THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

CERTIORARI TO 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: 2015-000351

THE STATE, ...RESPONDENT,

v.

DONNA LYNN PHILLIPS, ...PETITIONER.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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Petitioner's argument is not preserved for appellate review because it was raised for the first time in her petition for rehearing to the Court of Appeals. To the extent this Court finds Petitioner's argument was sufficiently preserved, the Court of Appeals nevertheless properly affirmed the trial court's denial of Petitioner's directed verdict motion where the totality of the evidence presented during trial, with or without the "direct evidence of child abuse" which was appropriately considered by the Court of Appeals under the "waiver rule," constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse 24

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Whether the "waiver rule" argument being presented by Petitioner is preserved for appellate review where it was raised for the first time in her petition for rehearing to the Court of Appeals and, to the extent this Court finds Petitioner's argument was sufficiently preserved, whether the Court of Appeals nevertheless properly affirmed the trial court's denial of Petitioner's directed verdict motion where the totality of the evidence presented during trial, with or without the "direct evidence of child abuse" which was appropriately considered by the Court of Appeals under the "waiver rule," constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse.

STATEMENT OF THE CASE

Donna Lynn Phillips (Petitioner) 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. Respondent (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, Petitioner and her two co-defendants, Jamie Edward Morris (Morris) and Latasha Diane Honeycutt (Honeycutt), proceeded to a joint trial by jury pursuant to which Petitioner was found guilty of homicide by child abuse, Honeycutt was acquitted, and Morris was found guilty of homicide by child abuse - aiding and abetting.[2] Petitioner 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. Petitioner timely filed a notice of intent to appeal and on November 12, 2014, her conviction for homicide by child abuse was affirmed in a published opinion from the Court of Appeals. State v. Petitioner, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014). (App.p.1-p.10). Petitioner submitted a timely petition for rehearing, the State filed a return, Petitioner submitted a reply, and by order filed January 27, 2015, rehearing was denied by the Court of Appeals. (App.p.11-p.46). On March 9, 2015, Petitioner submitted a petition for a writ of certiorari to this Court and on April 8, 2015, the State submitted a return. In an order dated July 2, 2015, two

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[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.

[2] In her Brief, Petitioner notes she required the assistance of a breathing machined during the trial. (Brief of Petitioner, p.2). Although similarly irrelevant to the issues in this appeal, the State likewise notes that Petitioner's 21-month-old victim also had difficulty breathing before he died from being given hydrocodone. (R.p.31, line 25-p.191, line 10; SROA.p.14, lines 4-25; p.81, line 11-p.82, line 19).

members of this Court granted the petition and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. On August 10, 2015, Petitioner submitted a brief in support of his appeal. This Brief of Respondent now follows.

STATEMENT OF FACTS

Opening Statements

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, Petitioner, 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).

Petitioner initially argued in her opening statement that neither she nor her co-defendants were at fault in the child's death. Counsel said: "[T]his is a case where maybe nobody did anything wrong. Maybe they all tried to do everything right, and it just didn't work out. Now sometimes, that happens." However, Petitioner immediately switched tactics and then attempted to pin blame for the death squarely on Honeycutt. Counsel suggested Petitioner would testify in her own defense and argued that after Petitioner and

Morris "brought the child to the mother [a]nd the mother took care of the child after they dropped the child off. . . . The mother didn't go check. The mother didn't go check." Counsel concluded by stating: "My client is innocent. Because she didn't do anything. She was simply a grandmother taking care of her grandkid." (R.p.36, line 23-p.39, line 6). Counsel for Honeycutt followed Petitioner's opening statement by arguing: "The facts are going to show that my client did absolutely nothing wrong." He repeated: "She's not guilty. She didn't do anything wrong, nothing." (R.p.39, line 8-p.41, line 18). Honeycutt neither directly nor indirectly claimed Petitioner gave the victim Tussionex, and she never suggested the evidence would show this is what Petitioner did. Instead, before any evidence was presented Honeycutt's defense simply consisted of the claim that she did nothing wrong.

The State's Case

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).

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 Tussionex[3] 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 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

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[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).

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 Petitioner 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 Petitioner' 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. Petitioner 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. Petitioner claimed she heard Honeycutt say she hoped the victim did not get any of her Lortab[4] or her sister's Lortab. (R.p.136, line 8-p.137, line 25). On April 10, 2008, Burgess interviewed Petitioner at the

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[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).

