THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Robert Addy, Jr., Circuit Court Judge

Appellate Case Number. 2013-001571

State of South Carolina ..... Petitioner,

vs

Richard Brandon Lewis ..... Respondent.

BRIEF OF RESPONDENT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
Bar #: 006188

Attorney for Respondent

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ISSUE PRESENTED

Did the Court of Appeals err in reversing the denial of the trial court for a directed verdict when the record failed to contain any evidence of any overt act committed by Richard Brandon Lewis to support a finding of aiding and abetting homicide by child abuse?

ARGUMENT

Did the Court of Appeals err in reversing the denial of the trial court for a directed verdict when the record failed to contain any evidence of any overt act committed by Richard Brandon Lewis to support a finding of aiding and abetting homicide by child abuse?

In viewing the evidence in the light most favorable to the State, the facts in this case established that in the early morning hours of October 13, 2011, Ashley Hepburn stomped into her child's room, who was crying, violently shook and struck her child causing the horrific injuries and then stomped back to her room. During the entire time of this violent act by Ms. Hepburn, Mr. Lewis was in an the living room next to the bedroom. He never entered the child's bedroom when the shaking and striking by Ms. Hepburn was occurring. App. at 865, ll 7-19.

About 20 to 30 minutes after Ms. Hepburn entered the room, Mr. Lewis entered the child's room and found the child in an unusual position in the bed. He approached her and found her comatose. App. at 867, ll 12-25 to 870, ll 1-15. He then picked her up and carried her to Ms. Hepburn. Emergency Medical Services were called and the child was carried to Self Regional Health Services. App. at 871, ll 11-23.

At the time the EMS personnel were at the residence and later at the hospital, Mr. Lewis did not tell anyone about hearing Ms. Hepburn stomp into the room and hearing the child make sounds that he later learned may have been her shaking the child. Late on the morning of October 13, 2013 he gave a statement that was consistent with his trial testimony, his testimony at a Department of Social Services hearing and his deposition testimony. App. at 880, ll 4-23.

The above stated facts have to be the true facts found by the jury. If they believed

Ms. Hepburn's testimony, they would have acquitted her and convicted Mr. Lewis of homicide by child abuse for actually inflicting the injuries to the child. The jury, therefore, found as a fact that Ms. Hepburn committed the physical act that caused her child's death. To exonerate Mr. Lewis of homicide by child abuse the jury had to find Mr. Lewis did no act or omission that would make him guilty of homicide by child abuse under S. C. Code § 16-3-85.[1]

Under the South Carolina law, if Mr. Lewis did any act of child abuse or neglect that caused the child to die, he would have been guilty of homicide by child abuse and not aiding and abetting homicide by child abuse. The acts and omissions that make one guilty of homicide by child abuse include actually inflicting injuries or failing to prevent the injuries, failing to supply health care and abandoning the child resulting in death of the child. Thus, under the verdict of the jury Mr. Lewis did not actually inflict any injuries nor did he fail to supply health care, even assuming he had such a duty. Nor did he fail to protect the child from abuse, again assuming he had such a duty.

In South Carolina the courts have long declared that before a person can be convicted of aiding and abetting a crime, the state must prove an overt act. *See, State v. Mattison,* 388 S.C. 469, 697 S.E.2d 578 (2010); *State v. Austin,* 299 S.C. 456, 385 S.E.2d 830 (1989). The aiding and abetting homicide by child abuse statute contains no language showing an intention by the legislature to change that principle of common law. When enacting the

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[1] Mr. Lewis is not waving his argument that the state had to establish a legal duty by Mr. Lewis toward the minor child in order for an act or omission to make him liable for the death of the child. See Brief of Appellant, App. at 1241-1244. The Court of Appeals did not reach this issue below because even assuming he had a duty to protect the child, the facts were not sufficient to sustain the conviction. Thus, the Court of Appeals properly avoided a constitutional due process issue.

statute, the legislature used a phrase well established in both the common law and decisions of this Court. "[W]here a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridges*, 329 S.C. 11, 13, 329 S.E.2d 196, 198 (1997).

