Blackmon and other officers. In his initial statement, he did not mention hearing Hepburn's loud footsteps down the hall prior to discovering Victim's condition; he simply said he found Victim unresponsive. Additionally, he did not tell the officers about his argument with Hepburn earlier in the night that resulted in her slapping him. Lewis testified that at the time of the initial statement, he did not want to get Hepburn in trouble and did not believe Hepburn would do anything to hurt Victim. After his initial statement, he spoke with his grandmother, who urged him to tell the officers anything he knew about the case. Lewis then gave officers a second statement and explained he had heard Victim crying followed by Hepburn's loud footsteps and then louder crying from Victim, "as if she was being shaken."

Hepburn also spoke with law enforcement within approximately twelve hours of Victim entering the Greenville Hospital, and in her initial interview with South Carolina Law Enforcement Division (SLED) agent, Casey Kirkland, she did not indicate Lewis was involved in Victim's injuries. Hepburn stated Lewis was "watching TV during all of this," and she was asleep, except for the two times she was awakened by Lewis, first asking about food and then with Victim in his arms. At trial, Hepburn implicated Lewis, asserting Lewis was the only person who could have harmed Victim. However, she conceded she never heard a sound, and she did not know Victim was hurt until Lewis brought Victim to her.

Officer Robert Plaxico, from the Sheriff's Office, also spoke with Hepburn and showed her Lewis's second statement. Officer Plaxico stated that when shown the statement, she said, "[O]h my god all of this is true but I don't remember hurting my baby." However, she explained her exclamation pertained to putting Owen to bed and the difficulty she had brushing his teeth because Lewis's statement was accurate in that respect. Officer Plaxico stated Hepburn never implicated Lewis during her interview with him.

Officer Plaxico visited Lewis's grandmother's home a couple of days after the incident, and when he arrived, Lewis ran out the back door. However, Lewis returned a couple of minutes later and told Plaxico he ran because he thought he was going to be arrested. Lewis was unable to give Plaxico any further information, and Plaxico left the home. A few days later, Lewis was admitted to the Laurens County Hospital for a suicide attempt. Lewis was not arrested until September 18, 2010, when he was charged with homicide by child abuse and aiding and abetting.

Lewis and Hepburn were tried jointly on February 22, 2011. The State introduced Alexander Brown, Self Regional's chaplain, as a witness, and he testified his position required him to serve as a caretaker, "emotionally, spiritually, and mentally," for patients and their families. Brown testified that during his time with Victim's family, Lewis stated Victim "didn't like him but he loved her." Brown thought Lewis's statement was odd, and it caused him concern. Hepburn's counsel asked Brown why he thought the comment was odd, and Lewis's counsel objected on the basis that Brown was not qualified as an expert, and it was speculative. The trial court asked for a foundation to explain "how long [Brown] worked [at Self Regional] or something like that." Brown testified he had two years of seminary education, which included activities such as analyzing conversations he had with patients to see "why we ask what we ask and what flags might have been drawn by

things that [the patients] have said." When Hepburn's counsel asked Brown again why Lewis's comment caused him concern, Lewis's counsel objected to it as speculative. The trial court overruled the objection, stating the answer was being received for the purpose of showing Brown's reaction to that moment and stated Lewis's counsel was welcome to cross-examine Brown on the issue. Brown answered that Lewis's comment "appeared to be a statement that had the possibility of having guilt behind it." Lewis's counsel objected once again, and the objection was sustained. Lewis moved for a mistrial, arguing Brown had testified as to his opinion that Lewis was guilty, which he maintained was far beyond anything admissible in court. The trial court gave the jury a curative instruction instead of granting a mistrial.

At the end of the State's case, Lewis asked for a directed verdict on both charges, which was denied by the trial court. Lewis renewed his directed verdict motion on the charge of aiding and abetting at the close of the trial, and the trial court again denied it. On March 3, 2011, the jury found Lewis guilty of aiding and abetting homicide by child abuse, but acquitted him on the charge of homicide by child abuse. The jury found Hepburn guilty of homicide by child abuse. The trial court sentenced Lewis to ten years, suspended upon service of seven years, and sentenced Hepburn to forty-five years.

LAW/ANALYSIS

Directed Verdict on the Charge of Aiding and Abetting

Lewis contends the trial court erred in denying his directed verdict motion because the State presented no evidence to support the charge of aiding and abetting. We agree.

"In reviewing the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury." *State v. Smith*, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct. App. 2004) (citing *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). "In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight." *Id.* (citing *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69). "If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the

jury." *Id.* (citing *State v. Jarrell*, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002)).

