THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-000197

The State,.....Respondent,

v.

Shawn Patrick White,.....Appellant.

INITIAL BRIEF OF APPELLANT

Kathleen Chewning Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, South Carolina 29924
(803) 943-4529

Robert M. Dudek
Chief Appellate Defender
Post Office Box 11433
Columbia, South Carolina 29211
803-734-1343

Attorneys for Appellant Shawn Patrick White

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT WHEN THE STATE'S EVIDENCE SHOWED ONLY HIS PRESENCE WITH THE VICTIM DURING A PORTION OF THE THIRTY-THREE HOUR TIMEFRAME IN WHICH HER INJURIES OCCURRED AND, THEREFORE, MERELY RAISED A SUSPICION OF GUILT?

STATEMENT OF THE CASE

This is an appeal from a criminal jury trial in which a jury found Appellant Shawn Patrick White ("White") guilty of homicide by child abuse under S.C. Code Ann. § 16-3-85 (2003). On July 26, 2013, White was indicted for homicide by child abuse. (Indictment). A jury trial took place before the Honorable Donald B. Hocker from January 6-9, 2014, in Abbeville, South Carolina. The State produced no direct evidence of the charge against White. At the close of the State's evidence, White made a motion for directed verdict based on the absence of substantial circumstantial evidence of the charge. (Tr. p. 447-48). White argued a directed verdict should be granted because the evidence presented by the State merely raised a suspicion of guilt. (Tr. p. 448 lns. 14-16). The trial court denied the motion. (Tr. p. 475 lns. 13-15). White renewed his directed verdict motion at the close of the trial, and the trial court again denied it. (Tr. p. 487 lns. 17-20).

The jury found White guilty, and the trial court sentenced him to forty years in prison, with four hundred and ninety-one days' credit for time served. (Tr. p. 540 lns. 18-23; Sentencing Sheet). On January 17, 2014, the trial court denied White's motion for a new trial. (Order). White file a timely Notice of Appeal.

FACTS

This case arises out of the death of a ten-month-old girl ("victim") in August 2012 as a result of nonaccidental head trauma. At the time of her injuries, victim lived in Calhoun Falls with her mother, Melody LaBounty ("LaBounty"); three older sisters, Child C, Child I, and Child R,[1] ages six, four, and three respectively; and White. (Tr. p. 245 lns. 3-5). The evidence

[1] The victim and minor girls' names, address, and dates of birth are substituted in this Brief and redacted in the Record on Appeal pursuant to Supreme Court Order No. 2014-04-15-02.

presented at trial shows that White and LaBounty were the only adults with victim during the timeframe in which some of her injuries occurred.

I. White's Role in Caring for Victim and Her Sisters

From January 1, 2012, until this incident occurred in August 2012, White lived with LaBounty and her daughters. (Tr. p. 210 lns. 4-7, p. 235 lns. 22-24). LaBounty and White dated in high school. (Tr. p. 210 lns. 8-12). White was not the biological father of any of LaBounty's children. (Tr. p. 291 lns. 2-3). In August 2012 LaBounty worked at Pop A Top Sports Bar in Abbeville from about 8:00 p.m. until 2:00 a.m. or 6:00 a.m. on the weekend. (Tr. p. 212 lns. 21-25, p. 217 lns. 20-24). White worked in construction. (Tr. p. 218 lns. 3-6). White babysat LaBounty's four daughters while she worked at night. (Tr. pp. 161 ln. 20 – 162 ln. 2).

LaBounty's house had two bedrooms—she slept in one and the three older children slept in the other. (Tr. p. 164 lns. 2-5). The doorknob on the door to the children's bedroom locked from the outside. (Tr. pp. 139 ln. 6 – 140 ln. 5). LaBounty testified *she* asked White to change the knob to lock from the outside because one of her daughters "would go in the room and lock herself in and wouldn't open the door, and we would have to beg her to open the door." (Tr. p. 221 lns. 12-19). Victim slept in a pack n' play crib in the living room. (Tr. p. 164 lns. 6-8). White slept on a couch in the living room. (Tr. p. 218 lns. 1-2).

II. Events Leading up to Victim's Injuries

From July 29-31, 2012, LaBounty traveled to North Carolina to visit a friend. (Tr. p. 212 lns. 12-20). In her absence, LaBounty chose to leave White to babysit victim. The other three girls stayed with LaBounty's mother for one day, until she called LaBounty and said "she was tired and she couldn't keep them." (Tr. p. 213 lns. 5-19). White then agreed to keep all four children, and LaBounty's father took them home to White. (Tr. p. 213 lns. 17-21). When

LaBounty returned home, victim had a bump on her head, which White explained occurred when his brother was roughhousing with the children on the front porch and accidentally knocked victim, causing her to hit her head on the steps. (Tr. p. 214 lns. 17-22, p. 236 lns. 5-13). LaBounty testified victim could crawl up the front steps and "was starting to walk." (Tr. p. 215 lns. 8-12). LaBounty believed victim hit her head on the steps because "she's moving around a lot and she could have fallen off those steps easily." (Tr. p. 215 lns. 17-19).

Victim was sick and throwing up for the next few days. (Tr. p. 216 lns. 6-9). LaBounty never took victim to the doctor and testified she gave her "teething tablets." (Tr. p. 237 lns. 3-6). LaBounty testified that, by the third day, victim improved, kept food down, and "wasn't lethargic or anything." (Tr. p. 216 lns. 11-15). LaBounty worked on the night of August 7, 2012. White arrived home from work about 6:00 p.m. to care for the children. (Tr. p. 292 lns. 15-16). LaBounty left around 7:30 p.m. and got home around 2:00 a.m. on August 8, 2012. (Tr. p. 219 lns. 17-18). Child C testified she and her sisters, including victim, played that night, and White put them to bed after they "were done with playing." (Tr. pp. 162 ln. 14 – 164 ln. 22). This is consistent with White's statement to police regarding the events of the night of August 7, 2012. (Tr. p. 292 lns. 15-25).

