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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of *Certiorari*
To the Court of Appeals

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Supreme Court Appellate Case Number 2015-000351
Court of Appeals Appellate Case Number: 2012-212663

The State

Respondent,

v.

Donna Lynn Phillips,

Petitioner.

Appendix

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Index

<i>State v. Donna Lynn Phillips</i> , Ct. App. Op. No. 5280	A. 1
Petition for Rehearing	A. 11
Phillips Supplemental Citation Letter	A. 26
Petition to Substitute Counsel	A. 27
Order Granting Petition to Substitute Counsel	A. 31
Letter Requesting Return to Petition for Rehearing	A. 32
Return to Petition for Rehearing	A. 33
Reply to State's Return to Petition for Rehearing	A. 41
Order Denying Petition for Rehearing	A. 46

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Donna Lynn Phillips, Appellant

Appellate Case No. 2012-212663

Appeal From Pickens County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5280
Heard September 10, 2014 – Filed November 12, 2014

AFFIRMED

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Columbia, for Respondent.

FEW, C.J.: A jury convicted Donna Lynn Phillips of homicide by child abuse in connection with the death of her grandson. On appeal, Phillips argues the trial court erred by denying her directed verdict motion because the State's evidence was insufficient to prove her guilt. We affirm.

I. Facts and Procedural History

On March 17, 2008, the twenty-two-month old victim arrived by ambulance at the emergency department of Baptist Easley Hospital with no heartbeat or pulse. A urine sample collected from the child tested positive for opiates. After doctors resuscitated the child, he was airlifted to Greenville Memorial Hospital, where he later died. According to the medical examiner, his death resulted from an overdose of hydrocodone—an opiate.

As part of the investigation into the child's death, an officer with the Pickens County Sheriff's Office retrieved from Phillips' home a bottle of Tussionex—a prescription cough syrup—that was prescribed to her. The officer submitted the bottle for chemical testing, and the results indicated the medication contained hydrocodone.

The State indicted Phillips for homicide by child abuse under subsection 16-3-85(A)(1) of the South Carolina Code (2003). The indictment alleged Phillips caused the death of the child "by facilitating or allowing the excessive ingestion of opiate drugs." In addition, the State indicted Latasha Honeycutt—the child's mother—for homicide by child abuse and Jamie Edward Morris—the child's father and Phillips' son—for aiding and abetting homicide by child abuse under subsection 16-3-85(A)(2). The State tried the three co-defendants together.

At the close of the State's case, Phillips moved for a directed verdict, arguing the State failed to prove she gave the child Tussionex or that she did so with the requisite mental state. The trial court denied the motion. The jury convicted Phillips of homicide by child abuse, and the trial court sentenced her to twenty-five years in prison.¹

II. Evidence Presented at Trial

At trial, the State presented the following evidence to prove Phillips' guilt.

A. Defendants' Statements Made to Police

Detective Rita Burgess with the Pickens County Sheriff's Office spoke with Morris, Phillips, and Honeycutt at the hospital and subsequently took each of their written statements. According to their statements, the child spent the weekend

¹ The jury found Morris guilty of aiding and abetting but acquitted Honeycutt. This court affirmed Morris's conviction. *State v. Morris*, Op. No. 2014-UP-112 (S.C. Ct. App. filed March 12, 2014).

with Morris and Phillips. Specifically, Morris and Phillips picked the child up from Honeycutt's home around 2:00 p.m. on Friday, March 14, and returned him to Honeycutt on Sunday around 7:30 p.m. Phillips told Det. Burgess the child "had a runny nose all weekend . . . [a]nd by Sunday, he was coughing and congested." She claimed Morris gave him children's Tylenol on Sunday afternoon, although she "did not know how much of a dose he had given" the child. Phillips stated that when she and Morris took the child back to Honeycutt's home that evening, the child "was breathing hard" and Morris had to "move[] [the child] around in the car seat to try to help his breathing." Phillips claimed she told Honeycutt the child needed to go to the doctor, and that Morris gave Honeycutt the child's Medicaid card and told her "to get him to the doctor" because "his breathing sounded bad."

According to Honeycutt's statements to police, the child returned home Sunday evening and "was extremely sleepy and pitching a fit." She noticed the child "sounded congested" and "had a runny nose." The next morning around 8:00 a.m., Honeycutt changed the child's diaper, during which time the child never awoke. Honeycutt told Det. Burgess she then went back to sleep until approximately 10:00 a.m., when she checked on the child and found him unresponsive. She called out to her boyfriend Brandon Roper, who discovered the child was not breathing. Honeycutt called 911, which phone records confirm occurred at 11:15 a.m. that morning.