The State now argues that the homicide by child abuse statute includes aiding and abetting by both an overt act and an act of omission. Br. of Pet. at 15. This assertion does not make logical sense under the plan wording of the statute and would be completely contrary to the common law. Under the statute an act of omission makes one guilty of homicide by child abuse and not aiding and abetting. In addition the state is confronted with another problem. The trial court charged the jury that an act of omission only applied to the crime of homicide by child abuse. App. at 1187, ll 24-25 to 1188, ll 1-7. The jury was also instructed "You will then write a separate verdict of guilty or not guilty for each individual defendant for each charge that defendant is facing." App. at 1179, ll 20-22. Thus, a guilty verdict of aiding and abetting homicide by child abuse was an implicit acquittal of homicide by child abuse. Again assuming Mr. Lewis had a duty to protect the child from injury, the acquittal of the homicide by child abuse would be a finding by the jury that Mr. Lewis did not do any act of commission or omission that caused injury to the child nor did he fail to render medical attention. The State now contends that this acquitted conduct is sufficient to sustain a conviction for homicide by child abuse.

The trial judge very clearly instructed the jury that mere presence is not sufficient to convict one of aiding and abetting homicide by child abuse App. at 1188, ll 13-25 to 1189, ll 1-14. The jury was never instructed how to distinguish the fact that mere presence is not

sufficient to convict for aiding and abetting and how being merely present and failing to act does make one guilty of aiding and abetting and not homicide by child abuse. As this Court has said "A jury charge is no place for purposeful ambiguity." *State v. Belcher,* 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). When aiding and abetting is understood as requiring an affirmative, overt act, then there is no ambiguity.

Any confusion by the jury in this case may have been caused by the closing argument of the assistant attorney general. In closing she stated "Let's talk about aiding and abetting, it is aiding and abetting not only to cover up a crime but to do so to advance the commission of the crime. And if his testimony is the truth then that is exactly what he was doing. He was covering up this crime even as [victim] was fighting for her life because he wanted to protect Ashley Hepburn." App. at 1177, ll5-11. This is not a proper statement of the law. What the assistant attorney general describes is accessory after the fact, a crime for which Mr. Lewis was not charged.[2]

South Carolina Code § 16-3-85 provides that "homicide by child abuse" occurs when death of a child is caused "while committing child abuse or neglect . . . ." The statute then says "child abuse or neglect" means an act or *omission* by any person which causes harm to the child's physical health or welfare." (emphasis added) Thus, if one does an act of omission that resulted in the death of a child, that person is guilty of actual homicide by child abuse and not

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[2] Trial counsel had objected below to the state not being required to open fully on the law and the facts. If the state had made such a statement in its opening argument, trial counsel would had the opportunity to correct this statement in his closing statement. This issue, as were several others, were not address by the Court of Appeals due to their finding that the facts were not sufficient to convict. In the event this court reverses the Court of Appeals the case should be remanded to the Court of Appeals for consideration of the numerous issues not addressed.

aiding and abetting.[3] An act of omission by a person can never make one guilty of aiding and abetting. If an act of omission means one can be guilty of aiding and abetting homicide by child abuse, the "mere presence" charge is meaningless or confusing at best.

The two subsections have different *mens rea*. Under (A)(1) the law does not require that one act "knowingly" in respect to their actions or omissions. The state need only prove that the person acted or failed to act with "extreme indifference." The state is not required to prove the person "knowingly" acted or failed to act with extreme indifference. Under (A)(2) the state is required to prove the person "knowingly" aided and abetted the commission of homicide by child abuse. Thus, the state is required to prove that the accused knew they were aiding and abetting "child abuse or neglect" and that their conduct was in fact aiding and abetting that abuse or neglect.

The State has argued that an act of omission can also be aiding and abetting homicide by child abuse. The problem presented with that analysis, and not discussed in the brief, is what is the difference between an act of omission that causes the death of the child and the act of omission that aids and abets the death of the child? In the present case the trial judge never gave a charge to the jury that enabled the jury to make such a distinction. The reason for not giving such a charge is simple - the distinction is impossible to make. This Court has recognized that the statute criminalizing homicide by child abuse and aiding and abetting homicide by child abuse provides for two separate and distinct crimes. *State v. Smith,* 406 S.C.

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[3] Mr. Lewis is not conceding his argument before the Court of Appeals that "any person" cannot apply to one who has no legal duty to the child. Under the interpretation urged by the State, every citizen who watches an act of child abuse, even in the grocery store aisle, who did not stop the act, would be guilty of homicide by child abuse. This Court need not reach that issue to decide this appeal.

215, 219, 750 S.E.2d 612, 614(2013)("We find the language of section 16–3–85 unambiguously signals the General Assembly's intent to codify two distinct crimes—homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to section (A)(2), each with distinct elements and sentencing ranges.")