LaBounty testified she sometimes drinks alcohol at work and, on the night of August 7, she smoked marijuana with a male customer before coming home. (Tr. p. 238 lns. 6-15). They smoked marijuana around 11:00 p.m. (Tr. pp. 238 ln. 23 – 239 ln. 2). LaBounty testified she finally arrived home three hours later, around 2:00 a.m., August 8, 2012. (Tr. p. 219 lns. 17-18).

When LaBounty came home, White and victim were asleep in the living room, and the other children were asleep in their bedroom. (Tr. p. 220 lns. 9-13). The girls' bedroom door was unlocked and open. (Tr. p. 220 lns. 16-22). LaBounty testified victim appeared asleep on her

back, and she *heard victim snoring.* (Tr. p. 222 lns. 3-5, 21-22; p. 245 lns. 13-18). She could see victim from the street light coming in through the window and looked at victim in the pack'n play bed. (Tr. p. 250 lns. 17-24, p. 259 lns. 23-25). She did not see any marks on victim that night or the next morning. (Tr. p. 258 lns. 10-19).

LaBounty first went to sleep on another couch in the living room until Child R got up and they went to sleep in LaBounty's room. (Tr. pp. 222 ln. 25 – 223 ln. 2). White left around 6:30 a.m. to go to work. (Tr. p. 223 lns. 23-25, p. 241 lns. 17-23). LaBounty got out of bed around 9:00 or 9:30 a.m. after her mom called and woke her up. (Tr. p. 240 lns. 11-16). She went to a Dollar General store across the street from the house to get cereal and milk for the girls' breakfast. (Tr. p. 224 lns. 3-6, p. 224 lns. 10-14). The two middle children, Child I and Child R, went with LaBounty to the store but she left victim home alone with the six-year-old. (Tr. p. 224 lns. 6-17, p. 245 lns. 19-25). When LaBounty returned from the store, she fed the three older children and then put them on the front porch to color, leaving LaBounty alone in the house with victim. (Tr. pp. 243 ln. 18 – 244 ln. 2).

Despite three children, ages six, four, and three, and one adult moving around the small home, getting dressed, and eating breakfast, LaBounty claims it was quiet enough for victim to continue sleeping in the main living area of the house. (Tr. pp. 244 ln. 25 – 245 ln. 12). LaBounty did not move victim into a quiet bedroom to continue sleeping. (Tr. p. 244 lns. 22-24).

LaBounty testified she touched victim that morning "to make sure she wasn't hot or cold, but I didn't want to wake her because she hadn't been sleeping through the night for days." (Tr. p. 225 lns. 6-8). LaBounty did not testify as to whether victim appeared to be breathing normally or had any physical signs of injury when she touched victim. Later that morning, LaBounty

"was doing something on the laptop and [] looked over and it looked like [victim] was waking up. Like her eye was opening. So I went to go pick her up, and that's when she was limp." (Tr. p. 225 lns. 15-18). That occurred about 10:45 a.m., at which point victim had been *sleeping for over twelve hours* and had not eaten since dinner the night before. (Tr. p. 244 lns. 9-15). Victim usually woke up over three hours earlier, around 6:00 or 7:00 a.m. (Tr. p. 255 lns. 23-24). Contrary to the statement that victim looked "like her eye was opening," LaBounty testified that moments later she "tried to open her eyes and they wouldn't open." (Tr. p. 225 lns. 22-23). LaBounty did not explain how a "limp" child could have moved or shown signs of "waking up" given the medical testimony described below as to victim's brain injuries.

III. Victim's Injuries and Medical Care

LaBounty first called her mother, then "hung up and dialed 911." (Tr. p. 226 ln. 9). LaBounty made the 911-call at 10:53 a.m. on August 8, 2012. (Tr. p. 96 lns. 21-25). Lewis Murrell served as the Abbeville County EMS lead medic that responded to LaBounty's 911 phone call. (Tr. pp. 108 lns. 19-23, 110 lns. 3-13). Murrell testified victim was unresponsive and he started rescue breathing. (Tr. pp. 110 ln. 23 – 111 ln. 2). Victim's pupils were "fixed and dilated, which means they were not – not reactive, which can indicate some kind of neurological problem." (Tr. p. 113 lns. 9-11). White called the house while the ambulance was there "and asked what was wrong and [LaBounty] told him that [victim] was sick and we were going to the hospital." (Tr. p. 228 lns. 13-15). Victim arrived at Self Hospital in Greenville about thirty minutes later. (Tr. p. 112 lns. 5-11).

Dr. Richard Brooksbank is a staff emergency physician at Self Regional Healthcare in Greenwood. (Tr. pp. 263 ln. 23 – 264 ln. 2). The lower court qualified Dr. Brooksbank as an expert in the field of emergency medicine. (Tr. p. 268 lns. 13-15). Brooksbank treated victim

around 11:40 a.m. on August 8, 2012. (Tr. p. 269 lns. 9-13). He ordered a CAT scan, which showed "a significant amount of blood within her brain which is something that's often seen with trauma." (Tr. p. 273 lns. 4-7). The scan showed both "chronic blood which had been there for days to weeks" and "evidence of acute blood that had been present within the past several hours." (Tr. p. 273 lns. 15-18). "Acute" means "fresh" or "very recent." (Tr. p. 347 lns. 17-20). Brooksbank testified the acute blood in the brain "absolutely" could have occurred within the past "two or three" hours, and "It could have been minutes . . . to several hours" but "Twelve to 24 hours at the absolute most." (Tr. pp. 280 ln. 19 – 281 ln. 6). White had not been with victim since at least 6:30 a.m. and had not been the only adult with victim since 2:00 a.m., about ten hours earlier. The scan also showed a "midline shift," which occurs when one hemisphere of the brain moves and is displaced to the other side of the skull. (Tr. p. 273 lns. 8-10, p. 274 lns. 19-24).

