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.

SUPPLEMENTAL RECORD ON APPEAL

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do you recall?

A Yes, I was.

Q And did you have an opportunity to come in contact with a toddler on July the 14th, 2008, in the E.R.?

A Yes.

Q Okay, please tell the jury what you recall seeing whenever you first came into contact with this toddler?

A Can I refer to my notes?

Q Absolutely.

A Okay, could I grab them now?

Q Sure, go ahead, that's fine.

A I was, it was actually Room 9 cause I remember the room number, this child came in and I was told he had been seizing since 6:00 from the day shift nurse that was on which was Lisa, and then when I immediately observed him I found that he was, and I'll read from my notes which I documented, that he was unresponsive, he was posturing, which is an abnormal flexion, and also seizing at the time, and he had no response whatsoever and his pupils were dilated.

Q And in your experience in dealing with traumatic injuries in the E.R. what was, what did you consider his prognosis to be at that time?

A Very critical.

Q Okay, and whenever you actually had the opportunity to make those observations were there any other people in that Room Number 9 with you when you were caring for the child?

A Yes, at that time there was Lisa, still cause she was giving me report, and I was also observing Dr. Cacace. We also had the two family members that came in with the child which was the boyfriend and the grandmother.

Q Okay, now when you were in the room with the child what were ya'll doing immediately to try and treat his symptoms?

A We were giving him medication to stop the seizing and we were also putting in the I.V.'s and drawing blood like we normally do on all of our patients.

Q Okay, and who provided you with a history as to any injuries or, you know, illnesses in regards to this particular child?

A The grandmother.

Q All right, and do you see the grandmother in the courtroom now?

A I can't remember her face as much but it's been a long time, 2008.

Q Okay, and what information did the grandmother provide to you?

A She had told us that he had been seizing, she had also told us that he was on a medication. She didn't really tell us why he was on that medication, which we knew what the medication was. She also told us that he hadn't fallen or anything and we were told by the grandmother, you know, that at first she was the mother and then stated she was the grandmother of the child.

Q Okay, what medication was reported to you as being the one that the child was on?

A Xyzal.

Q Xyzal, and were you familiar with that medication?

A Yes.

Q All right, and did she give you approximate time line as to when the last time the child would have received that medication?

A Yes, can I refer to my notes?

Q Please do.

A She said it was on 7-11-2008 at 21:00.

Q Okay, and the day that of his visit was 7-14-2008, correct?

A Correct.

Q Did she tell you what amount of that particular medication that she was administering to the child?

A Yes, she did.

Q How much?

A I'm going to review my notes, 2.5 teaspoons.

Q Two point five teaspoons?

A Uh-huh.

Q Yes, now whenever you got this information from the grandmother did she, was there anything else that she said or did that, that you noticed?

A She was very anxious, pacing back and forth in front of the bed, seemed very upset, and the boyfriend was there with her as well.

Q And what did you notice about the boyfriend, if anything?

A Very concerned about the child. While the child was seizing he actually wanted to approach the bed and I told him he could go ahead and talk to the child and he was holding his hand.

Q Okay, and what about the grandmother, did she do the same?

A She didn't at first and then she did later on.

Q And at any point in time did Aydain become responsive?

A No, no, not at all.

Q All right, in reference to your notes, which you've provided to myself as well as the defense, what is a Glasglow Coma Score?

A It is what we use for a neurological exam to see how well the patient is responding to us.

Q Okay, all right, and tell the jury what the three different things are that you look for in establishing a score for a particular patient?

A Okay, can I review to my notes?

Q Absolutely.

A We would have used three things, eye response; we'd also do verbal response and motor response.

Q Okay, and before you came on to your, to work that night had there been some type of, you said Lisa was there before you?

A Uh-huh.

Q Okay, so had she already done that type of testing on Aydain before you got there?

A She did, yes.

Q And is that documented in your nurses notes?

A I'm going to look real quick.

Q Okay?

A Yes, it is.

Q Okay, please tell the jury what Aydain's

Glasglow Coma Score was at the time that it was first noted?

A It was noted at 19:02 and it was a five.

Q Okay, what is the range for a Glasglow Coma Score?

A It can go from three which would be coma and then fifteen which is the highest which they're awake and alert.

Q Okay, and whenever you're dealing with a trauma patient in the E.R. what level Glasglow Coma Score concerns you greatly regarding that particular patient?

A Anything below nine.

Q Below nine?

A Yes.

Q And when Aydain got there at 7:02 his was a --

A Five.

Q Five, now while he was in your care was there any improvement to his, his physical condition?

A No.

Q All right, was there anything additional that you did regarding this child with regard to his breathing, let's talk about that first?

A Okay, yeah, we put a breather on him to make sure he's getting enough oxygen at a hundred percent.

Q Okay, and what is that to do?

A Just basically making sure that he's getting a lot of oxygen and that we're not depriving him of any oxygen.

Q Okay, what observations, if any, did you make regarding his breathing?

A He was very labored and grunting.

Q And did that give you any concern?

A Yes, it did.

Q Why is that?

A Because they can't keep going like that. They're going to eventually get tired where they'll not breath at all.

Q Okay, and so in regards to his heart rate were you ever able to get his heart rate while he was in your care?

A Can I look real quick at my notes?

Q Please do.

A I did get it down some but the lowest I could get it was 142.

Q And for a child his age is that, is that a concern?

A Yes, it is.

Q What would you have liked to have seen it, the range be for him?

A At least 110 to 115.

Q Now how long, were you caring for him the entre time he was there?

A I was, yes.

Q And at some point in time was there a decision made regarding where, whether his care was going to continue at Conway Medical Center?

A Yes, as soon as we got the cat scan.

Q Okay, all right, and when you got the cat scan were you able to review that cat scan and be with the E.R. doctor to determine the next stage in his, in Aydain's care?

A I was in the actual cat scan with the child and was in the back watching the scan while I was watching Aydain at the time and then when I saw it I called immediately to Dr. Cacace to pull it up and look at the cat scan and then when we came back he came into the room.

Q Okay, what did you see?

A I saw cranial skull fractures.

Q Skull fractures?

A Uh-huh.

Q Okay, and what else did you see in regards to those scans?

A I noticed a little bit of bleeding in the back of the head as well.

Q Now whenever you saw the skull fractures and the bleeding, well let me ask you this, with that kind of trauma what kind of a history would you expect to get as to what had happened to this child?

A Any, it could range from anything of a child falling from a second story building, a car accident being thrown from a car or any kind of abuse to the child, I mean it can range from a lot of things.

Q Okay, now whenever you saw Aydain in the hospital did you see any outside injuries or anything that gave you concern?

A Yes, I did.

Q Okay, and what were those?

A I'm going to look at my notes again and tell you.

Q Okay.

A I saw bruising on his right hand, his right thigh, and his left thigh. I also saw a bruise on his lower side of his chest on the left side.

Q And, and why do you document things like that?