Det. Burgess further testified that during the conversation with Phillips at the hospital, Phillips "made random statements" regarding the prescription drug Lortab—a narcotic pain medication containing hydrocodone. Specifically, Phillips told Det. Burgess, "I hope [the child] didn't get any of my Lortab." Phillips also mentioned her sister takes Lortab and "hoped [the child] did not get her sister's Lortab." Moreover, according to Phillips' written statement, Phillips spoke to Brandon Roper at the hospital and told him she had Lortab but "didn't think the child could have gotten it."

Charlie Lark, an investigator with the Pickens County Sheriff's Office, testified about a conversation he had with Morris regarding the child's death. Morris claimed he did not see Phillips give the child any medication. Morris stated, however, that Phillips had prescriptions for Lortab and cough medicine, specifically Tussionex, that she kept in a basket in her closet. Morris told Lark that Phillips "had a hard time reaching" the basket due to its placement on the top shelf, so he got it down for her twice during the weekend. Although Morris mentioned "the child was playing with the bottles" on one occasion, he told Lark "the tops

were on the medication" and "to his knowledge, none of the medication had come out of the bottles."

Lark also testified regarding a conversation he had with Phillips, in which she expressed concern that she "accidentally dropped [a hydrocodone pill] on the floor, and the child could have picked it up." Phillips told Lark, however, she did not see the child "get any medication."

B. Medical Evidence

Jeffrey Morris Hollifield, a chemist, conducted tests on the liquid in the Tussionex bottle. He testified the tests detected two controlled drug substances in the bottle that were consistent with the two active ingredients in Tussionex—hydrocodone and chlorpheniramine. Although the bottle originally contained twelve teaspoons of medication, Hollifield testified a little over eight teaspoons were missing from the bottle.

According to the testimony of Robert Foery, a forensic toxicologist, the child's urine and blood samples revealed the presence of hydrocodone and chlorpheniramine. Foery testified the concentration of hydrocodone in the child's blood—102 nanograms per milliliter—was at least two-and-a-half times higher than the therapeutic range recommended for an adult—10 to 40 nanograms per milliliter. In fact, he stated the amount of hydrocodone found in the child's blood would be considered "very high" even for an adult. He further testified the child's death was not the result of a single dose of Tussionex but was caused by receiving multiple doses of the medication. He testified the first dose was probably administered sometime after midnight on Sunday, during the early morning hours. As to whether the child could have died from ingesting Phillips' Lortab, Foery explained that although Lortab contains hydrocodone, it also contains acetaminophen. Because acetaminophen was not found in the child's blood or urine, Foery concluded the child did not ingest Lortab.

Michael Ward, a forensic pathologist and the chief medical examiner for Greenville County, testified that had the child received medical treatment any time before Sunday night, he would have lived. He also noted the child had a lesion on his lower back, which he testified was a pressure ulcer caused by a lack of blood flow for a period of time. He explained pressure ulcers are common "in comatose patients where they lay in one position for a prolonged time without movement." Dr. Ward also stated the child had "a fairly large amount of firm, knot-like stool," which was consistent with a period of constipation, a side effect of taking

hydrocodone. He testified that although it was possible for constipation to result from a single dose of hydrocodone, the degree of constipation indicated the child received multiple doses rather than a single dose. As to the effect hydrocodone would have on the child's behavior, Dr. Ward stated the child would "not have the usual respiratory drive" and would exhibit symptoms of irritability, sleepiness, lethargy, and, ultimately, unconsciousness.

C. Phillips' Testimony

Phillips testified in her defense. According to her testimony, the child had a "runny nose" on Friday and Saturday but was otherwise "full of life." By Sunday afternoon, however, the child "started crying" and neither she nor Morris "could[] console him." Phillips admitted she had a prescription for Tussionex but denied giving any to the child. Specifically, she stated she would "never" give a child medicine not prescribed to him. When asked if Morris gave the child Tussionex, she stated, "No, he wouldn't. I know my son knows better than that."

She further testified she got the basket of medicine down from the shelf in her closet on Saturday morning, and although the child "grabbed a bottle" of medication from it, he did not ingest any of it. She claimed the child could not have accessed the medication without her knowledge because it was stored on the top shelf of her closet.

D. Other Witnesses' Testimony

Both of Phillips' co-defendants testified at trial. According to Morris's testimony, the child was very active on Saturday and Sunday, although on Sunday he had "a little cough every now and then" and "breathed a little funny." During its case-in-chief, the State presented evidence that on Saturday evening, Morris called and left a voicemail at the DSS office indicating he needed a Medicaid card because the child was sick. Morris testified he called DSS on Saturday because he misplaced the child's Medicaid card, which he later found on Sunday. Morris told the jury he gave the Medicaid card to Honeycutt on Sunday evening and asked her to take him to the doctor. He testified he did not take the child to the doctor over the weekend because he "didn't feel his symptoms were severe enough."