Brooksbank found "no evidence of a skull fracture." (Tr. pp. 275 ln. 25 – 276 ln. 4). Brooksbank observed splotchy, red marks found on victim's arms, which he described as "nonspecific" and "often seen with decreased temperature or decreased oxygen saturation." (Tr. p. 276 lns. 15-17, p. 277 lns. 2-3). Brooksbank transferred victim to Greenville Memorial Hospital's pediatric intensive care unit. (Tr. p. 277 lns. 9-17).

Dr. Christopher Troup is a pediatric neurosurgeon at the Children's Hospital within Greenville Health Systems. (Tr. p. 339 lns. 13-16, p. 340 ln. 6). The lower court qualified Dr. Troup as an expert in pediatric neurosurgery. (Tr. p. 342 lns. 7-12). Troup operated on victim. (Tr. p. 343 lns. 19-21). He reviewed the CAT scan taken in Greenwood and saw the same chronic and acute blood components as Dr. Brooksbank. (Tr. p. 347 lns. 12-16). Troup testified the "very bright blood, the acute blood, that's on the scan, is usually within a few hours. Within

minutes to hours." (Tr. p. 348 lns. 7-9). During surgery, Dr. Troup removed a blood clot and about four centimeters of victim's temporal lobe, which he testified "wouldn't have any affect" on a person. (Tr. p. 356 lns. 7-23). Dr. Troup also found no sign of a skull fracture. (Tr. p. 357 lns. 12-14, p. 378 lns. 20-22).

As to the cause of victim's injuries, Dr. Troup testified "this pattern of injury is very, very, very consistent with a nonaccidental shake and shake, slam type of mechanism", "[t]he body being held and the head being slammed, either *on a pillow* or anything. (Tr. p. 368 lns. 21-23, p. 369 lns. 2-3) (emphasis added). He testified neither victim's fall on the front porch steps nor one of her siblings could have caused the injuries. (Tr. p. 371 lns. 13-21, pp. 371 ln. 23 – 373 ln. 9). In Troup's opinion, the acute injuries occurred between "two to three hours" before the CAT scan was taken but "less than 24 to 36 hours." (Tr. p. 384 lns. 1-5). LaBounty was the only adult with victim two-to-three hours before the CAT scan.

The pediatric intensivist at Greenville Health Systems requested Dr. Nancy Henderson, a child abuse pediatrician, consult on victim's injuries. (Tr. p. 388 lns. 21-23, p. 392 lns. 11-16). Dr. Henderson also concluded the injuries were the result of nonaccidental head trauma. (Tr. p. 396 lns. 23-25). She testified the amount of force necessary to cause the injuries would take only "15, 20 seconds." (Tr. p. 400 lns. 11-13).

Dr. Anthony Johnson, an ophthalmologist, examined victim on August 9, after surgery. (Tr. p. 431 lns. 12-21). The lower court qualified Dr. Johnson as an expert in pediatric ophthalmology. (Tr. p. 428 lns. 13-14, p. 429 lns. 18-19, p. 431 lns. 6-7). Johnson testified to bleeding in victim's retina and said the injuries were caused by "movement to and fro, back and forth, repetitively with violent force." (Tr. p. 436 lns. 10-11, p. 440 lns. 7-8).

White also called LaBounty when she "was at the hospital in Greenville." (Tr. p. 228 lns. 15-16). Victim did not recover from her injuries and passed away on August 11, 2012. (Tr. p. 231 lns. 3-4).

IV. Investigation of Victim's Injuries

Vickie Hallman is a senior agent at the South Carolina Law Enforcement Division ("SLED") assigned to the latent prints crime scene unit. (Tr. p. 116 lns. 7-11). Hallman took photos of LaBounty's house on the night of August 9, 2012. (Tr. p. 120 lns. 7-17). Hallman testified the house was in "pretty extreme disarray" and the mother's and siblings' rooms had clothes and toys everywhere. (Tr. pp. 145 ln. 18 – 146 ln. 15). There were no sheets on LaBounty's bed but it was covered in a clothes pile, despite LaBounty's testimony that she and the three older children slept in her bed on the morning of August 8. (Tr. p. 146 lns. 5-8, p. 242 lns. 5-7). Hallman found bugs and roaches throughout the home, including live roaches in victim's pack'n play bed. (Tr. p. 146 lns. 22-24, p. 147 lns. 7-11, p. 246 lns. 15-18). Hallman testified she collected "all of the bedding out of the Pack'n Play" and a "donut pillow" but did not know the results of any analysis of those items. (Tr. p. 124 lns. 1-2, p. 142 lns. 18-19, p. 143 lns. 21-25). SLED documented a cup with ten white pills in it right next to victim's pack'n play bed but did not collect or analyze the pills. (Tr. p. 128 lns. 8-19, p. 145 lns. 1-8). Hallman took photos of victim at the hospital and found no bruises around her armpits or chest. (Tr. pp. 129 ln. 22 – 130 ln. 3, p. 144 lns. 12-18).

Major Patsy Lightle worked as major of the special victims unit with SLED at the time of these events. (Tr. pp. 283 ln. 25 – 284 ln. 7). Major Lightle interviewed White at the Calhoun

Falls Police Department on the evening of August 9, 2012. (Tr. p. 287 lns. 12-15, p. 289 lns. 16-17). White's voluntary police interview is consistent with what he told LaBounty regarding victim.