A Because normally you wouldn't see that on a child at all, I mean you would see it maybe a little scratch here or there but you wouldn't see the type of bruises that I saw.

A Uh-huh.

Q Okay, was there any information, was any

Q And at the time whenever you were observing him in the hospital what did he have on his body clothing-wise?

A I can't remember, honestly.

Q All right, but you did document the bruising?

A Yes, I did.

Q Was there ever a time whenever you discussed with the grandmother or the boyfriend anything about how he got the bruises?

A I did ask and I was told by the grandmother that he did not have any falls.

Q Okay, that was the only response you got?

A Yeah, other, well I did get one other response from the boyfriend, he said that he was dragging his foot but, you know, earlier that day but I don't remember anything else at that time.

Q Okay, and was there any follow up in regards to dragging his foot, what do you mean or anything like that?

A They just said that he had eaten earlier and was dragging his foot.

Q Okay, all right, so he had eaten earlier?

A Uh-huh.

Q Okay, was there any information, was any

information provided to you as to anyone else who had cared for that child?

A I was just told that the, the dog, I'm sorry, the mother of the child had dropped him off, but I don't know when.

Q That the mother of Aydain had dropped him off?

A Yeah, with the grandmother.

Q Okay, did the grandmother say anything else to you about the mother or concerns that she had with the mother and this child?

A Yes, she did, she, she had also told me that she was a drug addict and she just dropped the child off and she didn't know where she was.

Q Now after the skull fractures were seen on the cat scans and who made the decision that Aydain was to be transferred?

A Dr. Cacace.

Q Okay, and is that a normal procedure whenever you have a child with these type of injuries?

A Yes.

Q Why is that?

A We are a level three hospital and you need a level one hospital to care for a patient in that critical state.

Q And so do you, and you can refer to your notes, do you recall when the child was going to be transported to MUSC?

A The child left at 22:33, I mean could you repeat the question?

Q Okay, that's basically my question when was he actually transferred to MUSC, you said 22 --

A Thirty-three which is 10:33.

Q 10:33 p.m.?

A Uh-huh.

Q And, and who was it that actually comes and gets the child?

A We actually had Megicare come, they flew into our hospital to fly the child out.

Q And whenever they come and get the child at that point in time is that when you relinquish your care of the child?

A Yes.

Q Can you recall, and you might have said this, was this an air flight or was it an ambulance?

A It was an air flight.

Q Okay ---

A We, I'm sorry.

A No, that's fine, and whenever, by the time they got there what was Aydain's condition right before he

left?

A He was still critical.

Q He was still critical?

A Uh-huh.

Q And had his Glasglow Coma Score changed in any way, shape or form?

A Oh, yeah.

Q It did?

A Yes.

Q Okay, when did you reassess him for his, those three things you look at in regards to Glasglow Coma Score?

A I'm going to look at my notes again.

Q That's fine.

A 20:30.

Q And that would be 10:30?

A That would be 9, I'm sorry 8:30.

Q 8:30?

A Uh-huh.

Q Okay, thank you, 8:30, and what was his Glasglow Coma Score for each thing you look at?

A It was a three.

Q It was a three?

A Uh-huh.

Q And you stated earlier that three is

CERTIFICATE OF COUNSEL

Counsel for Respondent certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: _____

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September 9, 2013

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 Supplemental Record on Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 9th day of September, 2013.

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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

APPELLATE CASE NO. 2011-203707

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Appellant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution was violated by the introduction of her statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of her Miranda warnings and the second statement was tainted by the initial violation and was the product of an involuntary waiver.

A. The court erred in admitting the statement made by Appellant prior to officers advising Appellant of her Miranda rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.

B. The court erred in admitting the statement made by Appellant subsequent to the officer advising her of her Miranda rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officers questioned Appellant in the same interview room and in close temporal proximity to the prior unwarned interrogation.

C. The court erred in admitting the statements made by Appellant because the statements were not the product of a voluntary waiver of Appellant's rights due to Appellant's lack of sleep, state of shock and grief over the loss of her grandson, lengthy detention for interrogation, and ingestion of a prescription anti-anxiety drug during the interrogation.

II. The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the state failed to present any direct or substantial circumstantial evidence that Appellant committed the alleged criminal acts.

STATEMENT OF THE CASE

During its September 2008 term, the Horry County Grand Jury indicted Appellant for homicide by child abuse (2008-GS-26-3756). In its February 2010 term, the Horry County Grand Jury indicted Appellant for unlawful conduct toward a child (2008-GS-26-00841). Finally, during its May 2010 term, the Horry County Grand Jury indicted Appellant for aiding and abetting homicide by child abuse (2010-GS-26-02194). Indictments. Appellant and her co-defendant, Robert A. Palmer, were jointly tried before the Honorable Larry B. Hyman and a jury on November 14-18, 2011. James C. Galmore and J. Andrew Ritner represented Appellant. Carla F. Grabert-Lowenstein represented the co-defendant. Candice A. Lively and Nancy G. Cote prosecuted the cases. R. 1.

The jury found Appellant and the co-defendant guilty of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct toward a child. R. 875, line 6 – R. 876, line 4. Judge Hyman sentenced Appellant to thirty-five years for homicide by child abuse, ten years for unlawful conduct toward a child, and twenty years for aiding and abetting homicide by child abuse. R. 886, lines 5-16; sentence sheets.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. Appellant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments was violated by the introduction of her statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of her *Miranda* warnings and the second statement was tainted by the initial violation and was the product of an involuntary waiver.

On July 2, 2008, Appellant's daughter provided temporary guardianship over Appellant's grandson, minor, to Appellant and co-defendant, Appellant's boyfriend, for an unspecified amount of time. Appellant's daughter planned to go home to Arizona to pack her belongings, return to Horry County to pick up minor, and then settle into her new residence in Beaufort. R. 250, line 21 – R. 256, line 3.[1] The prosecution alleged that on July 14, 2008, minor suffered severe head trauma. R. 13, line 20 – R. 14, line 3; Indictments. On July 16, 2008, minor died as a result of the head trauma. R. 270, lines 4-5.

Prior to the start of trial, the court convened a hearing pursuant to Jackson v. Denno[2] regarding the admissibility of Appellant's videotaped statement to police. R. 21, lines 9-10. Detective Timothy Troxell, an employee of the Horry County Police Department testified that he accompanied Detective Weaver to the Medical University of South Carolina (MUSC) to investigate the injuries sustained by the victim. R. 22, lines 6-25. The testimony revealed Troxell and Weaver attempted to video record the interviews, but the equipment malfunctioned. R. 29, line 25 – R. 30, line 10; R. 91, lines 8-14.

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[1] Appellant uses the abbreviation Hrg. to refer to the transcript of the hearing on October 31, 2011. Appellant uses the abbreviation Tr. to refer to the trial transcript.

[2] 378 U.S. 368 (1964).

