

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

D. Garrison Hill, Circuit Court Judge

RECEIVED

JAN 21 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DONNA LYNN PHILLIPS,

APPELLANT

APPELLATE CASE NO. 2012-212663

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying appellant's motion for a directed verdict on the charge of homicide by child abuse when the state failed to present substantial circumstantial evidence that appellant acted with extreme indifference where the child died from an overdose of hydrocodone as allegedly found in the cough syrup, Tussionex?

STATEMENT OF THE CASE

On December 16, 2008, the Pickens County Grand Jury indicted Donna Lynn Phillips on the charge of homicide by child abuse of her grandson. R. 855. Also indicted at that time was one of her co-defendants, her son Jamie Morris who was indicted for homicide by child abuse, aiding and abetting. Supp R.1. On October 13, 2009, Co-defendant Latasha Honeycutt, the mother of the child, was indicted for homicide by child abuse. Supp R. 4. The three co-defendants proceeded to trial on July 23 – 27, 2012, before the Honorable D. Garrison Hill. Phillips was represented by James P. O'Connell; Morris was represented by John W. Dejong; and Honeycutt was represented by H. Chase Harbin. The state was represented by Doug Richardson, Esquire, and Jenny Barwick. R. 1.

Appellant and co-defendant Morris were found guilty as charged. R. 837, ll. 1 – 24 and Supp. R. 3. Co-defendant Honeycutt was found not guilty. Phillips was sentenced to twenty-five years, and Morris was sentenced to twelve years, suspended to eight years with two years' probation thereafter. R. 853, ll. 23, - R. 854, ll. 10. This appeal follows.

STATEMENT OF FACTS

Jamie Morris and Latasha Honeycutt had lived together for several years beginning when Honeycutt was seventeen. They had a son who was twenty-two months old at the time of this incident. After they separated, Honeycutt began living with Brandon Roper who was a mutual friend of both Morris and Honeycutt. The child lived with Honeycutt for a while and Morris for a while. R. 683, ll. 1 – R. 685, ll. 16; R. 620, ll. 3 – R. 624, ll. 23.

When this incident occurred in March 2008, the child had been in foster care for ten months in the custody of DSS. He was returned on Wednesday, March 12, 2008, just four days before his death, to live with his mother, Latasha Honeycutt, and her boyfriend, Brandon Roper, and their two month old daughter, Ava. R. 13, ll. 18 – R. 14, ll. 9; R. 661, ll. 9-17.

On Friday afternoon, March 14, 2008, Jamie Morris picked up his twenty-two month old male child from Honeycutt's mobile home and brought him over to the mobile home he lived in with his mother, Donna Phillips, for a weekend visit. R. 439, ll. 12 – R. 440, ll. 23.

During that weekend visit, there was celebration because the father and grandmother had not seen the child in ten months. Phillips bought a riding John Deere toy for him, Buzz Light Year pajamas, and clothes. They took him to visit relatives both Saturday and Sunday. The child slept with his father on the sofa. The child had a runny nose and cough during much of the weekend. R. 535, ll. 12 – R. 536, ll. 25; R. 540, ll. 13 – R. 570, ll. 25; R. 441, ll. 4 – R. 446, ll. 4.

On March 16, Morris and Phillips took the child back over to Honeycutt's house that Sunday evening. On the next Monday morning, March 17, Honeycutt went in to check

on him around 8:00 a.m. and the child was asleep and she changed his diaper while he was sleeping. Around 10:00 – 10:30 a.m., Honeycutt went back into his room and found the child unresponsive. She called 911. R. 446, ll. 8 – 24; R. 686, ll. 22 – R. 702, ll. 16.

The first witness at trial was Patience Johnson, a supervisor involved with intake at the Department of Social Services (DSS) operations in Pickens County. She received a report of the child's fatality on March 17 and she initiated an investigation. She said there was a voice mail from Morris on March 15 to DSS wanting a Medicaid card for the child because he was sick. R. 43, line 5 – R. 49, line 7.

Julie Sailors testified that she was a paramedic who responded to Honeycutt's residence on March 17. She asked the mother, Honeycutt, questions about the child, but she thought Honeycutt was being evasive. R. 50, lines 13 – 21; R. 69, lines 4 – 13. Ms. Sailors put the child in the ambulance and she and her partner took him to Palmetto Health Baptist Easley. The mother did not go to the hospital with them. R. 52, ll. 11-20.

Ms. Sailors said most parents are very hysterical, screaming, crying. They do not want to give up the child or they are jumping in the ambulance. R. 52, line 11 – R. 53, line 13. When Ms. Sailors and her partner had gone into the child's bedroom, the mother did not follow them in there and Ms. Sailors thought that was unusual. R. 68, lines 15 – 20. She said that in all twenty cases she had handled of this type, the caregivers were consistently agitated. This case, though, was unlike anything she had ever seen. R. 77, line 21 – R. 78, line 3.

Kathy Purdessy, the emergency room nurse, testified that when the child arrived, his heart was not beating. There was no parent there at the emergency room and that was not normal. The child was intubated and they were bagging him to breathe for him. He was

lifeless. They took a urine sample. R. 81, line 15 – R. 82, line 21. She said when the mother did arrive at the hospital, she said the mother seemed to act inappropriate to her. The mother's answers were so vague. She wasn't crying. She was not even standing near her child. R. 84, line 2 – R. 85, line 19. Later, the nurse said a drug screening of the child's urine revealed that opiates were present. R. 87, line 25 – R. 88, line 4.

On cross-examination, the nurse said she had never seen a parent act the way the mother did. She seemed to be very detached from the child. She was emotionless. R. 95, lines 5 – 17.

Dr. James Mahanes, the coroner for Pickens County, testified that the child died from an overdose of hydrocodone contained in Tussionex. He explained that hydrocodone and chlorpheniramine were found and those were the ingredients in Tussionex. R. 264, ll. 2 – 19.

Detective Rita Burgess testified that she spoke to all of the defendants and took statements from them. She first talked to Latasha Honeycutt, who told her that the child had been with Phillips and Morris from Friday, March 14 until Sunday, March 16 between 8:00 and 9:00 p.m. She said when the child got back, he was extremely sleepy and pitching a fit. She put him in his crib and closed the door. She checked on him later and he was still fussy. She put him to bed and he slept all night. Honeycutt said she woke up Monday morning around 8:30 or 9:00 and the child was still sleeping at that time. She went back to bed and woke back up around 11:00 and checked on the child and he was unresponsive. She called Brandon for help and also called 911. R. 125, line 7 – R. 126, line 14.

On March 27, Honeycutt gave Detective Burgess a written statement. R. 127, lines 8 – 21. The written statement was not much different from the verbal statement, but she did

add that when she checked on the child Monday morning around 8:00, she did change his diaper and he was still asleep. R. 133, line 1 – R. 136, line 3. She also told Burgess when Jamie dropped the child off on Sunday evening, he told her the child was sick and should go to the doctor because he was congested. He gave her the Medicaid card. Honeycutt told her the child did sound congested and he had a runny nose. R. 131, lines 2 – 10.

Detective Burgess also said when Honeycutt was in the emergency room with her child, she showed no emotion. R. 178, lines 12 – 17.

Detective Burgess said she talked to the grandmother, Donna Phillips, Monday evening at the hospital. She told her on Friday, they had trouble getting the child to sleep. She said the child would have “frightmares” during the night where he would wake up fighting and crying. On Sunday, she said the child was coughing and congested and Morris had given him some children’s Tylenol. A couple of times she said she hoped the child did not get any of her Lortab. She also said her sister takes Lortab and she hoped the child did not get her sister’s Lortab. R. 136, line 20 – R. 137, line 25.

Phillips said on Sunday, when she and Morris returned the child to Honeycutt, she told Honeycutt that the child was sick and needed to go to the doctor. Honeycutt just acted like he was having a temper tantrum, and put the child in the crib. When Phillips went to the hospital to see the child, someone said the child had opiates in his system. Phillips told Brandon, Honeycutt’s boyfriend, she had some Lortab, but she didn’t think the child could have gotten it. Brandon told her he had been prescribed Lortab two weeks before, but they were all gone. R. 142, line 23 – R. 144, line 25. Phillips said at the funeral home, Brandon told her the child woke up four times during the night. R. 145, lines 3 – 4.