> And he said that on [July] 30th, on Monday, he and [victim] were sitting on the front porch on the top step and that his brother came out the door, hit [victim] and knocked [victim] off the top step and she fell to the bottom step. There were three steps. And that [victim] hit her head. He picked her up, and she skinned her nose. Had a little knot on her head about the size of a half dollar. And he picked her up and she quit crying and she seemed to be okay.
> . . .
> [H]e was up front with [LaBounty]. That he told her [about victim falling down the steps] and that she believed him. And I said, well, did [LaBounty] want to take [victim] to the doctor, and he said no, she never takes the children to the doctor.
> . . .
> And he said after that [victim] vomited for like four more days, stopped for two, and then vomited again for another day, and – which kind of led us up to August the 7th.
> And on August the 7th he said that he went to work and got home about 6:00, or 6:00 p.m. that day. . . . [h]e said that [victim] was feeling better that day, or that night when he got home, and she was playful. And that the girls – the three other girls and [victim] played and they were having a good time. Were so playful that he allowed them to stay up past their bedtime. But their bedtime was usually 8:00 p.m. and on this night he allowed them to stay up until 10:00 p.m. He said at 10:00 p.m. he put the three girls in their bedroom and put [victim] in her playpen. He said about 30 minutes later he went to sleep on the couch and woke up at 6:30 the next morning when [LaBounty] woke him up. He said he went to work.

(Tr. p. 291 lns. 9-16, p. 292 lns. 5-10, pp. 292 ln. 15 – 293 ln. 4)

White told Major Lightle that LaBounty usually goes to sleep when she gets home from the bar and does not get up until noon or 1:00 p.m. and he "doesn't know what's going on while she's asleep" and he is not there. (Tr. pp. 305 ln. 22 – 306 ln. 6). Major Lightle spoke with White's brother, Chris White, who confirmed what White said about Chris accidentally knocking victim down the front porch steps. (Tr. p. 306 lns. 10-19).

Lieutenant Charity Herlong works in the special victims unit for SLED and began investigating this case on August 14, 2012. (Tr. p. 313 lns. 9-16, p. 316 lns. 11-13). No witness Lieutenant Herlong interviewed "had any knowledge of [White] doing anything to [victim]" on the night of August 7. (Tr. pp. 337 ln. 24 – 338 ln. 2). Lieutenant Herlong and Major Lightle conducted interviews of LaBounty and her mother, Jodyne Moss. (Tr. p. 317 lns. 19-24). LaBounty told SLED in her interview on August 14, 2012, that White "was great" with her children. (Tr. p. 249 lns. 11-13). Lieutenant Herlong sent the two older sisters, Child C and Child I, for forensic interviews. (Tr. p. 321 lns. 2-5, p. 325 ln. 1). Child C, Child I, and Child R lived with LaBounty's aunt for forty-five days after this incident, and then went to foster care for fourteen months. (Tr. p. 248 lns. 6-17). Lieutenant Herlong acknowledged at trial that "not a single one of the[] [people interviewed] had any knowledge of Shawn [White] doing anything to [victim] that night" of August 7, 2012. (Tr. pp. 337 ln. 24 – 338 ln. 2).

Child C, who was six-years-old in August 2012 and eight-years-old at the time of trial, testified that, on the night of August 7, 2012, she and Child I and Child R went to sleep in their room and the door was locked. (Tr. pp. 164 ln. 24 – 165 ln. 3). LaBounty, on the other hand, testified the door to the children's room was open when she arrived home at 2:00 a.m. (Tr. p. 220 lns. 16-22). Child C testified she heard "a banging sound" "and then [victim] started crying."[2] (Tr. p. 165 lns. 8, 15). She acknowledged on cross-examination that the banging sound could have been a knock at the door or the television. (Tr. p. 172 lns. 18-23). Child C also said she "can't remember" if she heard victim cry. (Tr. p. 176 lns. 15-16). Child C did not tell anyone about the noise during her first forensic interview. (Tr. p. 174 lns. 11-19). However,

[2] As discussed below, the sequence of these events is significant.

after seeing her mother every day for a few weeks after the incident, she claimed in the second interview to hear the noise. (Tr. p. 174 lns. 16-24, p. 175 lns. 2-3).

Child I testified she heard "a banging noise" but did not hear anything else and did not hear any noise from victim. (Tr. pp. 189 lns. 23 – 190 ln. 4). She was four-years-old in August 2012 and six-years-old at the time of trial.[3] (Tr. p. 185 ln. 25). She also said that she heard the noise because Child C woke her up when Child C heard the noise. (Tr. p. 190 lns. 7-8). It is unclear whether Child I actually heard the noise or just repeated what Child C told her.

Child C and Child I's testimony contradicts the testimony of LaBounty and Donald Cabral, the officer who first responded to LaBounty's 911 call. Cabral testified he did not see any marks on victim's body because "I think she was wearing a one piece." (Tr. p. 106 lns. 13-15). Child C testified she saw "some red dots" on victim. (Tr. p. 173 lns. 11-13). She continued, "I saw them on there when she was laying in the bed, too." (Tr. p. 173 lns. 15-16). Child I testified "I saw [victim] when I woke up and she had like red marks all over her arm." (Tr. p. 190 lns. 16-17). LaBounty testified she did not see any marks on victim until she picked her up out of the pack'n play, called 911, and laid victim on the couch. (Tr. p. 226 lns. 20-22). It cannot be true that Cabral saw no marks on a child with a one-piece outfit on covering her body, Child I saw marks on victim when Child I woke up around 8:30 a.m., Child C saw marks on victim when victim was laying in the pack'n play, and LaBounty did not see marks until she picked up victim from the pack'n play around 10:30 a.m.

Lieutenant Herlong arrested White on September 6, 2012, and charged him with homicide by child abuse. (Tr. p. 334 lns. 3-10). White denied that he harmed victim. (Tr. p. 338 lns. 6-7).

---

[3] Child I testified in camera, and then counsel for Appellant and Respondent agreed to play the tape of the in camera testimony for the jury.

