

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198 (S.C. Ct. App. filed 2/12/2014)

10-GS-26-2196

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

PETITIONER

APPELLATE CASE NO. 2011-203766

APPENDIX

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorney for Petitioner

ALAN WILSON
Attorney General
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-3970

Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Palmer and Julia Gorman, Appellants.

Appellate Case No. 2011-203707

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198
Heard October 9, 2013 – Filed February 12, 2014

AFFIRMED IN PART, REVERSED IN PART

Appellate Defenders Robert M. Pachak, of Columbia,
for Appellant Robert Palmer, and Susan Barber Hackett,
of Columbia, for Appellant Julia Gorman.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blich, Jr., both of
Columbia, for Respondent.

FEW, C.J.: Robert Palmer and Julia Gorman were convicted in a joint trial of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct toward a child, in connection with the death of Gorman's seventeen-month old grandson. The State proved conclusively that the child died from blunt force head trauma while in the exclusive custody of Palmer and Gorman. Palmer and Gorman contend, however, the trial court erred in denying their directed verdict motions because the State's evidence was insufficient to

prove (1) which defendant inflicted the child's injuries, and (2) that either of them aided or abetted the other.¹ We affirm their convictions for homicide by child abuse and unlawful conduct toward a child. However, we find insufficient evidence of aiding and abetting, and therefore, we reverse those convictions. We affirm all other issues pursuant to Rule 220(b), SCACR.

I. Standard of Review

Our task on appeal is to determine whether the trial court committed an error of law in denying Palmer and Gorman's motions for a directed verdict. *See State v. Cope*, 405 S.C. 317, 334, 748 S.E.2d 194, 203 (2013) ("In criminal cases, the appellate court sits solely to review errors of law."); *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013) (stating "the appellate court sits to review errors of law only"). Our supreme court recently summarized the standard we employ in reviewing a trial court's decision to deny a motion for a directed verdict:

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. During trial, when ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

On appeal, when reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. *See State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state

¹ We consolidated their appeals pursuant to Rule 214, SCACR.

has presented . . . substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. *Cf. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'") (emphasis removed) (citation omitted).

State v. Hepburn, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 17, 28-29) (some citations and internal quotation marks omitted).

II. Facts and Procedural History

On July 2, 2008, the child's mother—Gorman's daughter—left the child in Palmer and Gorman's custody under a temporary guardianship.² On the evening of July 14, 2008, Gorman made a 911 call from her home reporting the child had "shortness of breath." A member of the Horry County Fire and Rescue team testified that when he arrived at Gorman and Palmer's home, the child was seizing and in "a pretty grave condition." A doctor who treated the child at Conway Medical Center testified the child showed signs of "severe neurological injury," the cause of which "would have to be tremendous force to the skull." A CT scan of the child's head revealed skull fractures and swelling of the brain, which the doctor indicated "raise[d] the concern of child abuse." Due to the severity of the injuries, the child was flown to the Medical University of South Carolina (MUSC), where he was kept on life support for two days. His parents decided to cease support, and the child died July 16, 2008.

A forensic pathologist performed an autopsy on the child and found skull fractures on both sides of the child's head. She concluded the child died from blunt force head trauma, and the manner of death was homicide.

A. Palmer's and Gorman's Statements to Police

² The child's mother left town to visit her husband, the child's father, who was stationed out-of-state on military duty.

On July 18, 2008, Palmer and Gorman gave statements to the police. Palmer told police he did not know what happened to the child and denied hurting him. Similarly, Gorman told police she did not know how the injury occurred, but neither she nor Palmer hurt the child.

When asked whether the child's injuries could have been caused by being shaken, Gorman denied ever shaking the child. However, after the police continued to question her, she admitted she may have shaken the child and demonstrated how she shook him. She stated she did not think she shook him hard and denied shaking him the day he went to the hospital.

Palmer and Gorman both gave police a timeline of what occurred the day of July 14. According to Gorman's statement, she checked on the child at approximately 5:30 a.m. before she left for work and found him sleeping. According to Palmer's statement, he woke the child at 9:30 a.m., fed him breakfast and lunch, then laid the child down for a nap at 3:30 p.m. Gorman confirmed this, stating Palmer called and told her that he fed the child in the morning and again around noon. Gorman and Palmer both stated Palmer was alone with the child all day while Gorman was at work.

Gorman arrived home between 4:00 and 4:30 p.m. Gorman claimed she checked on the child as soon as she got home, and, similarly, Palmer stated he and Gorman walked to the "edge of the door" and "peeked in" the child's room to check on him. Gorman stated the child "was breathing fine, everything was fine." She also told police that "a little bit later," she and Palmer checked on him again and "still everything was fine." Palmer's statement, however, does not mention that they checked on the child a second time. Instead, he claims they went outside to talk "for a little bit" and then Gorman prepared dinner, which they ate around 6:00 p.m.

Gorman told police that after dinner, Palmer took the dog outside while she went to wake the child. Palmer did not mention walking the dog, but only that after dinner, Gorman went to check on the child. According to Gorman, when she entered the child's room, she heard him making "really strange noises" and noticed he was "slack looking," with saliva coming from his mouth. She claimed she picked him up and "leaned him over [her] arm because [she] didn't know if he was choking or if he was going to throw up." She called out to Palmer that something was wrong. Palmer came to her and discovered the child was having a seizure. Gorman called 911 while Palmer held the child.

B. Medical Evidence

At trial, the State introduced medical experts who testified to the extent of the child's injuries. Dr. Donna Roberts, a neuro-radiologist with MUSC, testified the child had skull fractures on both sides of his head, which resulted from severe trauma that occurred the day the child arrived at the hospital. She testified it "required severe force to create [the skull fractures]," and likened it to falling from a three-story window or being involved in a car accident. She stated the fractures could not have been caused by merely shaking the child. She also testified a person with these injuries "would be immediately severely symptomatic" and display a loss of consciousness, alteration in breathing, seizures, and foaming at the mouth.

The State also called Dr. Ann Abel, the director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, who testified that she spoke with Gorman and Palmer at MUSC to gain more information about the child. She claimed they both denied that any injury or accident occurred the day the child went to the hospital. Medical evidence, however, indicated the injuries must have occurred sometime that day. Dr. Abel testified that, in her medical opinion, the head injury occurred no more than three hours before the child arrived at the hospital.

Dr. Abel further testified the child suffered "massive" blows to both sides of the head that could have been inflicted in "less than a minute." She stated that a person observing the injuries take place "would perceive that this was a tremendous force" inflicted upon the child. However, she also testified that a person who did not see the force applied may not appreciate that something had happened to the child. She explained a person may be unable to discern whether the child was sleeping or unconscious if the person was not aware the head trauma had occurred.

Three of the State's witnesses testified they noticed bruises on the child while he was in the hospital, and Gorman could not account for them in her testimony. Dr. Abel testified the child had multiple bruises in places that were atypical for "normal childhood falling." Similarly, one of the nurses who treated the child in the emergency room testified she saw bruises on the child's body that "you wouldn't [typically] see." Additionally, a Department of Social Services employee investigating the case observed dark bruises on the child at the hospital, and when she asked Gorman how the bruising occurred, she responded the child "liked to pinch himself." However, the child's mother testified that, to her knowledge, the child had never intentionally hurt or pinched himself. Regarding whether the

bruises were recently inflicted, Dr. Jody Hutson, the child's primary care physician, testified that when he saw the child on July 1 for ant bites and allergies and again on July 8 to administer vaccinations, the child had no bruises or any other injuries that would cause him to suspect child abuse. Furthermore, Palmer's parents testified that when the child came to their house to swim on July 13—the day before his injuries occurred—they did not notice any bruises on him.

C. Gorman's Trial Testimony

All of the evidence described above was presented by the State in its case in chief. Both Palmer and Gorman presented evidence at trial, although Palmer did not testify. Under the waiver rule recognized by this court in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), and recently confirmed by our supreme court in *Hepburn*, this court properly considers evidence presented by defendants unless an exception to the waiver rule applies. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 29-30 n.15, 32 (providing that when a defendant presents evidence, "the 'waiver doctrine' requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the [State's] case-in-chief" (citation omitted)); *Harry*, 321 S.C. at 277, 468 S.E.2d at 79 (stating "when the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone"). Neither Palmer nor Gorman argue any exception applies, and we find none applies.

Gorman testified at trial to a timeline of events that occurred on July 14, parts of which contradicted her statement to police. A time card introduced in evidence showed she clocked out from work at 3:45 p.m. Gorman testified she drove home immediately after leaving work, which took around forty-five minutes. When she arrived home at approximately 4:40 p.m., she "walked to the [child's] bedroom door" and saw the child was asleep. Although Gorman and Palmer's statements to police do not indicate that Gorman left the house after checking on the child, Gorman introduced a check she signed made payable to a grocery store that was dated July 14 and had a time stamp of 3:52 p.m. Gorman explained she had forgotten to tell the police she went to the grocery store after checking on the child. Gorman claimed, however, that it was impossible for her to clock out of work at 3:45 p.m. and be at the grocery store by 3:52 p.m. She stated, though, it was "fair to say that maybe [she] cashed th[e] check at 4:52 p.m.," and the time stamp was off by one hour. While she was at the grocery store, Palmer stayed at home with the child.

According to Gorman's testimony, when she returned from the store, she did not check on the child again but instead began cooking dinner. She told the jury that when she and Palmer finished eating, she walked to the child's bedroom to wake him. When asked where Palmer was when she went to wake the child, Gorman testified that "at one point he took the dog outside to use the bathroom" but stated "he could have been already back inside the house." She went on to testify that when she discovered the child was injured and called out to Palmer, he arrived in the child's room in "seconds."

Gorman testified at trial she had never shaken the child. When asked why she demonstrated to police how she shook the child, she responded she "was just so tired and drawn out" that she "just reacted."

D. Directed Verdict Motions, Verdict, and Sentence

Palmer and Gorman both moved for directed verdicts on all charges, which the trial court denied. The jury found both Gorman and Palmer guilty of all charges. The court sentenced them each to ten years for unlawful conduct toward a child, twenty years for aiding and abetting, and thirty-five years in prison for homicide by child abuse, all to run concurrently.

III. Palmer's and Gorman's Directed Verdict Motions

Palmer and Gorman both assert the trial court erred in denying their directed verdict motions because the State did not present substantial circumstantial evidence to prove identity—whether it was Palmer or Gorman who inflicted the injuries that caused the child's death. They also assert the State did not prove that Palmer or Gorman aided and abetted the other in committing homicide by child abuse.

A. Homicide by Child Abuse

Subsection 16-3-85(A)(1) of the South Carolina Code (2003) provides that a person is guilty of homicide by child abuse when he or she "causes the death of a child . . . while committing child abuse." "Child abuse" is defined 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) (2003), and "harm" occurs when a person "inflicts or allows to be inflicted upon the child physical injury." § 16-3-85(B)(2)(a).

The State conclusively established by direct medical evidence that the child's fatal injuries were the result of child abuse. This evidence consisted of the following trial testimony: (1) the child died from intentionally inflicted blunt force trauma to the head; (2) the child suffered two skull fractures caused by "massive" blows to each side of the head, and exhibited multiple dark bruises that were atypical for "normal childhood falling"; and (3) the force used to inflict the skull fractures was comparable to falling from a three-story window or being involved in a car accident.

The State also conclusively established by direct evidence that the child's injuries occurred sometime on July 14. Both of the State's medical experts testified the injuries occurred that day. In fact, Dr. Abel testified the head injuries occurred within three hours before the child was taken to the hospital.

The State relies entirely on circumstantial evidence, however, to prove who inflicted the injuries that killed the child. Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries.