Morris further testified there was not "even a sheer possibility" that the child ingested Tussionex while in his care. Although he admitted retrieving the Tussionex from Phillips' closet on Friday and Saturday, he denied that he or Phillips gave the child any medication, except Tylenol on Sunday afternoon.

Kayla Roper—the sister of Honeycutt's boyfriend Brandon—testified, however, that while at the hospital, she overheard Phillips say to Morris that Phillips gave the child some cough medicine over the weekend and "surely to God that's not what is wrong." Brandon also testified that when a nurse told Morris and Phillips that opiates were found in the child's urine sample, Phillips "got [Morris] by the arm and . . . drag[ged] him out the back door of the hospital."

III. Directed Verdict Motion

In reviewing a denial of a directed verdict, we must view the evidence in the light most favorable to the State. *State v. Jarrell*, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). If there is any direct evidence of guilt, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, we must find the trial court properly submitted the case to the jury. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013).

To convict a defendant of homicide by child abuse, the State must prove (1) the defendant "cause[d] the death of a child . . . while committing child abuse or neglect"; and (2) "the death occur[red] under circumstances manifesting an extreme indifference to human life." § 16-3-85(A)(1). Phillips argues the trial court erred in denying her directed verdict motion because the State failed to present sufficient evidence to prove either of these elements.

A. The Evidence Proving Child Abuse

A trial court must deny a directed verdict motion when the State presents "any direct evidence" or "substantial circumstantial evidence" to prove the defendant's guilt. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis removed). "Direct evidence is based on personal knowledge or observation and . . . , *if true*, proves a fact without inference or presumption." *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270 (internal quotation marks and citation omitted) (alteration in original). "The presentation of direct evidence 'immediately establishes the main fact to be proved.'" *Id.* (quoting *State v. Salisbury*, 343 S.C. 520, 524 n.1, 541 S.E.2d 247, 249 n.1 (2001)). For this reason, the existence of "any direct evidence" proving the defendant's guilt requires the denial of a directed verdict motion. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50. "Circumstantial evidence, on the other hand, is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred." *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270. If the State relies exclusively on circumstantial evidence to prove guilt, that evidence must be

"substantial" to justify denying the motion. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50; *see also Rogers*, 405 S.C. at 565, 748 S.E.2d at 271 ("We find the State's proof that [the defendant] is guilty of murder consisted entirely of circumstantial evidence, and therefore, we review the trial court's decision to deny his directed verdict motion under the 'substantial circumstantial evidence' standard" (citation omitted)).

The State made no argument at trial as to the existence of direct evidence proving Phillips' guilt. In its appellate brief, the State refers generally to the existence of "substantial evidence." At oral argument, this court asked counsel whether the following testimony from Kayla is direct evidence: "I heard [Phillips] say that she . . . gave the child some cough medicine over the weekend and 'surely to God that's not what is wrong.'" Phillips' counsel responded it was circumstantial evidence because even if the jury believed Kayla's testimony, it would need to assume the "cough medicine" she referred to was Tussionex. The State, responding to the same question, told the court it believed the statement was direct evidence.

We find Kayla's testimony regarding what she heard Phillips say at the hospital is direct evidence of child abuse. Direct evidence is that which requires only the factfinder's determination that the evidence is credible before it may find the existence of a disputed fact. If the jury believed Kayla's testimony, the evidence would "immediately establish[] the main fact to be proved"—Phillips gave the child cough medicine. 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." § 16-3-85(A)(1); *see also* S.C. Code Ann. § 16-3-85(B)(1) (2003) (defining "child abuse" as "an act . . . which causes harm to the child's physical health or welfare"). Therefore, we find the trial court properly denied Phillips' directed verdict motion as it relates to the element of child abuse.²

² 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*

B. The Evidence Proving Mental State

To prove a defendant guilty of homicide by child abuse, the State must demonstrate the "the death occur[red] under circumstances manifesting an extreme indifference to human life." § 16-3-85(A)(1). Phillips contends that even if the State proved she committed child abuse by giving the child Tussionex, it failed to prove she acted with extreme indifference to human life. To support her argument, she points to *State v. Jarrell*, in which the court of appeals defined "extreme indifference" as "a mental state akin to intent characterized by a deliberate act culminating in death." 350 S.C. at 98, 564 S.E.2d at 367. She asserts there is no evidence proving she intended to harm the child but, instead, the evidence demonstrates that her "only intent was to the help the child feel better" by giving him medicine.

