ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

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S.C. Supreme Court

THE STATE,

PETITIONER/RESPONDENT,

V.

JULIA GORMAN,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2014-001008

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTION PRESENTED

Did the Court of Appeals correctly determine Gorman was entitled to a directed verdict on the charge of aiding and abetting homicide by child abuse pursuant to section 16-3-85(A)(2) of the South Carolina Code?

STATEMENT OF THE CASE

During its September 2008 term, the Horry County Grand Jury indicted Julia Gorman for homicide by child abuse (2008-GS-26-3756). In its February 2010 term, the Horry County Grand Jury indicted Gorman for unlawful conduct toward a child (2010-GS-26-00841). Finally, during its May 2010 term, the Horry County Grand Jury indicted Gorman for aiding and abetting homicide by child abuse (2010-GS-26-02194). R. 888-889; R. 891-892; R. 894-895. Gorman 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 Gorman. Carla F. Grabert-Lowenstein represented Palmer. Candice A. Lively and Nancy G. Cote prosecuted the cases. R. 1.

The jury found Gorman and Palmer 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 Gorman 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; R. 890; R. 893; R. 896. Gorman filed a timely notice of appeal.

After the parties filed their final briefs, the Court of Appeals scheduled oral argument on October 9, 2013. On that date, the Court of Appeals consolidated Gorman's case with Palmer's. On February 12, 2014, the Court of Appeals issued a split decision. Although a unanimous panel reversed Gorman's conviction under the aiding and abetting portion of the statute, two of the three judges voted to affirm Gorman's conviction under the principal portion of the statute and the conviction for unlawful conduct toward a child. App. 1-15. On March 13, 2014, the state filed a petition for rehearing on the reversal of the aiding and abetting charges. App. 34-38. On April 7, 2013, the Court denied the state's petition for rehearing. App. 41-42.

On June 5, 2014, the state filed a petition for a writ of certiorari challenging the Court of Appeals' decision directing a verdict on the aiding and abetting charge. Gorman now files her return to the state's petition.[1]

[1] Gorman has filed a petition for writ of certiorari asking this Court to review the Court of Appeals' split decision affirming the homicide by child abuse conviction.

ARGUMENT

The Court of Appeals correctly determined Gorman was entitled to a directed verdict on the charge of aiding and abetting homicide by child abuse pursuant to section 16-3-85(A)(2) of the South Carolina Code.

Reasons to deny certiorari

Pursuant to Rule 242(b), SCACR and long-standing practice of this Court, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." The character of reasons considered for certiorari review include novel questions of law, when a judge dissents in the opinion of the Court of Appeals, where the Court of Appeals' decision conflicts with a prior decision of this court, where substantial constitutional issues are involved, and where the Court of Appeals' decision concerns a federal question and conflicts with a decision of the United States Supreme Court. The state's petition offers none of these characteristics to require certiorari review. In fact, the state's petition does not even cite to the governing rule or offer any reasons to support its request for certiorari other than the merits of the case.

Our appellate courts have addressed the issue of a directed verdict numerous times, including in the specific instance of aiding and abetting homicide by child abuse. The panel of Court of Appeals judges unanimously reversed Appellant's conviction concerning aiding and abetting. The Court of Appeals' decision aligns with this Court's jurisprudence and the United States Supreme Court's jurisprudence. Thus, this Court should deny the state's petition as it fails to fall within the character of reasons requiring review. Additionally, the Court of Appeals correctly decided the matter as it concerns the charge of aiding and abetting homicide by child abuse.

Relevant facts

Pretrial hearing

On May 26, 2011, the prosecutor candidly admitted she had no idea who harmed minor. Specifically, she stated she indicted Gorman and Palmer for homicide by child abuse and aiding and abetting homicide by child abuse because she had "two individuals who were the only two people who could have had access and contact with this child and the child ends up dead, that's it. So it could have been either one of them and that's where we are." R. 7, line 14 – R. 8, line 3. The prosecutor clarified that in her view, "the case law of the Supreme Court of South Carolina clearly allows us to proceed under that theory that we do not know which one was necessarily the principal aiding and abetting, that's why I charged them with both." R. 9, lines 5-13. The prosecutor was "proceeding that either one of them had access and could have inflicted the blow that killed the child, there you go." R. 9, lines 16-18.

Trial

Prosecution's evidence

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. The prosecution alleged that on July 14, 2008, minor suffered severe head trauma. R. 13, line 20 – R. 14, line 3; R. * (Indictments). On July 16, 2008, minor died as a result of the head trauma. R. 270, lines 4-5.

The prosecution introduced statements made by Gorman and Palmer while in police custody. Neither admitted causing harm to minor. The prosecution relied primarily upon medical

evidence to support its theory that either Gorman or Palmer 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, arrived at Gorman'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; R. 335, lines 8-15. Although Rainbolt transferred minor to the medic unit in the ambulance and rendered aid to minor, he saw no bruises on minor's body and observed no injuries to minor's head. R. 337, lines 2-6; R. 343, lines 10-11; R. 345, lines 15-20.