"The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005) (citing *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984)).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id.* (quoting *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 102-03, 610 S.E.2d at 863 (quoting *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478; *State v. Ballenger*, 322 S.C. 196, 470 S.E.2d 851 (1996)). This court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the trial court's ruling. *Id.* at 103, 610 S.E.2d at 863 (citing *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92-93 (2002)).

"A person is guilty of homicide by child abuse if the person . . . knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." S.C. Ann. Code § 16-3-85(A)(2) (2003). "Child abuse or neglect" is defined under the statute as "an act or omission by any person which causes harm to the child's physical health or welfare." § 16-3-85(B)(1). Further, the statute provides that one causes harm to a child's physical health or welfare when one "inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment." § 16-3-85(B)(2)(a). "Aid and abet" is defined as "assist[ing] or facilitat[ing] the commission of a crime or . . . promot[ing] its accomplishment." Black's Law Dictionary 81 (9th ed. 2009).

"Under accomplice liability theory, a person must personally commit the crime or be 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." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (quoting *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). "In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." *Id.* at 480, 697 S.E.2d at 584 (quoting *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)); see *Wilson v. Wilson*, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is

going to be committed, without more, is not sufficient to make a person guilty of the crime."). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." *Mattison*, 388 S.C. at 480, 697 S.E.2d at 584 (quoting *Leonard*, 292 S.C. at 137, 355 S.E.2d at 272). "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" *Id.* (quoting *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977)).

In *State v. Smith*, the victim passed away from severe injuries sustained by abuse. 359 S.C. 481, 486-87, 597 S.E.2d 888, 891-92 (Ct. App. 2004). The two defendants, the victim's mother and the mother's boyfriend, were tried together on charges of homicide by child abuse and aiding and abetting. *Id.* at 488, 597 S.E.2d at 892. The jury found each defendant guilty of both charges. *Id.* The mother's boyfriend appealed his conviction, arguing the trial court should have granted his directed verdict motion on his charge of aiding and abetting. *Id.* at 490, 597 S.E.2d at 893. On appeal, this court noted that in their statements to investigators both defendants indicated they were never separated from each other or the victim during the time when her injuries occurred. *Id.* at 491, 597 S.E.2d at 894. Medical testimony established the injury was unquestionably the result of child abuse. *Id.* at 492, 597 S.E.2d at 894. We found the statute made it clear "child abuse may be committed by either an act or an omission which causes harm to a child's physical health." *Id.* (citing S.C. Code Ann. § 16-3-85(B)(1) (2003)) (emphasis omitted). This court then determined

[g]iven the evidence on the severity and number of injuries to [the victim], the fact that both [the mother and the mother's boyfriend] were the only adults with [the victim] during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, . . . there was sufficient evidence of an act or omission by [the mother's boyfriend] wherein he inflicted or allowed to be inflicted physical harm to [the victim] resulting in [the victim's] death.

Id.

In the present case, both Lewis and Hepburn assert they were in separate rooms during the time of the incident and not within eyesight of each other. Hepburn claimed she was asleep during the incident, and Lewis claimed he was in the living room watching the television. We believe this is an important distinction from *Smith*. Hepburn's and Lewis's statements to investigators and testimony implicate one or the other as having committed homicide by child abuse. Lewis stated he was in the living room and simply heard Hepburn walk loudly into Victim's room, at which point he heard Victim's crying eventually stop. He testified he subsequently discovered the Victim's abnormal condition when checking on her. Hepburn claimed she never went into Victim's room after placing her in the crib for the second time, and she asserted Lewis was the only person who could have harmed Victim that night.

The record does not contain any evidence to support this conviction. The State argues because Lewis instigated, abetted, and witnessed Hepburn's spanking of Owen, and then "witnessed Hepburn's disciplinary outburst against her infant daughter," he "knew then what he knew later." First, there is no evidence to support the claim that Lewis witnessed Hepburn discipline her infant daughter. Second, we disagree with the State's contention that because he witnessed Hepburn spank Owen earlier in the night, he knew Hepburn was going to abuse Victim. Even if Lewis did have prior knowledge Hepburn was going to commit a crime, without more, that was insufficient to constitute guilt. *See Wilson v. Wilson*, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995).

Next, the State argues Lewis can be held liable as an aider or abettor for his failure to act—specifically, his failure to enter Victim's room and stop any abuse after hearing her crying. However, an overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held liable for a failure to act. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). Thus, his failure to act, assuming he knew a crime was occurring, cannot suffice as evidence of aiding and abetting. In the present case, any other finding would nullify the mere presence charge. *See 21 Am. Jur. 2d Criminal Law* § 172 (2008) (explaining "there normally must be some evidence that the reason that the accused is present is to further the criminal intent of the perpetrator").