Subsection 16-3-85(A)(1) does not require the State to prove a defendant acted with the intent to harm in order to prove extreme indifference. Instead, the State must prove the defendant performed a deliberate act that he or she knew would create a risk of death to the child. A deliberate act in the face of such knowledge is a reckless disregard of the risk, and thus demonstrates an extreme indifference to the child's life. See *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 173 (2003) (finding the deliberate ingestion of cocaine in the face of "public knowledge that usage of cocaine is potentially fatal . . . was sufficient evidence to submit to the jury on whether [the defendant] acted with extreme indifference to her child's life"); *Jarrell*, 350 S.C. at 98, 99, 564 S.E.2d at 367 (stating "indifference in the context of criminal statutes [is] the conscious act of disregarding a risk which a person's conduct has created" and finding the defendant's deliberate act "created a grave risk of death to her child, evidencing her extreme indifference to his life"). Therefore, to 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.

With this in mind, we turn to the issue of whether the State's evidence was sufficient to prove this element. We find the record contains direct evidence that Phillips knew giving prescription medication to the child when it was not prescribed to him would put the child's health at risk. In fact, Phillips embraced

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).

her own knowledge of this risk in her attempt to show the jury she was not the type of person who would give the child Tussionex:

I would never---I was not raised that way. I would never give a child any kind of medicine that was not prescribed for them. I would never give a child anything under the age of two years old. Anybody in my family has better sense

She continued to make this claim throughout her testimony, stating, "I would never give this medicine or any medicine to [the] child." When asked if Morris gave the child Tussionex, Phillips testified, "No, he wouldn't. I know my son knows better than that. Like I said, my whole family, they had better sense. Nobody gave [the] child anything." We find this testimony to be direct evidence that Phillips knew giving the child her prescription medication created a risk to the health of the child.

Additionally, we find the health risks associated with giving children medications prescribed to adults are a matter of common knowledge. Federal law requires a patient to obtain a prescription for medication that cannot be bought over-the-counter because these medications are "not safe for use except under the supervision of a practitioner licensed by law to administer such drug[s]." 21 U.S.C. § 353(b)(1)(A) (2013). Phillips' bottle of Tussionex contained a label with the following warning: "federal law [provides] that prescribed medications are only for the person they're prescribed to."

The common knowledge of the health risks associated with prescription medication was discussed in *Commonwealth v. Walker*, 812 N.E.2d 262 (Mass. 2004). In that case, a jury convicted the defendant of involuntary manslaughter, finding he caused the death of a woman by mixing prescription sleeping medication into her alcoholic drink. 812 N.E.2d at 266. On appeal, the defendant argued the Commonwealth's evidence was insufficient to prove "his conduct posed a high degree of likelihood that substantial harm would result" because the drug was "a legally prescribed medication that has numerous legitimate and 'fairly safe' uses." 812 N.E.2d at 269. The Supreme Judicial Court of Massachusetts rejected his argument, stating, "A person of ordinary intelligence would be aware that there are varying risks associated with all prescription medications. It is a matter of both common knowledge and common sense that a prescription is required to obtain certain medications precisely because they contain drugs that are not safe except when administered and supervised by a physician or other properly licensed practitioner." 812 N.E.2d at 271 n.17.

We understand the direct evidence of Phillips' mental state proves only that she gave the child cough medicine with the knowledge that doing so posed a risk to his *health*. The law requires the State to prove she acted in reckless disregard of a risk of *death*. However, the medical evidence in this case demonstrated that Phillips, knowing the safety risks associated with her conduct, gave the child multiple doses of Tussionex, resulting in a toxic blood level of hydrocodone that was up to ten³ times higher than the normal range for an adult. In addition, the State presented evidence that Phillips tried to cover up her actions and shift the blame from herself by (1) telling police Morris gave the child Tylenol on Sunday; and (2) suggesting the child could have accidentally ingested Lortab prescribed to her sister or Brandon. *See State v. Martin*, 403 S.C. 19, 26, 742 S.E.2d 42, 46 (Ct. App. 2013) ("[A]ny guilty act, conduct, or statements on the part of the accused are . . . evidence of consciousness of guilt." (citation omitted)). We also consider the fact that Phillips knew Morris had to "move[] [the child] around in the car seat to . . . help his breathing" on the way to Honeycutt's home Sunday evening. In addition, Phillips admitted telling Honeycutt the child needed medical attention and that Morris told Honeycutt "to get him to the doctor" because "his breathing sounded bad."

From this combination of direct and circumstantial evidence, a jury could infer Phillips acted with extreme indifference to the child's life. Thus, we find the trial court properly submitted the case to the jury.