The brief of the State cites several examples of what it contends Mr. Lewis did to aid and abet the commission of homicide by child abuse. The state, however, fails to state one fact that would show an overt act to commit the aiding and abetting of homicide by child abuse. The facts stated by the State would make Mr. Lewis guilty of either homicide by child abuse or accessory after the fact to homicide by child abuse, a crime for which he was not charged. What specific act does the State contend Mr. Lewis did that would make him guilty of aiding and abetting homicide by child abuse that would not have made him guilty of homicide by child abuse?

The State argues that "The record reflects that Lewis failed to report to Dr. Curry, the emergency medical responders, or other medical treatment providers that he was aware the mother was agitated because she did not get an anticipated job, that she reacted angrily and physically against Lewis and her other child earlier in the evening, that he heard and felt the mother stomp angrily into the victim's bedroom in response to the victim's whimpering, that the victim began to cry louder and harder after Hepburn entered the room, or that this was followed by loud, broken cries from the victim as though the victim was being shaken." Br. of Pet. at 11. Much of what the State contends is simply not evidence of homicide by child abuse or aiding and abetting homicide by child abuse. If Mr. Lewis had a duty to protect the child and failed to stop Ms. Hepburn, by that act of omission he is guilty of homicide by child abuse. The jury acquitted

Mr. Lewis of that crime. If he withheld information after Ms. Hepburn shook the child, he was guilty of accessory after the fact to homicide by child abuse and the state did not charge him with that crime.

The State further argues "Dr. Seigler testified that the lack of resuscitation **near the time of the injury** caused the child to experience difficulty breathing leading to a reduction in the oxygen level in the brain and resulting in brain damage." Br. of Pet. at 12 (emphasis in the original) If by this the State is contending that Mr. Lewis failed to render medical care to the child, again assuming he had a legal duty, then Mr. Lewis would have been guilty of homicide by child abuse and not aiding and abetting.[4]

The State again contends "[Lewis] admitted he did all of this to protect Hepburn. He clearly knew what happened and knowingly decided to join with and protect Hepburn." Br. of Resp. at 18-19. But these acts would make Mr. Lewis guilty of accessory after the fact to homicide by child abuse, a crime the state elected not to bring against Mr. Lewis.

The State also contends that "The evidence in this case established that, despite what he knew about Hepburn's agitation, angry, and physical violence earlier that evening and despite feeling the angry footsteps and altercation in the victims's room, Lewis knowingly chose to do nothing; rather he allowed Hepburn to inflict physical injury." Br. of Pet. at 18. Assume, for the sake of this argument, that Mr. Lewis knew Ms. Hepburn was going to injure her child

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[4] The State asserts on page 18 of their Brief "Lewis, with Hepburn, intentionally thwarted access to critical information about Hepburn's actions to enable emergency medical responders and medical treatment providers to deliver appropriate health care." The record simply does not support this broad statement. The doctors at the emergency room at Self Regional determined the likely cause of the injury was child abuse. App. 59, ll 21-25 to 60. L 1-5. *See, also* testimony of Dr. Michael Ward, App. at 375, ll 7-23.

and was in a position to prevent her act. Under those facts Mr. Lewis would have been guilty of homicide by child abuse under S. C. Code § 16-3-85(A)(1). He would not have been guilty of aiding and abetting. He would have committed an act of "omission by any person which causes harm to the child's physical health or welfare." The jury by its verdict of guilty of aiding and abetting homicide by child abuse, acquitted him of that act of omission.[5] The trial judge specifically said the questions of failure to prevent an injury and the failure to render medical aid would have made Mr. Lewis guilty of homicide by child abuse. App. at 1079, ll 1-14.

The State's reliance upon *State v. Smith*, 359 S.C. 481, 490 S.E.2d 888 (Ct. App. 2004) is misplaced. First the Court of Appeals never discussed, because it was apparently not raised, whether the defendants could in fact be convicted of both charges. Here the trial court recognized the verdict was an "either or" proposition. App. at 1093, ll 21-25 to 1094, ll 1-12. Secondly, the issue of whether aiding and abetting homicide by child abuse requires an overt act was also apparently not raised in the *Smith* case. If a court does not discuss an issue, it cannot stand for the proposition that the court decided the issue. As former Court of Appeals Chief Justice Alex Sanders said "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162,182, 325 S.E.2d 550, 562 (Ct. App. 1984).