Moreover, the State must also present evidence of the requisite mental state for the charge of aiding and abetting, which the statute provides is "knowingly." *See 21 Am. Jur. 2d Criminal Law* § 131 (2008) (stating the term knowingly, as used in criminal statutes, "imports that an accused person knew what he or she was

doing"). In *Smith*, the defendants indicated they were never apart during the weekend, and the mother's boyfriend further admitted witnessing the victim's resulting side effects from the abuse, yet did not tell medical personnel. 359 S.C. at 491-92, 597 S.E.2d at 894. Thus, the court found the evidence was sufficient to establish to a jury that he knowingly aided and abetted in the crime. *Id.* at 492, 597 S.E.2d at 894. As we previously stated, the parties here assert they were apart during the incident, and Lewis testified the moment he found Victim's condition to be odd, he brought her to Hepburn and medical personnel were immediately called. Lewis stated it was only after he was told about the implications of Victim's injuries did he realize Victim's sounds that night could have been the result of someone shaking her. Initially, he thought Victim had suffered a seizure. We find the State did not present evidence to prove the requisite mental state for aiding and abetting.

The State also asserts Lewis's flight and suicide attempt are sufficient evidence to withstand a directed verdict. We disagree with the State's contention under these facts. The State did not present any evidence of an overt act or the requisite state of mind for aiding and abetting, and thus, evidence of flight and a suicide attempt alone will not suffice to withstand a motion for a directed verdict. *See State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (declining to hold "that flight alone is substantial circumstantial evidence of a defendant's guilt"). Accordingly, we reverse the trial court.

Because we find a directed verdict should have been granted in Lewis's favor, we need not address his remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find there was no evidence to support the charge of aiding and abetting against Lewis, and a directed verdict should have been granted in Lewis's favor. For the foregoing reasons, the trial court is

REVERSED.

GEATHERS, J., concurs.

FEW, C.J., concurring: I join in the majority opinion except for one sentence: "We find the State did not present evidence to prove the requisite mental state for aiding and abetting." For two reasons, I would not make that statement. First, the statement is unnecessary to the resolution of the appeal, and is therefore dicta, because we found the State presented no evidence that Lewis knew or had reason to know Hepburn had abused or neglected the victim in time to save the child's life. Thus, there is no evidence that Lewis committed any act to aid or abet Hepburn with homicide. Second, the State will almost never have direct evidence of a defendant's mental state. Therefore, the law expects that the State will rely on circumstantial evidence to meet its burden of proof on this issue. "[I]ntent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred. Circumstantial evidence alone is often sufficient to show criminal intent because the element of intent, being a state of mind or mental purpose, is usually incapable of direct proof." *State v. Cherry*, 348 S.C. 281, 288, 559 S.E.2d 297, 300 (Ct. App. 2001) (Goolsby, J., concurring) (internal citations and quotations omitted), *aff'd but criticized*, 361 S.C. 588, 606 S.E.2d 475 (2004). In this case, there is ample circumstantial evidence that would require the trial court to deny a directed verdict as to Lewis's mental state if the State had proven Lewis acted to aid or abet.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE.

Respondent,

vs.

RICHARD BRANDON LEWIS,

Appellant.

PETITION FOR REHEARING

On May 15, 2013, this Court reversed Appellant conviction for aiding and abetting homicide by child abuse in a published opinion. State v. Richard Brandon Lewis, Op. No. 5132 (S.C. Ct. App. filed May 15, 2013). Pursuant to Rule 221 (a), SCACR, the State respectfully petitions for rehearing on the following points the State believes were possibly overlooked or misapprehended.

In its opinion reversing Appellant's conviction, this Court 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 Appellant's favor. Respondent respectfully submits that this Court overlooked or misapprehended the evidence before the trial court in reaching its conclusion. Respondent submits the record, when viewed in the light most favorable

to the State, contains substantial circumstantial evidence reasonably tending to prove Appellant's 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 Appellant's motion for directed verdict. State v. Smith, 359 S.C. 481, 490 S.E.2d 888 (Ct. App. 2004).