1. Evidence of Gorman's Guilt

We find the trial court correctly denied Gorman's motion for a directed verdict because there is substantial circumstantial evidence that she inflicted at least one of the child's injuries—specifically, while she was alone in his bedroom after dinner. Dr. Robert's testimony established the child would be "immediately severely symptomatic" after receiving the injuries and incapable of normal functioning, i.e., eating, walking, or playing. According to Gorman's statement to police, she observed nothing abnormal about the child when she left for work at 5:30 a.m. Similarly, Palmer told police the child functioned normally during the day—he ate breakfast and lunch and played. When Gorman returned home from work between 4:00 and 4:30 p.m., she claimed the child "was breathing fine, everything was fine," and when she checked on him again "a little bit later" with Palmer, "still everything was fine." Although she contradicted herself on this point at trial, Gorman's statement suggests Palmer was not alone with the child after she returned from work. Gorman entered the child's room to wake him around 6:00 p.m. that evening, and at 6:06 p.m., Gorman called 911 to report the child's symptoms. From this evidence, the jury could have "fairly and logically deduced" that Gorman inflicted the fatal injuries. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 29 ("The trial judge is required to submit the case to the jury if there is any substantial

evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (quoting *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127)).

2. Evidence of Palmer's Guilt

We find the trial court also correctly denied Palmer's motion for a directed verdict because there is substantial circumstantial evidence that Palmer inflicted at least one of the child's injuries. There are two scenarios under the evidence that reasonably tend to prove Palmer's guilt. First, the evidence supports that Palmer injured the child while Gorman was at work. Palmer had the child in his care the entire day of July 14. Though Gorman stated the child was sleeping "and breathing fine" when she returned from work, Dr. Abel testified a person may be unable to differentiate a sleeping child from one who is unconscious. Thus, the child's injuries might not have been noticeable to her at this time, particularly given Gorman's testimony that she did not actually enter the child's room or go close enough to carefully observe the child.

As to the second scenario, Palmer could have injured the child while Gorman was at the grocery store. The time stamp on Gorman's check established that she went to the grocery store that evening, and according to her trial testimony, Palmer stayed at home with the child. She testified that when she returned from the store, she did not check on the child. From this evidence, the jury could have "fairly and logically deduced" that Palmer inflicted the fatal injuries. *See id.*

3. Other Circumstances of Guilt

The State also presented evidence at trial from which it argued the jury could infer "why someone would kill a seventeen-month old child." While this evidence is insufficient by itself to prove Palmer or Gorman's guilt, the evidence must be considered in combination with all the evidence to determine whether there is substantial circumstantial evidence of guilt. *See State v. Frazier*, 386 S.C. 526, 532, 533, 689 S.E.2d 610, 613, 614 (2010) (viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *State v. Cherry*, 361 S.C. 588, 595, 606 S.E.2d 475, 478 (2004) (finding the circumstantial evidence, when combined, was "sufficient for the jury to infer [guilt]"). Because the State relied on the evidence at trial, we summarize it here.

This evidence relates primarily to Gorman, and includes (1) evidence that Gorman was often frustrated and annoyed with the child's behavior because, as Gorman

testified, he "crie[d] every day, [was] cranky every day, whine[d] every day;"³ (2) evidence that Gorman disliked the child, shown through comments she made to others; (3) testimony that Gorman and Palmer were "stressed about money" and concerned about how the child would affect their financial problems; (4) Gorman's testimony that she did not have a good relationship with the child's mother; (5) Gorman's testimony that she had never met the child before the child's mother left him with Gorman; and (6) Gorman's admission to shaking the child on a previous occasion.

As to Palmer, the State showed he was only thirty years old, unemployed, and experiencing financial difficulty at the time the child came to live with them. Palmer's father testified Palmer had a five-year old son who lived with Palmer's father and mother most of the time because he "didn't think that [Palmer] had any time for [the child]." Palmer's mother testified she and her husband "basically raise[d]" Palmer's son. Based on this evidence, the State theorized Palmer did not want to take on the responsibility of caring for a child, particularly one that was not his own.

4. Palmer's and Gorman's Statements

In Palmer's and Gorman's statements to police, they both deny causing the child's injuries and deny any knowledge of the other doing so. From the medical evidence and testimony presented at trial, however, it is not possible that both of these statements are true. While we are careful not to consider the falsity of a defendant's statement as positive evidence of the defendant's guilt, we find the impossibility that both statements are true is a circumstance the jury was entitled to consider in determining the guilt of both parties. Likewise, it is evidence the trial court and this court may properly consider in determining whether there is substantial circumstantial evidence of each defendant's guilt.

5. Concerns Related to Proving the Identity of the Principal

Because these cases were tried jointly, we necessarily merged the evidence presented as to Palmer and Gorman into one discussion. This necessity highlights the difficulty of the question presented by this appeal—whether the evidence the

³ Gorman told Dr. Abel the child was "clingy and whiny and want[ed] to be held all the time." Similarly, a paramedic testified Gorman told her that "she's raised several children in her lifetime and never seen such a bad one."

State presented as to each defendant eliminates the possibility that the other defendant inflicted all of the injuries that killed the child. The essence of Palmer and Gorman's argument on appeal is the evidence does not eliminate that possibility. We agree it does not. However, we find the State presented substantial circumstantial evidence of each defendant's guilt on the charge of homicide by child abuse.

This court "sits solely to review errors of law," *Cope*, 405 S.C. at 334, 748 S.E.2d at 203, and therefore we must confine *our* decision to whether the trial court correctly made *its* decision. As the supreme court stated in *Hepburn*, "we are called by our standard of review to consider the evidence as it stood" when the trial court made the ruling that is now on appeal.⁴ Shearouse Adv. Sh. No. 52 at 42. In denying the defendants' directed verdict motions, the trial court considered the evidence as it stood at that time in regard to each individual defendant, and determined whether that evidence was sufficient to support each charge against each defendant. The possibility that the jury may later reach verdicts that are inconsistent between the defendants was outside the trial court's power to consider, as that would require the court to weigh the strength of the case against one defendant in considering the sufficiency of the evidence against the other. See *Hepburn*, Shearouse Adv. Sh. No. 52 at 28 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." (quoting *Cherry*, 361 S.C. at 593, 606 S.E.2d at 477-78)); *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (stating our case law prohibits "inconsistent verdicts when multiple offenses are submitted to the jury, not when the jury returns disparate results for co-defendants"). As the trial court was required to do, we independently analyze the evidence against each defendant. Because that independent review of the evidence as to each defendant reveals "substantial evidence which reasonably tends to prove the guilt of the accused, [and] from which his guilt may be fairly and logically deduced," *Hepburn*, Shearouse Adv. Sh. No. 52 at 29, we affirm the trial court's

⁴ We recognize the supreme court made this statement to indicate it was not considering evidence presented after the State rested its case in chief. However, the reasoning of the court applies here. The statement indicates a reviewing court must identify a point in time where its review is focused for the purposes of determining error. In this case, the relevant point in time is when the trial court ruled on the directed verdict motion at the close of all evidence. We must analyze whether the trial court erred based on the evidence that was before it at that time, not retrospectively after the jury returned a verdict based on that evidence.

denial of each defendant's motion for a directed verdict for homicide by child abuse.⁵

B. Unlawful Conduct Toward a Child

We also find the evidence discussed above as to Palmer and Gorman supports the trial court's refusal to grant their directed verdict motions on the charge of unlawful conduct towards a child. *See* S.C. Code Ann. § 63-5-70(A)(2) (2010) (making it unlawful for a child's guardian to "do or cause . . . any bodily harm to the child so that the life or health of the child is endangered").

C. Aiding and Abetting Homicide by Child Abuse

Under subsection 16-3-85(A)(2) of the South Carolina Code (2003), a person is guilty of aiding and abetting homicide by child abuse when he or she "knowingly aids and abets another person to commit child abuse or neglect . . . [that] results in the death of a child." "Aid and abet" is defined as to "[h]elp, assist, or facilitate the commission of a crime," which can be rendered by "words, acts, encouragement, support, or presence, actual or constructive." *State v. Smith*, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). "To be guilty as an aider or abettor, the participant must have knowledge of the principal's criminal conduct." *State v. Zeigler*, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005). Thus, "[m]ere 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, 584 (2010) (citation omitted).

While the State's evidence conclusively proved the child died from child abuse, we find the State presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse. Therefore, the trial court erred in denying Palmer's and Gorman's motions for a directed verdict on aiding and abetting. *See State v. Lewis*, 403 S.C. 345, 355-57, 743 S.E.2d 124, 129-30 (Ct. App. 2013) (reversing denial of directed

⁵ The dissent relies on *Hepburn* as to the sufficiency of the evidence in this case. While we rely on *Hepburn* as to our standard of review, we find it distinguishable on the facts. In *Hepburn*, the supreme court found the State did not present sufficient evidence that Hepburn inflicted the child's injuries, stating, "Every State witness placed [Hepburn] asleep at the time the victim sustained the fatal injuries." *Id.* at 40. Based on this, the court concluded no inference could be drawn "that Appellant harmed the victim." *Id.*

verdict motion when evidence was insufficient to prove the defendant knowingly undertook an overt act to aid and abet his codefendant in committing homicide by child abuse).

The State contends *State v. Smith* controls and requires us to affirm. The supreme court's discussion of *Smith* in *Hepburn*, however, defeats the State's argument. See *Hepburn*, Shearouse Adv. Sh. No. 52 at 40-42. As it relates to aiding and abetting, the key facts in *Smith* were that the defendants were never separated during the time the medical evidence proved the injuries occurred, and "the medical testimony indicated that the victim['s] . . . symptoms would have been severe and immediate, and importantly, obvious to both Smith and the victim's mother very soon after the injuries were inflicted." *Hepburn*, Shearouse Adv. Sh. No. 52 at 41 (quoting and citing *Smith*, 359 S.C. at 491-92, 597 S.E.2d at 894). Here, Palmer and Gorman were separated for periods of time in which the injury could have occurred, and Dr. Abel testified the injuries may not have been apparent to someone who did not see them inflicted. Thus, we find this case distinguishable from *Smith*.

IV. Other Issues on Appeal

As to all other issues on appeal, we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

Regarding Palmer's argument that the State violated its agreement with him, we find it is not a "proffer agreement." See *United States v. Gillion*, 704 F.3d 284, 292 (4th Cir. 2012) (defining a "proffer agreement" as an agreement "intended to protect the defendant against the use of his or her statements," particularly when "the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement"). Regardless of this finding, we affirm on the basis that Palmer failed to demonstrate how enforcement of the agreement would affect him.

Turning to the issues raised by Gorman on appeal, we find the following:

(1) We find Gorman did not preserve for our review her argument that any statements she gave before being advised of her constitutional rights are inadmissible under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The record reflects Gorman objected only to the voluntariness of her statement at the *Jackson v. Denno*⁶ hearing and renewed this initial objection at

⁶ 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

trial. Because Gorman did not allege a *Miranda* violation before or during trial, she cannot do so now. *See State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (stating an issue not raised to and ruled upon by the trial court is not preserved).

(2) Gorman asserts that any statements given after she waived her *Miranda* rights are tainted by the initial violation—being subjected to custodial interrogation without first being given her *Miranda* warnings—and are thus inadmissible. *See State v. Peele*, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989) (requiring police to advise suspects of their *Miranda* rights before initiating "custodial interrogation"); *State v. Lynch*, 375 S.C. 628, 633, 654 S.E.2d 292, 295 (Ct. App. 2007) (stating the State may not use statements gained from custodial interrogation in violation of *Miranda*). We find, however, the police did not interrogate Gorman before giving her *Miranda* rights and thus no *Miranda* violation occurred. *See Lynch*, 375 S.C. at 633, 654 S.E.2d at 295 (stating *Miranda* rights attach only when the suspect is subjected to custodial interrogation); *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (defining interrogation as "express questioning, or its functional equivalent," consisting of words or actions by police that "are reasonably likely to elicit an incriminating response"); *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989) (holding defendant's statements to police were not the product of interrogation and were thus admissible).

(3) Gorman asserts her statement is inadmissible because it was not voluntarily given. *See Franklin*, 299 S.C. at 137, 382 S.E.2d at 913 ("The test of admissibility of a statement is voluntariness."). In finding the statement was voluntary, the trial court evaluated the totality of the circumstances and made the requisite findings. *See State v. Dye*, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (stating voluntariness of a statement is determined by examining the totality of circumstances surrounding the statement, including "background, experience, conduct of the accused, age, length of custody, . . . [and] threats of violence"). We affirm because each of these findings is supported by the record. *See State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (requiring appellate courts to review a ruling concerning voluntariness under an "any evidence" standard).