PCSO. In her second oral statement Petitioner 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, Petitioner gave a written statement. In that statement Petitioner 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. Petitioner 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. Petitioner 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. Petitioner said she told Roper she had Lortab but did 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, Petitioner, 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 Petitioner 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 Petitioner 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 Petitioner' residence to pick up a bottle of Tussionex from Petitioner. 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 Petitioner 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 Petitioner. The two medicine bottles tested positive for acetaminophen[5] 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 [Petitioner'] home, in the form of Tussionex. (R.p.263, line 19-p.264, line 19).

Michelle Henry, Honeycutt's neighbor, talked to Honeycutt about the victim's behavior the day Morris and Petitioner 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).

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

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 Petitioner had a prescription for cough medicine, and that she kept hydrocodone in her purse, but he did not see Petitioner give the victim any medication over the weekend. Morris said he and Petitioner were together the entire weekend, from Friday afternoon to Sunday afternoon. He said Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner, on June 4, 2008. Petitioner told him the victim was having "frightmares" during the night and although she wanted Morris to take care of him, there were times Petitioner had to hold him to get him to go to sleep. Petitioner 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. Petitioner 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 Petitioner 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 Petitioner nor Morris claimed that after they discovered the victim was sick, they ever told anybody he might have gotten into Petitioner' 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 Petitioner' 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 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).

[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.

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).

Motion for a Directed Verdict

Petitioner moved for a directed verdict at the close of the State's case and argued: "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 are other people involved in this that could have gave the child stuff and done other things." 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) (emphasis added). Thus, just as she did in her opening statement, Petitioner cast suspicion on Honeycutt.

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 Petitioner' motion. (R.p.396, line 7-p.397, line 1). After denying all three co-defendants' motions for a directed verdict, each co-defendant presented evidence in his or her defense.

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 that 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 Petitioner 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 vicitm 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 Petitioner 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 Petitioner kept her Tussionex and her other medications. He said he got the pumpkin down for Petitioner 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 Petitioner 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).

Petitioner: Donna Lynn Petitioner

After co-defendant Morris presented his defense but before co-defendant Honeycutt presented her defense, Petitioner was given the opportunity to produce evidence in her own defense. First Petitioner called Laura Phillips, Petitioner's daughter and Morris's younger sister, to the stand. 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, Petitioner 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).

Petitioner 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). Petitioner 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. Petitioner 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. Petitioner 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). Petitioner 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 Petitioner 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

After Petitioner rested, and in light of Petitioner's defense that someone other than she or Morris must have given the victim Tussionex, co-defendant Honeycutt

presented her own defense. 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 Petitioner 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 Petitioner 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 Petitioner after he drove Honeycutt to the hospital. He testified that when he told Petitioner about the victim, Petitioner 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 Petitioner and asked: "What? Opitates?" Thirty seconds later, Petitioner 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 Petitioner 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, Petitioner 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 Petitioner the solicitor focused on inconsistencies in Petitioner' 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 Petitioner 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 Petitioner 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). Petitioner 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 Petitioner to twenty-five (25) years' imprisonment. (R.p.853, line 23-p.854, line 4).

After all three co-defendants rested, Petitioner renewed her 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, Petitioner continued pushing her theory of defense that Honeycutt gave the victim the Tussionex. Counsel argued Petitioner did nothing except be a great grandmother to the victim. He argued there was no evidence Petitioner 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. Counsel said: "Whatever happened at his mother's house, I don't know. I wasn't there. My client wasn't there. But here's the question for all of you: when did the child get the alleged dosing? Not from my client. She never gave him anything." He goes on to argue: "So this child comes back to their house in good condition, in good health. Guess what? Something happened. We don't know what it was." (R.p.761, line 17-p.769, line 13).

Thereafter, the trial court charged the jury on the applicable law. (R.p.815, line 11-p.830, line 7). At the conclusion of trial the jury convicted Petitioner 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). Petitioner 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 Petitioner to twenty-five (25) years' imprisonment. (R.p.853, line 23-p.854, line 4).

ARGUMENT

Petitioner's argument is not preserved for appellate review because it was raised for the first time in her petition for rehearing to the Court of Appeals. To the extent this Court finds Petitioner's argument was sufficiently preserved, the Court of Appeals nevertheless properly affirmed the trial court's denial of Petitioner's directed verdict motion where the totality of the evidence presented during trial, with or without the "direct evidence of child abuse" which was appropriately considered by the Court of Appeals under the "waiver rule," constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse.