IV. Conclusion

We find the State's evidence supports the trial court's decision to deny Phillips' directed verdict motion. Therefore, her conviction of homicide by child abuse is **AFFIRMED**.

THOMAS and LOCKEMY, JJ., concur.

³ Foery testified "the concentration of the drug in the [child's] blood is somewhere between two and a half and five times higher than it should be for a therapeutic [adult] dose." However, the child's level of 102 nanograms per milliliter is actually up to ten times what Foery testified was the "therapeutic range for an adult . . . 10 to 40 nanograms per milliliter."

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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.

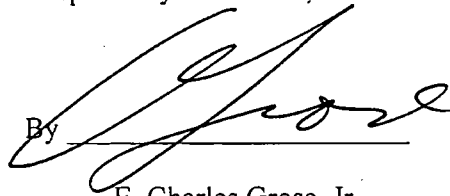
⁵ See also Brief of Appellant, at pp. 14-17.

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
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Appellate Case Number: 2012-212663

The State

Appellant.

v.

Donna Lynn Phillips,

Respondent

Certificate of Service

I certify that I have served the Petition for Rehearing on the South Carolina and the S.C. Commission on Indigent Defense Appellate Division, by hand delivering a copy, on the date reflected below, to the physical addresses of:

J. Benjamin Aplin, Esquire
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Columbia, S.C. 29201

Attorney for Respondent

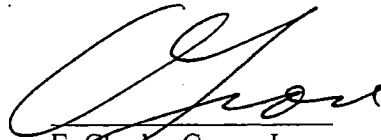
LaNalle C. DuRant, Esquire
Appellate Division
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Columbia, SC 29201

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DEC 01 2014

SC Court of Appeals

(signature on next page)



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December 1, 2014
Greenwood, South Carolina



SCCID

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Robert M. Dudek, Chief Appellate Defender
 Wanda H. Carter, Deputy Chief Appellate Defender

September 3, 2014

RECEIVED

SEP 03 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
 Clerk, S.C. Court of Appeals
 Post Office Box 11629
 Columbia, South Carolina 29211

Re: The State v. Donna Lynn Phillips
Appellate Case No. 2012-212663

Dear Ms. Kitchings:

The above-referenced case is set for oral argument on Wednesday, September 10, 2014, at 10:40 a.m. in this Court. Counsel would ask the Court to take notice of the following cases which counsel may cite at oral argument:

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011)

State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011)

State v. Ashley N. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013)

By copy of this letter, I am informing opposing counsel of this matter.

Please contact me if you have any questions or concerns.

Sincerely,

LaNelle Cantey DuRant
 Appellate Defender

LCD/mpm
 cc: John Benjamin Aplin, Esquire

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 to Substitute Counsel

The Appellant, Donna Lynn Phillips, petitions this Court to substitute the undersigned counsel, E. Charles Grose, Jr., for LaNelle Durant of the South Carolina Commission on Indigent Defense, Appellate Division. The Appellant has retained the undersigned counsel to represent her for the Petition for Rehearing in the Court of Appeals and any appeal to the South Carolina Supreme Court.

IT IS SO MOVED.

By 

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

Attorney for Appellant

November 26, 2014
Greenwood, South Carolina

I so Move and Consent:


Donna Lynn Phillips, Appellant

Sworn to and subscribed before me

this 20th day of Nov, 2014



E. Charles Grose, Jr.
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: May 31, 2023

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

The State

Appellant.

v.

Donna Lynn Phillips,

Respondent

Certificate of Service

I certify that I have served the Petition to Substitute Counsel on the State of South Carolina and the S.C. Commission on Indigent Defense Appellate Division, by hand delivering a copy, on the date reflected below, to the physical addresses of:

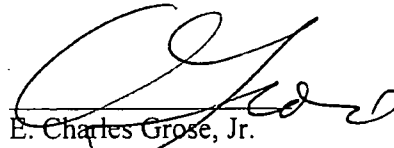
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Attorney for Respondent

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SC Court of Appeals

(signature on next page)



E. Charles Grose, Jr.
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December 1, 2014
Greenwood, South Carolina

The South Carolina Court of Appeals

The State, Respondent,

v.

Donna Lynn Phillips, Appellant

Appellate Case No. 2012-212663

The Honorable D. Garrison Hill
Pickens County
Trial Court Case No. 2008GS3902052

ORDER

The Court has received the Appellant's petition to substitute counsel in the above appeal. This request is Granted. Mr. E. Charles Grose, Jr. will now serve as counsel for the appellant in place of Ms. LaNelle DuRant.

