ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-GS-30-1773 and 1774

State of South Carolina,.....Respondent,

v.

Ashley N.
Hepburn,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE FACTS

I. BACKGROUND

Ashley Nicole Hepburn (Ashley) and Daniel Hepburn (Daniel) met while attending Clinton High School and started dating in August 2004. R. pp. 848-849. They were married on July 28, 2006 after Ashley became pregnant with their son, Owen Hepburn (Owen). R. p. 848. Daniel joined the National Guard. R. p. 851. In the summer of 2007, after the completion of his initial military training, Daniel, Ashley, and Owen lived in Greenville, South Carolina. R. p. 854. Ashley worked as a waitress and Daniel found a job at a local car dealership. Id. Neither of them made very much money, but Ashley made more than Daniel. R. p. 855. Unfortunately, Ashley was forced to quit her job so that she could take care of Owen. Id. This created a major financial problem. R. p. 855. In approximately December 2007, Ashley, Daniel, and Owen were evicted from their apartment. The couple contemplated divorce. Id. Ashley and Owen moved in with her mother, Doris Davis (Doris), in Cross Hill, South Carolina. R. p. 856. Daniel moved to Spartanburg and lived with friends. Id.

One month after they separated, Ashley learned she was pregnant with Daniel's second child. R. p. 857. She initiated an attempt at

reconciliation. Id. Daniel went on active duty in the military and was assigned to a post on the Pacific coast. R. p. 858. The young family moved to Lakewood, Washington in May of 2008. Id. On June 6, 2008, while only twenty-nine (29) weeks pregnant, Ashley gave birth to Audrina Claire Hepburn (Audrina). R. p. 859. Due to complications related to her premature birth, Audrina remained hospitalized for eight (8) weeks. Id. Ashley was unable to see Audrina during the day because while Daniel was at work she took care of Owen and children were not allowed to visit the Intensive Care Unit. R. pp. 861-862. After Daniel returned home from work they would eat dinner and Ashley would go to the hospital to visit Audrina. She was at the hospital between the hours of 8:00 p.m. and 1:00 a.m. every night for eight weeks. R. p. 860.

The fact that she had to remain home while Audrina was in the Intensive Care Unit created unfortunate stress on the couple's marriage. Additional factors, such as Daniel's irresponsible financial habits, led to the break-up. R. p. 998. Ashley returned to South Carolina in October 2008 with Owen and Audrina so that they could grow up in a more family oriented environment. R. p. 862. They moved back to Cross Hill with Doris and her boyfriend, David Crumley (David). R. pp. 863-864. Ashley stayed at home with the children and was a full-time mom. Id.

Ashley became reacquainted with one of Daniel's friends, Richard Brandon Lewis (Brandon), after returning to South Carolina. R. p. 891. Brandon regularly drove by Ashley's home because it was on the route he took from his grandmother's house where he lived to Piedmont Technical College where he was taking classes. Id. Brandon had lived with his grandmother for many years because his parents never offered a stable home. When Brandon was twelve (12) years old his father shot his grandfather and his mother shot and wounded his father. His father served fourteen (14) years in prison as a result of the incident. R. p. 1170.

Ashley and Brandon started seeing one another in June 2009. He was a jealous boyfriend. R. p. 893. On more than one occasion he asked Ashley whether she was going to break-up with him and return to Daniel. Id. Brandon regularly stopped by Ashley's house during the day and slept over approximately two (2) or three (3) nights a week. His relationship with Audrina was unusual. On more than one occasion, Ashley found Brandon in the children's shared bedroom holding Audrina. R. p. 692. Additionally, Audrina would "cry and cling" to Ashley when Brandon was around. R. p. 892.

On October 11, 2009, after Owen and Audrina had gone to bed Ashley stayed up cleaning the house and using the computer. R. p. 987.

She slept approximately three (3) hours that night. R. p. 988. The next day, October 12, 2009, Ashley interacted with her children the same way she always did. R. pp. 893-894. She got them out of bed, fed them, and played with them. Id. At approximately 4:00 p.m., as the children finished their customary afternoon nap, Brandon stopped by. R. p. 895. Soon after he arrived, Brandon hit Ashley with a pillow, she thought he was being playful, and she returned the flirtatious gesture. R. p. 897. However, Brandon became very angry with Ashley, "jerked the pillow" from her, and said "don't you ever hit me in the face again." Id. Brandon left and said he was going to his grandmother's house. Id. Ashley prepared dinner. R. p. 898. After the family ate, Doris and David went to bed. Ashley ran bath water for the kids. R. p. 899. Audrina, who loved bath time, was very excited. Id.