Detective Burgess spoke with Morris who said the child was fine all weekend until around 3:00 p.m. Sunday when he started crying and acting ill. Around 4:00 p.m., the child started wheezing and was congested. He was concerned. Around 3:45 p.m., he gave the child a dropper-full of infant Tylenol. R. 146, line 17 – R. 147, line 2.

Jamie Morris testified at trial that Tussionex was in his mother's house but the child never got any Tussionex. He did not give the child any and his mother did not give the child Tussionex to his knowledge. R. 446, ll. 25 – R. 447, ll. 14.

Later, on April 10, 2008, Donna Phillips met Detective Burgess at the station and gave a written statement. R. 138, ll. 1 – R. 139, ll. 25. Phillips told Detective Burgess that she and Morris picked the child up from Honeycutt's home on March 14, 2008, and returned him the evening of March 16, 2008. Phillips said he had a runny nose and was beginning to get congested Sunday. When they returned him Sunday, Honeycutt put him in the crib sick and closed the door. They went to the hospital when they received the call about the child. R. 141, ll. 1 – R. 145, ll. 25.

Deputy Albrecht, a forensics investigator, went by Phillips' residence after March 17 and she gave him a bottle of Tussionex. R. 188, lines 8 – 24. Lt. Robinson said the Tussionex cough syrup is a prescription medicine. R. 199, lines 14 – 15. The medicine was prescribed to Phillips. R. 199, lines 2 – 5.

Jeff Hollifield with Micro Analytical, testified that he analyzed what was in the Tussionex bottle and found it contained hydrocodone and chlorpheniramine, which were consistent with the drug Tussionex. R. 227, lines 4 – 9.

William Gassman, the supervisor of chemistry and toxicology at the hospital testified that they analyzed the child's urine and found opiates in it. R. 246, line 11 – R. 249, line 21.

Michael Lark, an investigative consultant testified, as a state's witness, that he spoke with Morris and Morris told him his mom, Appellant Phillips, kept her Tussionex in a pumpkin in a hard-to-reach place in her closet. His mom got the medication down twice when the child was in the room, but he did not see the child get any of the medication. He said the tops were on the medication, but the child was playing with the bottles. He did not see any medication come out of the bottles because the tops were on them. R. 288, line 13 – R. 289, line 3.

Robert Foery, a consultant in forensic toxicology, analyzed the blood and urine samples taken from the child. He found hydrocodone was the opiate that was in the blood. He found hydrocodone, hydromorphone, and chlorpheniramine in the urine. Hydromorphone is a metabolite of hydrocodone. There was only enough in the blood specimen to confirm the presence of hydrocodone. The hydrocodone and chlorpheniramine are found in Tussionex and it was a time released formula. R. 325, line 1 – R. 328, line 10.

On cross-examination, Dr. Foery admitted that the blood report stated: "Insufficient specimen volume remaining to complete the testing for hydromorphone and for chlorpheniramine." He admitted that the report said negative for chlorpheniramine but said that it should not say that. It should say insufficient volume. R. 336, ll. 21 – R. 339, ll. 23.

The concentration of hydrocodone in the victim's blood was found to be 102 nanograms per milliliter. The therapeutic range for an adult would be 10 to 40 nanograms per milliliter. It would take 10 to 12 hours for the drug to be completely absorbed by the

body. R. 329, line 1 – R. 330, line 8. The expert said that in his opinion, to a reasonable degree of medical certainty, the drug was given on Sunday, sometime between midnight on Sunday up until the time the child was found. By midnight on Sunday, he meant midnight Saturday going into Sunday. R. 331, lines 2 – 13. Because the drug was time-released, some effect would probably be felt in an hour. R. 344, lines 8 – 10.

Dr. Michael Ward, the Greenville County medical examiner, testified the high level of the drugs in the child would make him comatose. R. 378, lines 13 – 17. In his opinion, the child was comatose at 8:00 a.m. on Monday. R. 379, lines 20 – 21.

The defense called Dr. William Brewer as an expert in forensic toxicology without objection from the state. R. 399, ll. 1 – R. 401, ll. 16. He testified that testing the blood was the most important as urine levels were really irrelevant. He explained that the blood would give a time as to the most recent dose. He was skeptical of the toxicology results in this case because there was such a limited amount of blood that was tested. He said hydrocodone peaked at about four hours. He found it alarming that the vomit from the child, produced when CPR was performed, was never tested. The vomit would have given the most recent information of stomach contents. R. 402, ll. 13 – R. 429, ll. 25.

Donna Phillips testified in her own defense. She freely said she had prescription Tussionex that was filled on January 4, 2008, four months before the child's death. She denied giving this medication to the child on March 15 or 16. R. 535, ll. 11 -24; R. 572, ll. 11 – R. 574, ll. 5. She testified that she would never give a child any medicine not prescribed for them, and she would not give a child under two any medicine. She kept her medicine in a pumpkin on the top shelf of her closet. R. 551, ll. 1 – R. 554, ll. 24. Phillips said she loved that child.

Honeycutt's attorney called Kayla Roper, the sister of Brandon Roper, to testify. Kayla testified that while she was in the waiting room at the hospital, she overheard Phillips say to Morris that she had given the child cough medicine over the weekend, and "surely to God that's not what is wrong." R. 606, ll. 12 – 24; R. 613, ll. 9 – 23.

After the State rested its case, defense counsel for appellant moved for a directed verdict because there was no evidence that Phillips gave drugs to anybody. He argued that did not show extreme indifference to human life. Counsel argued that she had to have the intent to harm this child, and the state did not prove that. The judge ruled there was sufficient evidence for the case to go to the jury because there was a lethal dose of hydrocodone in the child's system. R. 395, ll.3 – R. 397, ll. 2.

At the close of the defense case and of the evidence, defense counsel renewed his motion for a directed verdict because the state did not prove by substantial circumstantial evidence that "anybody did anything in this case." The judge denied the motion as viewing the evidence in the light most favorable to the state. R. 739, ll. 18 – R. 740, ll. 24.

ARGUMENT

The trial court erred in denying appellant's motion for a directed verdict on the charge of homicide by child abuse when the state failed to present substantial circumstantial evidence that appellant acted with extreme indifference where the child died from an overdose of hydrocodone as allegedly found in the cough syrup Tussionex.

South Carolina Code Sect. 16-3-85 provides:

(A) 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.

In State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), the Court of Appeals defined extreme indifference as a mental state akin to **intent** characterized by a **deliberate act culminating in death**. The Court went on to say that in this state, the indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created or failed to exercise ordinary or due care.

In State v. Jarrell, id., the Court affirmed the trial court's denial of Jarrell's directed verdict motion finding that Jarrell acted with extreme indifference because she knew when she left home the morning of the incident that her child would be killed by her husband. She did not protect her child as she had helped plan the child's murder.

In State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), the Supreme Court ruled that the homicide by child abuse statute applied to the stillbirth of a fetus caused by the ingestion of cocaine. The Court wrote that the issue of whether the defendant had requisite criminal intent to commit homicide by child abuse, that is, whether she acted with extreme

indifference to her unborn child's life, was for the jury, where it was public knowledge that maternal use of cocaine during pregnancy could cause serious harm to the viable unborn child, and there was evidence that the defendant took cocaine knowing she was pregnant.

This case is distinguishable because Appellant did not plan any harm to the child. First, the only evidence that Phillips may have given the child Tussionex was from Kayla, the sister of Brandon Roper, who said she overheard Phillips say this to Morris in the waiting room of the hospital. Phillips denied giving the medicine to the child who was sleeping with his father.

Even if Phillips gave the cough medicine to the child, she had no intent to harm the child. Her only intent was to help the child feel better. This was not acting with extreme indifference. McKnight's intent was for her pleasure.

In State v. Sterling, 723 S.E.2d 176 (2012), the Supreme Court held that knowledge or intent that his conduct violated the securities law is not required to convict a defendant of securities fraud, but the state must present evidence that the defendant made statements or committed acts in a severely reckless manner such that he knew presented a danger of misleading an investor.

In State v. Sterling, Id., the Supreme Court wrote:

What is at issue here is not whether Sterling acted intentionally, but whether his mental state met the *mens rea* standard we created in Morris, that is, did he know, or was it so obvious that he must have known, that the information he disseminated presented a danger of misleading buyers or sellers.