Petitioner argues this Court should reverse the Court of Appeals and direct a verdict of acquittal because the Court of Appeals erred by not applying this Court's precedent in State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), when it affirmed the trial court's denial of her directed verdict motion. In support of this argument she references this Court's recently filed opinion in State v. Palmer, Op. No. 27552 (S.C.Sup.Ct. filed July 29, 2015) (Shearouse Adv. Sh. No. 29 at 39). Petitioner contends the Court of Appeals overlooked or misapprehended the central holding in Hepburn in regard to the "waiver rule" and its exceptions, as well as that holding's implications for her case.[7] She argues that if the Court of Appeals had applied Hepburn, it would have had no choice but to reverse the trial court's failure to direct a verdict of acquittal. The State disagrees for several reasons.

Initially, the State submits this issue is not preserved for appellate review. Furthermore, the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict both because it appropriately considered

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

Petitioner's testimony and the testimony of Honeycutt's witnesses under the "waiver rule," and because even without such evidence, the totality of the evidence presented during trial constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse. There is no basis for this Court to reverse the Court of Appeals in this matter. Indeed, the Court of Appeals decision addressed the arguments raised by Petitioner on appeal and was a straightforward exercise of applying the proper standard of review and existing precedent to the particular facts and circumstances of Petitioner's case. Thus, the State respectfully requests that the Court of Appeals decision be affirmed and that Petitioner's appeal denied and dismissed.

On appeal to the Court of Appeals, Petitioner argued 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 responded by arguing the trial court properly denied Petitioner's motion for a directed verdict. The State contended that when viewed in a light most favorable to the State, the evidence presented during trial constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse, including that Petitioner committed a deliberate act causing the victim's death under circumstances manifesting an extreme indifference to human life. The State maintained the trial court properly considered the existence of evidence as opposed to its weight and was required to deny Petitioner's directed verdict motion and submit the case to the jury. Ultimately, the Court of Appeals agreed with the State's position and affirmed the denial of Petitioner's motion for a directed verdict.

A. Argument is not preserved for Appellate Review

The State respectfully asks this Court to dismiss certiorari as improvidently granted because the sole argument presented in this appeal is based on an issue/claim that simply was not preserved for appellate review. The "waiver rule" argued by Petitioner in this petition for a writ of certiorari was: (1) not raised to or ruled upon by the trial court; (2) not raised or argued in Petitioner's brief to the Court of Appeals; (3) not stated as a reason for the supplemental citations submitted by Petitioner on September 3, 2014; (4) not argued or mentioned a single time during oral arguments on September 10, 2014; and (5) raised for the first time in Petitioner's petition for rehearing to the Court of Appeals.

Petitioner appears to recognize that she failed to raise any argument regarding the "waiver rule" to the Court of Appeals until filing her petition for rehearing, and she is now seeking to circumvent the well-established rules of error preservation to raise the issue in her appeal to this Court. She argues her September 3, 2014, letter called the Court of Appeals' attention to State v. Hepburn, and that: "Pursuant to the limitation contained in Rule 208(b)(7), SCACR, [Petitioner] did not include any argument in her letter." (Brief of Petitioner, p.17). 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, Petitioner's 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. Petitioner 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. (App.p.26). 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 Petitioner's brief. Petitioner 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. Petitioner also did not mention the "waiver rule" during oral arguments despite her apparent contention that, as the "central holding in Hepburn" the "waiver rule" was the reason she listed Hepburn as a supplemental citation. The State submits that under the plain, unambiguous, and mandatory terms of Rule 208, Petitioner's 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, Petitioner's subsequent failure actually mention or argue the "waiver rule" during oral arguments to the Court of Appeals constituted a waiver of her right to pursue it by way of rehearing, as well as a waiver of her right to now pursue it on appeal to this Court.

B. Evidence was Properly Considered

Petitioner does not appear to dispute that under the "waiver rule" a defendant who presents evidence waives her directed verdict motion made at the end of the State's case and 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. Hepburn, 406 S.C. at 430 n.15, 753 S.E.2d at 409 n.15. However, she argues the court should not have considered co-defendant Honeycutt's evidence because the rule is inapplicable to co-defendant testimony. Id. 406 S.C. at 434, 753 S.E.2d at 412. The State submits Petitioner's argument must be rejected for two reasons.

