THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

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

The State — Respondent,

v.

Donna Lynn Phillips, — Petitioner.

Reply Brief of Petitioner

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In Reply

I. Statement of Facts.

Because this Court must view the facts in a light most favorable to the State when reviewing the denial of a directed verdict motion, it is important that the facts are reported accurately.

Initially, the State's presentation to this Court assumes it proved that Tussionex caused the child's death. For example, Respondent's Brief, p. 10 states, "On cross-examination Mahanes testified in his opinion the victim died from an overdose of hydrocodone that came from Petitioner's home, in the form of Tussionex." Mchanas was the Corner, not the medical examiner. Coroners are not qualified to give opinions on the cause and manner of death. *State v. Griggs*, 184 S.C. 304, 192 S.E. 360, 364 (1937) ("We cannot hold that the coroner sufficiently qualified as an expert to give his opinion as to the cause of the death of the deceased."). In fact, Mahanes role in this case was transporting the urine sample collected at the hospital in Easley and the blood sample collected at the hospital in Greenville to the Medical Examiner. R. 257, line 14 – 259, line 12. The Coroner did not have any involvement in testing or interpreting the test results. R. 261, lines 1-15. Mahanes did testify that the cause of death was "an overdose of hydrocodone," which is the opinion of the medical examiner. Testimony that the overdose of "hydrocodone came from the grandmother's home. . . . in the form of Tussionex," therefore, is beyond the scope of Mahanes personal knowledge as a law witness. R. 263, line 25 – 264, line 15; 374, lines 23-25. Regardless, this testimony does not establish the identity of the person providing the child the hydrocodone.

A close review of the State's evidence reveals it never proved the presence of Tussionex in the child's blood. The State's toxicologist, Dr. Foery, testified that chlorpheniramine was not found in the child's blood. Regardless of whether that resulted was a negative test result, as set forth in the written report, or an insufficient sample of blood, chlorpheniramine must be present to prove that Tussionex was present in the child's blood. R. 325, line 1 – 326, line 24; 337, line 19 – 339, line 23; 865.

Contrary to the presentation in Respondent's Brief, at p. 13, Dr. Foery did not testify "to a reasonable degree of scientific certainty, the drug was given to the victim sometime Sunday, March 16, 2008." He gave a range of time of up to 36 hours "between midnight on [Saturday going into] Sunday up until the time the baby was found" on Monday morning. R. 331, lines 5-10. And, he acknowledged the letter, form his colleague Dr. Kreger, who actually performed the blood test, to the Coroner, opining, "Given the extremely elevated level of blood, it is possible that the last dose would have been consumed shortly before the collection of the specimen." R. 354, line 6 – 359, line 12.

Additionally, Phillips wishes to clarify the following:

1) Respondent's brief at p. 6 states:

> [Phillips] 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 overheard Honeycutt say she hoped the victim did not get any of her Lortab or her sister's Lortab.

The State's brief implies that Phillips and Honeycutt were talking about Lortab on Sunday evening when Phillips and Morris returned the child to Honeycutt. Detective Burgess claimed that Phillips made this statement at the hospital, but only after Phillips

had learned the child had opiates in his system.[1] Burgess' trial testimony was in response to a question by the Solicitor about Lortab. R. 137, lines 20-25. As seen, Lortab did not cause the child's death. *See* Brief of Petitioner, p. 9 (fn. 8), 10, and 14.

2) Respondent's brief at p. 9 states, "Hollifield measure 18.401 milliliters or 3.68 teaspoons sill in the bottle, which means 41.6 milliliters or 8.32 teaspoons was missing." Use of the term "missing" is misleading. The record does not contain any evidence of how many does of the medication were properly taken between January 4, 2008 when the prescription was filled and march 16, 2008 when the medication was turned over to law enforcement. When someone takes prescribed medication, the doses are not "missing."

II. Argument.

A. Phillips' issue is preserved for Appellate Review.

The State argues, "[T]he sole argument presented in this appeal is based on an issue/claim that simply was not preserved from appellate review.". Respondent's Brief, p. 26. The State contends that the issue was not preserved either at trial or on appeal to the Court of Appeals. This argument is simply not correct.

Phillips appealed to the Court of Appeals the trial court judge's denial of her directed verdict motion. She preserved for appeal the denial of her directed verdict motion by making that motion at the end of the prosecution's case and again at the end of all evidence. *See State v. Bailey*, 368 S.C. 39, 43, fn. 4, 626 S.E.2d 898, 900, fn. 4 (Ct. App. 2006) ("If a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at

[1] *See* R. 144, lines 2-7.

the close of all evidence in order to appeal the sufficiency of the evidence."). The trial court judge had a fair opportunity to decide on Phillips' directed verdict motion. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.").

