

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Appellate Case Number: 2012-212663

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SC Court of Appeals

The State

Appellant.

v.

Donna Lynn Phillips,

Respondent

Petition for Rehearing

The appellant, Danna Lynn Phillips, respectfully petitions this Court for rehearing, pursuant to Rule 221(a), SCACR, because this Court overlooked or misapprehended *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) when considering the standard of review for directed verdict motions. Once this Court recognizes the significance of *Hepburn* and the “waiver rule,” including the exceptions to that rule, the need to reverse the trial court becomes apparent.

I. This Court overlooked or misapprehended *Hepburn* when considering the standard of review for directed verdict motions.

Ms. Phillips filed her initial brief with this Court on August 23, 2013. Our Supreme Court decided *Hepburn* on December 11, 2013. By letter dated September 3, 2014, Ms. Phillips called this Court’s attention to *Hepburn*. Pursuant to the limitation contained in Rule 208(b)(7), SCACR, Ms. Phillips did not include any argument in her

letter. This Court's only reference to *Hepburn* is in footnote 2 of the written opinion, which stated:

The State also asserts Phillips' failure to seek medical care after giving the child multiple doses of Tussionex constituted child abuse or neglect. *See* §16-3-85(B) (defining "child abuse or neglect" as "an act *or omission* by any person which causes harm to the child's physical health," and stating "harm" includes the "fail[ure] to supply the child with adequate ... health care" that causes a "condition resulting in death" (emphasis added)). We need not address this argument because we find the State presented direct evidence that Phillips committed child abuse by giving the child multiple doses of Tussionex. *See State v. Hepburn*, 406 S.C. 416, 428 n. 14, 753 S.E.2d 402, 408 n. 14 (2013) (declining to decide other issues when the determination of one issue was dispositive).

This Court, respectfully, appears to have overlooked or misapprehended the central holding in *Hepburn*, as well as that holding's implications for Ms. Phillips' case. *Hepburn* addressed the applicability of the "waiver rule" and the exceptions to that doctrine of law. That case involved two defendants—Ashley Hepburn and Brandon Lewis—and "the State chose to prosecute them as co-defendants in a joint trial." *Hepburn*, 406 S.C. at 418, 753 S.E.2d at 403. "Neither party accused the other of any wrongdoing at th[e] time" of the police investigation. *Id.* 406 S.C. at 422, 753 S.E.2d at 405. At the end of the State's case, Hepburn moved for directed verdict. Her

counsel argued, the State's evidence merely rose to a suspicion that [she] committed the crime, and this mere suspicion was insufficient to survive a directed verdict motion, in that the State had only proven that [Hepburn] was in the home when the victim sustained the fatal injuries. While [her] counsel conceded that the State had proven that the child died from homicide by child abuse, he argued that the State had not proven that the child abuse was inflicted by [Hepburn]. Finding it could be logically deduced from the circumstantial evidence that one of the two defendants violently shook the victim causing her injuries, the court denied [Hepburn's] motion for directed

verdict. The trial judge stated that the jury would be given a “mere presence” charge, would have the opportunity to evaluate the witnesses' credibility, and could ultimately conclude that either defendant was not guilty.

Id. 406 S.C. at 424, 753 S.E.2d at 406.

Hepburn’s “testimony largely corroborated the State's evidence.” *Id.* She “testified that Lewis was the only person awake in the house at the time the victim sustained her injuries and was the only person who could have harmed the victim.” *Id.* 406 S.C. at 425, 753 S.E.2d at 407. “On the other hand, Lewis's defense painted a markedly different version of events.” *Id.* 406 S.C. at 426, 753 S.E.2d at 407. Lewis claimed

he heard the victim “faintly crying” and then “heard [Hepburn] get up and stomp into the room, I actually felt her footsteps.” Lewis testified, “I can remember hearing [Hepburn] stomp into the room I heard her go into the room and I can remember [the victim] crying a little bit. And then she wasn't crying and [Hepburn] went out of the room.” Lewis testified that the victim's cries were different from her normal cries. He testified he heard “short pauses in between [the victim's] cry and it just, it sounded to me like she could have been shaken.” Lewis testified that the crying then stopped and [Hepburn] left the victim's bedroom.