First, the exception is limited to "co-defendant testimony." Hepburn, 406 S.C. at 436, 753 S.E.2d at 412 ("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 Appellant that is responsive to Lewis's testimony, for purposes of determining whether the State presented substantial circumstantial evidence sufficient to survive Appellant's mid-trial motion for directed verdict."). This Court's recent decision in Palmer does not alter this limitation. Indeed, it was co-defendant Gorman's testimony this Court appropriately declined to consider in reviewing Palmer's directed verdict motion. Palmer, Shearouse Adv. Sh. No. 29 at 41.

Here, the testimony Petitioner finds offensive came from Kayla Roper and Brandon Roper, not from Honeycutt herself. Therefore, the "waiver rule" exception described in Hepburn simply does not apply. From a practical standpoint, this limitation to codefendant testimony makes sense. In regard to Kayla's testimony that she heard Petitioner admit giving the victim cough medicine, Petitioner complains that "[t]he prosecution seized on this testimony, not asking Roper about anything else." (Petition, p. 14). Yet, there was absolutely nothing preventing the State from calling both Kayla and Brandon in reply, at which point the prosecution could have elicited the very same information. Indeed, as opposed to co-defendant testimony, testimony from other

witnesses is: "testimony within the government's power to command in a joint trial." See Hepburn, 406 S.C. at 435, 753 S.E.2d at 412 (reciting the Fifth Circuit's explanation of the operative principle of the waiver doctrine in United States v. Belt, 574 F.2d 1234 (5th Cir. 1978)). By offering evidence in her defense, Petitioner waived consideration of the evidence as it stood at the close of the State's case, particularly where witnesses with additional evidence previously unknown to the State could have been called in reply. The State acknowledges the important policy considerations related to the "waiver rule" and the solicitor's duty to ensure Petitioner was accorded procedural justice and it submits those considerations and duties were fulfilled in Petitioner's case. The State further submits that as a "minister of justice" the solicitor also has responsibilities to the jury, the victim, and the public to seek to introduce relevant and admissible evidence regardless of when it is discovered. Rule 3.8, cmt.1, RPC, Rule 407, SCACR.

Second, Petitioner's argument is grounded in the fallacy that her defense was offered in response to Honeycutt rather than in response to the State. Even though Petitioner acknowledges she presented her defense before Honeycutt, she argues: "Both witnesses responded to Honeycutt's defense, foreshadowed during her opening statement, that [Petitioner] and Morris returned a sick child that had already been fatally overmedicated with a fatal dose of hydrocodone." (Brief of Petitioner, p.16). As explained above, Honeycutt made no such claim in her opening statement, either directly or through foreshadowing. Indeed, Honeycutt only offered testimony from Kayla Roper and Brandon Roper after Petitioner repeatedly implied Honeycutt may have been the person who gave the victim the lethal dose of Tussionex. Thus, contrary to Petitioner's

assertions, Honeycutt was the one who responded to Petitioner and not the other way around, and the exception does not apply.

Petitioner further argues her own testimony qualifies for an exception to the "waiver rule" because it did not provide a missing link in the Government's evidence or rectify any deficiency in the State's case. Hepburn, 406 S.C. at 436, 753 S.E.2d at 412. Yet this is precisely what Petitioner did when she took the stand. As noted by the Court of Appeals, Petitioner's testimony provided direct evidence of her mental state by proving she knew giving prescription medication to the child when it was not prescribed to him would put the child's health at risk. (App.p.8-p.9). Although the Court of Appeals found the health risks associated with giving children medications prescribed to adults are a matter of common knowledge, the lack of direct evidence of Petitioner's actual knowledge of these health risks was a deficiency in the State's case that was rectified by Petitioner during her defense. Thus, unlike the case in Hepburn, Petitioner's testimony did more than merely rebut Honeycutt's testimony. As explained above, not only was it not truly offered in rebuttal of Honeycutt, but it also provided a crucial missing link in the State's case. Petitioner properly was not allowed to insulate herself from the fact that her evidence was favorable to the government. When Petitioner 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 Petitioner 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.