Phillips, furthermore, called the Court of Appeal's attention to *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013). A. 26. Hepburn pertains to the standard of review ***by the appellate court*** of the denial of a directed verdict motion at trial. When the Court of Appeals did not apply the correct standard, Phillips pointed out the error in her petition for rehearing. A. 11-25. The Court of Appeals, therefore, had a fair opportunity to apply *Hepburn*. *See Oxner.*

B. Court of Appeals improperly considered evidence outside the State's case-in-chief.

The State argues that Hepburn "is limited to 'co-defendant testimony'" and only if the co-defendant presents a case before the party challenging the denial of the directed verdict motion presents a case. Respondent's Brief, pp. 27-30. This argument ignores *Hepburn* and *State v. Palmer*, No. 2014-000954, 2015 WL 4549528 (S.C. July 29, 2015)

Hepburn pointed out, [T]he decision of a codefendant to testify ***and produce witnesses*** is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial." *Hepburn*, 406 S.C. at 435, 753 S.E.2d at 412 (2013) (emphasis added and citing *United States v. Belt*, 574 F.2d 1234, 1236–37 (5th Cir. 1978). In addition to his own testimony, co-defendant Lewis actually called eight witnesses during his defense case. *See Hepburn* Record on Appeal (found at

http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014)). In addition to her own testimony, Hepburn called three witnesses. *Id.*

The State argues:

> 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.

Respondent's Brief, p.28. The State completely overlooks that this Court's decision in *Palmer* reviewed the trial court's denial of both Palmer and Gorman's directed verdict motions. And, this Court stated, "The application of the directed verdict standard in a circumstantial evidence case where one of two persons must have killed a child is set forth in" *Hepburn. Palmer* at 5.

The State continues to argue that it could have called Kayla Roper. Respondent's Brief, pp. 28-29. But, that is precisely the point—the State did not call her to the stand. For all we know, the prosecution, exercising its responsibility as "ministers of justice," chose not to call Honeycutt's self-serving witness because of questions about Roper's reliability. Under *Hepburn*, the State cannot delegate to a co-defendant its responsibility to prove its case.

C. Evidence Presented during State's case-in-chief is insufficient.

The State contends, "[T]he remaining evidence was sufficient to withstand Petitioner's motion for directed verdict." Respondents Brief, p. 31. In making this argument, the State commits two errors. First, it relies on the medical evidence that the child died from an overdose of hydrocodone. The medical evidence does not establish the identity of person giving the child the hydrocodone. Second, the State continues to

point to evidence presented by Phillips and her co-defendants, contrary to this Court's holding in *Hepburn.*

Even when discussing this Court's decision in *Palmer*, the State argues, "[W]e already know precisely what the jurors did infer." Respondent's Brief, p. 36. The jurors, of course, considered evidence that the appellate courts cannot consider under *Hepburn.* As this Court has reminded:

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

Hepburn, 406 S.C. at 442, 753 S.E.2d at 416. This standard of review calls for the same result here, where the State presented the jurors with theories that could not possibly be consistent—whether the child received hydrocodone at Phillips' house or Honeycutt's house when the other was not present.

This Court should take this opportunity to remind bench and bar that, while joint trial are allowed, jointly trying co-defendants present special considerations, not only about the evidence that can be presented,[2] but also what evidence can be considered in reviewing the sufficiency of the evidence.

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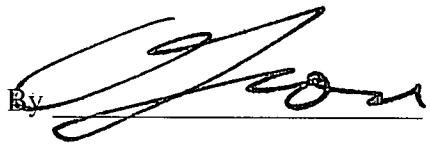
[2] *E.g. State v. Henson*, 407 S.C. 154, 754 S.E.2d 508 (2014) (admission of codefendant's redacted confession during a joint trial violated defendant's rights under the Confrontation Clause).

Conclusion

The Court of Appeal's did not follow *Hepburn*. Applying Hepburn, there is no direct or substantial circumstantial evidence that Phillips gave the child the hydrocodone that caused his death. This Court, therefore, should reverse the Court of Appeals, and direct a verdict of acquittal.

Respectfully Submitted,



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Rule 211(b), SCACR Certification

I certify that the Final Reply Brief of Petitioner complies with Rule 211(b), SCACR. Because this matter is before this Court on a writ of *certiorari* to the Court of Appeals, there was not an initial reply brief.

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Certificate of Service

I certify that I have served the Reply Brief of Petitioner on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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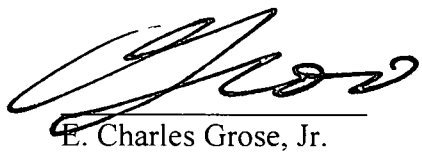

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