

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

FEB 27 2014

RESPONDENT, Court of Appeals

V.

JULIA GORMAN,

APPELLANT

Appellate Case No. 2011-203707

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Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

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Opinion No. 5198

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PETITION FOR REHEARING

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On February 12, 2014, this Court affirmed Appellant's convictions for homicide by child abuse and unlawful conduct toward a child, and reversed Appellant's conviction for aiding and abetting homicide by child abuse. State v. Palmer and Gorman, Op. No. 5198 (S.C. Ct. App. filed Feb. 12, 2014). Despite a lack of direct evidence and insubstantial circumstantial evidence, this Court affirmed Appellant's conviction for homicide by child abuse "[b]ecause the child was in the exclusive custody of Palmer or [Appellant], or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or [Appellant], or both Palmer and [Appellant], inflicted the child's injuries." Appellant files this petition for rehearing pursuant to Rule 221(a),

SCACR requesting this Court rehear the matter as it concerns the convictions for homicide by child abuse and unlawful conduct toward a child due to the following points overlooked or misapprehended.

South Carolina's homicide by child abuse statute criminalizes conduct for acting as a principal or as an aider and abettor.<sup>1</sup> Under the principal portion of the statute, a person who "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs during circumstances manifesting an extreme indifference to human life" is guilty of homicide by child abuse. S.C. Code Ann. § 16-3-85(A)(1). The statute further defines child abuse as "an act or omission by any person which causes harm to the child's physical health or welfare." S.C. Code Ann. § 16-3-85(B)(1). Harm occurs when a person "inflicts or allows to be inflicted upon the child physical injury." S.C. Code Ann. § 16-3-85(B)(2)(a). In short and for purposes of this appeal, a person who causes the death of a child under the age of eleven while committing an act, or fails to act, that inflicts or allows to be inflicted physical injury upon the child is guilty of homicide by child abuse. Likewise, South Carolina's unlawful conduct toward a child statute makes it unlawful for a person who has custody of a child to "place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety" or to "do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered." S.C. Code Ann. § 63-5-70(A)(1) & (2).

This Court correctly determined that the prosecution relied entirely on circumstantial evidence to prove the identity of the person who inflicted the injuries upon the child in the present

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<sup>1</sup> The aiding and abetting portion of the statute provides that 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 results in the death of a child under the age of eleven." S.C. Code Ann. § 16-3-85(A)(2).

case. However, this Court erred in failing to direct a verdict where the best that could be said of the state's case was that "[b]ecause the child was in the exclusive custody of Palmer or [Appellant], or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or [Appellant], or both Palmer and [Appellant], inflicted the child's injuries." This statement alone demonstrates the lack of substantial circumstantial evidence to prove identity. Although the prosecution presented some evidence that the child's injuries occurred on July 14 and that the child was in the custody of Palmer or Appellant or both at all times that day, the prosecution failed to prove if Palmer or Appellant or both were in custody of the child when the injuries actually occurred. As explained by the dissent, the evidence, at best, established that Appellant and Palmer "each had time alone with the child during the timeframe of the abuse, and therefore, the state has only demonstrated that each defendant had an opportunity to injure the child." Thus, the dissent concluded "the only inference that can be fairly and logically deduced from the evidence is that one of the two codefendants inflicted the child's injuries."

Concerning Appellant, this Court found there was "substantial circumstantial evidence that she inflicted at least one of the child's injuries – specifically, while she was alone in his bedroom, after dinner." Because Appellant "entered the child's room to wake him around 6:00 p.m. that evening, and at 6:06 p.m., [Appellant] called 911 to report the child's symptoms," this Court found that the jury "could have 'fairly and logically deduced' that [Appellant] inflicted the fatal injuries." The only fair and logical deduction from this evidence was that Appellant found the child exhibiting signs of illness and did what was required of her by law – called for help.

Later, this Court held the prosecution presented substantial circumstantial evidence of each defendant's guilt on the charge of homicide by child abuse after determining the evidence failed to eliminate the possibility that the other defendant inflicted all of the injuries that killed the child.

This was error because substantial circumstantial evidence must not be equated to a possibility.<sup>2</sup> Rather, substantial circumstantial evidence requires more than evidence that “merely raises a suspicion the accused is guilty.” State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). The prosecution must present more than “a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963). In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2012), the South Carolina Supreme Court explained that the language of the traditional circumstantial evidence jury charge is instructive in making a directed verdict determination. The traditional charge provides:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)). Using the traditional circumstantial evidence jury charge as a guide, it is clear the

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<sup>2</sup> Just as this Court equated substantial circumstantial evidence with a possibility, the trial judge did the same when ruling on the motions for directed verdict. At the conclusion of the prosecution’s case, Appellant moved for a directed verdict. R. 769, lines 5-15. The judge found that the prosecution “presented a substantial amount of circumstantial evidence that really puts forth just in my view two scenarios. Number one, that [codefendant] injured the child and the child was unconscious when [Appellant] came home and she found him that way.” R. 772, lines 1-6. Appellant noted that in that scenario, there was no evidence that Appellant failed to act. R. 772, lines 7-8. “The other [scenario] is that [Appellant] came home and as [co-defendant] said the child was fine and that she injured the child, who knows, I don’t right now, but that’s what a jury is for and I think this should go to the jury.” R. 772, lines 9-14. The judge later stated a third scenario was possible “Or both could have been involved in it, so there’s three scenarios.” R. 772, lines 21-22.

prosecution's evidence against Appellant failed to rise to the level of substantial circumstantial evidence.