FOR THE COURT

BY *V. Clive Allen, Deputy*
CLERK

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
LaNelle Cantey DuRant, Esquire
John Benjamin Aplin, Esquire
E Charles Grose, Jr., Esquire

FILED

12/8/14



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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December 16, 2014

Mr. Alan McCrory Wilson, Esquire
PO Box 11549
Columbia SC 29211-1549

Mr. John Benjamin Aplin, Esquire
PO Box 11549
Columbia SC 29211

Re: The State v. Donna L. Phillips
Appellate Case No. 2012-212663

Dear Counsel:

The Court requests that you file a return to the petition for rehearing filed by the appellant within ten days of the date of this letter.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

cc: LaNelle Cantey DuRant, Esquire
E. Charles Grose, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Opinion No. 5280 (S.C. Ct. App. filed November 12, 2014)

Appellate Case No. 2012-212663

THE STATE, RESPONDENT,

v.

DONNA LYNN PHILLIPS, APPELLANT.

RETURN TO PETITION FOR REHEARING

On November 12, 2014, this Court issued a published opinion which affirmed Appellant's (Phillips') conviction for homicide by child abuse in connection with the death of her grandson. State v. Phillips, Op. No. 5280 (S.C. Ct. App. filed November 12, 2014) (Shearouse Adv. Sh. No. 45 at 76). On December 1, 2014, Phillips submitted a Petition for Rehearing and by letter dated December 16, 2014, this Court requested that Respondent (the State) submit a return within ten days of the date of the letter. This return to the petition for rehearing now follows.

The State respectfully asks the Court to deny the petition for rehearing pursuant to Rules 208(b)(7) & 221(a), SCACR, because every argument presented in the petition is based on an issue/claim that simply was not preserved for appellate review. The “waiver rule,” now argued by Phillips for the first time, was: (1) not raised to or ruled upon by the trial court, (2) not raised or argued in Phillips’ brief, (3) not stated as a reason for the supplemental citations submitted by Phillips on September 3, 2014, and (4) not argued or mentioned a single time during oral arguments on September 10, 2014.

Phillips appears to recognize that she failed to raise any argument whatsoever regarding the “waiver rule” to this Court, and is now seeking to circumvent the well-established rules of error preservation to raise the issue in a petition for rehearing. She argues her September 3, 2014, letter called this Court’s attention to State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), and that: “Pursuant to the limitation contained in Rule 208(b)(7), SCACR, Ms. Phillips did not include any argument in her letter.” However, the limitation on including an argument with a supplemental citation is only one part of the Rule. The complete subsection provides:

When pertinent and significant authorities come to the attention of a party after his initial brief(s) has been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to an issue to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations . Any response shall be made promptly and shall be similarly limited.

Rule 208(b)(7), SCACR (emphasis added). Here, Phillips’ letter asked the Court to “take notice of the following cases which counsel may cite at oral argument” and then listed three citations to directed verdict cases, including Hepburn. Phillips did not reference a page number of her brief or an issue to which the citations pertain, and she failed to state

a substantive reason for any of the three supplemental citations. Indeed, in regard to the “waiver rule” it would not have been possible to reference a page number or issue to which the citations pertain because the “waiver rule” was not argued in Phillips’ brief. Phillips did not mention the “waiver rule” at all in her letter and the three cases cited appear to simply be some of the latest published opinions where an appellate court has reversed a trial court’s denial of a motion for directed verdict. Phillips also did not mention the “waiver rule” during oral arguments despite her current contention that, as the “central holding in Hepburn” the “waiver rule” was the reason she listed Hepburn as a supplemental citation. This contention defies belief. The State submits that under the plain, unambiguous, and mandatory terms of Rule 208, Phillips’ supplemental citation letter was deficient and did nothing to raise or preserve an issue she failed to argue in her Appellate brief. Furthermore, to the extent this Court finds the letter was sufficient under Rule 208, Phillips’ subsequent failure to argue the “waiver rule” during oral arguments constitutes a waiver of her right to pursue it by way of rehearing or a future petition for writ of certiorari in the South Carolina Supreme Court.

As to the merits of the petition, the State submits the sole ground supporting the request, as alleged by Phillips, is entirely without merit. Phillips argues 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” and goes on to argue the “waiver rule” that was discussed in Hepburn requires the grant of rehearing and reversal of her conviction. Yet, in its opinion, this Court clearly and correctly recited the standard of review for considering the denial of a directed verdict, and then properly applied that standard of review in affirming Phillips’ conviction. Phillips, Shearouse

Adv. Sh. No. 45 at 81-86. As explained by our supreme court in Hepburn, the “waiver rule” concerns “*what* evidence we deem appropriate for consideration at the appellate stage of review.” Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (emphasis in original). Thus, the “waiver rule” has nothing to do with the standard of review itself in regard to directed verdict motions. Consequently, Phillips’ stated basis for seeking rehearing is patently without merit and her petition should be denied.¹