V. Conclusion

We affirm the trial court's refusal to grant Palmer's and Gorman's directed verdict motions on the charges of homicide by child abuse and unlawful conduct toward a child, but reverse as to aiding and abetting homicide by child abuse. We affirm any other issues on appeal.

AFFIRMED IN PART, REVERSED IN PART.

KONDUROS, J., concurs.

PIEPER, J., concurring in part and dissenting in part.

I concur in the majority's decision to reverse Gorman and Palmer's convictions for aiding and abetting homicide by child abuse, as there was insufficient evidence that they were acting together or assisting one another. I also would find there was insufficient evidence of the codefendants' guilt for homicide by child abuse and unlawful conduct toward a child because the State did not present any direct or substantial circumstantial evidence to reasonably prove which codefendant harmed the child. *See State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) ("The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes."). The evidence establishes that Gorman 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. Utilizing the analysis of the supreme court in *State v. Hepburn*, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 38-40) and *State v. Lewis*, 403 S.C. 345, 352-56, 743 S.E.2d 124, 128-29 (Ct. App. 2013), I would find 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. *See Hepburn*, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 40) ("While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two [codefendants] inflicted the victim's injuries, but not that *Appellant* harmed the victim. Thus, we reverse the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellant's guilt." (emphasis in original)); *Lewis*, 403 S.C. at 354-56, 743 S.E.2d at 129 (reversing the defendant's conviction when the State failed to offer any direct evidence or substantial circumstantial evidence of the defendant's guilt and the defendant's involvement amounted to mere presence at the scene). Accordingly, I would find the trial court erred by denying the defendants' directed verdict motions, and I would reverse the convictions for homicide by child abuse and unlawful conduct toward a child.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

APPELLANT

APPELLATE CASE NO. 2011-203766

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198

PETITION FOR REHEARING

Pursuant to Rule 221(a) SCACR, appellant petitions this Court for rehearing as it may have overlooked or misapprehended several points in this case.

The Proffer Agreement

This first argument raised on appeal was that the trial court erred in refusing to enforce a proffer agreement made between the State and appellant. This Court disposed of the issue as follows:

Regarding Palmer's argument that the State violated its agreement with him, we find it is not a "proffer agreement." *See United States*

v. *Gillion*, 704 F.3d 284, 292 (4th Cir. 2012) (defining a “proffer agreement” as an agreement “intended to protect the defendant against the use of his or her statements,” particularly when “the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement”). Regardless of this finding, we affirm on the basis that Palmer failed to demonstrate how enforcement of the agreement would affect him. (emphasis supplied)

The Court is urgently asked to reconsider its ruling that this was not a “proffer agreement.”¹

The proffer was drawn up by the assistant solicitor. She called it a “proffer” and an “agreement.” She set the terms of the agreement. Both Palmer and his attorney accepted the agreement, including taking and passing a polygraph test. Appellant was also required to be a witness at trial. In return, the State shall consider the extent and degree of cooperation by appellant in the election of charges and at sentencing and shall advise the Court of appellant’s extent and degree of cooperation.^{2, 3} The assistant solicitor reneged on her agreement. She used as her excuse, “He has not provided us, he has not given us the smoking gun in this case.” (R. p. 12, lines 4 – 5). See, *State v. Gates*, 299 S.C. 92, 382 S.E.2d 886 (1989).

Appellant was prejudiced by the State’s failure to keep their part of proffer in the following respects:

1. Appellant was not allowed to testify against the co-defendant at trial. Instead, he had to sit at the co-defendant’s table with the co-defendant and be tried under the doctrine of “guilt by association.” **The Solicitor has freely admitted that they did not know who did this crime so they were prosecuting both parties!** (R. p.23 line 22-p. 25, line 9; R. p. 34, line 25- p.35, line 9). The State obviated their burden of proof by trying

¹ Respectfully, even the Court casts doubt on this statement when it begins the next sentence with “Regardless of this finding...”

² Originally the State charged co-defendant Gorman with homicide by child abuse and appellant was charged with unlawful neglect of a child.

³ The proffer agreement is found at R. p. 506 – p. 507.

appellant under the doctrine of “guilt by association.” There was not sufficient evidence to convict appellant by trying him alone.

2. Instead of the State having to elect favorable charges in return for appellant’s cooperation, they were now able to go after appellant on the highest charges.
3. The State offered no help at sentencing contrary to their agreement.
4. The State was able to gain information through their debriefing of appellant and their interviews to try to make a case against appellant.

The Directed Verdict Issue

This case should not have gone to trial. The assistant solicitor admitted twice that she did not know who did this crime so she was going to prosecute both parties. When the directed verdict motion was first made, the trial judge said, “I don’t know how this case will go, that’s why we have juries.”(R. p. 727, line 24- p. 728, line 21). At sentencing, the trial judge remarked, “whoever did it, struck the blow, knew very well what you were doing or just did not care what you were doing.” (R. p. 990, lines 23 – 24). During oral argument in this case, Judge Pieper asked the assistant attorney general if this had happened with five adults in the house and if you did not know who did it, would you try all five of them. He replied that he would! This represents the prosecutorial mindset in this case. By contrast, Justice Harlan wrote in a concurring opinion in In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), the following:

I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

397 U.S. at 372, 90 S.Ct. at 1077.

The majority opinion cites no evidence meeting the legal standard to demonstrate who is guilty beyond a reasonable doubt. The Court wrote:

The State relies entirely on circumstantial evidence, however, to prove who inflicted the injuries that killed the child. Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries. (emphasis supplied).

Then the Court posits two scenarios under which appellant could be guilty.

First, the evidence supports that Palmer injured the child while Gorman was at work.

And the second scenario:

Palmer could have injured the child while Gorman was at the grocery store. (emphasis supplied).

Respectfully, the majority opinion is speculating as to guilt. A directed verdict should be granted when the evidence raises only a suspicion as to guilt. A "suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (citations omitted). The State did not present substantial circumstantial evidence reasonably tending to prove appellant's guilt. They have convicted an innocent man.

CONCLUSION

Rehearing should be granted and a directed verdict should be granted to the charges against appellant.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

This 27th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

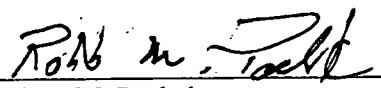
V.

ROBERT PALMER,

APPELLANT

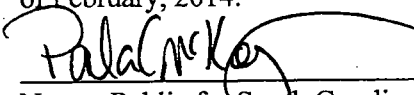
CERTIFICATE OF SERVICE

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. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of February, 2014.


Robert M. Pachak
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: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr. Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State,

Respondent,

vs.

Robert Palmer,

Appellant.

RETURN TO PETITION FOR REHEARING

On February 12, 2014, this Court properly affirmed Appellant's convictions and sentences for homicide by child abuse and unlawful conduct toward a child. State v. Palmer and Gorman, Op. No. 5198 (S.C.Ct. App. Filed February 12, 2014). Appellant has filed a Petition for Rehearing asserting this Court overlooked or misapprehended the relevant issues, case law, or facts of the case. This Court, however, properly concluded Appellant's issues were without merit and his convictions and sentences should be affirmed.

The facts of this case are thoroughly set out in the State's Final Brief of Respondent as well as in this Court's majority opinion. Appellant maintains this court erred in affirming the trial court's denial of her motion for directed verdict. The State contends substantial circumstantial evidence supports sending the case to the jury and supports the jury's verdict finding Appellant guilty of the charges. Further, the State submits State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), the case primarily relied

on by Appellant to argue the State failed to present substantial circumstantial evidence, is clearly distinguishable from the case at hand and was distinguished by the majority opinion in this case.

In Hepburn, the South Carolina Supreme Court explained: "There were only two people who could have killed the victim, either Appellant or her boyfriend of five months, co-defendant Brandon Lewis, as they were home with the victim on the night she sustained her fatal injuries." Id. at ___, 753 S.E.2d at 403. The Court found, once the co-defendant's testimony was excluded under an exception to the waiver rule, the State's evidence only demonstrated: "(1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after [her co-defendant] retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself." Id. at ___, 753 S.E.2d at 415-416. As a result, the Court distinguished State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

As the majority opinion found, the facts of this case are distinguishable from Hepburn and more in line with Smith. In Smith, this Court explained:

The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child's physical health. Additionally, harm to a child's health occurs when a person either inflicts, or allows to be inflicted physical injury upon a child. Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn 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, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or

allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death.

Smith, 359 S.C. at 492, 597 S.E.2d at 894 (internal citations omitted).

According to the testimony of Appellant and his co-defendant, Appellant was home the majority of the day alone with the toddler. Appellant's co-defendant merely looked in on the toddler in the morning and when she arrived home that evening. She did not go into the room or near the child. She testified he appeared to be sleeping, but she did not verify the condition of the child.

In the instant case, Dr. Abel and others testified the injury had to happen the day the toddler was taken to the emergency room. The doctors all testified the injury was severe and caused by blunt force trauma intentionally inflicted to the child. Further, they testified the child suffered fractures to the skull on both the left and right sides, as well as significant bleeding on the brain, and death of brain tissue.

Dr. Abel further testified if an observer did not see the force applied or the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). She testified it could be possible for an observer to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457). Further, she specifically testified:

[T]he signs of head trauma are changing consciousness, sometime seizures, sometimes breathing abnormalities. They, they don't all happen at once, so 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.

(T.559; R. 458).

As a result, the injury could have been inflicted by Appellant prior to Appellant's co-defendant getting home and, if the co-defendant did not notice anything wrong from the doorway when she looked in on the toddler, then she would not have known something happened to the child until she went to pick up the child. Appellant's co-defendant testified she did not enter the room, but instead merely observed the child appearing to be asleep. She testified when she went into the room to pick up the child was when she noticed something wrong. Prior to this time, Appellant was the only one home throughout the day with the child. Accordingly, the evidence when viewed in the light most favorable to the State provides substantial circumstantial evidence Appellant inflicted the harm to the toddler. The majority of this Court correctly affirmed the denial of Appellant's motion for directed verdict.

On the issue of the proffer agreement, the State submits no matter what the agreement is called or how it is construed, Appellant violated its terms by not being forthcoming with all the material information. As a result, the agreement became null and void.

Further, Appellant cannot demonstrate how he was prejudiced by or failed to receive the benefit of his bargain. The agreement only required the State to take into consideration his information and assistance when determining charges against Appellant. As the trial court found, the State had every right to charge Appellant as it deemed appropriate. There was absolutely no requirement the State charge Appellant only with a lesser included offense or that he not be tried as a codefendant with Gorman. The only requirement was for the State to consider his cooperation in reaching its decision. There is no evidence this was not done, especially in light of the State's belief

that Appellant was not entirely forthcoming regarding the time frame and the events leading up to the toddler's death. As a result, Appellant cannot demonstrate how he was prejudiced, or show any provision of the proffer agreement with which the State failed to fully comply.

Finally, Appellant has not demonstrated any relief to which he is entitled. As mentioned, the agreement did not entitle him to testify unless the State chose to call him. It did not entitle him to be charged with a specific crime or receive a specific sentence. Accordingly, even if the agreement was enforced, the State could still try Appellant for the same charges, using the same evidence, and ask for the same sentence considerations as it did in the instant case. As a result, if the agreement is enforced, there is no relief which Appellant can receive which he has not already received.

Accordingly, this Court properly found Appellant was not entitled to relief on this issue.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General


WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 10, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr. Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State,

Respondent,

vs.

Robert Palmer,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

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

This 10th day of March, 2014.



SALLY ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Tracking No. 2011-203707

The State,

Respondent,

vs.

Robert Palmer and Julia Gorman,

Appellants.

PETITION FOR REHEARING

On February 12, 2014, this Court properly affirmed the Appellants' convictions and sentences for homicide by child abuse and unlawful conduct toward a child, but incorrectly reversed their convictions for aiding and abetting homicide by child abuse. State v. Palmer and Gorman, Op. No. 5198 (S.C.Ct. App. Filed February 12, 2014). This Court misapprehended or overlooked the relevant facts in this case and applied an incorrect standard of review by viewing the evidence in the light favorable to the defendants instead of to the State. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the trial court properly denied the Appellants' motions for directed verdict, and affirm their convictions and sentences for aiding and abetting homicide by child abuse.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when

the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences **in the light most favorable to the State.** State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004) (emphasis added). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.” Id.