Id. 406 S.C. at 426-27, 753 S.E.2d at 407. Lewis claimed “he withheld this version of events in previous statements because he loved [Hepburn] and wanted to protect her.”

Id. 406 S.C. at 427, 753 S.E.2d at 408.

In addition to his own testimony,

Lewis re-called an investigating officer to the witness stand, who testified that after Lewis's second statement was shown to [Hepburn] later in the afternoon on October 13, she allegedly exclaimed “oh my god all of this is true but I don't remember hurting my baby.”

Id. 406 S.C. at 428, 753 S.E.2d at 408.¹

At the close of all evidence, Hepburn renewed her motion for directed verdict. She appealed to this Court, but our Supreme “Court certified [her] case for review pursuant to Rule 204(b), SCACR.” *Id.*

At the beginning of its discussion about the “waiver rule,” our Supreme Court noted its

decision depends on *what* evidence we deem appropriate for consideration at the appellate stage of review to assess whether the State presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused sufficient to overcome [Hepburn’s] **mid-trial motion for directed verdict**. In turn, this issue hinges on whether or not we accept the so-called waiver rule.

Id. 406 S.C. at 429-30, 753 S.E.2d at 409 (internal quotations and citations omitted) (italics original; bold added). Under this rule, a defendant that presents evidence waives her directed verdict motion made at the end of the State’s case. “If a defendant renews his motion for judgment of acquittal at the end of all the evidence, the ‘waiver doctrine’ requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the Government’s case-in-chief.” *Id.* 406 S.C. at 430 (fn. 15), 753 S.E.2d at 409 (fn. 15).

After reaffirming the applicability of the “waiver rule” in our state, the *Hepburn* Court outlined significant exceptions to this doctrine. “Most courts that recognize the waiver rule also acknowledge its inapplicability to co-defendant testimony.” *Id.* 406 S.C.

¹ In addition to his own testimony, Lewis actually called eight witnesses during his defense case. See *Hepburn* Record on Appeal (found at <http://ctrack.sccourts.org/public/caseView.do?csIID=49979> (last viewed November 30, 2014)). In addition to her own testimony, Hepburn called three witnesses. *Id.*

at 434, 753 S.E.2d at 412. Recognition of the nature of our adversarial system forms the foundation for the “waiver rule.”² “[T]he decision of a codefendant to testify *and produce witnesses* is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial.” *Id.* 406 S.C. at 435, 753 S.E.2d at 412 (emphasis added).

Additionally, the waiver rule recognizes that “if the defendant's case does not provide a missing link in the Government's evidence or rectify any deficiency in the State's case, then the presentation of a defense does not operate as a waiver of the right to have an appellate court review the mid-trial denial of a motion for directed verdict on the State's evidence alone.” *Id.* 406 S.C. at 436, 753 S.E.2d at 412.

Hepburn, therefore, held “that the waiver rule is operative” but “because Appellant's co-defendant testified and implicated her and because Appellant's testimony merely rebutted this testimony, [the appellate court] will not consider either testimony in

² Important policy considerations related to the “waiver rule” arise from Solicitors and criminal defense lawyers’ respective roles in our adversarial system. “[P]rosecutors . . . are ministers of justice and not mere advocates. Their special responsibility carries with it specific obligations to see the defendant is accorded procedural justice.” *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (internal quotes and citations omitted) (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR). A criminal defense lawyer’s obligation is to advocate for the client. “The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.” *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948). The defense lawyer, not restricted by any of the additional special duties of prosecutors, is free to advocate every advantage for the client. *See also Amicus Curie* Brief of The South Carolina Association of Criminal Defense Lawyers in *Hepburn*, pp. 16-17 (found at <http://ctrack.sccourts.org/public/caseView.do?csIID=49979> (last viewed November 30, 2014)).

assessing the propriety of the trial court's denial of Appellant's mid-trial directed verdict motion." *Id.* 406 S.C. at 438, 753 S.E.2d at 413.

II. Once this Court recognizes the significance of *Hepburn* and the “waiver rule,” including the exceptions to that rule, the need to reverse the trial court becomes apparent.