The Supreme Court wrote that they were within their authority to determine the level of intent required for a violation of the securities statute because the legislature did not specify any *mens rea*.

The Supreme Court cited the case of State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994), where they held that recklessness is one level of criminal intent, as are knowledge and negligence. The Court wrote that under Jefferies, intentional connotes a higher sense of awareness than mere recklessness.

Extreme indifference is not the same as lack of due care or negligence as negligence is a less culpable *mens rea* than extreme indifference.

On appeal of a denial of a directed verdict of acquittal, the Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

A directed verdict motion should not be granted if there is direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. State v. Latimore, 397 S.C. 9, 723 S.E.2d 589 (2012). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. McCombs, 368 S.C. 489, 629 S.E.2d 361 (2006).

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 297 (Ct. App. 2001); State v. Martin, 340 S.C. 597 533 S.E.2d 572 (2000). In a case with much stronger evidence of wrongdoing, the New York Court of Appeals found that the evidence at trial was insufficient as to a mother's mental state to convict her of second degree murder because it did not rise to the level of depraved indifference. People v. Matos, 19 N.Y.3d 470.

(2012). In Matos, the defendant returned home to find that her partner had severely beaten her child. Id. at 473-74. The child's leg and ribs were broken and was bleeding internally. Id. The mother did nothing more than splint the child's leg.. Id. She only called EMS after seeing blood flowing from the child's rectum and first helping her partner attempt to cover up the crime. Id. The court stated, "While we concede that defendant's behavior fell egregiously short of what we would expect from an ordinary person, faced with a child in such distress, to say nothing of a mother of said child, it does not rise to the level of wickedness, evil, or inhumanity so as to render the actor as culpable as one whose conscious objective is to kill." Id. at 476. The court emphasized that the State failed to prove that the mother "did not care whether her son lived or died." Id.

Phillips conduct is far less culpable than the mother in Matos.

Dr. Brewer, the expert forensic toxicologist who was a witness for the defense, testified that the dose given to the child was a very small dose. He stated:

I don't think that the child being so small received a very large dose. I think it was a very small dose. And I would venture to say----and I didn't hear the toxicologist before me, but that he would concur with that. Because that's important for the jury to realize too. We're not talking about a large dose. To me, looking at this, being completely unbiased, this is not an intent to cause harm to the child, you know. It's not a large dose.

(R. 410, ll. 14 – 22.)

The state only presented a mere suspicion that Phillips gave the child the cough medicine, and presented no evidence that she had any intent to harm the child. No evidence was presented that Phillips knew the cough medicine contained hydrocodone or the danger of hydrocodone.

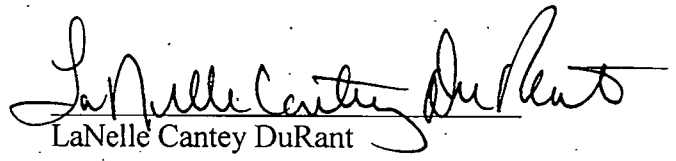
The investigation was sorely lacking as there was not enough blood to accurately test for drugs. The child's vomit was not tested which would have given the most recent contents of the stomach and what he had been given. There was time and opportunity for other medication or substance that may have contained opiates to have been given to this child between the time he was returned to Honeycutt on Sunday night and when he was found unresponsive Monday morning.

The state did not prove that Donna Phillips acted with extreme indifference to this child's life and well being.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for the entry of a directed verdict.

Respectfully submitted,

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LaNelle Cantey DuRant
Appellate Defender

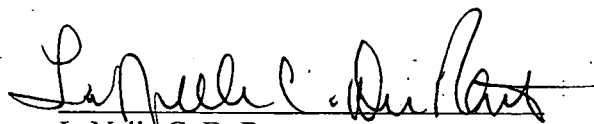
ATTORNEY FOR APPELLANT

This 21st day of January, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 21st, 2014



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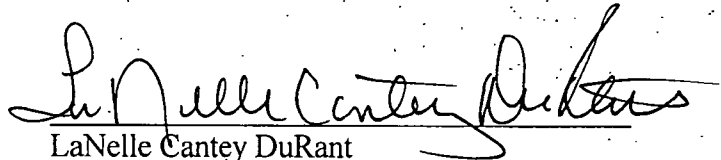
V.

DONNA LYNN PHILLIPS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of January, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of January, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented substantial evidence from which the jury could fairly and logically find Appellant acted with extreme indifference to human life, thereby satisfying the elements of homicide by child abuse?

STATEMENT OF THE CASE

Appellant, Donna Lynn Phillips (Phillips), was indicted at the December 16, 2008 term of the grand jury for Pickens County for homicide by child abuse (2008-GS-39-2052).¹ She was represented by James P. O'Connell, Esquire, of the Pickens County Bar. The State was represented by W. Douglas Richardson, Jr., and Jenny L. Barwick, of the Thirteenth Circuit Solicitor's Office. On July 23-27, 2012, Phillips and her two co-defendants, Jamie Edward Morris (Morris) and Latasha Diane Honeycutt (Honeycutt), proceeded to a joint trial by jury pursuant to which Phillips was found guilty of homicide by child abuse, Honeycutt was acquitted, and Morris was found guilty of homicide by child abuse - aiding and abetting. Phillips was sentenced by the Honorable D. Garrison Hill to twenty-five (25) years' imprisonment. Morris was sentenced to twelve (12) years' imprisonment suspended upon the service of eight (8) years' imprisonment and two (2) years' probation. Phillips timely filed a notice of intent to appeal her conviction and sentence and subsequently submitted a Brief in support of her appeal. This Brief of Respondent (the State) follows.

¹ Latasha Diane Honeycutt, the child's mother, was also indicted for homicide by child abuse and Jamie Edward Morris, the child's father was indicted for homicide by child abuse, aiding and abetting.

STATEMENT OF FACTS

At the start of trial, the solicitor made an opening statement outlining the evidence the jury would hear from the State and the State's basic theory of the case. The solicitor explained that on Friday, March 14, 2008, the twenty-one month old victim was given by Honeycutt to Morris for the weekend. He remained in the care and custody of Morris and Morris's mother, Phillips, until he was returned to Honeycutt on the evening of Sunday, March 16, 2008. On Monday, March 17, 2008, at approximately 11:15 a.m., a 911 call was made from Honeycutt's residence indicating the victim was not breathing. When emergency medical services (EMS) personnel arrived at the scene the victim did not have a heartbeat. He was transported to the hospital but ultimately was pronounced brain dead and removed from life support as a result of being given a lethal dose of opiates. (R.p.27, line 16-p.32, line 20).² The State proceeded to present testimony and other evidence in support of this theory of the case.

The State

On Monday, March 17, 2008, Patience Johnson, a South Carolina Department of Social Services (DSS) intake investigator, received a report in regard to trauma suffered by the victim and began an investigation. Johnson went to Greenville Memorial Hospital and talked to law enforcement officers and the victim's family members. Two days before, on Saturday, March 15, 2008, Morris had left a voicemail message at the DSS office indicating he needed a Medicaid card because the victim was sick. (SROA.p.1, line 14-R.p. 43-p.49, line 7).

² The trial was transcribed in two separate parts by two different court reporters. The first part, captioned "Volume I," covers July 23-25, 2012, consists of 730 pages, and by way of example will be hereinafter be cited as follows: "Tr.p.123." The second part, captioned "Partial Transcript," covers July 26-27, 2012, consists of 415 pages, and by way of example will hereinafter be cited as follows: "P.Tr.p.321."

Dr. John Richard Yelton, the victim's pediatrician, saw the victim for one well visit and four minor sick visits in 2007 and 2008. He said the victim was a normal, healthy, twelve to twenty-one month old who was developing well with no indications of distress. (SROA. p.2, line 17-p.5, line 8). Dr. Yelton testified hydrocodone is dangerous to a small child. He said the medication Tussionex³ includes hydrocodone, and that because of the dangers he does not prescribe Tussionex for children. (SROA.p.6, line 9-p.7, line 22).

Rhonda Whittaker, a communications specialist in the Pickens County 911 dispatch center, described the emergency call that was received from Honeycutt's residence at approximately 11:15 a.m. on Monday, March 17, 2008. She said the EMS workers and law enforcement officers who were dispatched to the scene arrived at 11:25 a.m. and 11:35 a.m. respectively. (SROA.p.8, line 8-p.11, line 14). Upon arrival, EMS paramedic Julie Sailors discovered the victim on the floor just inside a bedroom, all alone, cold, not breathing, and with no pulse. Her partner scooped the victim from the floor and carried him to the ambulance to be transported to Baptist Easley Hospital, while Sailors briefly questioned Honeycutt in an effort to get information about the victim's condition. (SROA.p.12, line 2-p.14; R.p.54, line 14).