John Cacace, a medical doctor at Conway Medical Center's Emergency Department, treated minor on July 14, 2008 in the emergency room following minor's arrival via ambulance. 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. According to Dr. Cacace, the 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 (emphasis added).

Dr. Donna Ray Roberts, a neuro-radiologist at MUSC, reviewed 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. 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 (emphasis added).

She believed 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. However, she could not say whether the fractures were intentional or accidental, but she would not expect to see a fracture from a fall from standing or from a stroller. R. 407, lines 22-23; R. 407, line 24 – R. 408, line 2; R. 426, lines 17-19. 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 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 (emphasis added). 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, consulted on minor's case on July 15, 2008. R. 478, lines 13-14; R. 484, lines 18-20. Gorman and Palmer provided Dr. Abel with the same history of minor as they provided to police, including that Gorman 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 (emphasis added); R. 527, line 14 – R. 528, line 20.

On cross-examination, she admitted she was unable to confirm Palmer'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.

Motion for directed verdict

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

> They've established that an injury was inflicted upon [minor]; they have not established, they have not connected that injury to Gorman. 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," Gorman responded the evidence was questionable because the cause of death was not due to shaking. R. 769, lines 16-19. Gorman argued Palmer's denial of guilt likewise failed to provide any direct or substantial circumstantial evidence of Gorman'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 Palmer injured the child and the child was unconscious when Gorman came home and she found him that way." R. 772, lines 1-6. Gorman noted that in that scenario, there was no evidence that Gorman failed to act. R. 772, lines 7-8. "[t]he other [scenario] is that Gorman came home and as Palmer 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.

Gorman's defense

During the defense's case-in-chief, Gorman 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 Gorman leaving working at 3:45 and it being physically impossible to arrive at IGA by 3:52 p.m. from her workplace, Gorman 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.

Gorman and Palmer sat down to dinner. After the two ate, Gorman prepared a plate for minor. R. 802, lines 13-18. Gorman 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 Palmer who took minor from her. Gorman then called 911. R. 803, lines 4-15.

Gorman 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.

Renewed Motion for Directed Verdict

At the conclusion of the presentation of the defense case, Gorman renewed her motion for a directed verdict. Specifically, Gorman 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. Gorman argued the evidence "[a]t best [] raises a mere suspicion of her guilt." R. 873, lines 4-23. The judge denied Gorman's motion. R. 873, line 24 – R. 874, line 1.

Motion for a New Trial

Gorman moved for a new trial based upon the insufficiency of the evidence after the jury returned its verdicts. Her counsel explained the motion was based in part upon the "inconsistent theories." Gorman described the verdicts as "mind boggling" because the jury found Gorman guilty "of being the principal and being the accomplice." As expressed by Gorman: "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 Gorman's convictions for both charges, "the jury could not have understood their obligations and responsibilities as jurors." Gorman further explained the state presented "no direct evidence" in the case, and the circumstantial evidence presented was not substantial. According to Gorman, 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 Gorman's motion. R. 882, lines 13-22.

Sentencing

During the sentencing proceeding, the judge expressed some of his reasoning behind his decision to deny Gorman'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.[2]

Decision by the Court of Appeals

On February 12, 2014, a unanimous panel of the Court of Appeals reversed Gorman's conviction for aiding and abetting. State v. Palmer, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014). The Court of Appeals held the "state's evidence conclusively proved the child died from child abuse," but determined the "state presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse." Thus, the Court held the trial court erred in denying the motions for a directed verdict. Id. at ___, 758 S.E.2d at 204. Distinguishing the instant case from State v. Smith, 359 S.C. 481, 597 S.E.2d

[2] This explanation demonstrates the trial court's failure to apply the correct standard when considering Gorman's directed verdict motion. The trial court must ask if there is any direct or substantial circumstantial evidence of the charged offense, not whether there is "any evidence," which is the standard used by the trial judge in the instant case. This further supports the Court of Appeals' decision to reverse.

888 (Ct. App. 2013), the Court of Appeals correctly noted the key fact in Smith was that "the defendants were never separated during the time the medical evidence proved the injuries occurred, and 'the medical testimony indicated that the victim['s] ... symptoms would have been severe and immediate, and importantly, obvious to both Smith and the victim's mother very soon after the injuries were inflicted.'" Palmer, 408 S.C. __, 758 S.E.2d at 204 (internal citations omitted). The evidence presented at Gorman and Palmer's trial showed the two "were separated for periods of time in which the injury could have occurred, and Dr. Abel testified the injuries may not have been apparent to someone who did not see them inflicted." Id.

Discussion

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). The prosecution must prove the identity of the defendant as the person who committed the charged crime beyond a reasonable doubt. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (citing Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013)).