In cases like Ms. Phillips', the Court is “called by [the] standard of review to consider the evidence as it stood after the State presented its case.” *Hepburn*, 406 S.C. at 442, 753 S.E.2d at 416. Under *Hepburn*, this Court *may not* consider the evidence presented by Ms. Phillips and co-defendant Honeycutt.³

A. Evidence presented at trial.

The State acknowledged the problems with its proof during its opening statement: “This crime is a crime where you will never hear the victim’s story.” Record on Appeal (hereinafter “R.”) 29, lines 12-13. The Solicitor acknowledged, “nobody” would admit to giving the child “that lethal dose of opiates.” R. 30, lines 6-12. The prosecutor asked the jurors to “weed through the evidence. . . . weed through the various statements” and “to put the pieces together, read between the lines, and find out the story that [the child] would tell you today, if he was still alive.” R. 30, lines 16-18; 32, lines 16-19.

After co-defendant Jamie Morris made his opening statement, R. 33-36, Ms. Phillips made hers. Her counsel stated, “My client is innocent because she didn’t do anything. She was simply a grandmother taking care of her grandkid.” R. 39, lines 2-4.

Co-defendant Latasha Honeycutt, the child’s mother, immediately began suggesting Morris or Phillips committed the crime: “She was handed her child Sunday

³ Under *Hepburn*, this Court may not consider the evidence presented by co-defendant Morris. This Court, however, did not identify any of that evidence as tending to prove Ms. Phillips’ guilt. *See* Slip Opinion, Sections II(D), III(A) and III(B).

evening with some congestion.” She put the child to bed. When the child was not responsive, Honeycutt “call[ed] 911.” R. 40, lines 17-25.

In Section II of the written opinion, this Court summarizes the evidence “the State presented” at trial “to prove Phillips’ guilt.” Slip opinion at 1. In Section II(A) of the written opinion, this Court summarized the testimony of Pickens County Sheriff’s Office Investigators Rita Burgess and Charlie Lark. The prosecution called both witnesses. R. 122-88; 271-72; 279-97. In Section II(B) of the written opinion, this Court summarized the medical evidence presented by Jeffery Morris Hollifield (a chemist), Robert Foley (a forensic toxicologist), and Michael Ward (a forensic pathologist). The prosecution called all three of these witnesses. R. 221-36; 309-66.

Sections II(C) and (D) of the written opinion, however, do not address evidence “the State presented,” Slip Opinion at 1, but rather evidence presented by Ms. Phillips and her co-defendants—Ms. Honeycutt in particular.

Ms. Phillips called two witnesses in her defense, and neither witness filled in the gaps in the State’s case. The first witness was Ms. Phillips’ daughter that was eleven years old at the time of the child’s death and fifteen at the time of trial. R. 501, lines 5-12; 505, lines 18-24. She was present at her mother’s house the entire weekend Ms. Phillips and co-defendant Morris had custody of the child. R. 501, lines 18-24. She testified the child was “fine. . . . act[ing] like a normal baby.” When Ms. Phillips and Mr. Morris returned the child to Honeycutt, he was “awake,” and “he seemed fine like a normal kid, other than maybe coughing. . . . [H]e didn’t act sick like he would have something that needed to [be] checked right away.” R. 504, lines 2-9. She also testified

about Honeycutt's strange behavior at the child's funeral, showing "no emotion." R. 504, lines 20-24.

Ms. Phillips testified in her own defense. When she and Morris got the child from Honeycutt on Friday, he was "awake," "alert," and "seemed to be fine." R. 543, lines 14-24. She did notice the child had "a little runny nose." R. 548, lines 6-7. While the child was with Ms. Phillips and her son, he had difficult sleeping, waking up with "nightmares" and "would start crying." R. 550, lines 14-20. She testified that while the child was with them, he was "crying" and "fussing." *E.g.* R. 563, line 5; 564, lines 11-14; 565, lines 16-17; 566, lines 9-12. Ms. Phillips testified that she did not give the child any Tussionex. R. 553, line 24 – 554, line 24; 562, lines 2-8; 568, lines 17-21; 572, line 12 – 574, line 5. When Ms. Phillips and her son returned the child, Mr. Morris told Ms. Honeycutt the child "was crying and he could be getting sick." The child was "a little wheezy," "might be getting congested," and "his nose was running." R. 578, line 22 – 579, line 4.