Then, on July 18, 2008, Troxell and Weaver interrogated Appellant and her co-defendant. R. 23, lines 1-6; R. 69, lines 22-25. Troxell explained they initially interviewed co-defendant, and then interviewed Appellant. R. 23, lines 11-12. The interview of co-defendant began at 9:07 a.m. R. 24, lines 21-24. The video[3] of the interview of co-defendant, which was thirty nine minutes long, was played for the court. R. 28, lines 2-10.

The co-defendant reported that neither he nor Appellant slept the night before the interviews and had very little sleep over the last four days. R. 28, line 23 – R. 29, line 4; R. 29, lines 7-18; R. 68, lines 19-23. Troxell noted that co-defendant had not slept, probably had not eaten, over the course of the week. R. 68, lines 6-11.

The officers questioned co-defendant regarding what transpired in the days preceding the minor's death and in the days after his death. On camera, Troxell stated "[w]hat we need to do is kind of like I said when we talked to you in the hospital my tape recorder died ... And we kind of need to go back over and ... some of the things that happened." R. 29, line 25 – R. 30, line 10. Then, Troxell remarked

> But being that [minor] has passed away, or whatever, and this investigation has taken more of a serious note instead of just trying to get information we've got to advise everybody that we talk to from this point forward of their Miranda rights. It doesn't mean you're under arrest or anything like that; it's just before we talk we've got to advise everybody of these, okay.

R. 30, lines 15-23. Troxell then explained the rights and co-defendant agreed to waive those rights. R. 31, line 23 – R. 32, line 1. After obtaining co-defendant's account of the days preceding minor's death, the officers questioned him regarding whether Appellant had any problems at work. Officers inquired if Appellant was agitated and upset at home. R. 44, line 4 – R. 45, line 5.

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[3] This exhibit is on file with the Court.

When co-defendant offered no explanation that fit within the medical evidence of what happened to minor, the officers continued to press him to inculpate Appellant. R. 52, line 25 – R. 53, line 1; R. 54, lines 19-21; R. 56, lines 9-10; R. 60, line 24 – R. 61, line 6; R. 64, lines 11-19. Suggesting that co-defendant was covering for Appellant, the officers asked if Appellant were worth going to jail over. R. 56, lines 1-6. The officers told co-defendant they were questioning him first because he showed compassion for minor and had positive character, whereas Appellant "was stone cold and straight faced." R. 61, line 7 – R. 62, line 1. Officers noted that co-defendant had been unable to see his five-year old son and probably would not see him "until this is resolved." R. 48, line 25 – R. 49, line 12; R. 56, lines 17-25. He even told co-defendant "you're going to end up going to jail for this." R. 51, lines 23-24; R. 54, lines 7-11.

When co-defendant stated that his story had not changed in over forty hours and he would not change it then, Weaver declared "[t]his interview's over, buddy." When co-defendant attempted to rise, Weaver stated "sit down, you ain't going anywhere just yet, we've gotta get a set of handcuffs for you." R. 68, line 25 – R. 69, line 5.

At 10:06 a.m., Troxell and Weaver "initiated an interrogation with [Appellant] at the Horry County Police Department." R. 70, lines 1-7. According to Troxell, he provided Appellant with "the standard police department form for the advisement of one's Miranda rights." R. 70, lines 11-18. Troxell testified the form contained Appellant's signature. R. 71, lines 3-6. Additionally, Troxell read the statement of rights to Appellant. R. 71, lines 7-21. According to Troxell, he asked Appellant to initial after each warning indicating that the line had been read to her. R. 71, line 22 – R. 72, line 3. Troxell did not recall any impairment due to alcohol or drugs on the part of Appellant. He had no concerns about

Appellant's ability to understand. He claimed that he did not coerce Appellant to give a statement. Finally, Troxell indicated that he observed no indication of educational or mental incapacity. R. 72, lines 4 – 25.[4]

The video[5] of the interview, which was transcribed by the court reporter, was played for the court. The video was one hour and twenty-two minutes. R. 28, lines 7-10.

When Troxell escorted Appellant into the interview room, and when he told her to take a seat, she responded "I don't like this." R. 75, lines 10 – 14. Initially, Troxell noted that Appellant looked exhausted. R. 76. lines 15 – 18. Appellant responded that she had no sleep the night before. R. 76, lines 19 – 20. Although no one had advised Appellant of her rights, Troxell continued to question Appellant regarding the circumstances surrounding the victim's injuries. R. 77, lines 5 – 6. Appellant engaged in an almost stream of consciousness response to Troxell's questioning. R. 77, lines 7 – R. 83, line 5. In response to statements made by Appellant, Troxell and Weaver continued to question her, and Appellant continued to discuss the circumstances of the victim's injuries with the officers. R. 83, line 6 – R. 89. line 6.

Only after obtaining substantial information from Appellant did officers advise Appellant of her rights and ask for her to waive those rights. Troxell said:

> I hate to interject but now that we've, we've kind of got to the point where [minor] is deceased. Before we talk and this is just standard practice with everybody, we did it with [codefendant] earlier, you've got to be advised of your Miranda rights, the investigation as, you know, has taken a turn into now a death investigation.

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[4] On cross-examination, Troxell admitted that he had previously interviewed Ms. Gorman at MUSC. He was unaware if Weaver had interviewed Appellant at Conway Medical Center. R. 74, lines 12 – 21.

[5] This exhibit is on file with the Court.

R. 89, lines 7-13. Troxell also stated, "Just an advisement standard policy and procedure I've got to advise you of the ease." Troxell then read the rights to Appellant, and she signed indicating she wanted to "continue to make a statement and stuff." R. 89, line 7 – R. 91, line 25.

Just as with co-defendant, Troxell reminded Appellant that she had discussed the matter previously with the officers, but he wanted her to do it again because the "tape recorders malfunctioned." R. 91, lines 8 – 14. When Appellant did not implicate herself or codefendant in the injuries to minor, Troxell confronted her with the current day's newspaper's headline, which read "Abused Child Dead." He threatened "tomorrow's headline is 'Arrest Made in Abused Child's Death.'" R. 103, lines 2-4. Troxell then challenged Appellant that the first tear he saw from her was when she was confronted with jail. He told her that her statements to police would determine whether she went home or if she went to jail. R. 103, lines 9 – 19. Later, following his theme of the newspaper's headlines, Troxell informed her that tomorrow's headline would read "Couple Arrested in Child's Death." R. 107, lines 13 – 14. Troxell again accused her of showing no remorse and told her she was going to jail. R. 109, lines 14 – 20. Despite Appellant's repeated protestations and claims of innocence, Troxell repeatedly accused her of knowing what happened to the minor. He even accused Appellant of killing minor. R. 109, line 21 – R. 111, line 12.

Weaver then interrogated Appellant, asking her repeatedly what happened and offering various scenarios, such as her taking her frustrations with work or with the codefendant out on the minor. R. 112, line 1 – R. 113, line 16. Weaver also repeatedly threatened Appellant with jail. R. 119, lines 16 – 18; R. 128, line 23 – R. 129, line 2. At one

point, Weaver asked Appellant what she thought was going to happen from that point forward. Appellant responded she was not going home. R. 120, lines 16 – 18. During the interview, Appellant requested permission to take her medication.[6] After examining the bottle, Troxell agreed to allow Appellant to take her medication. R. 131, lines 1 – 17. Additionally, Troxell confronted Appellant with numerous pictures of minor. R. 132, lines 4 – 8; R. 135, lines 14-19; R. 137, lines 2-7.