STANDARD OF REVIEW

"This court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the trial court's [directed verdict] ruling." *State v. Lewis*, 403 S.C. 345, 353, 743 S.E.2d 124, 128 (Ct. App. 2013) (emphasis added). "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." *State v. Bennett*, 408 S.C. 302, 306, 758 S.E.2d 743, 745 (Ct. App. 2014). "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011). "The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (internal quotations marks omitted). "In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight." Rule 19(a), SCRCrimP. The appellate court "must analyze whether the trial court erred based on the evidence that was before it at th[e close of all evidence], not retrospectively after the jury returned a verdict based on that evidence." *State v. Palmer*, 408 S.C. 218, 232 n.4, 758 S.E.2d 195, 203 n.4 (Ct. App. 2014).

ARGUMENT

The trial court erred in denying White's motion for a directed verdict because the State did not present substantial circumstantial evidence of his guilt of homicide by child abuse. Rather, the evidence presented raised, at most, merely a suspicion of guilt.

Before analyzing the evidence presented, it is necessary to explain the elements of proof of homicide by child abuse. "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." S.C. Code Ann. § 16-3-85(A)(1). "'[C]hild abuse or neglect' means an act or omission by any person which causes harm to the child's physical health or welfare." § 16-3-85(B)(1). "Harm" occurs when a person "inflicts or allows to be inflicted upon the child physical injury." § 16-3-85(B)(2)(a). "[I]n the context of homicide by 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, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). "[P]roving the crime of child abuse is extremely difficult." *State v. Fletcher*, 379 S.C. 17, 27, 664 S.E.2d 480, 485 (2008) (Toal, C.J., dissenting). Regardless of the difficulty of proof, there is no basis in South Carolina law for evaluating a child abuse case differently than any other alleged crime in reviewing the trial court's decision on a directed verdict motion or for holding the State to a lower threshold of proof of the defendant's guilt.

The analysis used by the trial court in assessing circumstantial evidence on a defendant's motion for directed verdict is different from the analysis charged to jurors for use in deliberation. *See State v. Logan*, 405 S.C. 83, 93, 747 S.E.2d 444, 449 (2013) ("It must be remembered, too, that there is one test by which circumstantial evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in . . . consideration of the accused's motion for a directed verdict." (internal quotation marks omitted)). The trial court cited the following evidence in its ruling to deny the motion for a directed verdict: (1) White, "the sole Defendant, [was] with the child by himself for a period of

six and a half hours"; (2) "two children who both said that they heard banging sounds" and "one of the children indicated that at the time of the banging sound they heard [victim] crying"[4]; (3) medical expert testimony as to the "actual timeframe when the injury would have occurred . . . minutes to hours to 24 hours . . . all the way to 36 hours"; and (4) LaBounty's testimony that she did not harm victim. (Tr. p. 472 lns. 16-17; p. 473 lns. 5-16; p. 475 lns. 3-7). Each of these pieces of evidence is addressed below. Even when viewed in the light most favorable to the State, the circumstantial evidence presented does not reasonably tend to prove White's guilt. This is especially true in light of the absence or non-existence of evidence of any motive or prior abusive conduct of White and LaBounty's testimony that victim appeared normal on the morning of August 8.

I. Evidence of the Timeframe in Which Victim's Acute Injuries Occurred Raises, at Most, a Mere Suspicion of White's Guilt

A crucial point in this case is the timeframe in which victim's acute injuries could have occurred. No medical expert testified as to a specific or even narrow timeframe. The State established that victim's injuries resulted from nonaccidental trauma but did not present substantial circumstantial evidence that White caused the injuries. Most importantly, the State's medical experts differed in their testimony as to when the injuries occurred. All of the expert testimony regarding victim's injuries provides someone besides White could have been alone with victim and caused her injuries. Below is a recitation of the medical expert testimony regarding when the acute injuries occurred prior to the CAT scan done sometime shortly after 11:40 a.m. on August 8, 2012. (Tr. p. 269 lns. 9-13, p. 270 lns. 9-12).

Dr. Brooksbank:

[4] This is a misstatement of the testimony. Child C actually testified the "banging was first and then [victim] started crying." (Tr. p. 165 ln. 15).

- "Additionally on the [CAT] scan it looked like there was evidence of acute blood that had been present within the past several hours . . . ." (Tr. p. 273 lns. 15-17).
- "Hours to may be a day at the most." (Tr. p. 274 lns. 11-12).
- Absolutely it could have been two to three [hours]. It could have been minutes to . . . several hours. Twelve to 24 hours at the absolute most." (Tr. pp. 280 ln. 25 – 281 ln. 4).

Dr. Christopher Troup:

- "The very bright blood, the acute blood that's on the scan, is usually within a few hours. Within minutes to hours. It can look bright sometimes up to a day out." (Tr. p. 348 lns. 7-9).
- "It had not been like that for over 24, 36, 48 hours. . . . So it has to be kind of in that – more than a few hours, but not a full day kind of . . . windowish." (Tr. p. 365 lns. 17-23).
- "[W]e were all pretty comfortable that this was not something that happened immediately prior to presenting to Greenwood. . . . it took several hours, at least, for those to evolve." (Tr. p. 379 lns. 6-12).
- "[I]t probably is less than 24 to 36 hours, and clearly more than two to three hours." (Tr. pp. 383 ln. 25 – 384 ln. 2).

On August 7, 2012, White arrived home from work around 6:00 p.m., and LaBounty left for work around 7:30 p.m. (Tr. pp. 292 lns.15-16, 219 lns.17-18). LaBounty arrived home around 2:00 a.m. on August 8. (Tr. p. 219 lns. 17-18). Based on LaBounty's testimony, White was alone with victim and the other children for six-and-a-half-hours. LaBounty and White were both in the home with victim for about four hours, during which White slept, until White left for work around 6:15 a.m. (Tr. p. 223 lns. 23-15, p. 241 lns. 17-23). LaBounty was alone with victim and the other children for about five-and-a-half hours, until 10:53 a.m. when she called 911. (Tr. p. 96 lns. 21-25).