To the extent this Court finds Phillips’ petition is not actually based on an allegation of overlooking or misapprehending the standard of review, despite Phillips specifically making this claim, the State submits it is nonetheless without merit for a variety of reasons. First, since Phillips did not raise the “waiver rule” to the trial court when she renewed her motion for a directed verdict at the close of the trial, the issue not preserved for appellate review regardless of any supplemental citation or argument made on appeal. Furthermore, as argued in detail in State’s final brief, the trial court properly denied Phillips’ motion for a directed verdict based on the totality of the evidence. When viewed in a light most favorable to the State, the evidence presented during trial constituted substantial evidence establishing Phillips’ guilt for each element of the offense of homicide by child abuse, including that Phillips committed a deliberate act causing the victim’s death under circumstances manifesting an extreme indifference to human life. Direct evidence from the trial supports the conclusion that Phillips deliberately gave the victim adult prescription Tussionex. It also supports the conclusion she failed to seek medical treatment for the victim after the Tussionex was ingested. The

¹ Appellant complains that this Court’s only reference to Hepburn is in footnote 2 of the written opinion; however, this is because Hepburn was only being cited to explain why this Court chose not to directly address an additional sustaining ground raised by the State for the denial of Phillips’ motion for a directed verdict. The State continues to maintain that Phillips’ failure to seek medical care after the child was given multiple doses of Tussionex constituted child abuse or neglect.

trial court properly considered the existence of evidence as opposed to its weight and was required to deny Phillips' directed verdict motion and submit the case to the jury.

Statement of the Case, Statement of Facts, and Argument

The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

In her petition for rehearing, Phillips argues this Court "acknowledged that Kayla Roper's testimony . . . 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." The State submits this is not accurate. While this Court may have relied heavily upon Roper's testimony as "direct evidence" of child abuse, it never found it was the only evidence presented during trial. Indeed, this Court described significant circumstantial evidence in both its recitation of the facts and its analysis of the evidence proving Phillips' mental state. Phillips, Shearouse Adv. Sh. No. 45 at 77-81 & 83-86. This evidence alone was enough to survive the motion for a direct verdict and allow the case to go to the jury, particularly in light of the alternate sustaining grounds argued by the State.

Phillips also argues her own testimony should not have been considered as direct evidence that she knew giving the child her prescription medication created a risk to the health of the child; yet, this is the very essence of the "waiver rule" recognized in Hepburn. When Phillips presented testimony she lost the right to have the court review the sufficiency of the evidence based upon the State's evidence alone. Because the referenced evidence was presented by Phillips herself, and was not merely responsive to testimony elicited by her co-defendants, it was not subject to a recognized exception to

the waiver rule and was properly considered in regard to the denial of her motion for a directed verdict. Hepburn, supra.

Finally, Phillips argues that since this is what she describes as a purely circumstantial evidence case, the trial court should have granted a directed verdict because the State failed to exclude "every other reasonable hypothesis," i.e. that someone other than Ms. Phillips gave the child the lethal dose of medication. This simply is not the correct standard of review at the directed verdict stage, even if the evidence was entirely circumstantial. Our supreme court has instructed:

When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.**

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (citations omitted). For all of these reasons, the State submits this Court properly affirmed the trial court's denial of Phillips' motion for a directed verdict.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Appellant, the State respectfully requests that this Court deny Appellant's petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY:


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S.C. Bar No. 8729

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ATTORNEYS FOR APPELLANT

Columbia, South Carolina
December 19, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Opinion No. 5280 (S.C. Ct. App. filed November 12, 2014)

Appellate Case No. 2012-212663

THE STATE,RESPONDENT,

v.

DONNA LYNN PHILLIPS,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Return to Petition for Rehearing*, dated December 19, 2014, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

I further certified that all parties required by Rule to be served have been served.
This 19th, day of December, 2014.



Angela Bennett
Legal Assistant

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DEC 29 2014

SC Court of Appeals

The State

Appellant.

v.

Donna Lynn Phillips,

Respondent

Reply to State's Return to Petition for Rehearing

Counsel for the appellant, Donna Lynn Phillips, replies to the State's return to her petition for rehearing as follows:

- 1) The State argues *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), the "waiver rule," and the exceptions to that doctrine of law have "nothing to do with the standard of review in regard to directed verdict motions." Return, p. 4. The *Hepburn* opinion refutes this contention. 406 S.C. at 442, 753 S.E.2d at 416 ("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." (emphasis added)).