Troxell offered that "another explanation" for the minor's injuries was "he was shook." Appellant denied ever shaking minor. R. 134, lines 5-8. Despite her denials, officers pressed this area. Weaver asked if she got a little frustrated and shook him a little hard. Appellant responded, "I don't think hard." R. 135, lines 5-9. Officers had her so confused she said "I don't know anymore." R. 135, line 23. She then stated, "I don't believe I've ever shook him." Finally, officers got her to admit "it's possible." R. 136, line 8 – R. 137, line 1. She repeatedly said she did not know if she shook him hard and said she did not recall shaking him at all. R. 138, lines 11-24; R. 140, lines 2-5; R. 143, lines 11-13; R. 144, lines 2-5. Officers provided a leprechaun for Appellant to use to demonstrate how she allegedly shook the minor. R. 145, lines 5-8. However, she denied shaking minor on Monday. R. 145, lines 14-20; R. 147, lines 24-25; R. 151, line 23- R. 152, line 2.

Weaver continued to suggest that Appellant injured minor because "the little guy's crying, whimpering" and this frustrated Appellant when she "didn't know how to help the little guy." R. 151, lines 16-22. He again asked how hard she shook him and Appellant demonstrated how she did not shake him. R. 157, lines 6-22. Weaver knew that

[6] Appellant testified at trial that she took Xanax, an antianxiety medication. R. 827, lines 7-17.

Appellant's alleged shaking of minor could not have caused the injuries and confronted her with this information. R. 158, line 13 – R. 159, line 17. At the end of the interview, Appellant stated "I don't think I did that either. I'm just, fuck it, say it, do whatever. No one's going to go down with me, and I'm not going to let anyone else take the fall." R. 165, line 23 – R. 166, line 1.[7] As Appellant explained to Weaver, "I'm broken." R. 140, line 18.

Appellant objected to the introduction of the statements and the video recording. Appellant noted the repeated "reference to forty hours without sleep" and Appellant taking medication during the interrogation. Appellant argued the statement was not "knowingly and voluntarily given." R. 167, lines 13-24. Nevertheless, the judge admitted the statement finding Appellant was not intoxicated and was advised of her Miranda rights. He did not find the interview, which was about an hour and a half long, to be overly lengthy. The judge saw no use of any threats or punishment for Appellant's answers. He saw that the interview took place in an area "like an office," which he found "nothing coercive about that." Thus, he found the statement to be voluntary and admitted it into evidence. R. 168, line 20 – R. 169, line 13.

A. The court erred in admitting the statement made by Appellant prior to officers advising Appellant of her Miranda rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. The Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees

[7] During the prosecution's cross-examination of Appellant during the trial, the prosecutor described the officers as "scream[ing] in [her] face and [telling her] that [she was] going to jail." R. 850, lines 22-23.

against federal infringement. Malloy v. Hogan, 378 U.S. 1, 8 (1964); see also U.S. Const. amend. XIV. In Denno, 378 U.S. at 376, the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." See also, Brown v. Illinois, 422 U.S. 590, 604 (1975). To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

As explained by the United States Supreme Court, "[p]rior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444. "Law enforcement must state the Miranda warnings 'after a person has been taken into custody or otherwise deprived of his freedom of action in any way.'" State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003)(quoting Miranda, 384 U.S. at 444). However, the use of these safeguards is required only when the accused is in custodial interrogation. Miranda, 384 U.S. 445; see also State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 445; see

also Stansbury v. California, 511 U.S. 318, 322 (1994); Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

The inquiry is based upon an objective assessment of the facts and circumstances surrounding the questioning.

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112 (1995); see also Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." Evans, 354 S.C. at 583, 582 S.E.2d at 410 (citing Berkemer v. McCarty, 468 U.S. 420 (1984); United States v. Helmel, 769 F.2d 1306 (8th Cir. 1985); Robert Kaupp v. Texas, 538 U.S. 626 (2003)).

In Evans, 354 S.C. at 584, 582 S.E.2d at 410, our Supreme Court held the defendant was in custody where the evidence demonstrated an officer accompanied her at all times, including escorting her to the restroom, the exclusion of the defendant's family members from the interview room, the interview was conducted in a back office of the police station, the interview lasted three hours, and the officer's stated purpose for questioning the defendant was to challenge her story.

Clearly, Appellant was in custody when she officers interrogated her on video. She was in an interview room where officers were questioning her about the death of minor. Immediately preceding her interrogation, officers placed co-defendant under arrest. As the interview progressed, officers threatened her with jail and accused her of killing minor. The court erred in permitting introduction of the statement due to the officer's failure to inform Appellant of her rights and obtain a waiver. The statement was obtained in a clear violation of Appellant's rights.

B. The trial court erred in admitting the statement made by Appellant subsequent to the officer advising her of her Miranda rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officers questioned Appellant in the same interview room and in close temporal proximity to the prior unwarned interrogation.

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986).

In Missouri v. Seibert, 542 U.S. 600 (2004), The United States Supreme Court confronted a case very similar to the one presented in the instant matter. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her Miranda warnings. During this discussion, the officer obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was set to cover up

the death of Seibert's disabled child. After obtaining this admission, the officer permitted Seibert a twenty-minute break. Id. at 604-605.

The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert by confronting her with her prewarning statements. Again, the officer obtained the answer he wanted – that Seibert knew the teenager was supposed to die in the fire. Id. at 605.

At trial, the officer testified that he used an interrogation technique in which he questioned the witness first, then gave the warnings, and then repeated the questioning until he got the answer that the witness had already provided once. Id. at 605-606. The trial judge suppressed Seibert's prewarning statements, but admitted the postwarning statements. Id. at 606. The United States Supreme Court held this was in error.

The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611. Thus, the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" Id. at 613-614 (quoting Moran, 475 U.S. at 424).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and "the questioning was systematic, exhaustive, and managed with

psychological skill." Officers paused only for twenty minutes before resuming questioning and providing the required warnings. Officers "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." Through the style of questioning employed which included repeated references to prior responses, the officers fostered the impression that further questioning was a mere continuation of the earlier questions. Id. at 616. Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Our Supreme Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, he gave a statement at the hospital to police, but was very upset and officers thought the statement was incomplete. Officers learned from the pathologist that the cause of death was smothering or suffocation. Id. at 297, 688 S.E.2d at 839. The following day, officers went to Navy's home with the intent of transporting him to the sheriff's office for further questioning. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted

to popping the child on the back and possibly patting the child on the mouth. After this statement, Navy received another smoke break. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, Officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

The Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to the court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree

to which the interrogator's questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

The interrogation of Appellant presents a similar factual scenario as in Seibert and Navy. Officers engaged in a lengthy exchange with Appellant for an extended period of time prior to advising Appellant of her rights. After obtaining a written waiver of those rights, the same officers continued questioning Appellant. There was no break between the unwarned statements and the warned statements. The setting did not change. The officers did not attempt to cure the error by information Appellant that her prewarned statements could not be used against her.