The evidence cited above establishes that both White and LaBounty were in the home alone with the children when victim's acute injuries could have occurred. White's presence with victim during a small part of the time frame in which she suffered the acute injuries does not rise to the level of substantial circumstantial evidence of his guilt.

This Court recently held in *State v. Bennett*, evidence of the defendant's fingerprint and blood at the crime scene insufficient to survive a motion for a directed verdict. 408 S.C. 302, 758 S.E.2d 743. In *Bennett*, police responded to an alarm at a community center where it appeared someone stole a television and computer. *Id.* at 303-04, 758 S.E.2d at 744. The police matched one fingerprint from a wall-mounted television and blood found below what would have been the bottom of the missing television as the fingerprint and DNA of Bennett. *Id.* at 304-05, 758 S.E.2d at 744-45. The evidence at trial showed Bennett was seen "in the Center several times prior to the break-in, characterizing him as a frequent visitor." *Id.* at 305, 758 S.E.2d at 744. Bennett was convicted of second degree burglary, petty larceny, and malicious injury to real property. *Id.* at 303, 758 S.E.2d at 743. On appeal, this Court reversed the trial court's decision to deny Bennett's motion for a directed verdict. *Id.* at 308, 758 S.E.2d at 756.

> Though the exact locations of the DNA and fingerprint evidence do raise a suspicion of his guilt, the evidence simply does not rise above suspicion. The evidence undoubtedly placed Bennett at the *location where a crime ultimately occurred*; however, it is undisputed that Bennett was a frequent visitor to the location prior to the crime, and we disagree with the State's assertion that the evidence placed Bennett *at the scene of the crime*.

Id. at 307, 758 S.E.2d at 746. Based on this analysis, the Court found the evidence merely raised a suspicion that Bennett committed the crime, and reversed.

This case is similar to *Bennett* in that the evidence placed White at the likely location where a crime occurred but did not place him with victim when the crime occurred. The State's evidence establishes a thirty-three hour window in which victim's acute injuries could have occurred. White was the only adult with victim and her sisters for only six-and-a-half of those thirty-three hours. Viewed in the light most favorable to the State, this evidence does not rise to the level of substantial circumstantial evidence to reasonably prove White's guilt, but at most, merely raises a suspicion of guilt.

II. Child C and Child I's Testimony is Inconsistent and Contradicts Other Witnesses' Testimony

The State based its case against White on the testimony of LaBounty's two children. During its argument regarding White's directed verdict motion, the State conceded "the Defense is exactly right here in the fact that they say the closest the State's come under the substantial circumstantial evidence standard is the testimony of the two girls." (Tr. pp. 459 ln. 24 – 460 ln. 2). Through the six- and four-year-old memories of Child C and Child I, the State sought to imply that White threw victim on the living room floor, causing her injuries. Not only do Child C and Child I's testimony on this point contradict each other, their testimony is also inconsistent with the medical testimony. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776 ("Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.").

During Child C's first forensic interview after the incident, she said nothing about victim crying or a banging noise. (Tr. p. 174 lns. 16-25). She only mentioned the noise two weeks later, after LaBounty—the only adult besides White known to be with victim during the timeframe she sustained the acute injuries—visited Child C every day. (Tr. pp. 174 ln. 25 – 175 ln. 3). Child I did not hear victim cry and first stated she heard the banging noise but then said Child C woke up Child I when Child C heard the noise. (Tr. p. 190 lns. 5-8). When viewed in the light most favorable to the State, this circumstantial evidence does not constitute positive proof of facts and circumstances which reasonably tend to prove White's guilt. This is especially true when the children's testimony is inconsistent with the medical testimony.

Evidence contradictory to the children's testimony of a "banging noise" is the absence of a skull fracture on victim. The State would infer from Child C and Child I's testimony that White threw victim on the hard floor. However, the medical experts testified victim did not suffer a skull fracture. (Tr. pp. 275 ln. 25 – 276 ln. 1; p. 357 lns. 2-18). Further, Dr. Troup

testified the injuries could have been caused if victim came into contact with a pillow. Dr. Troup said he saw patients with injuries like victim's "without a mark on them anywhere with retinal hemorrhages and a dead brain where it was even described that it was done on a pillow cushion or -- or a pillow. It doesn't have to be a hard surface as long as the brain inside the head gets . . . the acceleration motion. A hard surface would cause more of an impact injury as well." (Tr. p. 369 lns. 6-12). Therefore, based on the medical testimony as to what force may have caused victim's injuries, the children's testimony raises nothing more than a mere suspicion as to White.

The State's theory that White harmed victim before LaBounty returned home is also inconsistent with LaBounty's testimony. For example, LaBounty testified she heard victim snoring when she came home at 2:00 a.m. and victim was laying on her back but moved to her side sometime after LaBounty got home. (Tr. p. 245 lns. 13-24). LaBounty noticed nothing wrong with victim when she came home, saw her face, and heard her snoring. LaBounty also testified she "touched" victim that morning "to make sure she wasn't hot or cold, but I didn't want to wake her up because she hadn't been sleeping through the night for days." (Tr. p. 225 lns. 6-10). LaBounty noticed nothing wrong with victim when she touched her that morning. Victim's normal snoring, breathing, and appearance to her mother is inconsistent with the theory that she suffered a brain injury hours before that contributed to her death.