Gorman Conviction

This Court erred in viewing the facts not in the light most favorable to the State but instead in the light most favorable to Gorman. This Court relied on the fact the parties were apart at various times and on Dr. Abel’s testimony that a person may not have realized the injuries if they did not see the abuse occur. This Court erred in viewing the evidence in the light most favorable to Gorman instead of the light most favorable to the State.

First, there is no doubt the toddler died as a result of injuries inflicted upon him by either Palmer or Gorman. The parties were together during the time immediately after Gorman arrived home and both admitted entering the child’s room at that time. During this time, just as in State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004), the evidence supports a finding Palmer committed the abuse with Gorman present in the room. She would have known of the abuse and of the injuries and allowed them to be inflicted without inflicting them herself.

Further, there is circumstantial evidence, if believed by the jury, that Palmer committed the homicide by child abuse during the time Gorman was at work. Additionally, Dr. Roberts testified a person with the type of injury sustained by the

toddler would be **immediately and severely symptomatic**. She said the child would lose consciousness, **have altered breathing**, seizures, and would not be able to move or have other normal functions. She indicated the symptoms would have been seen by someone looking in on the toddler. (R.410; 418-419). Taking these facts in the light most favorable to the State, Gorman knew the child had been abused when she arrived home at 4:30 and viewed the child. She did nothing to assist the child or render aid for the child and assisted Palmer in neglecting the child's physical health or welfare.

Additionally, Gorman attempted to cover up any abuse inflicted upon the child by either accusing her daughter of causing the abuse before the child was brought to her and Palmer or by blaming the injuries on the dog knocking the child over. Accordingly, this Court should grant the Petition for Rehearing as to Gorman's conviction and affirm the trial court's denial of her motion for directed verdict.

Palmer's Conviction

Additionally, this Court viewed the evidence in the light most favorable to Palmer and not the State in determining the State failed to present substantial circumstantial evidence Palmer was guilty of aiding and abetting the homicide by child abuse. As in Smith, and as discussed above, there is no doubt the toddler died as a result of injuries inflicted upon him by either Palmer or Gorman. The testimony by Dr. Abel indicated the injuries to the child likely happened three or so hours before the child presented to the ER with his injuries. (R.530-531). The evidence indicated the parties were together at the time they checked on the child which occurred around 4:30, just a couple hours before 911 was called. Dr. Robert's testimony indicates the injuries would have been immediately noticeable and the child would have been **immediately symptomatic** so

there is no way Palmer would not know of the abuse being committed by Gorman during this time. It was several hours later before 911 was called to obtain any medical treatment for the child. As a result, there is substantial circumstantial evidence to support the trial court's decision to deny Palmer's motion for a directed verdict on the aiding and abetting homicide by child abuse charge. This Court should grant the Petition for Rehearing and affirm the trial court's decision.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the Petition for Rehearing, find the trial court properly denied the Appellants' motions for directed verdict on aiding and abetting homicide by child abuse, and affirm Appellants' convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 

William M. Blitch, Jr.
S.C. Bar No. 15608
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 13, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Tracking No. 2011-203707

The State,

Respondent,

vs.

Robert Palmer and Julia Gorman,

Appellants.

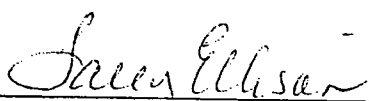
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

Robert M. Pachak, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 13th day of March, 2014.


SALLY ELLISON
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

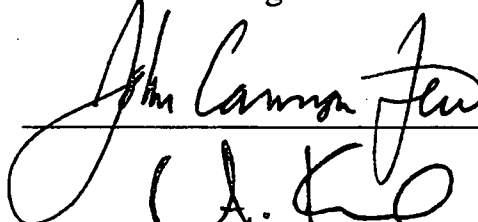
v.

Robert Palmer and Julia Gorman, Appellants.

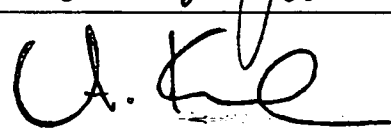
Appellate Case No. 2011-203707

ORDER

After careful consideration of the Appellants' petitions 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 Appellants' petitions for rehearing are denied.



C.J.



J.

I adhere to my dissent, and I would grant the petition for rehearing.

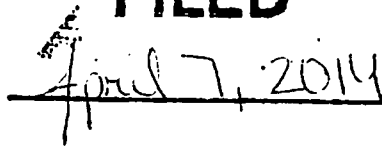


J.

Columbia, South Carolina

cc:

FILED



April 7, 2014

Susan Barber Hackett, Esquire
William M. Blitch, Jr., Esquire
Robert M. Pachak, Esquire
The Honorable Larry B. Hyman, Jr.
Alan McCrory Wilson, Esquire

The South Carolina Court of Appeals

The State, Respondent,

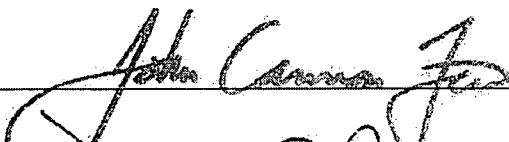
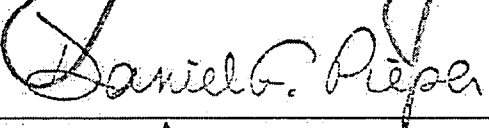
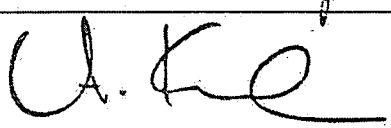
v.

Robert Palmer and Julia Gorman, Appellants.

Appellate Case No. 2011-203707

ORDER

After careful consideration of the Respondent's 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 Respondent's petition for rehearing is denied.

	C.J.
	J.
	J.

Columbia, South Carolina

cc:

Susan Barber Hackett, Esquire

William M. Blitch, Jr., Esquire

Robert M. Pachak, Esquire

RECEIVED

APR - 8 2014

FILED

April 7, 2014

SC OFFICE OF
APPELLATE DEFENSE

The Honorable Larry B. Hyman, Jr.
Alan McCrory Wilson, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

APPELLANT

APPELLATE CASE NO. 2011-203766

AMENDED FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in refusing to enforce a proffer agreement made between the State and appellant when it was binding on the parties?
- II. Whether the trial court erred in refusing to grant a directed verdict to the charges of homicide by child abuse, aiding and abetting the same, and unlawful conduct toward a child when the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that appellant committed the acts?

STATEMENT OF THE CASE

Appellant was indicted along with a co-defendant, Julia Gorman, for homicide by child abuse, homicide by child abuse-aiding and abetting, and unlawful conduct toward a child at October 2008 and May 2010 terms of the Horry County Grand Jury.

On June 10, 2010, a hearing was had on the enforceability of a proffer agreement before the Honorable Benjamin H. Culbertson. He held that the solicitor was allowed to withdraw the proffer and that it was not an immunity agreement.

On January 11-12, 2011, a hearing was held before the Honorable Larry B. Hyman on appellant's motion to have appellant's two polygraphs admitted as being scientifically reliable. Appellant passed both a SLED polygraph and an independently performed polygraph. On May 26, 2011, a hearing was held on respondent's motion to amend Judge Hyman's order excluding evidence of the two polygraph examinations pursuant to Rule 702, SCRE and the Jones factors. Judge Hyman granted respondent's motion to amend the order.

On October 31, 2011, a hearing was held on the co-defendant's motion to sever, on various voir dire questions, an amendment of the indictments in reference to the date of the incident, a discussion on autopsy photos, and an in camera hearing on the admissibility of appellant's and the co-defendant's statement. The statements were held admissible.

On November 14-18 the jury trial proceeded. Both appellant and the co-defendant were found guilty as charged. They were both sentenced to thirty-five (35) years for homicide by child abuse, to twenty (20) years for aiding and abetting, and to ten (10) years for unlawful conduct toward a child.

This appeal follows.

FACTS

Appellant and Julia Gorman were indicted for homicide by child abuse for inflicting fatal injuries to a seventeen (17) month old male child on July 14, 2008. Appellant and Gorman were also indicted for aiding and abetting under the homicide by child abuse statute and for unlawful conduct toward a child in relationship to the injuries that occurred to the victim.

Just how did the victim come into the care of appellant and Julia Gorman? Appellant and Gorman lived together. The victim was Gorman's grandson. The victim's mother was Cesalee Carnaghie. She gave appellant and Gorman temporary guardianship of the victim so she could visit her husband, Richard Grimes, who was stationed in the military and the father of the victim.

Mr. Grimes said he was notified by phone on the night of July 14 by Gorman that the victim was on his way to the hospital because he was having a seizure when they tried to wake him up for dinner. (R. p. 81, line 9 – p. 82, line 1). Cesalee said she tried to call Gorman but she would either ignore the call or she would push the end button and never answer the call. When she got back to South Carolina, Cesalee went to the Medical University of South Carolina (MUSC). Her husband and mother were there. Gorman said something about all the animosity that has been created. (R. p. 157, line 23 – p. 158, line 21). Cesalee had no idea what the animosity comment meant. (R. p. 160, lines 19-23). After consulting with the doctors, she and Richard decided to donate the victim's organs and cease life support. The victim died on July 16. Before he died they had him baptized. Cesalee invited and begged her mother to come, but she said she had other things to do. (R. p. 160, line 24 – p. 162, line 2).

On cross-examination Cesalee said that her mother did not handle stress well. She lets things bottle up and then goes into a fit of rage. (R. p. 181, line 17 – p. 182, line 2).

Dr. Jody Hutson testified that he was a family physician at Aynor Family Medicine. On July 1, Cesalee and Gorman brought in the victim because he had ant bites, allergies, and congestion. Otherwise, the victim looked normal. (R. p. 204, line 9 – p. 205, line 16). The doctor prescribed a steroid cream and antihistamines for the victim. (R. p. 207, lines 12-23). The victim was to be given ½ teaspoon a day of xyzal, the antihistamine. A side effect of the antihistamine is sedation. (R. p. 210, lines 6-25).

Gorman brought the victim back in to see the doctor on July 8 with complaints of nausea and vomiting. The victim had an emergency room visit the night before. Dr. Hutson examined him and he seemed very well. He was not concerned about him. (R. p. 211, line 8 – p. 214, line 16).

Lt. Rainbolt worked for Horry County Fire and Rescue. He was dispatched to the Gorman residence at 6:07 p.m. on July 14 and he arrived at 6:13 p.m. The dispatch mentioned shortness of breath or a seizure. (R. p. 235, line 2 – p. 236, line 19). When Rainbolt walked inside the residence, he saw appellant sitting on the couch holding the victim. (R. p. 237, lines 3-7). He said the victim was in a pretty grave condition and appeared to be having a seizure. (R. p. 238, lines 8-10). He asked appellant if the victim had been sick or had a fever. Appellant said, no. He said the victim was put down for a nap at 3:30 p.m. He had just risen from the nap and that was how they found him. (R. p. 239, lines 13-15).

Erica Rosenthal, a firefighter/paramedic, responded to the scene at 6:20 p.m. in medical transport unit. She testified the victim was “very lethargic, still seizing”... “He had

a right-sided gaze...” The victim was put in the ambulance and Gorman rode in the front passenger seat. (R. p. 253, line 8 – p. 254, line 9). She said that the victim “had suffered fire ant bites previously in the week and was treated for that.” She said “he had not been sick, he had not struck his head, he had not fallen...” (R. p. 254, lines 22-25). Later, Gorman told her that the victim had been whiny and lethargic since the ant bites and she also said she had “raised several children in her lifetime and never seen such a bad one.” She said that the statement stuck with her. (R. p. 256, line 18 – p. 257, line 13). Rosenthal did not notice any bruises on the victim. (R. p. 258, lines 17-22).