For purposes of the pertinent provisions of the statutory offense, a person is guilty of homicide by child abuse if he or she knowingly aids and abets another person to commit child abuse or neglect and the child abuse or neglect results in the death of the child under the age of eleven. For purposes of the statutory offense, child abuse or neglect is defined as "an act or **omission** by any person which causes harm to the child's physical health or welfare." Section 16-3-85(B)(emphasis added). The statute in question also provides harm to a child's physical health or welfare is caused when a person inflicts or **allows physical injury to be inflicted** upon the child or when the person **fails to supply the child with health care** resulting in a physical injury or condition resulting in death. Id.

Respondent submits that this Court overlooked or misapprehended the evidence reasonably tending to prove that Appellant, through omission, allowed physical injury to be inflicted upon the child and failed to immediately respond to the child when he knew the child had been shaken but waited a period of time before taking any action to summon assistance or health care for her. Thereafter, through an act as well as omission, Appellant hid information about the injury and affirmatively mislead health care responders and providers such that the victim failed to receive timely and adequate health care, all resulting in the victim's death.

The record before this Court reflects that EMS dispatcher Thompson received a 911 call at approximately 1:30 AM on October 13, 2009, reporting that the 16 month old victim was

breathing but unresponsive. Appellant was present in the room when the 911 call was made and could be heard in the background. (ROA p. 104 - 106; 127). Appellant provided information about finding the victim in her crib and the victim's condition at that time. (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 found unresponsive. This Court might have overlooked the fact that Appellant was present during this exchange about the victim's condition and requests for information about the victim's history of injuries or illnesses for treatment purposes. Appellant stood silent while the responders were informed the victim was normal when put to bed and inexplicably found to be unresponsive without cause when Appellant 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 in case the victim was suffering from a possible allergic reaction. The victim was transported to the hospital in Greenwood. (ROA pp. 38 - 44)

The treating emergency room doctor, Michelle Curry, testified that the victim arrived at the hospital at approximately 2:00 AM. She described the victim as critically ill, limp and unresponsive with shallow and weak respirations but a good pulse and blood pressure. She spoke with the EMS personnel and learned EMS received very little information about the child other than it had been reported to EMS that there was no history of falls, trauma, or illness. EMS concluded the victim was possibly having an allergic reaction. Curry found that the victim did not have a fever but her pupils were unresponsive and her body was limp. She was also found to

have retinal hemorrhages and bruising of different ages to her abdomen, upper and lower back, left shoulder, legs, head, forehead, jaw line, and under her chin. The victim's jaw was tightly clinched. It was Dr. Curry's testimony that the retinal hemorrhages were consistent with non-accidental trauma and child abuse. Dr. Curry was informed the victim had not been ill and had no history of falls. A CAT scan revealed a subdural hematoma to the brain containing enough blood to push the brain across to the opposite side of the skull. (ROA pp. 52-59; 63; 87). Dr. Curry spoke with the victim's mother and Appellant and was told that the victim was in a normal state when put to bed and when checked at 10:30 PM but that Appellant later inexplicably found the victim with her head against the side of the crib and in a limp condition. Dr. Curry spoke with Appellant separately but the victim's mother entered the room during the exchange. Appellant specifically informed Dr. Curry that he was watching television while everyone else in the home slept and that he found the victim unresponsive when he checked on her. Neither Appellant nor the victim's mother offered an explanation for the victim's condition despite repeated inquiry. (ROA p. 65) Dr. Curry testified that the victim would have experienced obvious limpness and unresponsiveness. (ROA p. 79). This Court might have overlooked that, in the face of Dr. Curry's findings of non-accidental trauma and despite repeated questioning of Appellant and the mother, Appellant and the mother confirmed the account that the mother put the victim to bed at 10:30, that the victim's mother then went to bed, and that the victim was a little fussy but was otherwise normal at that time. They also affirmed that Appellant checked on the victim at 1:30 AM after watching television and found her limp and unresponsive and EMS was contacted. (ROA p. 83). This Court might have overlooked the fact that Appellant failed to report to Dr. Curry or any of the medical responders or treatment providers that he was aware the

mother was "stressed" because she did not get an anticipated job, that she reacted angrily and physically against Appellant 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. (R. 872-76; 903: 909-12; 991; 944- 948; 997 - 998; SR 2-3; 991). This Court might have overlooked that, despite hearing and believing the mother was shaking the victim to the point that she stopped crying, Appellant did not intervene or immediately check on the victim but waited some ten to fifteen minutes before looking in on the victim. Appellant did nothing to prevent the infliction of physical harm. Despite what he heard and knew, Appellant did nothing to summon health care immediately after hearing the victim being shaken. This Court might have overlooked Appellant's admission that did not timely tell the truth about what happened because he was in love with the mother and was trying to protect her. (ROA pp. 902 - 917). Along with the mother, Appellant affirmatively hid the truth even though he understood that it was important for medical personnel to know what he heard. (902 - 919). Appellant and the mother either tacitly or overtly agreed to keep this information about the mother's actions from the medical team responding to and treating the victim. David Crumley confirmed, along with others that the only information Appellant 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) .