Brandon returned just as Ashley finished bathing Owen and Audrina. R. p. 900. Ashley and Brandon dressed the children and watched television with them. R. p. 901). Audrina was a little fussy so Ashley took her to bed and eventually got her to fall asleep. R. pp. 902-906. Audrina was happy and healthy. R. p. 907. Ashley entered the living room where Brandon was with Owen. R. p. 908. Owen had accidentally hit Brandon in the face while the two were playing. Ashley asked Owen to

apologize to Brandon, but he refused. Brandon criticized Ashley saying that she did not know how to parent and let the kids "walk all over her." Id. Ashley told him that he did not have a say in disciplining Owen and Audrina. Id.

When Ashley tried to put Owen to bed he became unruly and refused to brush his teeth. As many mothers do, Ashley disciplined Owen for his disobedience. Owen then brushed his teeth. R. p. 911. In order to get some books to read to Owen, Ashley quietly crept into the children's room where Audrina was in her crib. R. p. 912. Audrina popped her head up and looked at Ashley. She was perfectly healthy. Id. Ashley took Owen into her room, read him some stories, and the two fell asleep in her bed. R. p. 913. It was not uncommon for Owen to fall asleep in Ashley's room because he and Audrina would keep each other awake if they were simultaneously put to bed in their shared room. It was Ashley's habit to place Owen in his bed after he had fallen asleep. R. p. 990. However, Ashley fell asleep with him in her bed. R. p. 913.

Brandon was in the living room watching television. It was a Monday and he watched Monday Night Football. R. p. 1101. After the game was over Brandon entered Ashley's room, woke her up, and asked her whether she wanted some of the food his grandmother had sent with

him. Id. He also inquired whether she wanted to watch a movie with him. Id. She declined and went back to sleep. R. p. 1102. Brandon was alone and awake. Id.

At approximately 1:30 a.m. Brandon entered Ashley's room with Audrina in his arms. She was lifeless and unresponsive. R. pp. 916-918. He claimed she had a seizure. R. pp. 918-919. Ashley became frantic and took Audrina from him. R. p. 918. She ran into the living room and screamed for Doris and David who were asleep on the other side of the house. R. p. 919. Both Doris and David entered the living room and saw Ashley clinging to Audrina. Doris began to conduct CPR on Audrina and Ashley yelled "call 911." R. p. 920. David called 911 and the paramedics soon arrived. R. p. 922. Audrina was rushed in an ambulance to Self Memorial Hospital in Greenwood while Ashley and Brandon rode in another emergency vehicle. Id. Ashley was crying and kept saying, "what is wrong with her, what is wrong with her." Id. Brandon didn't say anything at first, but eventually said, "everything [i]s going to be okay." R. p. 923.

Upon arriving at Self Memorial Hospital, doctors determined that Audrina was in critical condition as a result of injuries she sustained from "non-accidental trauma." R. p. 924. Although Ashley did not know what

this term meant when she first heard it, she soon learned that Audrina had been severely abused. R. p. 925. Ashley and Brandon spoke with the doctors, the hospital chaplain, and were questioned by law enforcement officers that were summoned by the medical staff. They both told the same story: Ashley fell asleep in her bed with Owen while Audrina was asleep in her crib, Brandon was watching television, Brandon asked Ashley if she wanted to join and eat some food, but she declined, Brandon remained awake, at approximately 1:30 a.m. Brandon woke Ashley, he was holding Audrina's lifeless body, and Brandon claimed she had a seizure. Audrina was transported to Greenville Memorial Hospital where she received care in the children's Intensive Care Unit (ICU). R. p. 248.

Before he left Self Memorial Hospital Brandon called his grandmother and alerted her to the situation. R. p. 1225. Brandon went to the Laurens County Sheriff's Department for questioning and repeated the same version of events he told the medical staff, DSS workers, and law enforcement at the hospital. Then, Brandon's grandmother arrived at the Sheriff's Department and had a private conversation with him. R. p. 1226.

After this talk, Brandon changed his story and claimed he heard Ashley enter Audrina's room and shake Audrina.[1] R. pp. 1232-1233.

On October 14, 2009, Laurens County Investigator, Robert Plaxico (Lieutenant Plaxico) went to Brandon's grandmother's home to ask Brandon some additional questions. Brandon fled when Lieutenant Plaxico arrived. After his family found him, Brandon admitted that he ran because he thought Lieutenant Plaxico was going to arrest him. R. pp. 771-772.