Kathy Purdessy, an emergency room (ER) nurse at Baptist Easley Hospital who served as the victim's primary nurse, described his condition upon his arrival. The victim

³ Tussionex contains a combination of chlorpheniramine and hydrocodone. Chlorpheniramine is an antihistamine that reduces the natural chemical histamine in the body. Histamine can produce symptoms of sneezing, itching, watery eyes, and runny nose. Hydrocodone is a narcotic cough suppressant. Tussionex is used to treat runny or stuffy nose, sneezing, and cough caused by the common cold or flu. See <http://www.drugs.com/tussionex.html> (last viewed December 6, 2013).

was in cardiac arrest with no pulse, but the ER team was able to establish a pulse and a heart rate before he was transported by helicopter to Greenville Memorial Hospital. Purdessy took a urine sample from the victim and sent it to the lab and the urine came back positive for opiates. (R.p.79, line 16-p.89, line 3). She said the victim was not given any opiates at Baptist Easley Hospital during his ER treatment. Purdessy noted hydrocodone is an opiate. (R.p.99, lines 12-17; p.103, lines 9-12). Dr. Stacy Garmon, a local pediatrician, was called to assist in the ER. He noticed a red rash that looked like bed sores on the victim's bottom. Dr. Garmon could not say what caused the rash but it is typically caused by pressure on the skin from a lack of movement over a period of time. (R.p.104, line 2-p.109, line 1).

Rita Burgess, a detective with the Pickens County Sheriff's Office (PCSO) began investigating the circumstances surrounding the victim's injuries shortly after he arrived at the ER. She interviewed Honeycutt at Baptist Easley Hospital and later interviewed Phillips and Morris at Greenville Memorial Hospital, taking oral statements from each of the three co-defendants. She subsequently interviewed each co-defendant in her office, taking oral and written statements. (R.p.121, line 24-p.152, line 8).

In Phillips' initial oral statement on March 17, 2008, she said she and Morris had trouble getting the victim to sleep Friday evening, and that she had to rub his back to help comfort and calm him down. She said the victim had "frightmares" during the night and would wake up fighting and crying. Phillips said that on Sunday the victim was coughing and congested, and that Morris had given him children's Tylenol. She said she and Morris were upset when they dropped the victim with Honeycutt because Honeycutt put the victim in the bedroom and closed the door. Phillips claimed she heard Honeycutt say

she hoped the victim did not get any of her Lortab⁴ or her sister's Lortab. (R.p.136, line 8-p.137, line 25). On April 10, 2008, Burgess interviewed Phillips at the PCSO. In her second oral statement Phillips said the victim had a runny nose all weekend and by Sunday he had started getting congested and was ill and irritated. She said on their way home from Greenville the victim was breathing hard and that Morris had to move him around in the car seat to try and help his breathing. (R.p.145, lines 13-20).

Shortly after making the second oral statement, Phillips gave a written statement. In that statement Phillips provided additional details about how she, Morris, and the victim spent the weekend, but otherwise repeated the story about his nightmares, runny nose, and congestion. She noted that on Thursday, March 13, 2008, when she saw the victim at Honeycutt's house, the victim was crying and acting sleepy. Phillips said she and Morris picked the victim up Friday at 1:30 or 2:00 p.m. and that he woke up on schedule both Saturday and Sunday mornings between 6:30 and 7:00 a.m. She said that when they returned the victim to Honeycutt Sunday, she told Honeycutt the victim was sick and needed to go to the doctor, but Honeycutt smiled and acted like he was just having a temper tantrum. Phillips said someone at the hospital mentioned the victim had a trace of opiates in his system. She said that while she was in the waiting room she asked Brandon Roper, Honeycutt's boyfriend, if he and Honeycutt had anything in the house the victim could have gotten. Phillips said she told Roper she had Lortab but did

⁴ Lortab contains a combination of acetaminophen and hydrocodone. Both medicines are pain killers. Hydrocodone is an opioid pain medication. An opioid is sometimes called a narcotic. Acetaminophen is a less potent pain reliever that increases the effects of hydrocodone. Lortab is used to relieve moderate to severe pain. See <http://www.drugs.com/lortab.html> (last visited December 6, 2013).

not think the victim could have gotten it, and Roper replied he had been prescribed Lortab two weeks before, but they were all gone. (R.p.141, line 19-p.145, line 4).

In Morris' initial oral statement he said the victim had been fine all weekend until 3:00 p.m. Sunday when he started crying and acting ill. Morris said that at around 4:00 p.m. the victim started breathing funny and began wheezing and coughing, and that his jaw was shaking. Morris claimed the only medication he gave the victim was one dropper-full of Equate brand infant Tylenol. (R.p.146, line 1-p.147, line 10). On April 4, 2008, Burgess interviewed Morris at the PCSO. In his second oral statement Morris described the victim's troubled breathing as sounding like pneumonia, but maintained the victim was fine Friday and Saturday, and only started acting ill and crying between 3:00 p.m. and 3:30 p.m. Sunday. Morris said the victim was crying and acting sleepy, was "fighting sleep" and was rubbing his face into Morris's shirt. Morris again mentioned giving the victim a dose of Equate Tylenol. (R.p.147, line 11-p.150, line 1).

Ultimately Morris gave a written statement. In that statement Morris provided additional details about how he, Phillips, and the victim spent the weekend, but otherwise repeated the story about the victim first acting sick at 3:30 p.m. Sunday and Morris giving him Equate brand infant Tylenol. He also said that as he and Phillips drove the victim to Honeycutt's house Sunday afternoon, the victim was breathing badly, like he was congested. Morris said he got upset about the breathing and when they arrived at Honeycutt's house he gave the victim's Medicaid card to Honeycutt and told her to get him to the doctor. He said he told Honeycutt the victim should see a doctor very soon because his breathing sounded bad. (R.p.150, line 2-p.152, line 8). In addition to taking statements, Burgess received a bottle of Equate brand Tylenol which had been delivered

by Phillips to Sergeant Kristy Leopard at the PCSO detention center. Burgess turned the bottle over to the PCSO evidence division. (R.p.152, line 10-p.153, line 18).

On May 29, 2008, Sergeant J.T. Albrecht of the PCSO went to Phillips' residence to pick up a bottle of Tussionex from Phillips. He placed the bottle in the PCSO evidence room. (R.p.187, line 24-p.189, line 14).

Lieutenant Tony Robinson of the PCSO went to Honeycutt's house the afternoon the victim was taken to the ER. He took photos of the scene, retrieved a sippy cup from the refrigerator, and retrieved a bottle of Tylenol infant drops and an empty amoxicillin bottle from the house. Robinson sent these items to the state law enforcement division (SLED) for testing. (R.p.192, line 21-p.199, line 4). Robinson later retrieved the Tussionex bottle from the PCSO evidence room and checked it for fingerprints; however, he found no prints. Next he delivered the Tussionex bottle to Jeff Hollifield at Micro Analytical for testing, who then returned the bottle to Robinson after the analysis was complete. Robinson testified the Tussionex was from a CVS pharmacy and was prescribed to Donna Phillips. Robinson described the label on the Tussionex bottle as including language stating it is: "federal law that prescribed medications are only for the person they're prescribed to." (R.p.199, line 14-p.202, line 7).

Jeffrey Morris Hollifield, a chemist and the owner of a private chemical laboratory in Mauldin called Micro Analytical, was qualified as an expert in chemistry. He conducted routine general screening tests on the liquid in the Tussionex bottle. The tests detected two drug substances in the bottle, hydrocodone and chlorpheniramine, which were consistent with two active ingredients one would expect to find in Tussionex. (R.p.221, line 10-p.230, line 22). The original prescription was for 60 milliliters or 12

teaspoons. Hollifield measured 18.401 milliliters or 3.68 teaspoons still in the bottle, which means 41.6 milliliters or 8.32 teaspoons was missing.