This Court might have overlooked the testimony that Hospital Chaplain Brown testified that Appellant spoke first and was the "talker" about the victim. Appellant reported in the

mother'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 the mother and Appellant as concerned, collected, and united on the "story." (ROA p. 149 - 150).

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

The evidence establishes that Appellant was aware the victim's mother was angry about a number of events that occurred earlier that day and reacted in an uncharacteristically physical and violent manner toward Appellant and the other child in the home. He was also aware the victim was teething and fussy and that the mother's patience with the victim was wearing thin.

Appellant, who was sitting in a room adjoining the victim heard the mother stomp into the victim's bedroom in response to the victim's cries in such an angry manner that he could feel the vibration from the footsteps. This was not an injury committed in silence. Appellant heard the victim being shaken and injured and allowed the injury to be inflicted. Appellant then did not immediately respond to the aid of the victim but allowed her to languish in her crib for a period of time when health care was crucial despite what he heard transpire. Appellant also acknowledged that he failed to tell the first medical responders as well as the medical providers what happened even though the injuries the victim suffered were obvious and severe. Appellant knew the victim was gravely ill and despite his acknowledgment that it was important for the medical care providers to have information about the victim's history for treatment purposes. Along with the mother, Appellant affirmatively misled everyone during the critical time when resuscitation could have been provided to the victim and did so with the intent to protect the mother from being charged with the crime. The victim died as a result of the injury and lack of timely resuscitation. Appellant and the mother were interlocked from the beginning in covering up the truth about what occurred to the victim thereby thwarting efforts to provide the victim with adequate and timely medical treatment, advancing the crime, and ultimately causing the victim's death.

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, Appellant and the mother were the only two individuals in proximity to the victim at the time the injury. Both Appellant and the mother 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, Appellant and the mother 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 health care treatment leading to the child's death. Additionally, in this case, Appellant failed to respond to the child after he was aware the injury had been inflicted such that timely health care was not summoned for her.

Respondent also submits that this Court improperly rejected the evidence of flight and suicide. 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 this Court's finding 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

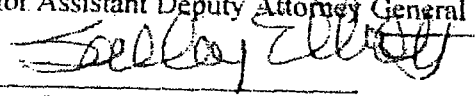
will necessarily rely on facts and circumstances from which intent must be inferred. See State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001).

Accordingly, coupled with the arguments raised in the Final Brief of Respondent and during oral argument, Respondent respectfully requests that the panel reconsider this matter, vacate the opinion and affirm Appellant's conviction.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 30, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County
Robert Frank Addy, Jr., Circuit Court Judge

Appellate Case No: 2011-187128

The State,

Respondent,

vs.

Richard Brandon Lewis,

Appellant.

PROOF OF SERVICE

I, Angela Bennett certify that I have served the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, 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 30th day of May, 2013.



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file

The South Carolina Court of Appeals

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The State, Respondent,

v.

Richard Lewis, Appellant.

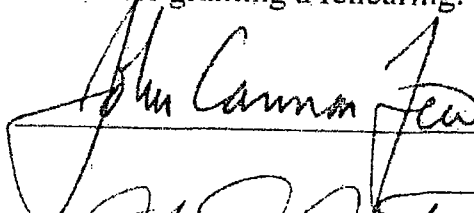
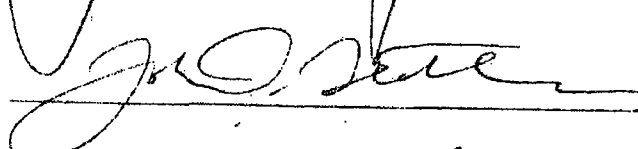
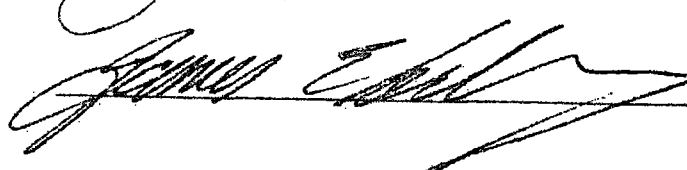
Appellate Case No. 2011-187128

JUN 21 2013

ATTORNEY GENERALS
OFFICE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

C. Rauch Wise

Salley W. Elliott

FILED

20 June 2013