In addition in *Smith* both parties admitted that they were the only two people who

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[5] The trial judge in his charge did not treat the aiding and abetting as a lesser included of homicide by child abuse. The jury was required to elect between either charge or not guilty. Thus, a finding of guilty of aiding and abetting homicide by child abuse was an acquittal on the charge of homicide by child abuse. App. at 1093, ll 24-25 to 1094, ll 1-22. Interestingly, the state, never gave an explanation as to the facts sufficient to send the charge of aiding and abetting homicide by child abuse by Ashley Hepburn to the jury. App. at 1097, ll 6-25 to 1098, ll 1-4.

were with the child during the critical time and neither did anything to harm the child. Here the testimony was the exact opposite. Both pointed the accusing finger at the other as to who inflicted the actual harm who was with the child at the time the injuries were inflicted. The jury resolved that factual dispute against Ms. Hepburn.

The Court of Appeals correctly said "However, an overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held liable for a failure to act." *State v. Lewis*, 403 S.C. 345, 356, 743 S.E.2d 124, 130 (Ct. App. 2013). The State now contends that an overt act is not required, but cites no authority for the proposition either in our state or any other state of the union.

The State argues in its brief the following: "The statutory definitions provided by our legislature make it clear that Lewis' acts and omissions are also proscribed conduct for section 16-3-85(A)(2). Our General Assembly characterized both as homicide by child abuse. The distinction provided between (A)(1) and (A)(2) pertains to accountability as assessed by punishment." Br. of Pet. at 15. Is the State arguing that the only difference between homicide by child abuse and aiding and abetting homicide by child abuse is the punishment? If so, how is a jury, who is not told of the punishment, to decide which one a defendant has committed? The holding of this Court in *Smith* that the legislature intended two distinct crimes would be meaningless.

The State also is in error in arguing that *Smith* holds that common law principle have no application in homicide by child abuse cases. What this Court held in *Smith* was that the common law principles of accomplish liability do not apply because the legislature intended to enact two distinct crimes. Nothing in the law passed by the general assembly remotely suggests

that the legislature intended to change the definition of "aiding and abetting" to exclude an overt act and include an act of omission that would be identical to the act of omission required to violate (A)(1).

The State's reliance upon the alleged "flight" and the suicide attempt is also misplaced. First, even if the alleged acts were relevant, they do not take the place of the required overt act. Secondly, the alleged flight is indicative of what crime? Homicide by child abuse, for which he was acquitted, aiding and abetting homicide by child abuse, for which he was convicted or accessory after the fact for which he was not charged. No facts in this record makes the alleged flight attributable to one crime more likely than the others. Under these facts the evidence is not substantial.

The suicide attempt is speculative at best if it is any indication of guilt. Nothing in the testimony of Dr. Vernetta Jacobs, the psychiatrist who treated Mr. Lewis at the veterans hospital, supports any indication of guilt for a crime as causing his suicide attempt. Dr. Jacobs testified that Mr. Lewis was simply being overwhelmed by the events in his life which included the loss of a child he had become close to, the loss of his girlfriend and his having to testify against his girlfriend. App. at 1062, ll 15-25. With this testimony from his psychiatrist as to the reason for his attempted suicide, any inference that it was caused by his guilt over committing any crime, much less aiding and abetting homicide by child abuse, is simply speculative at best.

In this case the State has simply not provided any facts that support a charge of aiding and abetting homicide by child abuse. The State has not tried to explain why under some circumstances homicide by child abuse is committed by an act or omission and under other circumstances the act of omission makes one guilty of aiding and abetting homicide by child

abuse. The State has provided no guidelines as to how this Court or a jury is to know the difference between an act of omission resulting in homicide by child abuse and an act of omission resulting in aiding and abetting homicide by child abuse.

REMEDY

In the event that this Court reverses the Court of Appeals decision reversing the conviction of Brandon Lewis, this Court should remand the case back to the South Carolina Court of Appeals to address the issues not considered by them due to the case being reversed on the single ground of the facts being not sufficient to convict. To fail to do this will deprive Brandon Lewis of the opportunity to have several relevant issues decided by the appellate courts.

CONCLUSION

As the Court of Appeals correctly concluded, in keeping with the precedent in this state, that the state failed to prove an overt act as required by the charge of aiding and abetting, this Court should affirm the decision of the South Carolina Court of Appeals. In the event this Court were to reverse the decision of the Court of Appeals, this matter should be remanded to the Court of Appeals to address the issues not ruled upon by them.

May 30, 2014

C. RAUCH WISE
305 Main Street
Greenwood, SC 29649
(864) 229-5010
rauch@simplepc.net
S. C. Bar № 06188

Attorney for
Richard Brandon Lewis

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on May 30, 2014, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Brief of Respondent the above case addressed to Salley Elliott, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 30 day

of May, 2013.

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