Co-defendant Honeycutt called Kayla Roper. Roper testified she overheard a statement by Ms. Phillips in the waiting room at the hospital. Roper claimed she "heard [Ms. Phillips] say that she had gave [sic] him some cough medicine over the weekend and 'surely to God that's not what is wrong.'" R. 616, lines 9-19. The prosecution seized on this testimony, not asking Roper about anything else. R. 614, line 10 – 615, line 15. Co-defendant Morris also emphasized this portion of Roper's testimony. R. 615, line 20 – 616, line 4. Ms. Phillips did not cross-examine Roper. R. 619, lines 5-6. The State relied on Roper's testimony during its closing argument, R. 812, lines 1-3, and in its brief to this Court, at p. 29.

Ms. Honeycutt also called Brandon Roper and testified in her own defense. R. 620-739.

As seen in Section I, *supra*, and Section II(B) *infra*, this Court overlooked or misapprehended the central holding in *Hepburn* when it considered the evidence set forth in Sections II(C) and (D) of the written opinion.

B. Discussion.

Ms. Phillips specifically called this Court's attention to her directed verdict motions both at the close of the State's case and the close of all evidence. Brief of Appellant 12.

At the close of the State's case, Ms. Phillips based her directed verdict motion on two grounds. First, she argued, "There's been no evidence to show whatsoever that she gave any drugs to anybody." R. 395, lines 6-7. Second, she argued there has been no showing of "extreme indifference." R. 395, lines 22-23. The trial court judge denied this motion based on the lethal dose of drugs and associated symptoms—not whether the State had presented evidence that Ms. Phillips administered the lethal dose of medication with willful indifference to the child's safety. R. 396, line 7 – 397, line 1.

Ms. Phillips renewed her directed verdict motion at the close of all evidence and stated, "The State has not proven by substantial circumstantial evidence that anybody did anything in this case." R. 740, lines 4-8.

1. Child Abuse.

Ms. Phillips' defense at trial did not dispute any of the medical evidence. Rather, she testified that she did not give the child any medication. Ms. Phillips' daughter confirmed Ms. Phillips' testimony.

In her brief before this Court, Ms. Phillips argued, “The [State’s] evidence merely raised a suspicion that Phillips was guilty of homicide by child abuse,” at p. 15. And, “The State only presented a mere suspicion that Phillips gave the child cough medicine,” at p. 16.

This Court acknowledged that Kayla Roper’s testimony—which was actually presented by co-defendant Honeycutt—was the only evidence presented during the trial that provided any evidence tending to prove that Ms. Phillips committed child abuse by providing the child Tussionex. Slip Opinion, Section III(A). This Court then concluded, “This evidence, when combined with the medical testimony that the cough medicine had to be Tussionex and the child died from receiving multiple doses of it, establishes that Phillips “cause[d] the death of [the] child ... while committing child abuse.” Slip Opinion at 5.

Under *Hepburn*, the Court erred by considering evidence presented by Honeycutt.⁴

The State might argue that it makes a difference that Ms. Phillips presented her case before co-defendant Honeycutt presented her case, but this consideration is not relevant. In *Hepburn*, Hepburn actually presented her case before co-defendant Lewis presented his case. *See Hepburn* Record on Appeal (found at <http://ctrack.sccourts.org/public/caseView.do?csIID=49979> (last viewed November 30, 2014)). Despite this sequence of testimony, our Supreme Court held:

We find this rationale persuasive. Here, [Hepburn] did not dispute the State's contention that the victim died from

⁴ To the extent this Court relied on Brandon Roper’s testimony, *see* Slip Opinion, Section II(D), *Hepburn* forecloses consideration of that evidence because co-defendant Honeycutt called him to the witness stand.

homicide by child abuse inflicted by one of the two defendants. Instead, her testimony rebutted Lewis's contention that she killed the victim. Thus, we recognize an exception to the waiver rule where a codefendant testifies, implicating the defendant, and will not consider Lewis's testimony, or testimony elicited by [Hepburn] that is responsive to Lewis's testimony, for purposes of determining whether the State presented substantial circumstantial evidence sufficient to survive [Hepburn's] mid-trial motion for directed verdict.