Tina Millan was a registered nurse in the emergency room at Conway Hospital where the victim was taken. She noticed the victim was unresponsive, posturing, and seizing, he had no response whatsoever and his pupils were dilated. The prognosis was very critical. (R. p. 264, lines 6-25). Gorman said the victim had not fallen or anything. (R. p. 266, lines 4-5). The nurse noticed that Gorman “was very anxious, pacing back and forth... seemed very upset.” Appellant was “very concerned about the child. While the child was seizing he actually wanted to approach the bed and I told him he could go ahead and talk to the child and he was holding his hand.” At first Gorman did not do the same but then she later did. (R. p. 267, lines 7-22).

A CAT scan of the victim revealed cranial skull fractures and bleeding in the back of the head. That sort of trauma could be caused by a fall from a second story building or being thrown out of a car or any kind of abuse to a child. Nurse Millan also saw some bruising on parts of the body. (R. p. 271, line 5 – p. 272, line 19). At 10:33 p.m. the victim was transferred by air flight to MUSC. (R. p. 275, lines 6-14).

Dr. Cacace was the emergency room doctor at Conway Medical Center. Gorman seemed to indicate a possible cause for the victim's condition was the victim's mother who had left him a week earlier. (R. p. 293, lines 1-6). The doctor said the head trauma was severe, impending death. (R. p. 295, lines 17-23). The injury was not accidental. (R. p. 296, lines 15-16). The victim was posturing due to neurological trauma. (R. p. 299, lines 9-13).

Dr. Donna Roberts testified that it would take severe traumatic force to cause the victim's skull fractures. (R. p. 335, line 22 – p. 336, line 1). A person with this type of injury would be severely symptomatic immediately. Symptoms would be a loss of consciousness, alteration in breathing, and likely seizures. The child would not be able to walk, move, play with toys, or eat. A person could foam at the mouth. (R. p. 345, lines 3-14). She said there were fractures on both sides of the head but she could not give an opinion as to what caused them. (R. p. 349, lines 1-2). If the victim had been checked on around 4:30 and was sleeping fine the injury would have to have occurred after that. (R. p. 353, lines 13-22). If someone came up to the victim and hit him on both sides of the head it could cause the injury if severe force was used. (R. p. 354, lines 17-25). If the victim had been shaken and the shaking were violent the injury could have been caused if there was also an impact. (R. p. 362, line 25 – p. 363, line 7).

Dr. Cynthia Schandl, a forensic pathologist at MUSC, testified that the victim had fractures on both sides of the head. (R. p. 382, line 20). She could not tell if there had been one big hit or two hits, one on either side of the head. (R. p. 387, lines 13-21). The cause of death was inflicted blunt head trauma. The manner of death was homicide. (R. p. 393, line

12 – p. 394, line 12). On cross-examination, she said attempts to resuscitate the victim could cause bruising. (R. p. 402, lines 3-8).

Dr. Ann Abel, an expert in child abuse pediatrics at MUSC, testified next. She said the degree of force inflicted on the victim was massive and she would expect him to be unconscious immediately. (R. p. 417, lines 21-24). The victim had multiple bruises, some of which were not typical of normal falling. Some of the bruises could very well have been accidental. She said one cannot date or time a bruise by its color. (R. p. 418, line 13 – p. 427, line 25). She put in her final report that the victim's injury was caused by inflicted head trauma. (R. p. 432, lines 19-24). She said Gorman told her the victim had severe developmental and behavioral problems but his records did not indicate those problems. Gorman also said the victim was clingy and whiny and wanted to be held all the time. (R. p. 435, line 17 – p. 436, line 7).

On cross-examination, Dr. Abel testified that the victim's bruises could have occurred the same times as the skull fractures. The victim's skull fractures could have occurred within one (1) hour of him being seen by EMS. And it would take less than a minute for the injuries to occur. If a layperson did not see the damage being inflicted, they would have no knowledge how it was done. (R. p. 437, line 25 – p. 440, line 9). A risk factor to a toddler is somebody with a low tolerance to stress and a low tolerance to the demands of a toddler. (R. p. 440, line 18 – p. 441, line 11). On redirect, Dr. Abel said the injuries occurred to the victim within three (3) hours of his being taken to the emergency room. (R. p. 455, line 24 – p. 456, line 18).

Marsha Bessant, a friend of appellant's and Gorman's, testified that Gorman was very stressed because of financial problems with appellant not working. (R. p. 466, line 21 – p. 467, line 3).

Brad Whiteis was a supervisor for the child protective services investigations at the Department of Social Services (DSS). He briefly spoke to Gorman over the phone after the victim was at MUSC. While she worked during the day, appellant took care of the victim. On Monday the 14th, she got home around 3:00 p.m. She said the victim was asleep. She checked on him shortly thereafter. She said the victim was acting weird. Foamy saliva was coming from his mouth. When she noticed this, she took the victim to appellant and told him something was wrong. She said after the victim started to have some form of seizure. She called 911 at 6:06 p.m. (R. p. 498, line 18 – p. 499, line 13).

Yvette Brown, an investigator with DSS, was assigned the case and she went to MUSC. She noticed bruises on the victim's thigh and on his lower legs. She asked Gorman about the bruises and she said the victim likes to pinch himself. (R. p. 509, line 13 – p. 510, line 1). Gorman described the victim while he was in her care as being cranky, underweight, undernourished, and that his head had a squishy feeling to it like it didn't have bone structure. Ms. Brown thought that was odd. (R. p. 513, lines 18-24). When she talked to appellant, she observed that "he was just stunned, bewildered." She asked him what had taken place on July 14 that the victim ended up in the hospital. He said he did not know. He just didn't know. (R. p. 516, line 18 – p. 517, line 7).

Detective Troxell with the Horry County Police Department testified that he interviewed appellant and Gorman on July 18. Gorman brought a notebook with her to the interview with issues she was having with her daughter. The detective found this

information irrelevant because the victim was injured after his mother had left. (R. p. 555, line 7 – p. 556, line 9).

Appellant was interviewed first. He testified that Gorman got up around 4:45 a.m. on Monday, July 14 because she had to be at work around 6:00 a.m. Appellant woke the victim up around 9:30 a.m. The victim was tired, as though he never slept. Appellant took him to the kitchen and got him something to eat. Around 11:30 a.m. to 12:00 p.m. he fed the victim lunch. Again the victim seemed tired and appellant let him lie down for about 30 minutes to see if he would sleep. The victim kept whining and held his hands out to be picked up. Appellant picked him up and took him to the living room to watch some television. The victim was whining and tired acting. Around 3:30 appellant laid the victim down again and he went to sleep. Gorman came home around 4:15 p.m. They both checked on the victim and he was asleep. (R. p. 565, line 7 – p. 567, line 23).

Appellant and Gorman let the victim sleep as they prepared dinner. They sat down around 6:00 p.m. to eat. After dinner, Gorman went to get the victim and she found him having a seizure. Appellant said the victim's head was limp, his arms were bowed up, it looked like a seizure. He had never seen anything like it. He told Gorman to call 911 and she did. The paramedics came and took the victim to Conway Medical. (R. p. 568, line 2 – p. 569, line 8).

Appellant testified Gorman had been upset with her job on an almost daily basis. (R. p. 575, lines 6-20). When Gorman comes home from work, she takes over caring for the victim. (R. p. 575, line 21 – p. 576, line 9). He did not know what happened to the victim. He did not hurt him. (R. p. 577, lines 19-22). Detective Troxell told appellant he was not

accusing him of anything. He did not think he had a malicious bone in his body. He had never been in trouble before. (R. p. 581, line 23 – p. 582, line 2).

The detective told appellant he showed compassion as opposed to Gorman who was stone cold and straight faced when he talked to her. (R. p. 592, lines 6-10). Appellant again said he did not do anything to the victim. He just tried to care for him. (R. p. 594, lines 24-25).

The next interview was with Gorman. She testified that Monday morning she got up 4:30 to 4:45. She checked on the victim and he was sleeping well. She went to work. Appellant called her around 9:00 to 9:30 a.m. to tell her he woke the victim up and fed him breakfast. Appellant called again later when he fed him lunch. She got home from work around 4:00 to 4:30 p.m. and checked on the victim. He was sleeping and breathing fine. She and appellant checked on him a little later and everything was still fine. She cooked dinner and they decided to eat before getting the victim. Appellant took the dog out and she went back in the bedroom to wake the victim up. She said the victim was “making the really strange noises and slack looking, saliva.” Something happened between dinner and 6:00 p.m. after which she called 911 on appellant’s phone. (R. p. 617, line 17 – p. 740, line 3).

Gorman testified that on Saturday she got home from work around 3:00 p.m. She said she “walked in the door, of course, victim’s making his whine, whine, whine, you know. It just gets louder when I get home, but that’s just the way he is, you know. If, if I walk in the door he starts, I mean he, he, he makes noises but it just seems like when a woman walks in it just gets more loud and he comes over and starts trying to climb up my leg and cause he wants to be carried and we don’t carry him because we are trying to break a habit.” (R. p. 624, line 11 – p. 625, line 8).

Detective Troxell confronted Gorman with jail time and he noted that was the first tear he had seen from her. (R. p. 629, lines 4-46). Later, Troxell told her, "there's not a bit of remorse coming from you..." (R. p. 635, lines 17-18).

Detective Weaver asked Gorman if appellant gets frustrated and she said no that he had better patience than she did. She had to walk out of the house because of the victim's whining and crying. The whining and crying does not faze appellant. (R. p. 660, line 13 – p. 661, line 6). Gorman then admitted she may have shook the victim but she did not think she did it hard. (R. p. 661, line 7 – p. 666, line 7; R. p. 669, lines 13-15; R. p. 670, lines 4-7). She then demonstrated how she shook him but claimed she did not shake him on Monday. (R. p. 671, lines 7-22; R. p. 674, lines 1-2; R. p. 683, lines 8-24). She said the victim cries everyday, he is cranky everyday, he whines everyday. (R. p. 676, lines 18-19). If she shook the victim, she did not tell appellant. (R. p. 688, lines 13-14).

On cross-examination Detective Troxell admitted appellant answered all questions and was cooperative. He said if appellant was not in the residence when Gorman shook the victim, or whatever she did to him, he would not have any knowledge of it. (R. p. 697, line 7 – p. 698, line 2). There was no evidence to show appellant was present when the injuries occurred. (R. p. 698, lines 7-12). Troxell admitted appellant freely consented to a search of the trailer. He admitted there was no direct evidence that appellant was the one who inflicted the injuries and Gorman was adamant that appellant had not inflicted any injuries. (R. p. 699, line 22 – p. 700, line 25).

After the state rested, and the judge denied the directed verdict motion, appellant called Adrian Robertson to testify. She worked with appellant. She had an eleven (11) year old daughter who was non verbal who had seizures and mental and physical disabilities.

Appellant was very caring for her. (R. p. 731, line 14 – p. 733, line 28). Ms. Robertson also had a five (5) year old daughter and a nine (9) month old daughter. Appellant was around them everyday at the office and interacted with them. She had no hesitation in having appellant around them or in leaving them alone with him. (R. p. 734, line 7 – p. 735, line 18).

James Palmer, appellant's father, testified that appellant interacted well with his own son Dylan. Appellant was good natured and never hit Dylan. (R. p. 742, lines 4-24). Appellant brought the victim over on Sunday, July 13th, to go swimming. Mr. Palmer said the victim was very pale and did not show any bruises. (R. p. 743, lines 5-12). On cross-examination, Mr. Palmer was asked if he knew appellant's ex-wife had filed a restraining order against appellant and he did not know about it. (R. p. 749, lines 3-25).

Appellant's mother, Gail Palmer, testified that she too observed the victim on Sunday with his swimming trunks on. She did not see any bruises. (R. p. 757, line 22 – p. 758, line 10).

Co-defendant Gorman was the last person to testify. She again brought up her strange concern over the victim's head being "soft and squishy." (R. p. 780, line 21 – p. 781, line 11). On Monday, July 14, she said she got up around 4:15 a.m. She checked on the victim and he was asleep. She went on to work. (R. p. 787, lines 16-22). She clocked out at work 3:45 p.m. to go home. (R. p. 790, lines 8-12). She got home around 4:30 – 4:45. (R. p. 790, lines 20-25). She checked on the victim and he was asleep.