2) The State's primary argument is that Ms. Phillips did not properly call this Court's attention to *Hepburn*.¹ This argument overlooks four important facts that are beyond dispute. First, Ms. Phillips properly moved for a directed verdict at trial. Second, she sought review of the trial court's denial of directed verdict. Third, she called this Court's attention to *Hepburn*. Fourth, this Court was aware of *Hepburn* when it issued the opinion. These four facts create a sufficient record for this Court to reconsider and reverse the trial court. As discussed in the Petition for Rehearing and paragraph 3, *infra*, Ms. Phillips' record on appeal is very similar to the *Hepburn* record on appeal.

3) The State argues the trial court did not rule on the "waiver rule." Return, pp. 2, 4. In this respect, Ms. Phillips' case is no different than *Hepburn*. The applicability of the waiver rule, and the exceptions to the rule, were raised for the first time during Ms. Hepburn's appeal. See Record on Appeal in *Hepburn*, Directed Verdict Motions, Volume III, at pp. 786-809, and Volume IV, at pp. 1336-38.² After all, the "waiver rule" and the exceptions to that rule concern "*what* evidence [the appellate courts] deem appropriate for consideration at the appellate stage of review." *Hepburn*, 406 S.C. at 429-30, 753 S.E.2d at 409 (emphasis original).

4) The State argues that even if this Court considers *Hepburn*, it should still consider Ms. Phillips' testimony. As outlined in the Petition for Rehearing, the State's argument does not recognize the exceptions to the "waiver rule."

¹ The State might be trying to push this issue into post-conviction relief, which would only result in additional delay. This Court, however, has an adequate record to determine the applicability of *Hepburn*. Ms. Phillips should get the benefit of this case, decided during the pendency of her appeal.

² Found at <http://ctrack.sccourts.org/public/caseView.do?csIID=49979> (last viewed December 23, 2014).

5) Finally, the State takes one quote from the Petition for Rehearing out of context and argues Ms. Phillips did not cite the “correct standard of review at the directed verdict stage.” Return, p. 6. Both Ms. Phillips and the State agree that the standard set forth in *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 572 (2000) applies. Brief of Appellant, p. 15; Petition for Rehearing, p. 12; and Return to Petition for Rehearing, p. 6. The only disagreement concerns whether this Court should consider the impact of *Hepburn* on Ms. Phillips’ appeal. Additionally, as the Chief Justice pointed out, the “traditional circumstantial evidence charge” was useful as it “illustrate[d] the lack of evidence against Petitioners” in *State v. Hernandez*, 382 S.C. 620, 626, 677 S.E.2d 603, 606 (2009). The same can be said here. See also *State v. Palmer*, 408 S.C. 218, 236, 758 S.E.2d 195, 205 (Ct. App. 2014), cert. granted (Sept. 24, 2014) (Konduros, J., concurring) (“I also would find there was insufficient evidence of the codefendants’ guilt for homicide by child abuse and unlawful conduct toward a child because the State did not present any direct or substantial circumstantial evidence to reasonably prove which codefendant harmed the child.”) (citing *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct.App.2013). (“The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes.”)).

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.

(signature on next page)

Respectfully Submitted,

By 

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Attorney for Appellant

December 23, 2014
Greenwood, South Carolina

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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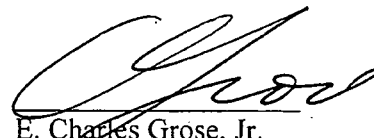
Respondent

Certificate of Service

I certify that I have served the Petition for Rehearing on the South Carolina and the S.C. Commission on Indigent Defense Appellate Division, by mailing a copy, on the date reflected below, to the physical addresses of:

J. Benjamin Aplin, Esquire
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P.O. Box 11549
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Attorney for Respondent



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December 23, 2014
Greenwood, South Carolina

The South Carolina Court of Appeals

The State, Respondent,

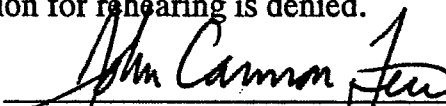
v.

Donna Lynn Phillips, Appellant

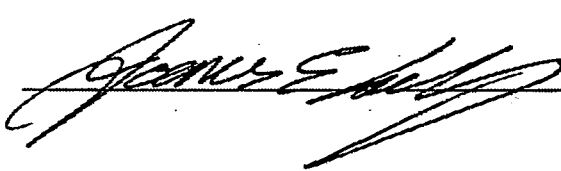
Appellate Case No. 2012-212663

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law as to any preserved issue has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 _____ C.J.

 _____ J.

 _____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
LaNelle Cantey DuRant, Esquire
John Benjamin Aplin, Esquire
E Charles Grose, Jr., Esquire
The Honorable D. Garrison Hill

FILED
January 27, 2015