C. The court erred in admitting the statements made by Appellant because the statements were not the product of a voluntary waiver of Appellant's rights due to Appellant's lack of sleep, state of shock and grief over the loss of her grandson, lengthy

detention for interrogation, and ingestion of a prescription anti-anxiety drug during the interrogation.

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

Appellant's waiver of rights was involuntary. The officers were aware she had very little sleep prior to the initiation of the interrogation. She stated repeatedly she was exhausted. She was detained for at least almost two hours during the interrogation. Officers failed to advise her of her rights and seek a waiver until a significant time after the interrogation began. Officers threatened her with jail if she failed to provide them with the answer they wanted. At one point during the interrogation, she described herself as "broken." During the interview, Appellant ingested a prescription anti-anxiety drug. Based on the totality of the circumstances, Appellant's waiver of rights was not voluntary.

II. The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the state failed to present any direct or substantial circumstantial evidence that Appellant committed the alleged criminal acts.

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.[8] 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.

In addition to the statements made by Appellant and co-defendant while in police custody discussed supra,[9] the prosecution relied primarily upon medical evidence to support its theory that either Appellant or co-defendant inflicted the fatal injury and aided and abetted the other in inflicting the fatal injury on minor.

Timothy Rainbolt, an employee with Horry County Fire and Rescue, testified that he arrived at Appellant's home on July 14, 2008 at 6:13 p.m. in response to a 911 call. He observed minor actively seizing. R. 330, lines 21-24; R. 332, lines 2-8; R. 333, lines 17-19;

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[8] Appellant refers to the May 26, 2011 hearing using the abbreviation May Hrg. to distinguish it from the October 31, 2011 hearing.

R. 335, lines 8-15. Rainbolt transferred minor to the medic unit in the ambulance. R. 337, lines 2-6. He saw no bruises on minor's body and observed no injuries to minor's head. R. 343, lines 10-11; R. 345, lines 15-20.

John Cacace, a medical doctor at Conway Medical Center's Emergency Department, testified about treating minor on July 14, 2008 in the emergency room. R. 359, line 24 – R. 360, line 3; R. 363, lines 13-17. Dr. Cacace described observing minor "exhibiting classical signs of intracranial injury, extensive posturing of the arms." R. 364, lines 15-20. Dr. Cacace's review of scans of minor's head revealed "gray-white matter junction loss and blood." R. 367, lines 2-21. Based upon the severity of minor's injuries, Dr. Cacace ordered minor transported to MUSC for further care. R. 369, lines 17-22. He gave a "ball park figure" of thirty-six hours for when the injury to minor occurred. R. 388, line 25 – R. 389, line 4.

Dr. Donna Ray Roberts, a neuro-radiologist, at MUSC testified regarding her review of the C.T. scans of minor's brain. R. 392, lines 15-19; R. 394, lines 10-18. She saw "blood around the brain ... severe swelling of the brain ... loss of the gray-white differentiation ... and ... severe fractures." R. 397, lines 9-13. She opined the injury was recent. R. 395, lines 17-20. According to Dr. Roberts, a patient with the injuries on the scans "would not be able to walk, eat, function normally." R. 406, lines 8-13. "A person with this type of injury would be immediately severely symptomatic ... [including] an alteration or loss of consciousness, alteration in breathing, likely seizures ... [inability] to walk, move, play." R.

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[9] During the trial, the prosecution presented the video statements of Appellant and co-defendant during Troxell's testimony. R. 608, line 6 – R. 647, line 20; R. 648, line 10 – R. 739, line 16.

410, lines 3-11. In her opinion, it was not possible that the injuries were inflicted two or three days before minor reported to the hospital. R. 425, line 20 – R. 426, line 3.

She testified that the fractures to the head could not have been caused by shaking minor. R. 426, lines 14-16; R. 427, line 25 – R. 428, line 4. She further testified that she could not say whether the fractures were intentional or accidental. R. 426, lines 17-19. She testified she would not expect to see a fracture from a fall from standing. R. 407, lines 22-23. She also would not expect the fractures like those sustained by minor based upon a fall from a stroller. R. 407, line 24 – R. 408, line 2. However, she was unable to testify regarding "the mechanism of injury" and could say only "it was some type of severe force." R. 412, lines 16-17. She further testified she was unaware of any naturally occurring condition that could result in the injuries. R. 414, lines 12-15.

Dr. Cynthia Schandl, a forensic pathologist employed by MUSC, performed the autopsy on minor on July 19, 2008. R. 432, lines 7-15; R. 438, lines 19-23. She found no evidence of injury on the surface of the scalp during her external examination. R. 449, lines 7-10. However, her internal examination revealed "very patchy light bleeding around those structures cover the skull," fractures to the skull on both sides of the head, and separation of the skull itself where the bones fuse together. R. 449, line 18 – R. 450, line 24. She was unable to say whether the injuries were the result of one impact or two impacts. R. 455, lines 13-21. She also could not state the amount of force used to inflict the injuries. R. 455, line 22 – R. 456, line 5. Dr. Schandl opined that the "damage occurred within a week." R. 458, lines 19-20. She later clarified her opinion – "this injury took place somewhere between three days and a week from when [she] saw him." R. 459, lines 1-3; R. 466, lines 21-24. In short, the injuries occurred sometime between July 11 and July 14. R. 468, lines

1-14. In fact, she testified that the injuries could have occurred at different times within the timeframe of three to seven days. R. 467, lines 7-15. According to Dr. Schandl, she and the solicitor had "gone back and forth about" the time of the infliction of the injuries. R. 459, line 24 – R. 460, line 2. The cause of death was "subdural and subarachnoid hemorrhage with global cerebral edema, due to inflicted blunt head trauma." R. 461, lines 2-16.

Dr. Ann Abel, a physician at MUSC, testified that she 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.

At the conclusion of the prosecution's case, Appellant moved for a directed verdict. Appellant argued the state failed to produce any direct or substantial circumstantial evidence that Appellant committed the crime charge.

> They've established that an injury was inflicted upon [minor]; they have not established, they have not connected that injury to [Appellant]. What they've done is said, well statistically we're the only two people who could have done it but they have not produced any evidence that said either he is the person that inflicted this injury or she was the person that inflicted this injury.

R. 769, lines 5-15. When the judge inquired about the "evidence of shaking," Appellant responded the evidence was questionable because the cause of death was not due to shaking. R. 769, lines 16-19. Appellant argued co-defendant's denial of guilt likewise failed to provide any direct or substantial circumstantial evidence of Appellant's guilt. R. 769, line 20 – R. 770, line 12.

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. "[t]he 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.