Now, after over three (3) years, her story started to change. She claimed that she left the house and went to the IGA to get something for dinner then she stopped at the video store and picked up a movie. She came home and cooked dinner and she and appellant

decided to sit down and eat dinner before waking up the victim. (R. p. 791, lines 2-19). She did say appellant called her at work during the day to tell her what the victim had for breakfast and lunch. (R. p. 791, line 20 – p. 792, line 7). She introduced into evidence a check she wrote out to the IGA on July 14, 2008. (R. p. 793, line 15 – p. 794, line 14). The time stamped on the check from the IGA cash register said 15:52 which would be 3:52 p.m. She thought maybe she cashed the check at 4:52 p.m. (R. p. 796, line 25 – p. 797, line 17). By the time she went to the video store, got home, and sat down to eat dinner it must have been around 5:30 p.m. (R. p. 797, line 18 – p. 800, line 21).

Gorman said she then prepared the victim's plate and went down the hallway to get him. She found him laying on his side, breathing really funny. He was heavy and saliva was hanging out of his mouth. She did not know what was wrong. She picked him up real quick and flipped him over her arm. All of a sudden he was seizing. She called appellant and said something was wrong. She told him to call 911. He took the victim and she grabbed the first phone she could find to call 911. (R. p. 800, line 24 – p. 806, line 15). She said at one point appellant had taken the dog outside. Appellant told her he took the dog out while she was prepping the food. (R. p. 801, line 21 – p. 802, line 6). Now, Gorman said she did not know why she demonstrated shaking the victim. She said she never shook the victim. (R. p. 824, line 20 – p. 825, line 6).

On cross-examination by the solicitor, Gorman said she did not know if she ever told the detectives, the people who treated the victim, Dr. Abel, or DSS over three years ago that she went to the IGA and the video store. She agreed that none of the officers who were looking into the death of the victim brought up the fact that she had gone to the IGA and the video store. (R. p. 833, line 19 – p. 834, line 24). When she was asked where the victim's

head was squishy, she said it was squishy all over. (R. p. 840, line 19 – p. 841, line 2). She denied telling medical personnel she gave the victim 2 to 2 ½ times the antihistamines she was supposed to give him. (R. p. 841, line 24 – p. 842, line 25). She admitted that she put appellant out of the house walking the dog on the day the victim was injured. (R. p. 850, lines 10-14).

When cross-examined by appellant's attorney, Gorman said when she first got home on Monday after work the victim was asleep and she did not hear any gurgling or strange sounds. There was normal breathing. (R. p. 863, line 9 – p. 864, line 5). She said appellant was agreeable to having the victim stay at their home. He was very loving, caring and patient with the victim. (R. p. 864, line 18 – p. 865, line 1).

After Gorman's testimony, defense counsel for appellant introduced a restraining order concerning appellant and his ex-wife to refute the paper work the court took judicial notice of earlier that Gorman's counsel had brought up. The order also gave appellant liberal visitation rights with his own son. (R. p. 873, line 20 – p. 874, line 11).

ARGUMENT I

The trial court erred in refusing to enforce a proffer agreement made between the State and appellant when it was binding on the parties.

On April 22, 2009, respondent extended the opportunity of a proffer to appellant. The offer provided that appellant submit himself to agents of the State for purpose of debriefing regarding the neglect and death of the victim. He was required to be completely truthful concerning his involvement and the involvement of all other individuals in this matter. He was required to truthfully and completely answer all questions posed by agents of the State and provide without prompting all information concerning this matter.

Appellant was required to submit to a polygraph examination(s) to verify all information provided to the State. The polygraph examiner(s) shall be selected by the State and will be designated agents of the State. Any statements made by appellant may be used against him by the State for any purpose.

Appellant was required to appear as a witness in the trial of all witnesses who were designated as defendants by the State. Appellant shall testify truthfully, completely, and consistently with prior statements made to the State.

In return, the State shall consider the extent and degree of cooperation by appellant in the election of charges and at sentencing and shall advise the Court of appellant's extent and degree of cooperation.

The State provided that this proffer was the entire agreement between the parties. Both appellant and his attorney accepted the proffer by their signatures on May 4, 2009.

On June 4, 2010 appellant's attorney filed a Motion for Hearing to Enforce Proffer Agreement. The motion noted that on May 4, 2009, appellant was interviewed by

investigator Carmen Burke-Mureddu and on a separate occasion by Assistant Solicitor, Candice Lively. At no time had appellant refused to be interviewed and he had even offered to be interviewed again. The motion noted that appellant was ready to testify in a trial against the co-defendant.

On September 24, 2009, appellant submitted to a polygraph examination administrated by Richard Charles of SLED. Appellant passed the polygraph examination.

The motion also noted that new evidence of when the time frame of the injuries occurred came about and appellant gave a brief summary of additional details concerning the new timeline and an invitation to reinterview appellant was made.

On May 11, 2010, Assistant Solicitor Candice Lively informed appellant's attorney that it was her intent to revoke the proffer.

On June 10, 2010, a hearing was held on the motion. The State noted that originally the co-defendant, Julia Gorman, was charged with homicide by child abuse and appellant was charged with unlawful neglect of a child. New evidence, however, led the State to believe that appellant may have had some knowledge or been involved in some way. The State inartfully tried to explain that they now had talked to the pathologist and the radiologist and it was their opinion that appellant was "potentially" involved in the injuries to the victim. The pathologist and radiologist were not at the scene and there is no way they could say appellant, as opposed to the co-defendant, was involved. The solicitor somehow "determined that the medical evidence clearly was contradiction? Or if not contradiction? the failure of the Defendant, this Defendant to provide us additional information led me to believe that he had to have had some knowledge or be involved." This is why the State unilaterally revoked its own proffer agreement. Instead of the State going to bat for

appellant on a lesser charge, they now wanted to go after appellant on the highest charges of homicide by child abuse and homicide by child abuse, aiding and abetting. (R. p. 2, line 2 – p. 3, line 24).

The trial court denied the motion to enforce the proffer. It said the State's obligation was to consider appellant's cooperation when they elect charges and at the time of sentencing. But it did not see where appellant was prejudiced. (R. p. 15, lines 1-7). That ruling was in error.

The State's proffer and appellant's acceptance of it is a contract and it is subject to contract principles. Reed v. Becka, 333 S.C. 676, 511 S.E. 2d 396 (1999). United States v. Irvine, 756 F.2d 708 (4th Cir 1985). Where the language in a contract is perfectly clear, that language determines the full force and effect of the document. State v. Gates, 299 S.C. 92, 382 S.E. 2d 886 (1989) citing, Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E. 2d 445 (1984). The State was obligated to fulfill its end of the agreement. Like the solicitor in Gates above, the solicitor here in her own words said, "He has not provided us, he has not given us the smoking gun in this case." (R. p. 12, lines 4-5). The terms of the agreement, however, do not require a "smoking gun." They require appellant to be truthful, to be debriefed, to answer all questions by agents of the State, to submit to a polygraph which he passed. The solicitor even admitted that after the time line changed, appellant did give more details. (R. p. 12, lines 8-9). And he offered another interview. He could not tell them what he did not know. But he did live up to his end of the bargain, except for testifying at trial against the co-defendant, which he was not allowed to do because the State broke their end of the agreement and violated due process of law under Article I, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

Appellant was prejudiced by the State's failure to keep their part of proffer in the following respects:

1. Appellant was not allowed to testify against the co-defendant at trial. Instead, he had to sit at the co-defendant's table with the co-defendant and be tried under the doctrine of "guilt by association." **The Solicitor has freely admitted that they did not know who did this crime so they were prosecuting both parties!** (R. p.23, line 22-p.25, line 9; R. p.34, line 25- p. 35, line 9). They obviated their burden of proof by trying appellant under the doctrine of "guilt by association." There was not sufficient evidence to convict appellant by trying him alone.
2. Instead of the State having to elect favorable charges in return for appellant's cooperation, they were now able to go after appellant on the highest charges.
3. The State offered no help at sentencing contrary to their agreement.
4. The State was able to gain information through their debriefing of appellant and their interviews to try to make a case against appellant.

The State cannot unilaterally withdraw the proffer. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971); United States v. Simmons, 537 F.2d 1260 (4th Cir 1976). There was no breach by appellant and he was prejudiced by the State's withdrawal. The trial court erred in denying appellant's motion to enforce the proffer.

ARGUMENT II

The trial court erred in refusing to grant a directed verdict to the charges of homicide by child abuse, aiding and abetting the same, and unlawful conduct toward a child because the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that appellant committed the acts.

This case proceeded on a strained theory of the law. The solicitor explained at an early motion hearing on May 26, 2011, that she did not know who inflicted the injuries on the victim so she was going after appellant and Gorman because they each had access to the victim and no one else was around. (R. p. 24, line 25 – p. 10, line 18). At another motion hearing held on October 31, 2011, the solicitor again said she was trying both parties together because she did not know who inflicted the injuries. (R. p. 32, line 19 – p. 16, line 9).

The solicitor is using *res ipsa loquitur* as her theory of the case. “The thing speaks for itself.” This creates a rebuttable presumption/inference that appellant and Gorman had to disprove.¹ The problem is that the doctrine of *res ipsa loquitur* is used in civil law in negligence cases, not in criminal cases. South Carolina does not even use the doctrine in civil cases. Orr v. J. K. Saylor, 253 S.C. 155, 169 S.E.2d 396 (1969). And shifting the

¹ See, Fiumefreddo v. McLean, 496 N.W. 2d 226 (Wisc App. 1993). Requirement for application of *res ipsa loquitur* that agent or instrumentality be in exclusive control of defendant was met in, medical malpractice action brought against two physicians who performed thymectomy, even though it was not shown which physician was guilty of the negligent act which caused the injury, as they were in a better position to know the cause than was patient, all persons who could possibly have been causally negligent were defendants in the action, and **shifting burden** of proof of individual causation was not unfair.

burden of proof to the defense to rebut the presumption or disprove an inference is unconstitutional and in violation of due process of law. Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). “No right is more fundamental than the right of an accused to plead not guilty and put the State to its proof.” State v. Sloan, 278 S.C. 435, 440, 298 S.E. 2d 92, 95 (1982); State v. Brown, 289 S.C. 581, 347 S.E. 2d 882 (1986). The solicitor summed up her case in opening argument about the victim and the defendants: “He died in their care, no reasonable explanation for it but you listen for that yourself.” (R. p. 48, lines 5-6). That is how this trial started and proceeded.

At the conclusion of the State’s case defense counsel moved for a directed verdict because the State failed to prove appellant was the person who inflicted the injuries on the victim. The State failed to prove he was aiding and abetting, or that he unlawfully neglected the victim. (R. p. 726, line 15 – p. 727, line 23). The trial court denied the motion. It said, “I don’t know how this case will go, that’s why we have juries.” (R. p. 727, line 24 – p. 728, line 21). The trial court’s ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires “that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion

where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is “sufficient to raise a strong suspicion of the guilt of the accused” is not sufficient to constitute “any evidence from which the guilt of the accused may be fairly and logically deduced.” State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir. 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir. 1994).

A key element of the offenses which the State had the burden of proving was the identity of the person who committed the offenses. In State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987), the Court dealt with a case where two defendants were charged as principals in vehicular homicide. The identity of the driver was disputed. The Court

wrote that when “two or more defendants are charged as principals in a vehicular crime, the jury must be instructed to first determine which of the defendants was the driver of the vehicle at the time of the offense.” The Court went on to note that “the jury, faced with a difficult factual question as to the identity of the driver, could have resolved the issue by convicting both defendants to insure a conviction of the driver.” In this case the solicitor did not know who committed the offenses. The judge also did not know.² The jury very likely also did not know and convicted both defendants.

In State v. Martin, 340 S.C. 597, 533 S.E. 2d 572 (2000), the Court granted a directed verdict where the State failed to place either defendant inside the apartment where a homicide was committed. The solicitor admitted to the trial judge, “We don’t know which person actually held [victim’s] head in that pan of water” and “Your Honor, the whole point is we don’t know if they acted in concert.”

In State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984) the Court granted a directed verdict holding that the evidence presented “may raise a suspicion of Schrock’s guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to his guilt.” The Court noted earlier, “By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the crime.” The Court went on to say, “Coming into Court, Schrock was clothed with the presumption of innocence. It was not incumbent upon him to prove that he was not guilty of these murders.”