Critically, the prosecution "has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013); see also State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984)(explaining that"[b]y bringing the case, the state assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act"). When a case is built wholly on circumstantial evidence, if the state fails to produce substantial circumstantial evidence the defendant committed a particular crime, he is entitled to a directed verdict. Odems, 395 S.C. at 586, 720 S.E.2d at 50. Thus, the prosecution must present any direct or substantial circumstantial evidence of the identity of the perpetrator of a crime in order to survive a directed verdict motion.

Recently, the Court of Appeals granted a directed verdict to Karl Lane on the charge of burglary in the first degree. On April 21, 2011, Mark McSwain discovered several firearms were stolen from his safe. McSwain's neighbor saw a car carrying two people pull into McSwain's driveway at 3:20 p.m. that day. One of the individuals approached the front door of the home, return to the car, and then approach the back door. The neighbor described the car as red or burgundy with a paper tag and the front passenger panel was covered in gray primer. After

police left the scene, McSwain noticed a folded piece of paper in the grass beside the driveway. The paper was from the unemployment office, where Lane had visited the day of the burglary and was located about three miles from McSwain's house. Lane, 406 S.C. at 119-120, 749 S.E.2d at 166-167.

The prosecution presented evidence that at times Lane drove a car matching the description provided by McSwain's neighbor and was driving the car the day of the burglary, that the folded piece of paper belonged to Lane, and that Lane did not want to talk to the police the day after the burglary. However, the Court found the evidence did not meet the standard of substantial circumstantial evidence. "At most, the evidence the state presented raise[d] only a mere suspicion that Lane committed the crime." Id.

The homicide by child abuse statute includes a principal portion and an aiding and abetting provision. Specifically, the 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 or neglect 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 (1) Gorman knowingly aided and abetted another person in committing child abuse or neglect regarding minor, (2) minor died as a result of the abuse or neglect, and (3) minor was under the age of eleven.

In State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004), the Court of Appeals 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.

Recently, the Court of Appeals reversed a trial court's failure to grant a directed verdict on the aiding and abetting portion of the homicide by child abuse statute. State v. Lewis, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013). The Court of Appeals defined "aid and abet" as "'assist[ing] or facilitate[ing] the commission of a crime or ... promot[ing] its accomplishment.'"

Id. at 354, 743 S.E.2d at 128 (quoting Black's Law Dictionary 81 (9th ed. 2009)). Explaining clearly established law concerning aiding and abetting, the Court of Appeals stated that "[i]n order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." Id. at 354, 743 S.E.2d at 129 (internal citations omitted). The prosecution failed to present any evidence that Lewis witnessed his girlfriend's infant daughter, who later died. The fact that Lewis witnessed his girlfriend spank her son earlier in the night was insufficient to show Lewis knew his girlfriend was going to abuse her infant daughter later. Id. at 355-356, 743 S.E.2d at 129.

Further, the Court of Appeals held that "an overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held liable for a failure to act." Id. at 356, 743 S.E.2d at 130. Thus, even if Lewis knew a crime was occurring, his failure to act was insufficient as evidence of aiding and abetting. Id. Additionally, the Court of Appeals noted the requisite mental state for aiding and abetting was knowingly per the statute. Thus, the state was required to prove Lewis knew he was aiding and abetting child abuse or neglect. Id. The evidence failed to demonstrate Lewis knew of his girlfriend abusing her infant daughter because Lewis and his girlfriend were apart when the incident occurred, and as soon as Lewis found the daughter in an odd condition, he sought medical help. Id. at 356-357, 743 S.E.2d at 130.

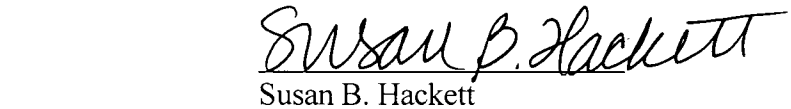
As the Court of Appeals correctly held, no direct or substantial circumstantial evidence existed that Gorman knowingly aided and abetted another person to commit child abuse. The evidence presented by the prosecution was that the injury to minor occurred sometime within a week or three days of July 14, 2008 or on July 14, 2008, but the specific time was unknown. Although the state claimed that Gorman and Palmer cared for minor at all times on that day, this

was not correct as demonstrated by the evidence. In fact, the evidence showed Gorman was at work for most of the day when the injury may have been inflicted, and her interaction with minor was limited to when she discovered minor actively seizing, which was when she called for help. The evidence failed to show that Gorman and Palmer were with minor the entirety of July 14, 2008, when the injury may have occurred or that they were with minor. The evidence fell far short of showing Gorman knowingly aided and abetted the abuse of minor or that she was even aware of minor's injury.

CONCLUSION

Gorman respectfully requests this Court deny the state's petition for writ of certiorari.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER.

This 6th day of August, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

PETITIONER/RESPONDENT,

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JULIA GORMAN,

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CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Julia Gorman #348815, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 6th day of August, 2014.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

SWORN TO BEFORE ME this 6th day
of August, 2014.

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