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.

At the conclusion of the presentation of the defense case, Appellant renewed her motion for a directed verdict. Specifically, Appellant argued that prosecution failed to produce any direct or substantial circumstantial evidence of her involvement either as the person who inflicted the injuries or the person who aided and abetted and failed to act in co-defendant's infliction of the injuries. Appellant argued the evidence "[a]t best [] raises a mere suspicion of her guilt." R. 873, lines 4-23. The judge denied Appellant's motion. R. 873, line 24 – R. 874, line 1.

Appellant moved for a new trial based upon the insufficiency of the evidence after the jury returned its verdicts. Appellant explained the motion was based in part upon the "inconsistent theories." Appellant described the verdicts as "mind boggling" because the jury found Appellant guilty "of being the principal and being the accomplice." As expressed by Appellant: "It's just not possible for her to be the person that inflicted the blow and for her to be the person that aids and abets him inflicting the blow at the same time." In light of Appellant's convictions for both charges, "the jury could not have understood their obligations and responsibilities as jurors." Appellant further explained the state presented "no direct evidence" in the case, and the circumstantial evidence presented was not substantial. According to Appellant, the "evidence must be logically connected to each other and it must be to the exclusion of any other reasonable hypothesis." Obviously, the evidence presented was not to the exclusion of the "serious other hypothesis" presented to the jury. R. 877, line 4 – R, 879, line 18. Nevertheless, the judge denied Appellant's motion. R. 882, lines 13-22.

During the sentencing proceeding, the judge expressed some of his reasoning behind his decision to deny Appellant's directed verdict motion.

> On review, it is my job to determine whether or not essentially if there's any evidence to support the jury's verdict. In this case there is no doubt, no doubt that this child died and that this child died violently at the hands of one or both of you, no question about that. This jury has determined that this was the act of both of you. There's evidence certainly to support conviction of either of you. You essentially both pointed the finger at each other, directly or indirectly, you have done so. This jury has obviously struggled with this case and it has handed it to me with verdicts of guilty on all charges and that is what I am left with. It's not my decision to go back and review the evidence and say what I would have done. That would not be appropriate. The question on your attorneys' motions is whether or not there was evidence, direct evidence, circumstantial evidence, a combination of the two, that would support the verdict of the jury. This jury found that beyond a reasonable doubt this was the correct verdict, the verdict that I'm holding.

R. 883, line 16 – R. 884, line 9.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely

raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 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). Our courts define suspicion as "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 Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems

was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> 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).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

In State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 530-31 (2004), the defendant's fingerprint was found on a coffee cup in a car borrowed by the victim. The victim disappeared after leaving his office in Savannah, Georgia, and his body was found

three days later in Colleton County. Id. at 388, 605 S.E.2d at 530. The borrowed car was found in Johnson City, Tennessee near where the defendant called another witness the day after the crime. Id. at 388-89, 605 S.E.2d at 530. The defendant and the victim had been sexual partners. Id. The Supreme Court held that a directed verdict should have been granted because the fingerprint only established that defendant "was in the borrowed [car] on the same day the victim was last seen alive." Id. at 390, 605 S.E.2d at 531. The fact that the car was found in Tennessee near the defendant only raised "a suspicion of guilt." Id.

The homicide by child abuse statute provides:

> A person is guilty of homicide by child abuse if the person (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse results in the death of a child under the age of eleven.

S.C. Code Ann. § 16-3-85(A). Thus, the prosecution was required to prove the minor died as a result of abuse or neglect by Appellant under circumstances manifesting extreme indifference to human life. This Court held "that in the context of homicide by child abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). In State v. McKnight, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (S.C. 2003), our Supreme Court likened extreme indifference to "reckless disregard for the safety of others" and "a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard therof."

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.

Another doctor testified it would take tremendous force to cause the area at the back of the head to fracture because of its thickness, that there was no way the child or her sister could have caused the injury, and there was evidence the child had been shaken. Id. at 486, 597 S.E.2d at 891. Police investigation revealed bed linens were missing from the room where the group stayed while at the beach. Id. at 487, 597 S.E.2d at 891-892.

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. Although the state claimed that Appellant and co-defendant cared for minor at all times on that day, this was not correct as demonstrated by the evidence. In fact, the evidence showed Appellant was at work for most of the day when the injury may have been inflicted. She could not have injured minor during a substantial portion of the day. This substantial factual distinction from Smith, supra, requires this Court to direct a verdict in Appellant's favor.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions and sentences. As to Ground I, Appellant requests this Court reverse her case and remand for a new trial. As to Ground II, Appellant requests this Court direct a verdict of acquittal.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2013.

CERTIFICATE OF COUNSEL

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

August 26, 2013

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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 Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of August, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

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

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Respondent,

vs.

Julia Gorman, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II. The trial court properly denied Appellant's motion for directed verdict.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant and her co-defendant were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Appellant. Appellant and her co-defendant lived together for approximately four years. They came into custody of the child after the child's mother had to leave him with them in order to attend to business out of town prior to reuniting with the child's father. (T.206-211; R. 250-255).

Appellant's daughter also indicated her mother did not handle stress well and would let things bottle up. Her daughter testified Appellant would go into a fit of rage once the anger was "uncorked." (T.246-247; R. 290-291).

Prior to the mother leaving, the child was taken to the doctor due to ant bites and congestion from allergies. He was given medication and was scheduled to return later for immunizations. (T.205-207; R. 249-251). The treating doctor indicated the toddler looked normal at the time of the examination and treatment. (T.269-270; R. 313-314).

On July 14, Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call from Appellant. (T.300-301; R. 332-333). He testified Appellant's co-defendant was holding the child on the couch when he arrived and he could tell the child was in grave condition. (T.302-303; R. 334-335). The child was given over to Erica Rosenthal a paramedic that arrived. Rosenthal testified the child had a right sided gaze and appeared to be having a seizure. (T.318; R. 350). Appellant told Rosenthal the victim had been whiny and lethargic since the any bites. Memorably to Rosenthal, Appellant also told her the Appellant had "raised several children in her lifetime and never seen such a bad one." (T.321-322; R. 353-354).

The emergency room nurse and the doctor who saw the toddler both testified his condition was critical. (T.329; Supp.R.1). The nurse indicated Appellant seemed "very anxious, pacing back and forth in front of the bed, seemed very upset." She also testified when the victim would have a seizure Appellant's co-defendant wanted to approach the bed to hold the child's hand and talk to him to get him settled down. Appellant did not do the same at first, but only later on. (T.332; Supp.R.4). They both indicated he was posturing due to the head trauma. A CAT scan was done and revealed skull fractures and bleeding in the brain. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. (T.358; R. 365). He testified the injury was not accidental. (T.362; R. 369). The victim was transferred by helicopter to MUSC for more specialized care. (T.362-363; R. 369-370).