² At sentencing the trial court remarked, “Whoever did it, struck the blow, knew very well what you were doing or just did not care what you were doing...” (R. p. 990, lines 23-24).

In State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001), the Court directed a verdict to the charges of murder and attempted armed robbery. The Court wrote that “the circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt.” The Court noted that “suspicion” implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.”

In State v. Smith, 359 S.C. 481, 597 S.E. 2d 888 (2004) the Court held that there was sufficient evidence to sustain convictions for homicide by child abuse and aiding and abetting homicide by child abuse concerning defendant Smith who was tried with co-defendant, Celeste, who was the mother of the victim. The Court noted that “Smith and Celeste were the only two persons with Jordyn who could have possibly caused her injury. Celeste told investigators she was with Jordyn the whole time and, in his statement to the investigators, Smith referred to all of their actions that day as ‘we,’ never indicating a time when he and Celeste were not together during that weekend.”

This present case is decidedly different. Appellant assumed the caregiving while Gorman was at work. When she came home from work, Gorman was the caregiver. There was simply no evidence that appellant struck the victim or aided and abetted in doing so. It was appellant who was the patient person and he did not have any resentment or frustration with the victim staying with them. He interacted well with other children and had liberal visitation with his own son. We know from Gorman’s daughter of Gorman’s difficulties in dealing with stress. She bottles it up until she explodes. When she walks in the door the victims whines, whines, whines. It gets louder when he sees her. The victim is clingy. He wants to be held. He tries to climb up her leg.

She was upset her daughter did not take the victim with her. They both checked on the victim when Gorman got home from work and he was fine and was breathing normally. They had dinner and then appellant went out to walk the dog. She went to wake up the victim who whines, whines, whines and is clingy. She had ample time to strike him once or twice or ram his head against the crib. Dr. Abel said the injuries would happen in a minute. Dr. Roberts said it was severe traumatic force. The victim would have been immediately severely symptomatic. She calls appellant who had gotten back from walking the dog. He sees the victim and tells Gorman to call 911. It is appellant who holds the victim until emergency medical personnel gets there. It was appellant, not Gorman, who was the first one at the victim's bedside at Conway Medical.

Yes, there was substantial circumstantial evidence that Gorman could have committed the crimes against the victim. There was insufficient evidence to tie appellant to these crimes. The trial judge said, "I don't know how this case will go, that's why we have juries." A jury is not supposed to speculate when the solicitor can not meet her burden and does not know who is guilty. The trial court should have granted a directed verdict in appellant's favor. Appellant's case should never have gone to trial.

CONCLUSION

Appellant should receive a new trial with enforcement of his contract with the State.

(Issue I). Appellant should receive a directed verdict of acquittal. (Issue II).

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robt M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

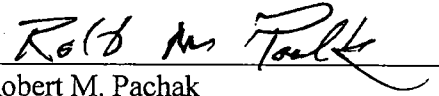
ATTORNEY FOR APPELLANT

This 26th day of February, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Amended Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 26, 2013


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

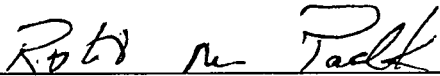
V.

ROBERT PALMER,

APPELLANT

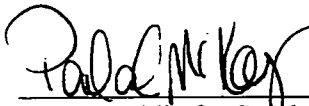
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Amended Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of February, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2013


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State,

Respondent,

vs.

Robert Palmer,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Trial court did not err in refusing to enforce the proffer agreement between Appellant and the State because Appellant breached the agreement. Additionally, Appellant has demonstrated no prejudice from the failure to enforce the agreement and has no relief to which he is entitled.
- II. Trial court did not err in denying Appellant's motion for a directed verdict.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Appellant and his co-defendant were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Appellant's co-defendant. Appellant and the victim's grandmother lived together for approximately four years. They came into custody of the child after the child's mother had to leave him with them in order to attend to business out of town prior to reuniting with the child's father.

Prior to the mother leaving, the child was taken to the doctor due to ant bites and congestion from allergies. He was given medication and was scheduled to return later for immunizations. The treating doctor indicated the toddler looked normal at the time of the examination and treatment.

On July 14, 2008, Appellant's co-defendant left for work before 6:00am and the child was sleeping and fine. The toddler remained in the care of Appellant throughout the day. Appellant fed the child at 9:30am and again around noon. Around 3:30pm, Appellant laid the victim down again for a nap.

Around 4-4:30pm Appellant's co-defendant arrived home from work and checked on the toddler who appeared to be sleeping. She did not touch the child or closely examine the child. Around 6:00pm, the parties finished dinner and Appellant's co-defendant went to wake the toddler. She found him limp, arms bowed, and frothy saliva coming from his mouth. She called 911 and the child was taken to Conway Medical.

Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call. He testified Appellant was holding the child on the couch when he arrived and he could tell the child was in grave condition. The child was given over to Erica Rosenthal a

paramedic that arrived. Rosenthal testified the child had a right sided gaze and appeared to be having a seizure.

The emergency room nurse and the doctor who saw the toddler, both testified his condition was critical. They both indicated he was posturing due to the head trauma. A CAT scan was done and revealed skull fractures and bleeding in the brain. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. She testified the injury was not accidental.

Dr. Roberts, a neuro-radiologist with the Medical University of South Carolina (MUSC), testified the toddler suffered blood around the brain, severe swelling of the brain, loss of the gray-white differentiation which indicated dead brain tissue, and severe fractures. (T.406; R. 332). She testified both sides of the skull were fractured by severe traumatic force. (T.409-410; R. 335-336). She indicated the fractures were caused by a force similar to falling out of a three story window or being involved in a motor vehicle accident. (T.416-417; R. 342-343). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (T.411; R. 337).

Dr. Roberts also testified the injury was acute, or very recent. She testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 339-341). She testified a person with the type of injury sustained by the toddler would be immediately and severely symptomatic. She said the child would lose consciousness, have altered breathing, seizures, and would not be able to move or have other normal functions. (T.419; R. 345). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 346-347; 360-361).

Dr. Abel, the Director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, testified she was called in to examine the toddler. She testified she took some background history from Appellant and Appellant's co-defendant. She testified she examined the child and his CT scans. She testified the fractures of the child's skull were similar to a cracked pot and indicated it appeared to be caused by severe forceful impact against a hard surface. She testified the blows were to both sides of the head. Dr. Abel indicated the degree of force used was "massive." (T.516; R. 417). Dr. Abel also testified to bruising on the child, including several suspicious bruises in locations it would be unlikely the toddler accidentally received the bruise. (T.519-522; R. 420-423). Dr. Abel testified anyone seeing the force being applied to the child would "perceive this was tremendous force." (T.534; R. 435).

Dr. Abel further testified if an observer did not see the force applied or the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). Dr. Abel testified the injury to the child occurred sometime the day he presented to the emergency room. (T.553-554; R. 452-453). She testified it could be possible for an observer not to be able to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457).

Dr. Schandl, a forensic pathologist with MUSC, testified the toddler had fractures on both sides of his skull. She testified the cause of death was inflicted blunt head trauma. (T.487; R. 393). She testified the manner of death was homicide. (T.488; R. 394).

Detective Troxell interviewed and took statement from both Appellant and Appellant's co-defendant. Both testified Appellant was alone with the toddler all day. Both testified Appellant's co-defendant woke up about 4:30am and left for work in the early morning to be there before 6:00am. Appellant's co-defendant testified she checked on the toddler and he appeared fine before she left. Appellant indicated he woke the child up about 9:30am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. Appellant's statement noted his co-defendant arrived home at about 4:15 pm.

Appellant indicated when his co-defendant arrived home they both checked on the toddler and decided not to wake him. (T.687; R.470). According to Appellant, they only walked to the edge of the door and not all the way into the room. (T.687; R. 567). Appellant testified they ate dinner before waking up the toddler. He testified she went into the room and found him having a seizure. (T.688; R. 568). Appellant admitted no one else comes over to assist him during the day when he is caring for the toddler. (T. 693; R. 573). According to Appellant, neither he nor his co-defendant did anything to the toddler.

Appellant's co-defendant also gave a statement in which she indicated that the toddler was in Appellant's care throughout the day. She testified she got up at 4:30am and left for work after checking on the child. She arrived home between 4:00 and 4:30pm and checked on him. He appeared to be sleeping. (T.737-739; R. 617-619). She confirmed they then ate dinner, and after dinner, she went into the toddler's room to wake him up. It was then she found him making strange noises with saliva running from his mouth.

(T.739; R. 619). Appellant's co-defendant testified she never laid a hand on the toddler. (T.751; R. 631).

Appellant's co-defendant testified the only time she picked up the toddler the day he was admitted to the emergency room was when she picked him up after dinner. (T.798; R. 678). Both Appellant and his co-defendant claimed ignorance of what happened to the child.

At trial, Appellant's co-defendant testified similarly to how she testified in her statement. She gave similar details about leaving for the day. Her story, however, changed regarding the sequence of events upon arriving home. She testified, and presented a time card from her employer, indicated she left her job at 3:45pm. She testified it takes about 45-50 minutes to get home. (T.920; R. 790). She indicated when she arrived home, she checked on the toddler. She verified when she came home she only walked to the door and did not attempt to pick him up. (T.921-922; R. 791-792). She then testified she went to the IGA to get food for dinner and to the video store. She produced a check written to the IGA the day the toddler was admitted to the hospital. It indicated it was processed by IGA at 3:52pm, which she testified would be impossible because of the time it takes to get there from work. She indicated it made sense if the clock was off and should have been 4:52pm. (T.923-925; 927; R. 793-795). She testified when she arrived home from IGA she did not check on the child again. (T.929; R. 799). She confirmed after dinner she entered the child's room and found him "breathing funny" with "saliva hanging out of his mouth." (T.931; R. 801). She called for Appellant, who immediately took the child while she called 911. (T.931-932; R. 801-802).

ARGUMENT

- I. **Trial court did not err in refusing to enforce the proffer agreement between Appellant and the State because Appellant breached the agreement. Additionally, Appellant has demonstrated no prejudice from the failure to enforce the agreement and has no relief to which he is entitled.**

Appellant contends the trial court erred in refusing to enforce the proffer agreement entered into between Appellant and the State. Appellant breached the agreement by failing to be fully forthcoming with the information about the toddler's death and, as a result, the agreement was rendered null and void under its terms. Further, the State completed the extent of its part of the agreement in considering the charges it brought against Appellant. Appellant has not demonstrated any relief he would be entitled to under the proffer agreement he failed to receive, and as a result has not demonstrated how he was prejudiced by the trial court's refusal to enforce the agreement.

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. See State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct.App.2004).

"Our case law unequivocally establishes agreements between defendants and the State should be interpreted 'in accordance with general contract principles.'" State v. Wills, 390 S.C. 139, 144, 700 S.E.2d 266, 268 (Ct. App. 2010) (quoting State v. Compton, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (Ct. App. 2005)). "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Compton, 366 S.C.

at 678, 623 S.E.2d at 665 (citing Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). "Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Language which is perfectly clear determines the full force and effect of the document." State v. Gates, 299 S.C. 92, 95, 382 S.E.2d 886, 887 (1989) (internal citations omitted).

In the instant case, the parties entered into a proffer agreement which was neither a plea agreement nor an immunity agreement. The proffer agreement required, *inter alia*:

1. Robert Andrew Palmer shall submit himself to agent(s) of the State for the purpose of the briefing regarding this matter and all other matters materially bearing on this matter. He shall be completely truthful concerning his involvement in this matter, and completely truthful concerning the involvement of all other individuals in this matter. He shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter, and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by a direct question. Any and all information provided by Robert Andrew Palmer under the terms of the proffer may be recorded in any fashion at the election of the State

(Proffer Agreement; R. 994). The agreement clearly required Appellant to provide all information concerning the homicide of the toddler without the State having to ask direct questions. Therefore, when Appellant failed to provide all the relevant information regarding the time line of the toddler's death, he breached the provisions of the proffer agreement. It was only after the State learned of a different time line from the pathologist and radiologist that Appellant was open to questioning about the actual events which took place leading to the death of the toddler. (June 10T. 2-3; 5; R. 2-3; 5). Appellant's counsel, in her motion to enforce the proffer agreement, states: "Mr. Palmer met with

[Appellant's counsel], and a brief summary of additional details concerning the new time line was given to Assistant Solicitor Lively and an invitation to re-interview Mr. Palmer was made." (Motion to Enforce Proffer Agreement page 2; R. 996) (emphasis added). The State, therefore, had a right to withdraw from the proffer agreement because under provision 5 "Violation of any term of this Proffer renders all terms null and void." (Proffer Agreement; R. 994).