Sergeant Kristy Leopard of the PCSO was supervising the Pickens County Detention Center on March 23, 2008, when Phillips dropped off a bottle of medication for Detective Burgess. She sealed the bottle in an envelope and delivered it to Burgess' office. (R.p.236, line 18-p.239, line 15). SLED forensic toxicologist Jennifer Michelle Gardner Brown tested the Tylenol bottle and the sippy cup from Honeycutt's residence and the Equate brand Tylenol bottle that had been delivered to Leopard by Phillips. The two medicine bottles tested positive for acetaminophen⁵ and no drugs were found in the sippy cup. (R.p.241, line 21-p.244, line 14).

William Gassman, a medical laboratory scientist working at Baptist Easley Hospital on March 17, 2008, received the urine sample collected from the victim in the ER. It tested positive for opiates and negative for everything else, and the results were transmitted to the ER doctors at 12:14 p.m. Some of the urine was reserved in the refrigerator and was later given to Pickens County Coroner James Mahanes. (R.p.246, line 3-p.250, line 5). Coroner Mahanes collected the urine sample from Baptist Easley Hospital and the victim's blood sample from Greenville Memorial Hospital and delivered them to the Medical Examiner's (ME's) Office in Greenville. (R.p.257, line 7-p.259, line 12). On cross-examination Mahanes testified that in his opinion the victim died from an overdose of hydrocodone that came from [Phillips'] home, in the form of Tussionex. (R.p.263, line 19-p.264, line 19).

⁵ Acetaminophen is the active ingredient in Tylenol and generic versions of Tylenol.

Michelle Henry, Honeycutt's neighbor, talked to Honeycutt about the victim's behavior the day Morris and Phillips brought the victim home. Honeycutt told Henry the victim was sleeping a lot, that she had trouble waking him up, and that he seemed too drowsy to stand. (R.p.273, line 5-p.275, line 1).

Charlie Michael Lark, an investigative consultant working with the PCSO, discussed the victim's death with Morris on May 29, 2008. Morris said the only medication he gave the victim was the Equate brand Tylenol on Sunday afternoon, and that he gave the victim two droppers full. He told Lark that Phillips had a prescription for cough medicine, and that she kept hydrocodone in her purse, but he did not see Phillips give the victim any medication over the weekend. Morris said he and Phillips were together the entire weekend, from Friday afternoon to Sunday afternoon. He said Phillips kept her Tussionex medication in a "pumpkin" in her closet and that he had a hard time reaching where it was kept. Morris told Lark that Phillips got the pumpkin down on two occasions when the victim was in the room but he didn't see the victim get any of the medications that were in the pumpkin, even though the victim was playing with the bottles. Morris said they all went to his sister's house Sunday afternoon, but that he and Phillips were with the victim the entire time. (R.p.285, line 20-p.289, line 12). On cross-examination Lark acknowledged Morris never said he and Phillips were actually in eyesight of each other the entire weekend. (R.p.291, line 8-p.292, line 8).

Lark subsequently discussed the victim's death with Phillips, on June 4, 2008. Phillips told him the victim was having "frightmares" during the night and although she wanted Morris to take care of him, there were times Phillips had to hold him to get him to go to sleep. Phillips told Lark she kept her medicine in a pumpkin on a shelf in her

closet, and that although she had gotten the medication down, she did not see the victim get any. She said the victim played with the medicine bottles while the pumpkin was down, but noted the tops were on. Phillips told Lark her only concern was that she may have accidentally dropped one of the bottles on the floor, and the victim could have picked it up, but she did not see how that was possible since the tops were on the bottles. (R.p.289, line 13-p.291, line 2). On cross-examination, Lark testified that although Phillips admitted her Tussionex was in the pumpkin she got down over the weekend to take her medications, she also she did not give the victim any medication the entire weekend. (R.p.293, line 5-p.294, line 1). Lark testified that neither Phillips nor Morris claimed that after they discovered the victim was sick, they ever told anybody he might have gotten into Phillips' medication. (R.p.296, lines 10-18).

Dr. Michael Eugene Ward, Chief ME for Greenville County explained he was familiar with standard procedures at Greenville Memorial Hospital, and that the victim's blood was drawn on March 17, 2008, after he was transported from Baptist Easley Hospital. Dr. Ward said Deputy Chief ME, Dr. Christiansen, received both the blood sample and the urine sample from Coroner Mahanes and then packaged and mailed them to AIT Laboratories for testing. (R.p.309, line 20-p.314, line 8).

Robert R. Foery, a consultant in forensic toxicology who worked at AIT Laboratories in 2008, was qualified as expert in forensic toxicology. He was the final certifying scientist at AIT, which meant he certified any lab results before they were communicated to the medical examiner, hospital, attorneys, or whoever requested the testing. Foery testified the analysis of the victim's urine unequivocally revealed the opiate hydrocodone, its primary metabolite oxymorphone, and chlorpheniramine. The

blood sample confirmed the presence of hydrocodone. He testified hydrocodone and chlorpheniramine are found in the pharmaceutical preparation called Tussionex. Foery explained that the Tussionex in Phillips' prescription was a liquid suspension time-release medication, meaning it is not all absorbed at once into the stomach and is instead absorbed over a period of time to extend the effectiveness and decrease the required frequency of dosing. (R.p.316, line 12-p.328, line 12).

Foery testified the concentration of hydrocodone in the victim's blood was found to be 102 nanograms per milliliter. The therapeutic range for an adult would be 10 to 40 nanograms per milliliter, so this was quite a high dose even for an adult, and particularly high for a child. (R.p.329, lines 1-13). He testified that in his opinion, to a reasonable degree of scientific certainty, the drug was given to the victim sometime on Sunday, March 16, 2008. Forey testified that based on the half-life of the drug, the first dose was given sometime between midnight on Sunday up until the victim was found, or more specifically, approximately 24 to 36 hours before the victim's blood was drawn.⁶ Forey testified that based on the victim's behavior Sunday, it could well have been a repetitive dose. He said that Lortab contains hydrocodone and acetaminophen, and since there was no acetaminophen in the victim's blood or urine, Lortab could not have been ingested by the child. (R.p.330, line 25-p.333, line 1). On cross-examination Foery testified there was a toxic level of hydrocodone in the victim but not a single toxic dose. He said in his opinion, to a reasonable degree of scientific certainty, more than one dose of Tussionex

⁶ Dr. Ward testified the blood was drawn sometime after the victim's 12:30 p.m. admission to Greenville Memorial Hospital, within a few hours, but was not sure of the exact time. (R.p.315, lines 18-23). However Forey later testified the blood was drawn at approximately 2:00 p.m. on the afternoon the victim was admitted to the hospital [Monday, March 17, 2008]. (R.p.357, lines 2-4). Thus, Forey's testimony places the initial administration of Tussionex at sometime between 2:00 a.m. and 2:00 p.m. on Sunday, March 16, 2008.

was given to the victim and that the concentration was two-and-a-half to five times higher than it should be for a therapeutic dose given to an adult. (R.p.345, line 18-p.347, line 2).

Chief ME Ward was re-called to the stand and was qualified as an expert in anatomic and forensic pathology. Although Dr. Christiansen performed the autopsy and completed the report, Dr. Ward was permitted to review the report and offer his opinion about the findings. (R.p.360, line 3-p.374, line 11). Dr. Ward testified the victim died as a result of a hydrocodone overdose. He noted a lesion on the victim's lower back just above the natal cleft. Microscopic testing revealed it was a pressure ulcer similar to what is seen in comatose patients who lie in one position for a prolonged time without movement. Dr. Ward noted a fairly large amount of knot-like stool in the victim's large intestine, which is consistent with a period of constipation, and that constipation is a known complication of taking narcotics. Dr. Ward said the constipation indicated the victim was subject to multiple doses rather than a single dose of narcotic exposure. (R.p.374, line 13-p.377, line 15). Ward explained the overdose of hydrocodone would have suppressed the victim's central nervous system to the degree that he would not have the usual respiratory drive. Not being able to unconsciously breathe, carbon dioxide would build up in the victim's blood, dropping his PH balance, leading to irritability, confusion, sleepiness, and lethargy until the victim passed out and became comatose. Dr. Ward testified that if the victim has been given medical treatment Sunday night before he was put to bed, he would have lived. (R.p.377, line 20-p.379, line 4).