In *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), the Supreme Court affirmed the Court of Appeals' decision to reverse the trial court's denial of a directed verdict motion. A jury convicted Arnold of murdering Dr. Jennings Cox. *Id.* at 387, 605 S.E.2d at 530. Arnold and Cox met about three days before Cox's murder and had sex in Savannah, Georgia. *Id.* at 388, 605 S.E.2d at 530. A witness testified he saw Arnold with a gun during that time. *Id.* at 389, 605 S.E.2d at 530. Cox left his office driving a borrowed BMW Z3 and was found shot dead

three days later in Colleton County. The BMW was found in Tennessee two days after Cox went missing. *Id.* Arnold's fingerprint was found on the lid of a coffee cup in the BMW and he made a phone call from Tennessee the day before police found the vehicle. *Id.* The Supreme Court found this evidence insufficient to survive a motion for a directed verdict. "Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed Dr. Cox." *Id.* at 390, 605 S.E.2d at 531.

There is less circumstantial evidence present in this case than in *Arnold*. In *Arnold*, physical evidence placed the defendant in the vehicle last driven by the victim within at least two days of his disappearance, and the stolen vehicle was found close to the defendant's location in another state directly following his visit with the victim. In White's case, the circumstantial evidence shows merely only that he was the only adult with victim during *part* of the timeframe in which her acute injuries occurred and, during that time, a six-year-old heard a banging noise followed by victim crying. This is not substantial circumstantial evidence that White abused victim, and the trial court's decision denying his motion for a directed verdict should be reversed.

III. The State Presented no Evidence of Motive or Prior Abuse by White

The State failed to present evidence of a motive of White to harm victim. *See Palmer*, 408 S.C. at 230, 758 S.E.2d at 202 (stating while "this evidence [of motive] is insufficient by itself to prove" guilt, it "must be considered in combination with all the evidence to determine if there is substantial circumstantial evidence of guilt"). To the contrary, LaBounty told SLED

after victim's death that White "was great" with her children. (Tr. p. 249 lns. 11-13). The mental state required to prove homicide by child abuse is "extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1). "[E]xtreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." *Jarrell*, 350 S.C. at 98, 564 S.E.2d at 367. The trial record is devoid of evidence of why White may have exhibited "extreme indifference" to victim's life. The closest the State comes to *even remote* circumstantial evidence is Child C's testimony that she heard "banging . . . first and then [victim] started crying." (Tr. p. 165 ln. 15). However, this does not even establish that White may have harmed victim to stop her from crying, since the crying came *after* the alleged banging noise.

Further, the State's evidence did not account for the older, chronic blood found in victim's brain. Dr. Troup testified "there was a darker fluid [on the CAT scan] that was outside of that that usually takes days to weeks to transition into that darker fluid." (Tr. p. 348 lns. 10-12). He further testified that where chronic blood appeared on the CAT scan "was either dead or dying brain." (Tr. p. 354 ln. 5). He explained "the amount of torque that was on that brain stem [from the chronic blood], that ***by itself*** is frequently not survivable." (Tr. p. 354 lns. 14-16) (emphasis added). Therefore, the injury victim sustained prior to the acute blood injury on August 7 or August 8 could have been fatal in and of itself. The State did establish that victim's fall down the front porch steps did not cause any of her brain injuries. (Tr. p. 372 lns. 5-25). Therefore, there is no evidence that White caused or was even present with victim for the prior brain injury.

In *State v. Bostick*, the Supreme Court reversed the trial court's decision to deny a directed verdict. 392 S.C. 134, 708 S.E.2d 774. A jury found Bostick guilty of the murder of Sarah Polite. *Id.* at 138, 708 S.E.2d at 776. Polite served as the treasurer of her church and

typically brought home a briefcase of money on Sunday for deposit at the bank on Monday. *Id.* at 136, 708 S.E.2d at 775. Polite's murder occurred on a Sunday afternoon. *Id.*

> When the State closed its case against Bostick, the following pieces of circumstantial evidence of his guilt had been presented: (1) Polite's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and (4) while the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to Polite's DNA.

Id. at 141-42, 708 S.E.2d at 778. The Court specifically noted the absence of evidence of a motive. "[N]o evidence was introduced concerning Bostick's knowledge that Polite may have had money in the briefcase or if indeed any money was in the briefcase on that particular Sunday." *Id.* at 142, 708 S.E.2d at 778. Analyzing this circumstantial evidence, the Supreme Court found it "raised, at most, a mere suspicion" of guilt. *Id.* at 142, 708 S.E.2d at 778.

White's case is analogous to *Bostick* in that the State failed to produce evidence of a motive in either case. The circumstantial evidence presented in this case raises, at most, a mere suspicion that White committed the crime.

IV. The Trial Court Improperly Weighed the Evidence

The trial court's ruling on White's directed verdict motion indicates it improperly weighed some of the evidence rather than ruling solely on its existence or non-existence. Under Rule 19(a), SCRCrimP, "In ruling on the [directed verdict] motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight." In announcing its ruling, the trial court interpreted some of White's comments to police as a "coverup" attempt and improperly weighed the evidence, basing its ruling on the court's curiosity as to why White would make certain statements. Specifically, the court stated:

> It's interesting that in the Smith case one of the factors that the Court determined to be important in the denial of the motion for directed verdict as that there was an attempt to cover up the situation.[5] Now, I'm not suggesting that there's any coverup in this situation, but I think we can make an analogy to the evidence that the Defendant first tried to put the blame of the injuries on the six-year-old, [Child C].[6] . . . And then he tried to blame the injuries on the fall from the -- from the steps.[7] While not suggesting that is a coverup, it certainly is some -- somewhat analogous to that, and I believe that is important as well. . . . During the conversation that he had after he found out that EMS and police were at the house, he makes the statement, "I guess they think it happened last night." That was a volunteered statement. Secondly, he volunteers that [victim] did not hit her head on the Pack'n Play. Question being, why would those two statements be volunteered. And then the statement that continues to -- and I hate to use the word haunt but I'm going to use it. Why would the Defendant state, volunteer to Major Lightle, that he put [victim] down, put the tape in the VCR, did not know when he fell asleep. But then he says "everything after that went to shit." Why would that statement be volunteered? And then he further volunteered the statement . . . something to the effect you think you have to shake a baby to see if the baby is okay, or words to that effect.