Dr. Roberts, a neuro-radiologist with the Medical University of South Carolina (MUSC), testified the toddler suffered blood around the brain, severe swelling of the brain, loss of the gray-white differentiation which indicated dead brain tissue, and severe fractures. (T.406; R. 397). She testified both sides of the 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. (T.416-417; R.407-408). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (T.411; R. 402).

Dr. Roberts also testified the injury was acute, or very recent. She testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 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; 425-426). She 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).

Dr. Abel, the Director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, testified she was called in to examine the toddler. She testified she took some background history from Appellant and Appellant's co-defendant. She testified she examined the child and his CT scans. Dr. Abel testified the fractures of the child's skull were similar to a cracked pot and indicated it appeared to be caused by severe forceful impact against a hard surface. She testified the blows were to both sides of the head. Dr. Abel indicated the degree of force used was "massive." (T.516; R. 490). Dr. Abel also testified to bruising on the child, including several suspicious bruises in locations it would be unlikely the toddler accidentally received the bruise. (T.519-522; R. 493-496). Dr. Abel testified anyone seeing the force being applied to the child would "perceive this was tremendous force." (T.534; R. 508).

As part of the background, Dr. Abel testified Appellant indicated the victim had severe developmental problems and behavioral problems. Appellant described a child to her that could only say one word, was clingy and whiny, and wanted to be held all the time. Dr. Abel testified the detailed pediatrician notes from when the child was in the custody of its mother indicated otherwise. She testified at nine months the child was saying multiple words and that his development was normal. (T.534-535; R. 508-509).

Dr. Abel testified the injury to the child occurred sometime the day he was presented to the emergency room. (T.553-554; R. 527-528). She also testified the injury had to occur after people looked at the child and believed him to look normal. (T.554; R. 528). Dr. Abel testified based on the information provided by Appellant and her co-defendant about the child napping and appearing normal, the injury occurred within three hours of the victim being taken to the hospital. (T.556-557; R. 530-531).

Marsha Bessant, a friend of Appellant and Appellant's co-defendant testified Appellant was very stressed over financial issues. She also testified Appellant would not remove her co-defendant from the checking account even though he was spending the money she earned and would be out at night instead of home when Appellant cooked. (T.583-585; R. 538-540). In jail, Appellant asked for pictures of her co-defendant and seemed only concerned with how her co-defendant was doing. (T.593-594; R.548-549).

Yvette Brown, an investigator with DSS, interviewed Appellant after viewing the victim at MUSC. She testified Gorman told her the child was "cranky, he looked underweight, undernourished, and that his head had a squishy feel to it like it didn't have bone structure." (T.513; R. 487). She thought the comment seemed a little "odd."

Detective Troxell interviewed and took a statement from both Appellant and Appellant's co-defendant. Appellant's co-defendant indicated Appellant woke up about 4:45 am and left for work in the early morning. (Oct T. 62; R. 34). Appellant's co-defendant indicated he woke the child up about 9:30 am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. (Oct T. 63-64; R. 35-36). He stated Appellant arrived home at about 4:15 pm and they both went to the edge of the door to check on the victim who was still down from his nap. (Oct T.64-65;

R. 36-37). They ate dinner before waking up the toddler. Appellant went into the room and found him having a seizure. (Oct T.65-66; R.37-38).

Appellant also gave a statement to Detective Troxell on July 18. She initially began discussing the days after the child was taken to the hospital along with some family background and history. (Oct T. 104-107; R. 76-79). She was then read her Miranda rights by Detective Troxell. (Oct T.117-119; State's Exhibit 67; R. 89-91; 887). After reading Appellant her Miranda rights, the officers questioned her regarding the events leading up to the injuries sustained by the victim.

Appellant stated she got up about 4:30-4:45 am and checked on the victim as she left. She stated he was sleeping. (Oct T. 119; R. 91). She arrived home between 4:00 and 4:30pm and checked on the minor victim. (Oct T. 120; R. 92). He appeared to be sleeping. (Oct. T. 120-121; T.737-739; R. 92-93; 810-812). She explained they then ate dinner, and after dinner, her co-defendant took the dog out while she went into the toddler's room to wake him up. (Oct. T. 121; R. 93). It was then she found him making strange noises with saliva running from his mouth. (Oct. T. 121; R.93).

Appellant was asked directly: "So Sometime between, something happened between four and six-fifteen, didn't it, because when you went in at six-fifteen he was salivating, okay?" Appellant responded: "Because, you know, when we checked on him (and everything, well I checked on him even after four and he was fine so, so anywhere (between dinner time, you know, as we were eating dinner until by six, whatever time I (called 911)." (Oct. T. 121; T. 739-740; R. 93; 666-667). She acknowledged only her and her co-defendant cared for the minor victim in the days leading up to his death. (Oct T.130; T.748; R. 102; 675). Detective Trexell noted the only tears he saw from

Appellant during her statement were when he mentioned the possibility of going to jail. (Oct T.131; 137; T. 750; 755; R. 103; 109; 677; 685).

When questioned about the possibility of shaking the child out of frustration, Appellant stated: "I don't think hard, I don't believe I - -." (Oct. T. 163; T.781; R. 135; 708). She stated at one point: "I don't know if I shook him hard, I don't know, I don't." She later stated: "If, if I shook him I swear to you I don't believe I shook him hard, you know. I don't think I have that much, I don't know." (Oct T.171; T.789; R. 143; 716). Both Appellant and her co-defendant claimed ignorance of what happened to the child.

The victim died on July 16, after his mother and father decided to donate his organs. Dr. Schandl, a forensic pathologist with MUSC, testified the toddler had fractures on both sides of his skull. She testified the cause of death was inflicted blunt head trauma. (T.487; R. 461). She testified the manner of death was homicide. (T.488; R. 462). Prior to his death, the victim's parents had him baptized. Appellant's daughter begged Appellant to attend, but Appellant said she had other things to do. (T.160-162; R. 204-206).

ARGUMENT

I. The trial court properly admitted Appellant's statements. The court properly concluded the statements were knowing and voluntary. Further, any issue related to the sequence of events and the giving of the Miranda warning is not preserved for review on appeal and is entirely without merit.

Appellant contends the trial court erred in admitting her July 18 statement to Detectives Trexell and Weaver. She contends: 1) The first part of her statement was made while during custodial interrogation and without her Miranda[1] warnings being read; 2) The second portion of her statement, after Miranda warnings were given, was improperly admitted because it was tainted an inadmissible under Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010); and 3) The statement as a whole was involuntary given the conditions under which it was given and Appellant's mental and physical state. The first two issues are clearly not preserved for review on appeal as the only issue ever raised to the trial court related to the knowing and voluntary nature of the statement given Appellant's lack of sleep, her taking of medication, and being out the night before. Further, the issues fail on their merits.