C. Remaining Evidence was Sufficient

Even if this Court determines the Court of Appeals erred in considering the testimony from Kayla Roper and Brandon Roper, the remaining evidence was sufficient to withstand Petitioner's motion for a directed verdict. As argued in detail in State's final brief, the trial court properly denied Petitioner's 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 Petitioner's guilt for each element of the offense of homicide by child abuse, including that Petitioner committed a deliberate act causing the victim's death under circumstances manifesting an extreme indifference to human life. The trial court properly considered the existence of evidence as opposed to its weight and was required to deny Petitioner' 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).

Petitioner argues the Court of Appeals "acknowledged that Kayla Roper's testimony was the ***only*** evidence presented during the trial that provided any evidence tending to prove that Petitioner committed child abuse by providing the child Tussionex." (Brief of Petitioner, p.20). The State submits this is not accurate despite the fact that Petitioner repeats the mantra throughout her brief. While the Court of Appeals may have relied heavily upon Kayla's testimony as "direct evidence" of child abuse, it never found it was the"only" evidence presented during trial. Indeed, the Court of Appeals described significant circumstantial evidence in both its recitation of the facts and its analysis of the evidence proving Petitioner's mental state. (App.p.2-6 & 8-10). 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.

Petitioner also takes issue with the Court of Appeals reliance on her admission that she understood the danger of giving an adult medication to a child when it concluded that: "From this combination of direct and circumstantial evidence, a jury could infer

[Petitioner] acted with extreme indifference to the child's life." Yet it was entirely appropriate for the Court of Appeals to focus on this direct evidence where Petitioner's admission was strong evidence of her extreme indifference.

Contrary to Petitioner's 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 Petitioner 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 Petitioner 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.[8] He explained

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

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 or 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.

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 vicitm'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 Petitioner's 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 Petitioner 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 Petitioner were with the victim the entire weekend. Petitioner testified 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. Petitioner also claimed she and Morris had their eyes on the victim all weekend and she agreed the victim slept on the couch with Morris. When coupled with the expert testimony that the victim was given multiple doses of Tussionex, this constituted sufficient circumstantial evidence that Petitioner 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. Petitioner's 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 Petitioner 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.").

State v. Palmer

Petitioner argues this Court's recent opinion in Palmer supports her position, provides guidance about what constitutes substantial circumstantial evidence, and merits discussion. She claims that since the victim's death resulted from an overdose of medication rather than the traumatic injuries that were involved in Palmer and Hepburn, it was much more difficult to determine the timing of the abuse causing the child's death. Petitioner contends that as a result of this distinction, the circumstantial evidence relied upon in her case is weaker than the evidence found insufficient in those cases. (Brief of Petitioner, p.24-p.26). The State disagrees.

Petitioner's argument simply describes two speculative alternative theories for how the victim may have ingested the Tussionex based on scant evidence in the record, one suggesting Morris administered the medicine and one suggesting Honeycutt administered the medicine. However, consideration of either of these theories ignores the standard of review. Rather than viewing the evidence in the light most favorable to the State, Petitioner would have this Court consider the evidence in the light most unfavorable to the State. Such a weighing of the evidence at the directed verdict stage was appropriately rejected by the Court of Appeals and should be rejected by this Court. Petitioner suggests several conclusions the "jurors could infer" under his alternate theories, but we already know precisely what the jurors did infer. 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, the Court of Appeals committed no error in affirming the denial, and Petitioner's conviction should be affirmed.

For all of the reasons above, the State submits the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict. The petition for a writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the Court of Appeals affirming Petitioner's conviction and sentence.

Respectfully submitted,

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Attorney General

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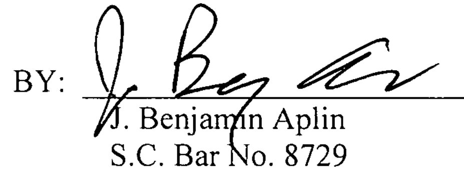
BY: 
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Columbia, South Carolina
September 9, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO 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: 2015-000351

THE STATE, ...RESPONDENT,

v.

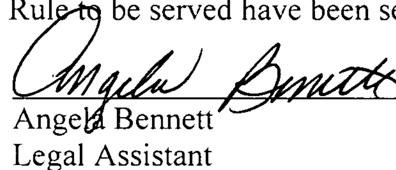
DONNA LYNN PHILLIPS, ... PETITIONER.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Brief of Respondent* dated September 9, 2015, on Petitioner by depositing two copies of the brief 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 9th day of September, 2015.



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