(Tr. pp. 473 ln. 20 – 474 ln. 25). In this analysis, the trial court weighs evidence rather than deciding the motion based on the existence or non-existence of evidence. For example, Major Lightle testified White said "You don't think about shaking a baby to see if it's okay." (Tr. p. 295 ln. 23). The trial court interpreted this as implying White shook victim and caused her injuries. However, it is also reasonably interpreted as referring to shaking the child to see if she

---

[5] The "attempted cover-up" in *Smith* consisted of "missing linens" from the defendants' hotel room and home, as well as defendants' failure to tell "medical personnel about the serious injury that was inflicted on [the victim] even though they had an opportunity to do so." 359 S.C. at 488, 597 S.E.2d at 892. There is no evidence in this case that White hid or destroyed physical evidence or withheld medical information.

[6] The court's reliance on this statement as blaming the six-year-old is an inaccurate recollection of the testimony. *White said* to police immediately after this statement "that Chief Galloway had asked the doctor if [Child C] could do something like that . . . and the doctor had said no, a six-year-old can't choke a child and squeeze a child to cause the injuries that [victim] had when she presented to the emergency room." (Tr. pp. 293 ln. 20 – 294 ln. 4). To the extent White suggested Child C could have hurt victim, he also eliminated that possibility in the same statement.

[7] White made this statement in response to a question from police as to what he thought caused victim's injuries. He said "I guess it was the fall down the stairs." (Tr. p. 294 lns. 22-24). He next immediately acknowledged his presence at the house alone with the four girls while LaBounty worked on August 7. (Tr. p. 295 lns. 2-4).

is all right before he left for work, not to harm her. This one example illustrates the trial court's improper weighing of the evidence.

To the extent this Court finds the trial court properly considered the above-cited evidence, it still does not rise to the level of substantial circumstantial evidence. In *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011), the State presented entirely circumstantial evidence that the defendant committed the charged crime. Odems appealed his convictions for first degree burglary, grand larceny, criminal conspiracy, and malicious injury to property arguing the trial court erred in denying his motion for a directed verdict. *Id.* at 584, 720 S.E.2d at 49.

> The State's case against [Odems] relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located [Odems] in the getaway car with the burglars and the stolen goods; (2) [Odems] fled from law enforcement; and (3) [Odems] asked an uninvolved person to lie for him.

Id. at 588, 720 S.E.2d at 51. The Supreme Court held that "[e]ven when viewed in the light most favorable to the State, the circumstantial evidence presented does not reasonably tend to prove [Odem]'s guilt. " *Id.* In *Odems*, the defendant asked someone to lie for him. White's responses to police questions as to what may have caused victim's injuries do not amount to a "coverup" that rises even to the level of the evidence in *Odems*, which the Supreme Court found insufficient to survive a motion for a directed verdict.

Finally, the trial court relied on LaBounty's in-court denial of harming victim to support its decision to deny White's motion for a directed verdict. (Tr. 475 lns. 2-7). This weighs LaBounty's denial in favor of her innocence and White's guilt, arguably holding it against White that he did not testify in court as to his innocence. *See, e.g.*, S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."); *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) ("If a defendant chooses not to take the stand in

his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations."). Regardless of the improper weighing and use of evidence, the trial record contained White's statement to police in which he denied harming victim. (Tr. p. 338 lns. 22-24). LaBounty's in-court statement should not have been relied upon or weighed by the trial court.

CONCLUSION

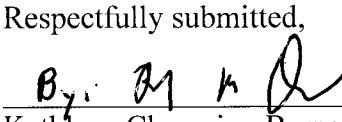
Victim suffered severe and tragic injuries. The desire to hold someone accountable for such harm is understandable. However, neither the nature of the injuries, the age of the victim, nor the desire for justice decrease the State's burden to prove a case by direct or *substantial* circumstantial evidence to reach the jury. Such evidence is absent in this case. As our Supreme Court noted in overturning a jury conviction for homicide by child abuse:

> While we are mindful that the net result of our decision is to overturn a jury verdict reached with all due deliberation and diligence, we are called by our standard of review to consider the evidence as it stood after the State presented its case, and we are not satisfied that the evidence was sufficient to sustain the State's ultimate burden of proof in this case.

Hepburn, 406 S.C. at 442, 753 S.E.2d at 416. The State chooses its trial strategy and the particular evidence to introduce. Considering the evidence collectively and in the light most favorable to the State, it merely raised a suspicion of White's guilt.

The trial court's decision to deny Appellant Shawn Patrick White's motion for a directed verdict should be reversed because the State failed to present substantial circumstantial evidence White committed the crime of homicide by child abuse. For the reasons set forth herein, White respectfully requests this Court reverse the trial court's ruling denying his motion for a directed verdict and his conviction.

Respectfully submitted,

By: 

Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, South Carolina 29924
(803) 943-4529

Robert M. Dudek
Chief Appellate Defender
Post Office Box 11433
Columbia, South Carolina 29211
803-734-1343

Attorneys for Appellant Shawn Patrick White

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions

Donald B. Hocker, Circuit Court Judge

RECEIVED
DEC 03 2014
SC Court of Appeals

Appellate Case No. 2014-000197

The
State,.....Respondent,

v.

Shawn Patrick White,.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on December ___, 2014, the foregoing **INITIAL BRIEF OF APPELLANT** was served via hand delivery to Salley W. Elliott at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201.

Attorneys for Respondent the State of South Carolina

[*Signature block appears on the following page.*]

December 3rd, 2014

By: [signature]

Kathleen Chewning Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, South Carolina 29924
(803) 943-4529

Robert M. Dudek
Chief Appellate Defender
Post Office Box 11433
Columbia, South Carolina 29211
803-734-1343

Attorneys for Appellant Shawn Patrick White