At the conclusion of the State's case, Phillips moved for a directed verdict arguing: "There's been no evidence shown whatsoever that she gave any drugs to anybody. There's no evidence to determine she did it in the manner the code says to do

it, in a manner with extreme indifference to human life.” She argued the circumstantial evidence wasn’t sufficient to prove she gave Tussionex to the victim because there were other people who could have done it. She further argued there was no showing of extreme indifference where there was no evidence she had intent to harm the victim. (R.p.395, line 4-p.396, line 6). The trial court noted that under the definition of child abuse or neglect: “harm to the child’s physical health or welfare could mean that the Defendant failed to supply the child with adequate food, clothing, shelter, or health care, and this failure caused an injury or condition that caused death.” The court listed some of the evidence presented at trial and held that when all the evidence is viewed in the light most favorable to the State, it would demonstrate extreme indifference, if believed by the jury. The court found there was enough for the statutory crime to go to the jury, and denied Phillips’ motion. (R.p.396, line 7-p.397, line 1).

Co-Defendant: Jamie Edward Morris

First, Morris called expert forensic toxicologist William Edward Brewer, PhD, in his defense. Brewer reviewed the victim’s medical records, including his toxicology report. He said an assessment of metabolites in the blood would have been more important than urine levels, and testified he would expect the victim to have been comatose before 11 a.m. Monday morning if he was given the amount of Tussionex at the time noted in the report. Brewer testified the amount of hydrocodone in the victim was not a large dose, and said that without being completely unbiased, he did not believe it indicated an intent to harm the victim. He noted however, that with a small child, it doesn’t take much to lead to toxicity. (R.p.398, line 19-p.414, line 14). On cross-

examination, Brewer concurred that the hydrocodone overdose was indeed the cause of death. (R.p.416, lines 21-25).

Morris testified in his own defense. He said he and Phillips picked the victim up from Honeycutt on Friday March 14, 2008, at 1:30 p.m. and kept him until 7:30 p.m. Sunday. Morris testified he gave the victim two droppers full of Tylenol around 2:30 or 3:00 Sunday afternoon and had no knowledge of anyone else giving the victim medication over the weekend. He claimed he never saw the victim get any Tussionex and he never gave the victim any Tussionex. Morris testified that to his knowledge Phillips also did not give the victim any Tussionex. (R.p.439, line 12-p.447, line 11). Morris acknowledged giving Honeycutt the Medicaid card and asking her to take the victim to the doctor, and claimed he did not take the victim himself because he didn't think the symptoms were severe enough to go right away. (R.p.454, line 3-p.455, line 6).

Morris testified he was familiar with the pumpkin where Phillips kept her Tussionex and her other medications. He said he got the pumpkin down for Phillips that weekend and that he frequently got it down for her because it was so high up, and he is taller than his mother. Morris testified he believed Phillips took some Tussionex during the weekend. He testified that although he and his mother were not under each other's feet 24 hours a day, he was with the victim the whole time. (R.p.456, line 24-p.457, line 25). On cross-examination Morris repeated he was with the victim the entire weekend and testified the victim followed him around everywhere he went. (R.p.462, lines 11-20). Morris testified the victim slept right beside him on the couch and he would know if something was happening to the victim during the night. He said he did not leave the victim alone at all during the weekend and was with the victim the whole time. Morris

testified he was even the one who normally changed the victim's diapers because the victim wouldn't let anyone else take care of him. (R.p.470, lines 15-p.473, line 19).

Morris insisted the victim was with him the entire weekend until he was dropped off Sunday evening and that the victim never left his sight for a second. Even when Morris went to the bathroom the victim would follow him in to watch, and would try to use the bathroom himself. (R.p.483, lines 4-16).

Appellant: Donna Lynn Phillips

Laura Phillips, Phillips' daughter and Morris's younger sister, testified on Phillips' behalf. Laura testified she was eleven years old the weekend the victim came to visit, and that although they may not have been in the same room all the time, she, Morris, Phillips and the victim were together the whole weekend. Laura said the victim seemed fine and alert all weekend until Sunday afternoon when they brought him back to Honeycutt's house. She said the victim may have been crying and coughing some, but otherwise seemed like a normal kid. (R.p.500, line 15-p.504, line 9). On cross-examination she admitted giving a prior written statement that they were worried about the victim when they dropped him off Sunday because of his cough and congestion. (R.p.510, lines 2-8). Laura said she never saw anybody give the victim any medicine over the weekend. (R.p.518, line 24-p.519, line 6).

Phillips then testified in her own defense. She was initially held in contempt for violating the trial judge's instruction not to mention the ten months the victim spent in foster care prior to the incident; however, she was allowed to continue her testimony. (R.p.535, line 12-p.538, line 24). Phillips testified the victim was fine when they picked him up from Honeycutt's house Friday. They noticed a little runny nose Friday night, but

he woke up Saturday morning like clockwork. Phillips said that on Saturday when she had the pumpkin down from the closet to take her medicine the victim grabbed at the bottles so she took them from his hand. She said did not give the victim any medication and would never give a child medication that wasn't prescribed for him. Phillips testified the victim could not have gotten into the pumpkin himself because it was on a top shelf in her closet, and he was never left alone. She claimed she and Morris had their eyesight on the victim the whole weekend saying: "We had an evil eye on him, the evil eye." (R.p.540, line 11-p.555, line 5). Phillips testified she did not give the victim any medications or any kind from her house. She insisted she did not give any of her Tussionex to the victim and that Morris would not have given it to him either. (R.p.568, lines 17-21; p.573, line 2-p.574, line 5; p.579, lines 14-16). On cross-examination Phillips testified the victim slept with Morris on the couch that weekend. (R.p.580, lines 9-17). She was subsequently held in contempt a second time for intentionally and willfully violating the trial court's order and was not permitted to testify any further. (R.p.604, line 24-p.605, line 8).

Co-Defendant: Latasha Diane Honeycutt

Sherry Price, Honeycutt's aunt, testified Honeycutt was upset and shaking when Price saw her at the hospital with the victim and that while Honeycutt does not get emotional in front of strangers she is very emotional in front of family members. (SROA.p.15, line 5-p.16, line 20). Kayla Roper, Brandon Roper's sister, testified she saw Honeycutt just after the victim was taken away by EMS and Honeycutt was shaking and in a state of shock. (R.p.606, line 15-p.608, line 2). She further testified that later that day while she was in the hospital waiting room she overheard Philips say to Morris

that Phillips had given the victim some cough medicine over the weekend and “surely to God that’s not what is wrong.” (R.p.613, lines 9-23).

Next Brandon Roper, Honeycutt’s boyfriend, testified on Honeycutt’s behalf. He explained he met Honeycutt through Morris when Honeycutt and Morris were together. Brandon said he had known Honeycutt for seven or eight years and they eventually started dating after she broke up with Morris, and the breakup occurred because Morris was abusive to Honeycutt. (R.p.620, line 17-p.623, line 8). Brandon testified the victim was fine when he was picked up by Morris and Phillips Friday but shortly after he returned Sunday he was crying and having trouble standing. He said he remembered Honeycutt getting up during the night Sunday night/Monday morning to check on the victim and their younger daughter Ava, and then he woke Monday morning to Honeycutt screaming when she discovered the victim nonresponsive. (R.p.625, line 8-p.636, line 23). Brandon described his efforts to resuscitate the victim, the call to 911, and the arrival of EMS, as well as his actions to notify Morris and Phillips after he drove Honeycutt to the hospital. He testified that when he told Phillips about the victim, Phillips asked: “Is he dead?” Then as she was running out the front door she screamed: “[Morris is] going to blame me. [Morris is] going to blame me. [Morris is] going to blame me.” (R.p.636, line 24-p.644, line 14). Later, at the hospital a nurse came in and whispered that they had found opiates in the victim’s system. Brandon said he looked at Phillips and asked: “What? Opiates?” Thirty seconds later, Phillips grabbed Morris by the arm and dragged him out the back door of the hospital. (R.p.647, lines 4-16). On cross-examination Brandon explained that when he said the victim had trouble standing Sunday evening, he meant the victim was fussy and did not want to stand, not that he

could not physically stand. (R.p.662, lines 1-11). On re-direct Brandon testified he and Honeycutt did not have any Tussionex in their house, he did not give the victim any medication, and he did not see Honeycutt give the victim any medication. (R.p.680, line 15-p.682, line 2).

