STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

PETITIONER/RESPONDENT,

V.

JULIA GORMAN,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2014-001008

BRIEF OF RESPONDENT/PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in failing to direct a verdict of acquittal where the state failed to present any direct or substantial circumstantial evidence that Gorman committed homicide by child abuse and unlawful conduct toward a child?

STATEMENT

During its September 2008 term, the Horry County Grand Jury indicted Julia Gorman (hereinafter 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 the co-defendant. Candice A. Lively and Nancy G. Cote prosecuted the cases. R. 1.

The jury found Gorman 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 Gorman to thirty-five years' imprisonment for homicide by child abuse, ten years' imprisonment for unlawful conduct toward a child, and twenty years' imprisonment 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 the co-defendant's case. 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. Gorman filed a petition for rehearing challenging the Court's affirmance of her conviction. App. 16-26. The state

responded on March 10, 2014. App. 27-33. On April 7, 2013, Chief Judge Few and Judge Kondorus denied Gorman's petition for rehearing. Judge Pieper would have granted the petition. App. 43.

On July 7, 2014, Gorman filed a petition for a writ of certiorari concerning the Court of Appeals' decision regarding her challenge to her convictions of homicide by child abuse and unlawful conduct toward a child. On September 24, 2014, this Court granted the petition for writ of certiorari and ordered the parties to brief the issue. This brief follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's failure to direct a verdict of acquittal in Gorman's favor where the state failed to present any direct or substantial circumstantial evidence that Gorman was guilty of homicide by child abuse and unlawful conduct toward a child.

Relevant facts

Pretrial remarks

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

Trial

Prosecution's evidence

In addition to the statements made by Gorman and co-defendant while in police custody, the prosecution relied primarily upon medical evidence to support its theory that either Gorman 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 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. 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. 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. Gorman and co-defendant 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; 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.

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 co-defendant'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 [codefendant] 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. "The other [scenario] is that [Gorman] 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.

Julia 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 work 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 co-defendant 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 co-defendant 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. Gorman 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.

Decision by the Court of Appeals

On February 12, 2014, a divided Court of Appeals affirmed Gorman's conviction for homicide by child abuse and reversed her conviction for aiding and abetting. Two judges determined the prosecution conclusively established by direct evidence that minor's fatal injuries were the result of child abuse. State v. Palmer and Gorman, 408 S.C. 218, 228, 758 S.E.2d 195, 201 (Ct. App. 2014); App. 8. Two judges determined the prosecution conclusively established by direct evidence that minor's injuries occurred sometime on July 14. Id.; App. 8. Concerning identity, the two judges explained that the prosecution relied exclusively on circumstantial evidence. "Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries." Id. at 229, 758 S.E.2d at 201; App. 8. Thus, the divided Court of Appeals upheld Appellant's conviction. Even the majority admitted the prosecution's evidence failed to eliminate the possibility that the other defendant inflicted all of the injuries that killed the child. Id. at 229-230, 758 S.E.2d at 203; App. 11.

The Honorable Daniel Pieper dissented from the majority opinion concerning the homicide by child abuse conviction and unlawful conduct toward a child. Judge Pieper found insufficient evidence of guilt for the charges. In arriving at his conclusion, Judge Pieper relied heavily upon the fact that the prosecution had failed to prove the identity of the person who caused the harm to

minor. As Judge Pieper explained, "[t]he evidence establishes that Gorman and Palmer each had time alone with the child during the timeframe of the abuse, and therefore, the state has only demonstrated that each defendant had an opportunity to injure the child." Additionally, Judge Pieper relied upon this Court's opinion in Hepburn, supra, to "find the only inference that can be fairly and logically deduced from the evidence is that one of the two codefendants inflicted the child's injuries." Id. at 236-237, 758 S.E.2d at 205-206 (Pieper, J. dissenting); App. 15.

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).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, this 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. This Court found the 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), this 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 State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), this 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, this 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. This 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.

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.

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 Gorman under circumstances manifesting extreme indifference to human life. The Court of Appeals 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 (2003), this 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 thereof."

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.

In State v. Hepburn, 406 S.C. 416, 442, 753 S.E.2d 402, 416 (2013), this Court directed a verdict in favor of Hepburn following her conviction for homicide by child abuse. After accepting the waiver rule, this Court held "[w]hile undoubtedly present at the scene, the only inference that can be drawn from the state's case is that one of the two co-defendants inflicted the victim's injuries, but not that Appellant harmed the victim." Id. at 440, 753 S.E.2d at 415 (emphasis in original). According to this Court, the state's evidence established Hepburn was asleep at the time the child sustained injuries and there was no evidence that Hepburn was aware of the child's injuries. Id. at 442, 753 S.E.2d at 415-416. This Court characterized the state's evidence as "scant" concerning Hepburn's frustrations due to her failure to secure employment, her living situation, and parental responsibilities. Id. at 440, 753 S.E.2d at 414-415.

No substantial circumstantial evidence exists that Gorman injured minor. The evidence presented by the prosecution was that the injury to minor occurred sometime on July 14, 2008, but the specific time was unknown. Although the state claimed that Gorman 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 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 Appellant and Palmer were with minor the entirety of July 14, 2008, when the injury occurred. The evidence fell far short of showing Appellant was aware of the injury or caused the injury.

CONCLUSION

Respondent/Petitioner respectfully requests this Court reverse the decision of the Court of Appeals and grant a directed verdict of acquittal in her favor on the charges of homicide by child abuse and unlawful neglect of a child.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER.

This 24th day of October, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

PETITIONER/RESPONDENT,

V.

JULIA GORMAN,

RESPONDENT/PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of Respondent/Petitioner, in this case has 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 24th day of October, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

SWORN TO BEFORE ME this 24th day
of October, 2014.

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