Hepburn, 406 S.C. at 436, 753 S.E.2d at 412 (citing *United States v. Belt*, 574 F.2d 1234, 1236–37 (5th Cir.1978)).

2. Mental State.

This Court pointed out, “[T]o prove Phillips acted with extreme indifference to the child's life, the State was required to prove Phillips intended to give the child Tussionex with the knowledge that doing so would create a risk to the child's life.” Slip Opinion at 5. As seen in Section II(B)(1), *supra*, Roper's testimony was the only evidence Ms. Phillips gave the child Tussionex. Consideration of Roper's testimony, however, departed from the applicable standard of review under *Hepburn*.

Consideration of Roper's testimony was also necessary for this Court's conclusion about mental state: “From this combination of direct and circumstantial evidence, a jury could infer Phillips acted with extreme indifference to the child's life.” *Phillips*, Slip Opinion at 7. This Court found Ms. Phillips own “testimony to be direct evidence that Phillips knew giving the child her prescription medication created a risk to the health of the child.” Slip Opinion at 6. Under *Hepburn's* application of the “waiver rule,” including the exceptions to the rule, this Court also erred by considering Ms. Phillips own testimony.

Thus, there is no reviewable evidence that Ms. Phillips gave the child Tussionex, let alone with extreme indifference for his life.⁵

3. Absence of Substantial Circumstantial Evidence.

This Court erred by concluding, “From this combination of direct and circumstantial evidence, a jury could infer Phillips acted with extreme indifference to the child's life.” Slip Opinion at 7. The only direct evidence relied upon by this Court in reaching this conclusion was the testimony of Roper and Ms. Phillips. Under *Hepburn*, the Court should not have considered either. Once this direct evidence is removed from consideration, only circumstantial evidence remains.

As she pointed out in her brief, at p. 15, “The evidence merely raised a suspicion that Phillips was guilty of homicide by child abuse. *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 572 (2000).” “A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged.” *Cherry*, 361 S.C. at 593, 606 S.E.2d at 478; *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). Not only did the State not present substantial circumstantial evidence of Ms. Phillips’ guilt, but also that evidence did not exclude “every other reasonable hypothesis,” *i.e.* that someone other than Ms. Phillips gave the child the lethal dose of medication. *Id.* 382 S.C. at 626 (fn. 2), 677 S.E.2d at 606 (fn. 2).

Once Ms. Phillips’ case is viewed as a circumstantial evidence case, the need to reverse the trial court and direct a verdict of acquittal becomes apparent. The State failed to present substantial circumstantial evidence of Ms. Phillips’ guilt of homicide by child abuse.

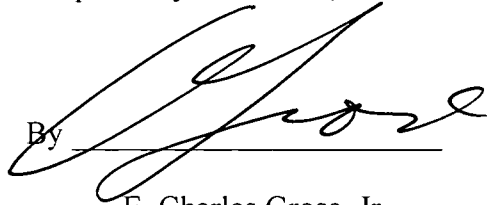
⁵ See also Brief of Appellant, at pp. 14-17.

Conclusion

This Court should rehear Ms. Phillips appeal, apply the “waiver rule” and exceptions to that rule as outlined by our Supreme Court in *Hepburn*, reverse the trial court judge, and direct a verdict of acquittal.

IT IS SO MOVED.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

Attorney for Appellant

December 1, 2014
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM PICKENS COUNTY

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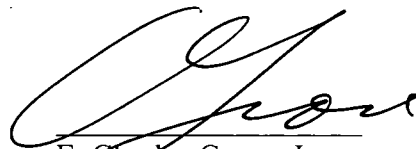
J. Benjamin Aplin, Esquire
Office of the Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

Attorney for Respondent

LaNalle C. DuRant, Esquire
Appellate Division
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

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(signature on next page)



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

December 1, 2014
Greenwood, South Carolina