Finally, Honeycutt testified in her own defense. She said that when the victim was returned by Morris and Phillips Sunday he was crying, pitching a fit, and not wanting to stand up, but she saw no signs or symptoms to make her worry about his health. Honeycutt testified that after putting the victim to bed, she got up three or four times during the night to check on the baby, and that each time she also checked on the victim. She said once, in the early evening, he was sleeping on his side and sounded a little congested so she turned him onto his back but otherwise did not touch him during the night. Honeycutt testified Monday morning at around 8:00 a.m. she quietly and carefully changed the victim's diaper so as not to wake him, and went back to sleep. She said when she later got up and ready for work and went to wake the victim at about 11:00 a.m. he didn't respond and she realized something was wrong. (R.p.683, line 1-p.700, line 23). Honeycutt testified she did not give the victim any medication, that she would do everything she could to help her son, and did not know he was in distress and needed medical attention before she found him and screamed for help. (R.p.711, lines 2-12). On cross-examination Honeycutt testified the victim seemed OK at 8:00 a.m. Monday and that he was warm and breathing normal. (R.p.723, line 18-p.725, line 23; p.734, lines 5-9).

Motions, Closing Arguments, Jury Charge and Verdict

After all three co-defendants rested, Morris renewed his motion for a directed verdict arguing: "The State has not proven by substantial circumstantial evidence that anybody did anything in this case." The trial judge denied the motion. (R.p.740, lines 4-24). In closing, Phillips argued she did nothing except be a great grandmother to the victim. She argued there was no evidence she gave the victim Tussionex or any other medication over the weekend, and that the victim was fine when he was dropped off at Honeycutt's house Sunday evening. (R.p.761, line 17-p.769, line 13). The solicitor briefly described the law to be applied by the jury and then restated the State's theory of the case. In regard to Morris the solicitor focused on the testimony that the victim was with him the entire weekend which was proof he had to have knowledge of anything that happened to the victim. In regard to Phillips the solicitor focused on inconsistencies in Phillips' statements to police, her evasive testimony at trial, and her admission to Kayla Roper at the hospital that she gave the victim some of her cough medicine. The solicitor noted the statute did not require proof of actual intent to kill, but rather required a proof of extreme indifference, which was shown by the intentional act of giving adult prescription medicine to the victim. Finally, the solicitor noted the expert testimony that the Tussionex was given in repetitive doses in the 24 to 36 hours before the victim's blood was drawn. (R.p.791, line 20-p.815, line 10).

Thereafter, the trial court charged the jury on the applicable law. The court instructed the jury on the respective roles of judge and jury, including the jury's duty to find the facts by weighing and evaluating the evidence. The trial court charged direct and circumstantial evidence, the jury's duty to determine credibility of witnesses, the law of

expert witness testimony, the burden of proof, the presumption of innocence, and reasonable doubt. (R.p.815, line 11-p.825, line 2). The court then charged the general law of homicide by child abuse in regard to Phillips and Honeycutt, including a charge on criminal intent, and gave an additional charge in regard to Morris on aiding and abetting homicide by child abuse. (R.p.826, line 15-p.830, line 7).

After beginning deliberations, the jury sent out a note asking the trial court to again define aiding and abetting homicide by child abuse. The trial court re-charged the language of the statute, and the legal definitions of “aid” and “abet.” (R.p.834, line 9-p.835, line 23). At the conclusion of trial the jury convicted Phillips of homicide by child abuse and Morris of aiding and abetting homicide by child abuse. Honeycutt was found not guilty. (R.p.837, lines 2-18). Phillips moved for a new trial on grounds that: “there is no way that this jury could have found as they found with respect to [her] actions.” The motion was denied. (R.p.840, lines 15-21). The trial court sentenced Phillips to twenty-five (25) years’ imprisonment. (R.p.853, line 23-p.854, line 4).

ARGUMENT

The trial court properly denied Appellant's motion for a directed verdict where the State presented substantial evidence from which the jury could fairly and logically find Appellant acted with extreme indifference to human life, thereby satisfying the elements of homicide by child abuse.

Phillips argues the trial court erred in denying her motion for a directed verdict on the charge of homicide by child abuse because the State failed to present any substantial evidence that she acted with extreme indifference where the child died from an overdose of hydrocodone as found in the cough syrup Tussionex. The State disagrees and submits Phillips' arguments are without merit.

The trial court properly denied Phillips' motion for a directed verdict. 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 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.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a denial of a motion

for a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004). Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Law/Analysis

Pursuant to the South Carolina Code: "A person is guilty of homicide by child abuse if the person 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) (2003) (emphasis added). "Child abuse or neglect" is defined as "an act or omission by any person which causes

harm to the child's physical health or welfare." S.C. Code Ann. § 16-3-85(B)(1) (2003). "[H]arm to a child's physical health or welfare" can occur when a person "fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death." S.C. Code Ann. § 16-3-85(B)(2)(b) (2003) (emphasis added). In the context of criminal statutes, indifference has been likened to a conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). For purposes of this statute, "extreme indifference" has been described as "a mental state akin to intent characterized by a deliberate act culminating in death." McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting Jarrell, 350 S.C. at 98, 564 S.E.2d at 367).

Phillips argues the State did not prove intent because she "did not plan any harm to the child." (Brief of Appellant, p.14). However, this is not what is required under South Carolina's interpretation of "extreme indifference." If the legislature had wanted to require that level of intent, it could have written the statute like the murder statute, which requires malice aforethought. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally and without just cause or excuse." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). By comparison, in describing the homicide by child abuse statute, South Carolina Jurisprudence specifically notes: "Proof of malice aforethought is not required." 23 S.C. Jur. Homicide § 29 (1994). Phillips seems to confuse the intent required for extreme indifference and

the intent required for malice. Extreme indifference only requires the actor has the intent to do a deliberate act with reckless disregards of the risk of death, and that act culminates in death. Nothing in the definition of extreme indifference indicates the act itself must be specifically wrongful or done with the intent to cause harm. On the other hand, malice requires the actor to have wrongful intent to injure another. Thus, in this case of homicide by child abuse, Phillips' act of deliberately giving the victim adult prescription Tussionex is sufficient to show the intent required for extreme indifference. This administration of hydrocodone was the deliberate act that caused the victim's death.

In State v. McKnight, the supreme court affirmed the denial of McKnight's motion for a directed verdict on the issue of extreme indifference. 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003). McKnight was charged with homicide by child abuse after taking cocaine while she was pregnant and giving birth to a stillborn baby. Id. at 641-42, 576 S.E.2d at 171. "Given the fact that it is public knowledge that usage of cocaine is potentially fatal, [the court found] the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life." Id. at 646, 576 S.E.2d at 174. McKnight did not have to intend to kill or harm her unborn child by taking cocaine because extreme indifference was shown when she recklessly disregarded the risk her conduct created. That act culminated in the death of her baby and was sufficient to satisfy the level of intent required under the homicide by child abuse statute.

Here, a similar analysis controls. This is true even if extreme indifference contemplates a showing of actions that evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim. See 40 C.J.S. Homicide, §

42 (“While intent may not be necessary under provisions [requiring depraved or extreme indifference to human life], something more than mere recklessness is comprehended, and a gross deviation from a reasonable standard of care may not be sufficient.”). Indeed, even if this Court finds the State must submit evidence that Phillips consciously engaged in a life-threatening act with indifference as to whether the victim lived or died to establish the requisite mental state, the evidence still supports the trial court’s decision. This is because the State submitted evidence indicating Phillips was aware of the gravity of the danger in giving adult prescription Tussionex to the victim, so as to prove she acted without regard as to whether the victim lived or died.

The theory of the State’s case was that Phillips was guilty of committing homicide by child abuse because, as set forth in Section 16-3-85(A)(1) of the South Carolina Code, she committed “child abuse or neglect” by deliberately giving the victim hydrocodone in the form of adult prescription Tussionex cough syrup, in what constituted a lethal dose. Specifically, the State intended to prove:

That DONNA LYNN PHILLIPS did in Pickens County, on or about, and/or between the dates of March 14, 2008 and March 17, 2008, caused the death of [the victim], a child under the age of eleven years while committing child abuse or neglect with circumstances manifesting and [sic] extreme indifference to human life by facilitating or allowing the excessive ingestion of opiate drugs and/or the failure to get medical treatment for said child. This is in violation of § 16-3-0085(A)(1) of the South Carolina Code of Laws (1976) as amended.