Preservation

During the Jackson v. Denno[2] hearing regarding the admission of the statements, the only objection made by Appellant's counsel was to the voluntariness. (Oct. T. 195-196; R. 167-168). At trial, when the court asked for objections to the admission of the statement, Appellant's counsel merely stated: "We had previously placed our objection but subject to that." At no time did he object to any part of the statement coming in for

[1] 384 U.S. 436 (1966).
[2] 378 U.S. 368 (1964).

lack or Miranda, nor did he object to the post-Miranda portion being tainted or inadmissible under Navy or Seibert. As a result these issues are clearly no preserved for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

The issues also fail on their merits. This case is clearly distinguishable from Navy and Seibert. Further, the trial court did not abuse his discretion in finding the statement was knowingly and voluntarily given.

Miranda warnings are required for official interrogations only when an individual "has been taken into custody or otherwise deprived of his freedom of action in any way." State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997). This language is interpreted to mean a formal arrest or a detention associated with a formal arrest. Id. (citing Berkemer v. McCarty, 468 U.S. 420 (1984)). To determine whether an individual is in custody, the trial judge was required to examine the totality of the circumstances, which included factors such as the place, purpose, and length of interrogation, as well as whether Appellant was free to leave the place of questioning. Id. "The fact the investigation has focused on the suspect does not trigger the need for Miranda warnings unless he is in custody." Easler, 327 S.C. at 128, 489 S.E.2d at 621 (citing Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)).

"The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody." Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994). The initial determination of whether an individual was in custody depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned. State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (citing Stansbury v. California, 511 U.S. 318 (1994)).

Appellant was not in custody at the time of her initial questioning. She was asked while outside her residence whether she was willing to go to the Horry County Police Department for an actual videotape interview. She agreed and willingly went to the station for the interview. (T.670-671; 953-954; R. 598-599; 825-826). At no time was Appellant told she could not leave, nor was she under arrest or in detention. Given the totality of the circumstances in this case, Appellant was not in custody at the time of her initial statement.

Further, this case is distinguishable from Navy and Seibert. In Seibert, the United States Supreme Court considered with the police practice of questioning a suspect until incriminating information is elicited, then administering Miranda warnings. Following the warnings, the suspect is lead through the same questioning to re-obtain the incriminatory statements. The post-warning statement is then sought to be admitted.

> The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;

> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Seibert, 542 U.S. at 616; Navy, 386 S.C. at 302, 688 S.E.2d at 841-842. The Court in Seibert explained: "The object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Seibert, 542 U.S. at 611.

In Navy, the South Carolina Supreme Court explained:

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after respondent admitted he had popped the child on the back and "patted" his mouth—respondent was permitted a supervised cigarette break, then given Miranda warnings, with interrogation by the same officer resuming immediately.

Navy, 386 S.C. at 303, 688 S.E.2d at 842. The Court found the statement given prior to Miranda, as well as the post-Miranda statement, had to be suppressed.

The facts of this case are significantly different from those of Navy and Seibert. While those two cases both involved officers obtaining incriminating statements without having given Miranda warnings and then re-obtaining those same incriminating statements after Miranda, the officers in this case did not obtain anything incriminating regarding Appellant's involvement in the minor victim's death prior to reading her Miranda rights. She talked about her background, the events since the child went into the hospital, and tried to provide background regarding her daughter's issues growing up. At

no time did she make any incriminating statements during the pre-Miranda statement to the officers. As a matter of fact, she maintained throughout her statement that she did nothing to the child and did not know how the injuries resulted. As a result, even if preserved, the officers did not violate the Fifth Amendment rights of Appellant as discussed in Seibert or Navy.

Finally, Appellant's statements were knowingly and voluntarily given. This Court explained:

> To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. During this hearing, the circuit court must examine the totality of circumstances surrounding the statement and determine whether the State has carried its burden of proving the statement was given voluntarily. If the statement is found to have been given voluntarily, it is then submitted to the jury where its voluntariness must be established beyond a reasonable doubt. On appeal, the circuit court's decision as to the voluntariness of the statement will not be reversed unless so erroneous as to demonstrate an abuse of discretion.

State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009).

The circuit court in this case conducted a hearing pursuant to Jackson v. Denno and heard the testimony of Detective Troxell who testified she did not appear impaired in any way, he had no concerns with her ability to understand what was happening during the interview, she was not educationally or mentally incapacitated, and he did not force or coerce the statement from Appellant. Significantly, the circuit court also viewed the videotape of Appellant's statement.

The circuit court issued detailed findings of fact regarding the voluntariness of the statement. He found:

> I've considered the circumstances of the, of the interrogation and the characteristics of your client. I think your client is an intelligent person; it's obvious from her responses. On the tape I do not see any evidence that would indicate to me that she was intoxicated, did not know what she, she was doing and she's a person that is mature. I've looked at the details of the interrogation. She was advised of her Miranda rights, no question about that. It was about an hour and a half long. I don't find that to be overly lengthy.
>
> The, there was no use of, in my view, of any threats or punishment for her answers. I notice that she did have her medication; she did have a purse. She did have something to drink during the interrogation. I paid close attention to the surroundings, it appeared to be like an office, more or less, nothing coercive about that. I believe it was a voluntary statement and I will admit it, okay.

(Oct. T. 196-197; R. 168-169).

The findings of the trial court are clearly supported by the Detective's testimony as well as a viewing of the statement and the conditions under which it was given. As a result, the trial court did not abuse his discretion in finding the statement was knowingly, intelligently, and voluntarily given. The trial court properly admitted the statement of Appellant and this Court should affirm that finding.

II. The trial court properly denied Appellant's motion for directed verdict.

Appellant maintains the trial court erred in denying 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.

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

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

> (A) A person is guilty of homicide by child abuse if the person:
> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
> (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.
>
> (B) For purposes of this section, the following definitions apply:

> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
> (2) "harm" to a child's health or welfare occurs when a person:
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment. . . .

It is clear from the statutory definition that to be guilty of homicide by child abuse or aiding and abetting homicide by child abuse one does not have to actually inflict the injury. A person may by act or omission allow the injury to be inflicted to cause the harm which may form the basis of the child abuse or neglect.

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

> The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child's physical health. Additionally, harm to a child's health occurs when a person either inflicts, or allows to be inflicted physical injury upon a child. Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death.

Smith, 359 S.C. at 492, 597 S.E.2d at 894 (internal citations omitted). This Court found where the evidence indicated one of the two adults clearly caused the injury, the fact the

exact identity of the individual who physically caused the harm is not necessary to support sending the case to the jury.

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 with the toddler after this time was when Appellant entered the room to get the toddler while her co-defendant was not present.

As a result, the evidence suggests either Appellant caused the harm to the toddler when she went to pick him up or she should have known the harm was done because the child would have been altered and not breathing or acting normally when she checked on him. In any event, she caused the harm, allowed the harm to occur, or failed to act appropriately based on the harm that was caused to the child. As in the Smith case, two people were present, either one or both of them had to do something to the child, and either one or both knew about it. Accordingly, the State provided evidence sufficient to warrant sending the case to the jury. See Smith, 359 S.C. at 492, 597 S.E.2d at 894.

CONCLUSION

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

Respectfully submitted,

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September 18, 2013

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.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served. This 18th day of September, 2013.

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