STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Horry County
Hon. Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Number 2014-001008

Opinion No. 5198 (S.C. Ct. App. Filed February 12, 2014)

The State, Petitioner/Respondent,

v.

Julia Gorman, Respondent/Petitioner.

JOINT APPENDIX

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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. Blitch, 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.
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> 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

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[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 difficultly of the question presented by this appeal—whether the evidence the

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[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

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[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

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[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.

JULIA GORMAN,

APPELLANT

Appellate Case No. 2011-203707

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198

PETITION FOR REHEARING

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

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

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

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

[1] The aiding and abetting portion of the statute provides that a person is guilty of homicide by child abuse if the person "knowingly aids and abets another person to commit child abuse or neglect, and the child abuse results in the death of a child under the age of eleven." S.C. Code Ann. § 16-3-85(A)(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
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.

JULIA GORMAN,

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. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Julia Gorman, # 348815, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 2921, this 27th day of February, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

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

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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.

Julia Gorman, 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 her 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).

The medical evidence in this case indicated the injury to the child was not accidental and was so significant either adult in this case would have known it happened. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. (T.358; R. 365). He testified the injury was not accidental. (T.362; R. 369). Dr. Roberts testified both sides of the toddler's skull were fractured by severe traumatic force. (T.409-410; R. 400-401). 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.

The doctors all testified the injuries had to occur the day the child was taken to the hospital. As a result, Appellant's attempts to explain the injuries by blaming the dog for knocking the child down, or the fact the child's head felt "squishy" to Appellant when the child arrived with his mom are unavailing. Further, none of the events would explain the significant trauma experienced by the toddler leading to his death.

Significantly, Dr. Roberts testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 404-406). 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. 410). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 411-412; 402-403).

Importantly, Appellant testified at approximately 4:30 when she arrived home, the toddler was sleeping normally and she heard him breathing fine. (T.984; 994; R. 856; 866). Dr. Roberts, however, testified she would expect symptoms of the injury to be seen, and, if the child was sleeping normally around 4:30 when checked on, then she expected the injuries occurred after that time. (T.427-428; R. 418-419). The only time either co-defendant was alone with the toddler after this time was when Appellant entered the room to get the toddler while her co-defendant was not present.

This case is clearly distinguishable from Hepburn because the State's evidence provided substantial circumstantial evidence Appellant committed the abuse resulting in the death of the toddler. In Hepburn, the only evidence indicated the defendant was asleep at the time the victim suffered the traumatic injury. Here, the testimony places Appellant alone at the child's bed with evidence indicating prior to that time the child was fine. Appellant's statement indicated when she checked on the child at 4:30 p.m., the child was fine and breathing normally. Her statement then indicated no one was with the child after that time until she entered the room alone, and exited with the dying child in her arms. As a result, the State presented substantial circumstantial evidence Appellant committed the homicide by child abuse.

Further, it is appropriate for this Court to consider the Appellant's attempts to deflect onto other incidents the cause of the trauma. See e.g., State v. Parker, 651 S.E.2d 377, 380 (N.C.App. 2007) ("Additionally, decisions from our Supreme Court have established 'that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to

reflect the mental processes of 'a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].'"). As the majority opinion noted,

> 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;" (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.

This evidence is further circumstantial evidence of Appellant's guilt. Accordingly, the majority did not err in affirming Appellant's convictions and sentences.

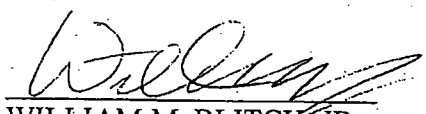
CONCLUSION

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



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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. 2011-203707

The State, Respondent,

vs.

Julia Gorman, Appellant.

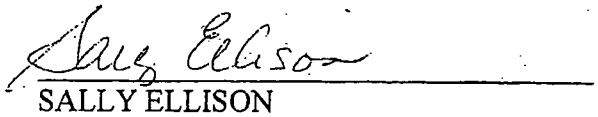
PROOF OF SERVICE

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:

Susan B. Hackett, 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.



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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,

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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

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.

John Cannon Few C.J.

J.

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

Daniel E. Pieper 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.

John Cannon Jr. C.J.

Daniel E. Pieper J.

A. Kee J.

Columbia, South Carolina

cc:
Susan Barber Hackett, Esquire
William M. Blitch, Jr., Esquire
Robert M. Pachak, Esquire

FILED
April 7, 2014

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Horry County
Hon. Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Number 2014-001008

Opinion No. 5198 (S.C. Ct. App. Filed February 12, 2014)

The State, Petitioner/Respondent,

v.

Julia Gorman, Respondent/Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 5th day of June, 2014.

Sally Ellison

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