(R.pp.855-856; R.p.27-p.32; R.p.152-p.176).

Contrary to Phillips’ assertions, the evidence presented at her trial did more than merely raise a suspicion of guilt. Instead, the State presented substantial evidence to support a finding that Phillips deliberately administered adult prescription Tussionex to

the victim, that she was aware of the gravity of the danger in doing so and thereby acted with extreme indifference for human life, and that she subsequently failed to get the victim medical help after the Tussionex had been administered. Dr. John Richard Yelton testified that in the months before the victim died he was a normal, healthy, twelve to twenty-one month old who was developing well with no indications of distress. In stark contrast, ER nurse Kathy Purdessy testified the victim was in cardiac arrest with no pulse when he arrived for emergency treatment on March 17, 2008. Purdessy took a urine sample from the victim and sent it to the lab and the urine came back positive for opiates. Dr. Garmon, who was assisting in the ER, noticed a red rash that looked like bed sores on the victim's bottom, typically caused by pressure on the skin from a lack of movement over a period of time. Laboratory scientist William Gassman confirmed that shortly after arriving in the ER the victim's urine tested positive for opiates.

Lieutenant Robinson of the PCSO testified the Tussionex bottle in evidence was prescribed to Phillips and included language on the label it is: "federal law that prescribed medications are only for the person they're prescribed to." Greenville County ME Ward testified the victim died as a result of a hydrocodone overdose.⁷ He explained the overdose suppressed the victim's central nervous system leading to irritability, confusion, sleepiness, lethargy, coma, and eventual death. The lesion on the victim's lower back indicated he was lying in one position for a prolonged time without movement, and constipation indicated the victim was subject to multiple doses of hydrocodone rather than a single dose. Dr. Ward testified that if the victim had been given medical treatment Sunday night before he was put to bed, he would have lived.

⁷ Coroner James Mahanes also gave an opinion that the victim died from an overdose of hydrocodone that came from [Phillips'] home, in the form of Tussionex.

Expert forensic toxicologist Robert R. Foery testified the victim's urine unequivocally revealed the presence of the opiate hydrocodone, its primary metabolite oxymorphone, and the drug chlorpheniramine. The victim's blood confirmed the presence of hydrocodone. Forey explained hydrocodone and chlorpheniramine are found in the pharmaceutical preparation called Tussionex. He testified the concentration of hydrocodone in the victim's blood was 102 nanograms per milliliter, two-and-a-half to five times higher than the normal therapeutic range for an adult of 10 to 40 nanograms per milliliter. Forey testified that in his opinion, to a reasonable degree of scientific certainty, the Tussionex was first given to the victim sometime between 2:00 a.m. and 2:00 p.m. on Sunday, March 16, 2008, and that more than one dose of Tussionex was administered.

A partially empty bottle labeled as Phillips' prescription Tussionex was removed from her residence. Chemistry expert Jeffrey Morris Hollifield tested the liquid in the bottle and detected hydrocodone and chlorpheniramine, the two active ingredients in Tussionex. Two medicine bottles removed from Honeycutt's residence tested positive only for acetaminophen, and no drugs were found in the victim's partially empty sippy cup that was removed from Honeycutt's refrigerator.

There was no dispute the victim was in the care and custody of Morris and Phillips from Friday afternoon, March 14, 2008, through Sunday evening, March 16, 2008. Prior to trial Morris told investigative consultant Charlie Michael Lark that he and Phillips were with the victim the entire weekend. When Morris testified in his own defense, he repeated the claim that he was with the victim the whole time from Friday March 14, 2008, at 1:30 p.m. until 7:30 p.m. Sunday. Morris said the victim slept right

beside him on the couch and followed him around everywhere he went. He said he did not leave the victim alone at all during the weekend and was with the victim the whole time including when he changed the victim's diapers. Morris insisted the victim was with him the entire weekend until he was dropped off Sunday evening and that the victim never left his sight for a second. Even when Morris went to the bathroom the victim would follow him in to watch, and would try to use the bathroom himself.

Phillips also testified and said the victim was fine when they picked him up from Honeycutt's house Friday. She admitted that on Saturday when she had the pumpkin down from the closet to take her medicine the victim grabbed at the bottles, but claimed she did not give the victim any medication. Phillips also claimed she and Morris had their eyes on the victim all weekend and she agreed the victim slept on the couch with Morris.

Kayla Roper was in the hospital waiting room and heard Phillips tell Morris she had given the victim cough medicine over the weekend, and "surely to God that's not what is wrong." The only "cough medicine" recovered during the investigation was Phillips' adult prescription Tussionex. When coupled with the expert testimony that the victim was given multiple doses of Tussionex, this constituted sufficient evidence that Phillips deliberately gave the victim her prescription Tussionex, which, as explained below, provided evidence demonstrating extreme indifference to human life.

Other substantial circumstantial evidence presented at trial also supported the trial judge's decision. Brandon Roper testified Phillips grabbed Morris by the arm and dragged him out the back door of the hospital within thirty seconds of hearing a nurse say they had found opiates in the victim's system. Phillips' statements to detective Burgess

and consultant Lark were inconsistent in certain details, like whether she had Lortab or Tussionex in the pumpkin, and whether she might have dropped a bottle on the floor. This evidence suggests Phillips knowingly gave the victim Tussionex and was trying to cover for herself, which provided circumstantial evidence of her acts. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (“As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.”).

Particularly with regard to proof of extreme indifference, the State submits the risks associated with all prescription medications are a matter of common knowledge as prescription medications are controlled substances and cannot be obtained without a prescription from a licensed medical professional. See Commonwealth v. Walker, 812 N.E.2d 262, 271 n.17 (Mass. 2004) (“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.”). Thus, the risks of prescription medications are inherent and clear due to the controlled and regulated nature of the substances themselves. In addition, the label on the bottle of the Tussionex administered to the victim contained a warning cautioning it is: “federal law that prescribed medications are only for the person they’re prescribed to.” Here, not only was the Tussionex not lawfully prescribed for the child victim, it was prescribed for Phillips, an adult. Phillips herself claimed she did not give the victim any medication over the weekend. She testified: “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.” (R.p.553, lines1-4). Thus, her own testimony proved her specific knowledge of the dangers of prescription medication, and the particular dangers of adult medicine when given to children. Finally, the evidence showed the victim was given Tussionex in an amount two-and-a-half to five times higher than the normal therapeutic range for an adult. For all of these reasons, the State submits Phillips was acutely aware the Tussionex carried a risk to the safety and physical health of the victim. Thus, regardless of any intent to harm the victim, Phillips recklessly disregarded the risk her conduct created. Consequently, she had the requisite intent to satisfy the extreme indifference element of the homicide by child abuse statute when she gave the victim her prescription Tussionex, and he died as a result.

In conclusion, viewing the evidence in a light most favorable to the State, the evidence clearly established issues requiring jury resolution. The evidence presented 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. Evidence from the trial shows Phillips deliberately gave the child victim adult prescription Tussionex in an amount that far exceeded an adult dose. Likewise the evidence adequately demonstrated her failure to get medical assistance for the victim on Sunday rather than leaving him at Honeycutt’s house. The State submits the evidence was sufficient, as a matter of law, to submit the case to the jury. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) (“Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts

in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury.”). The trial judge committed no error in denying the directed verdict motion, and Phillips’ conviction should be affirmed.

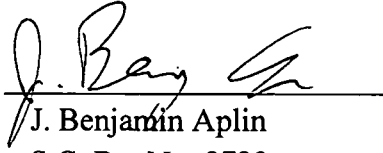
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
January 17, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2012-212663

RECEIVED

JAN 21 2014

SC Court of Appeals

THE STATE,.....RESPONDENT

v.

DONNA LYNN PHILLIPS, ...APPELLANT.

CERTIFICATE OF COUNSEL

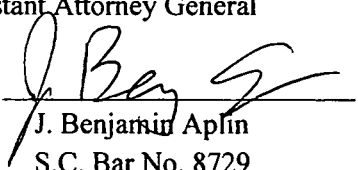
The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b),

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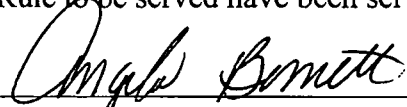
DONNA LYNN PHILLIPS, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated January 17, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 17th, day of January, 2014.


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