Like this Court, even the prosecutor admitted she could not prove the identity of the person who inflicted the child's injuries. During a pretrial motion hearing on May 26, 2011, the prosecutor stated she indicted Appellant and co-defendant for both homicide by child abuse and aiding and abetting homicide by child abuse because she had "two individuals who were the only two people who could have had access and contact with this child and the child ends up dead, that's it. So it could have been either one of them and that's where we are." R. 7, line 14 – R. 8, line 3. The prosecutor clarified that in her view, "the case law of the Supreme Court of South Carolina clearly allows us to proceed under that theory that we do not know which one was necessarily the principal aiding and abetting, that's why I charged them with both." R. 9, lines 5-13. The prosecutor was "proceeding that either one of them had access and could have inflicted the blow that killed the child, there you go." R. 9, lines 16-18.

During the defense's case-in-chief, Appellant testified that on July 14, 2008, she got up at 4:15 a.m. to get ready for work. R. 789, lines 16-22. According to her work time card, she clocked in at 6:00 a.m. and clocked out at 3:45 p.m. R. 791, lines 1-9. She then drove home, arriving between 4:30 and 4:45. From the bedroom door, she observed the minor sleeping. R. 793, lines 2-6; R. 793, lines 13-19. She then left to pick up food at IGA to cook for dinner. R. 795, lines 1-2. She produced a cancelled check showing she had been at IGA on July 14, 2008. R. 795, lines 15-25. The check was stamped by the store at 3:52 p.m. R. 799, lines 3-7. In light of Appellant leaving working at 3:45 and it being physically impossible to arrive at IGA by 3:52 p.m. from her workplace, Appellant surmised that the IGA computer stamp was off by approximately one hour.

R. 799, lines 10-17. She then stopped by the video store and went home. R. 799, line 18 – R. 800, line 18. As soon as she arrived home, she began cooking dinner. R. 400, lines 22-25.

Appellant and co-defendant sat down to dinner. After the two ate, Appellant prepared a plate for minor. R. 802, lines 13-18. Appellant then went to get minor. When she walked into the room, she noticed he “was breathing really funny.” She observed “saliva hanging out of his mouth.” Believing he was choking, she flipped him over her arm. Then minor began seizing. She called for co-defendant who took minor from her. Appellant then called 911. R. 803, lines 4-15.

Appellant denied striking minor and causing the injuries; she denied shaking minor. R. 826, lines 17-19; R. 827, lines 2-6. She explained that any statements in her interview about shaking minor were because she was so tired and the officers had “messed with [her] head” for so long. R. 826, lines 12-16. She emphatically denied abusing minor or permitting anyone else to abuse minor. R. 834, lines 3-17.

Dr. Ann Abel, a physician at MUSC, consulted on minor’s case on July 15, 2008. R. 478, lines 13-14; R. 484, lines 18-20. Appellant and co-defendant provided Dr. Abel with the same history of minor as they provided to police, including that Appellant was at work during the day and did not touch minor until she found him having a seizure. R. 487, line 14 – R. 488, line 13. Dr. Abel opined that the degree of force that was applied to both sides of minor’s head to cause the fractures would have rendered minor unconscious immediately. R. 490, lines 17-24; R. 504, lines 1-8. She concluded that the head injuries were inflicted on the day minor presented to the emergency department, which was July 14, 2008. R. 505, lines 1-7; R. 527, line 14 – R. 528, line 20.

On cross-examination, she admitted she was unable to confirm co-defendant’s claims that minor had eaten breakfast and lunch on the day the injuries were allegedly inflicted. R. 518, line 21

– R. 519, line 8. She also agreed that minor was underweight. R. 522, line 13 – R. 523, line 19. She testified that if a child had a head injury and the person who inflicted the head injury did not tell others, then “it’s very difficult for another observer who doesn’t know about the head injury to realize the child is unconscious.” R. 532, lines 4-12. According to Dr. Abel, “a child could have a head injury and be quietly breathing and apparently sleeping but actually unconscious and it would not be possible for a person who didn’t know that they had had the head injury to realize it until later, until something more started happening.” R. 533, lines 3-11. Along the same lines, she testified that if the minor had been struck in the head and lost consciousness and was not seizing or posturing, then the child would appear to be asleep.

The evidence against Appellant simply failed to rise to the level of substantial circumstantial evidence. An examination of two recent cases concerning the homicide by child abuse statute illustrates the complete lack of substantial circumstantial evidence against Appellant. In State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004), this Court affirmed the convictions of homicide by child abuse and aiding and abetting child abuse where the evidence indicated the injury to the child occurred during a time period when Smith and his co-defendant, Celeste Durant, were the only two persons who could have possibly caused the injury. Smith and Durant took the child to the beach on July 14, 2000. The next day, the two took the child to the emergency room because she began acting strangely. Id. at 483, 597 S.E.2d at 889. The scan revealed an old skull fracture, but no recent trauma. The doctor believed she had a viral infection. Id. at 484, 597 S.E.2d at 890.