Further, the proffer agreement only established a single obligation on the part of the State. It read:

The State shall consider the extent and degree of cooperation of Robert Andrew Palmer in the election of charges and at the sentencing of Robert Andrew Palmer, and shall advise the Court of Robert Andrew Palmer's extent and degree of cooperation in connection with this matter. . . .

(Proffer Agreement page 2; R.995). As the trial court found, the State had every right to charge Appellant as it deemed appropriate. There was absolutely no requirement the State charge Appellant only with a lesser included offense or that he not be tried as a codefendant with Gorman. The only requirement was for the State to consider his cooperation in reaching its decision. There is no evidence this was not done, especially in light of the State's belief that Appellant was not entirely forthcoming regarding the time frame and the events leading up to the toddler's death. As a result, Appellant cannot demonstrate how he was prejudiced, or show any provision of the proffer agreement with which the State failed to fully comply.

In his brief, appellant sets forth four ways in which he allegedly was prejudiced. First, he was not allowed to testify against his co-defendant, and instead, was a co-defendant tried at the same time as Gorman. However, the proffer agreement makes it

clear that he was only testifying on behalf of the State "upon being called upon to do so." (Proffer Agreement; R. 994). Further, nothing prohibited Appellant from testifying at trial either for or against his co-defendant. Therefore, Appellant did not detrimentally rely on the agreement and was not prejudiced in this manner.

Second, Appellant contends the State had to elect favorable charges in return for his cooperation. This completely misstates the obligation of the State under the proffer agreement. As stated above, the State merely had to consider his cooperation, and absolutely no restrictions existed on the charges which could be brought against Appellant. There was never a promise Appellant would only be charged with a lesser included offense instead of being charged with homicide by child abuse. Appellant did not detrimentally rely on the agreement, nor was he prejudiced by the State's withdrawal.

Third, appellant contends the State offered no help at sentencing contrary to the agreement. The State was not obligated to offer any specific help at sentencing or make any type of recommendation at sentencing. Its sole obligation was to make the court aware of the extent and degree of cooperation by Appellant. This was thoroughly accomplished both pretrial and by Appellant's counsel during sentencing.¹ As a result, Appellant did not detrimentally rely on the proffer agreement and was not prejudiced in any regard by its withdrawal.

Fourth, Appellant contends the State was able to gain information through their debriefing of Appellant and their interviews to try to make a case against Appellant. The proffer agreement specifically allowed the State to use any information obtained during

¹ The State notes that Appellant's cooperation only went so far because it was only after the time frame was condensed that he offered to be interviewed for a third time to provide additional details which he was obligated to provide from the beginning. Because of the pretrial motion, the court was well aware of Appellant's cooperation or lack thereof. (June 10 T.2-5; R. 2-5).

the interviews. Further, the State submitted appellant did not provide them any significant information. Finally, the State did not offer any recordings or other statements by Appellant from the interviews during trial. Accordingly, Appellant could not have detrimentally relied or been prejudiced in this manner.

Finally, Appellant has not demonstrated any relief to which he is entitled. As mentioned, the agreement did not entitle him to testify unless the State chose to call him. It did not entitle him to be charged with a specific crime or receive a specific sentence. Accordingly, even if the agreement was enforced, the State could still try Appellant for the same charges, using the same evidence, and ask for the same sentence considerations as it did in the instant case. As a result, if the agreement is enforced, there is no relief which Appellant can receive which he has not already received.

Therefore, the State submits the trial court did not err or abuse his discretion in refusing to enforce the proffer agreement any further than it had already been performed.

II. Trial court did not err in denying Appellant's motion for a directed verdict.

Appellant maintains the trial court erred in denying his motion for a directed verdict. The State presented ample evidence the toddler was viciously and intentionally struck on both sides of his head. The time line presented by the doctor's testimony included a significant period of a day in which Appellant was home alone with the child. Further, if the statements and testimony of the co-defendant are believed, then Appellant was the only other person who could have committed the actions.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

In relevant part, section 16-3-85 of the South Carolina Code provides:

(A) A person is guilty of homicide by child abuse if the person:

(1) causes 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

(2) 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.

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment. . . .

It is clear from the statutory definition that to be guilty of homicide by child abuse or aiding and abetting homicide by child abuse one does not have to actually inflict the injury, but must either by act or omission all the injury to be inflicted. The evidence demonstrated clearly the child died as the result of trauma that was intentionally and severely inflicted. Every doctor indicated it would require severe trauma to cause the type of injury and it was not contested the toddler died as a result of his head injuries.

The only issue Appellant contends the State failed to prove is whether Appellant can be identified as one guilty of homicide by child abuse. This case is remarkably similar to the case of State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), in which this Court found the trial court properly submitted the case to the jury when two people could have been responsible for the injuries. In Smith, this Court explained:

The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child's physical health. Additionally, harm to a child's health occurs when a person either inflicts, or allows to be inflicted physical injury upon a child. Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn 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, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death.

Smith, 359 S.C. at 492, 597 S.E.2d at 894. (internal citations omitted). This Court found where the evidence indicated one of the two adults clearly caused the injury, the fact the exact identity of the individual who physically caused the harm is not necessary to support sending the case to the jury.

According to the testimony of Appellant and his co-defendant, Appellant was home the majority of the day alone with the toddler. Appellant's co-defendant merely looked in on the toddler in the morning and when she arrived home that evening. She did not go into the room or near the child. She testified he appeared to be sleeping, but she did not verify the condition of the child.

In the instant case, Dr. Abel and others testified the injury had to happen the day the toddler was taken to the emergency room. The doctors all testified the injury was severe and caused by blunt force trauma intentionally inflicted to the child. Further, they testified the child suffered fractures to the skull on both the left and right sides, as well as significant bleeding on the brain, and death of brain tissue.

Dr. Abel further testified if an observer did not see the force applied or the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). She testified it could be possible for an observer to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457). Further, she specifically testified:

[T]he signs of head trauma are changing consciousness, sometime seizures, sometimes breathing abnormalities.

They, they don't all happen at once, so 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.

(T.559; R. 458).

As a result, it is possible the injury could have been inflicted by Appellant prior to Appellant's co-defendant getting home and, if the co-defendant did not notice anything wrong from the doorway when she looked in on the toddler, then she would not have known something happened to the child until she went to pick up the child. Appellant's co-defendant testified she did not enter the room, but instead merely observed the child appearing to be asleep. She testified when she went into the room to pick up the child was when she noticed something wrong. Prior to this time, Appellant was the only one home throughout the day with the child. Accordingly, the evidence when viewed in the light most favorable to the State shows Appellant either inflicted the harm.

The only opportunity Appellant's co-defendant had to inflict the harm would be when she entered the room to pick up the child. There is no testimony indicating any events took place during this time which would have caused the severe blunt force trauma to both sides of the toddler's head. The doctors indicated the trauma would be severe and as a result, had something happened during this time Appellant would have known. Appellant arrived in seconds when called by his co-defendant and so was within very close proximity to where she was with the child. At that distance, he should have known something occurred or was occurring if his co-defendant was the one who physically harmed the child. In the light most favorable to the State, he either inflicted the harm which went undiscovered until Appellant's co-defendant picked up the child, or he knew

and allowed the injury to be inflicted. In either situation, there was evidence sufficient to send the case to the jury for its consideration.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 

William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 25, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case Tracking No. 2011-203766

The State,

Respondent,

vs.

Robert Palmer,

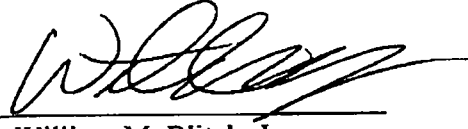
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 

William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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Appellant.

PROOF OF SERVICE

I, William M. Blitch, Jr., 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:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 25th day of February, 2013.



WILLIAM M. BLITCH, JR.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

APPELLANT

APPELLATE CASE NO. 2011-203766

FINAL REPLY BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENT I IN REPLY

The trial court erred in refusing to enforce a proffer agreement made between the State and appellant when it was binding on the parties.

Respondent claims "Appellant failed to provide all the relevant information regarding the time line of the toddler's death" and that because of that "he breached the provisions of the proffer agreement." Respondent goes on to say it "was only after the State learned of a different time line from the pathologist and radiologist that Appellant was open to questioning about the actual events which took place leading to the death of the toddler." (BOR, p. 9). That is a distortion of the record. Appellant was truthful and honest with the assistant solicitor. He passed not one, but two polygraphs. Appellant did not know the time line any better than the solicitor did. He was not a doctor. The solicitor even admitted that after the time line changed, appellant gave more details. (R. p. 31, lines 8 – 9). He even offered yet another interview. But, he could not tell them what he did not know because he was outside walking the dog when Gorman was alone with the victim. The assistant solicitor was just not happy because appellant had "not given us the smoking gun in this case." So she chose to renege on her agreement. It was not appellant's fault he could not provide a "smoking gun." Did the assistant solicitor want appellant to lie? Appellant relied on the agreement, was truthful, gave interviews and information, and passed a polygraph administered by a SLED agent. Respondent should have been required to live up to its end of the agreement. Appellant should not have had the rug pulled from under him.

ARGUMENT II IN REPLY

The trial court erred in refusing to grant a directed verdict to the charges of homicide by child abuse, abiding and abetting the same, and unlawful conduct toward a child because the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that appellant committed the acts.

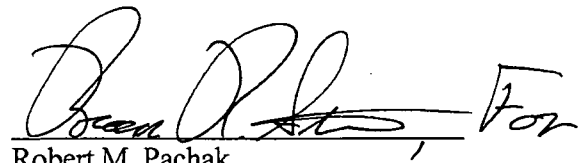
Respondent ignores the dangerous precedent the assistant solicitor and trial judge tried to establish in this case. The assistant solicitor twice said she did not know who committed the crimes so she was trying both appellant and Gorman. The trial judge denied appellant's directed verdict motion, but at sentencing said, "Whoever did it..." (R. p. 990, lines 23 – 24). The State simply has not met its burden of proof in this case as to proving that appellant committed a homicide by child abuse or that he aided or abetted in such.

All of the evidence in this case concerning the time line and Gorman's behavior pointed to Gorman. Even one of the detectives noted that he did not think there was a malicious bone in appellant's body and that Gorman was stone cold, straight faced, and showed no remorse. I urge the Court to view the video of the police interviews with appellant and Gorman. Pulling appellant into this trial was nothing more than guilt by association. A conviction should not rest on that and mere suspicion.

CONCLUSION

A directed verdict should be granted in appellant's favor.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Pachak", followed by a horizontal line and the word "For" written in a cursive script.

Robert M. Pachak
Appellate Defender

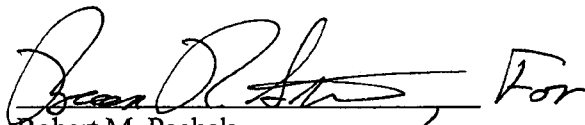
ATTORNEY FOR APPELLANT.

This 4th day of February, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 4, 2013


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
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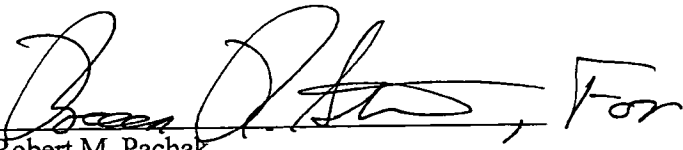
ROBERT PALMER,

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APPELLATE CASE NO. 2011-203766

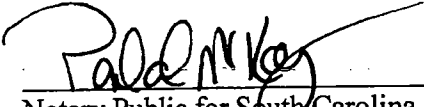
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of February, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2013.



Notary Public for South Carolina
My Commission Expires: July 24, 2022.