The child’s condition did not improve, and the following afternoon, Durant found blood coming from her mouth. The child was transported to the hospital where a second scan revealed significant bleeding in the child’s brain and swelling of the brain. Id. at 485, 597 S.E.2d at 890.

The doctor testified that the difference in the two scans helped determine when the injury occurred – within several hours of the first scan. Id. at 485, 597 S.E.2d at 891-892. The evidence presented was that Durant was with the child the entire time on the day when the injury occurred, and Smith’s statement indicated he was with Durant the entire time on that day. Therefore, the evidence presented was that both Smith and Durant were with the child when the injury was inflicted. Id. at 491, 597 S.E. 2d at 893. Thus, it would have been impossible for the injury to have been inflicted that day and the other person to not be aware of it. This is why this Court determined the prosecution presented substantial circumstantial evidence of the guilt of Durant and Smith as to the charge of homicide by child abuse under the principal and aiding and abetting subsections.

Recently, the South Carolina Supreme Court held the prosecution failed to present substantial circumstantial evidence to support a charge of homicide by child abuse where the prosecutor’s witnesses “placed [Hepburn] asleep at the time the victim sustained the fatal injuries.” The Court elaborated “[w]hile undoubtedly present at the scene, the only inference that can be drawn from the state’s case is that one of the two co-defendants inflicted the victim’s injuries, but not that [Hepburn] harmed the victim.” State v. Hepburn, 406 S.C. 416, \_\_\_, 753 S.E.2d 402, 414-415 (2013). The prosecution presented evidence that Hepburn was asleep in bed with her son while the victim slept in a nearby bedroom. Hepburn’s boyfriend, Brandon Lewis, was watching television in the living room. When Lewis checked on the victim between 1:00 and 1:30 a.m., Lewis found her unresponsive. Lewis immediately went to Hepburn for assistance. The two then called 911. Id. at \_\_\_, 753 S.E.2d at 403-404. The medical evidence showed numerous bruises and petechiae on the victim’s body, retinal hemorrhaging, labored breathing, and general lack of responsiveness. Additionally, the medical evidence showed the

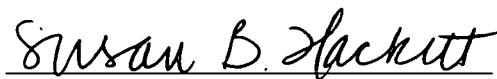
victim sustained a “fairly extensive” subdural hematoma extending from the front to the back of the right side of the victim’s brain, which was “caused by an acceleration-deceleration movement as in a car accident or shaken baby syndrome.” *Id.* at \_\_\_, 753 S.E.2d at 404. According to the medical professionals, the victim would have shown symptoms, including coma, immediately after an injury. The severity of the injuries would have resulted in a drastic change in the victim’s demeanor that would have been instantly noticeable to her caregivers. *Id.* at \_\_\_, 753 S.E.2d at 404.

In addition to the subdural hematoma, the prosecution’s “evidence also hinted at the possibility of prior abuse.” Hepburn took the victim to the pediatrician three times in the weeks leading up to her death because she had a petechial rash. Also, the victim had a chipped tooth and a bruised forehead, which Hepburn claimed was caused by the victim striking her head against her crib. *Id.* at \_\_\_, 753 S.E.2d at 405. Nevertheless, the Court held the evidence was insufficient to establish substantial circumstantial evidence that Hepburn engaged in acts or omissions constituting homicide by child abuse. The Court explained there was no evidence that Hepburn “was aware of the victim’s injuries, let alone caused them.” *Id.* at \_\_\_, 753 S.E.2d at 416.

No substantial circumstantial evidence exists that Appellant injured minor. The evidence presented by the prosecution was that the injury to minor occurred sometime on July 14, 2008, but the specific time was unknown. The evidence also showed Appellant or Palmer, or both, cared for minor that day. However, Appellant was at work for most of the day, and her interaction with minor was limited to when she discovered minor actively seizing, which was when she called for help. The evidence failed to show that Appellant and Palmer were with minor the entirety of July 14, 2008, when the injury occurred. Had the evidence done so, then

the prosecution would have been able to show that Appellant was aware of the injury because she would have observed it being inflicted. However, the evidence fell far short of showing Appellant was aware of the injury or caused the injury.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

This 27<sup>th</sup> day of February, 2014.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Horry County  
Larry B. Hyman, Jr., Circuit Court Judge  
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SC Court of Appeals

THE STATE,

RESPONDENT,

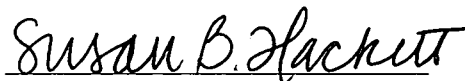
v.

JULIA GORMAN,

APPELLANT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

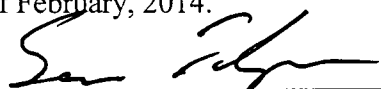
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blicht, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Julia Gorman, # 348815, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 2921, this 27th day of February, 2014.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day  
of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.