Three days after the incident, on October 16, 2009 Ashley was arrested by the Laurens County Sheriff's Department. The only piece of evidence they had against her was Brandon's story. That day, law enforcement personnel executed a warrant, searched Ashley's home, and collected the bedding from Audrina's crib for examination. R. p. 199.

On October 17, 2009 Audrina died as a result of her injuries. Brandon remained a suspect in the case. On October 18, 2009, the day after Audrina died, Brandon attempted suicide. R. p. 1159. Brandon was arrested by SLED on September 17, 2010. R. p. 241. Both Ashley and Brandon were charged with Homicide by Child Abuse (S.C. Code Ann. §

[1] Brandon's new version of events not only changed that morning, but he later told his psychiatrist that he "saw" Ashley enter Audrina's room. R. p. 1125.

16-3-85(A)(1)) and Aiding and Abetting Homicide by Child Abuse (S.C. Code Ann. § 16-3-85(A)(2)).

II. THE STATE'S CASE AGAINST ASHLEY

The State affirmatively elected to try Ashley and Brandon in a joint trial. Because Brandon was a defendant the State could not call him to testify. Thus, the State was prevented from presenting Brandon's accusation of Ashley as told to law enforcement. See Crawford v. Washington, 541 U.S. 36 (2004). Without this statement, the State's evidence uniformly established that Ashley was asleep and Brandon was awake and alone at the time Audrina was abused. The only evidence the State had against Ashley was entirely circumstantial.

The trial began on February 22, 2011 and lasted 8 days. In its case, the State presented the testimony of twenty-six (26) witnesses who established that Ashley was asleep at the time of Audrina's abuse, established other basic facts, and raised suspicions concerning Ashley. Their testimony can be classified in three categories: (1) events of October 12 and 13, 2009, (2) cause of death, and (3) attempts to incriminate Ashley.

A. Events of October 12 and 13, 2009

Doris testified that she went to bed on the evening of October 12, 2009 and was asleep until Ashley's screams woke her up at approximately

1:30 a.m. on October 13, 2009. R. p. 343. David also testified that he went to bed on the evening of October 12, 2009 and was woken up by Ashley's screams. R. p. 324. He testified that he called 911. R. p. 326. Calvin Duckett, a paramedic, testified that he responded to the 911 call, described Audrina's condition when he arrived at the home, and confirmed that he transported Audrina to Self Memorial Hospital in Greenwood. R. pp. 252-266.

Alexander Brown (Chaplain Brown) testified that he spoke with Brandon and Ashley when they arrived at Self Memorial Hospital. He stated that they both told him that Ashley was asleep until Brandon woke her up with Audrina's lifeless body. R. pp. 369-370. Chaplain Brown told the jury that Brandon voluntarily stated that Audrina "didn't like him but he loved her." R. pp. 369-370. Chaplain Brown added that this comment was "strange," it "concerned [him]," and it "seemed odd." R. p. 370.

The multiple law enforcement officials who interviewed Ashley and Brandon testified that both voluntarily told them that Ashley was asleep and Brandon, who remained awake all night, brought Audrina's lifeless body to her at approximately 1:30 a.m. on October 13, 2009. Ben Blackmon, a Laurens County Sheriff's Department investigator, testified that at around 6:40 a.m. on October 13, 2009 Brandon voluntarily told him

that Ashley was asleep in her bed while he remained awake and watched television until he entered Ashley's room with Audrina in his arms. R. pp. 620-623. Justin Moody, a sergeant with the Laurens County Sheriff's department, testified that Brandon voluntarily spoke with him at approximately 10:30 a.m. on October 13, 2009 and told him that Ashley was asleep while he watched television and that he found Audrina at approximately 1:30 a.m. R. pp. 638-639. Casey Kirkland, an investigator with SLED, testified that at approximately 6:00 p.m. on October 13, 2009 Ashley voluntarily told her what happened - she was asleep and Brandon was awake watching television until he entered her room holding Audrina. R. pp. 717-719.

South Carolina Department of Social Services (DSS) officials testified that Ashley told them she went to sleep at approximately 10:00 p.m. and did not get out of bed until Brandon came into her room with Audrina. Dee Deal (Deal), a Laurens County DSS employee, testified that Ashley told her she went to bed and that Brandon came into her room two times. The first time was at approximately 11:00 p.m. when he offered her food and invited her to watch a movie with him. The second time was when he entered her room with Audrina in his arms. R. p. 679. Deal also testified that Brandon told her he was the only person awake in the house and that

Ashley was in her bed with Owen. R. p. 681. Also, Calvin Hill (Hill), a DSS case-worker assigned to this matter, testified that Ashley told him the same story - she was asleep when Brandon carried Audrina into her room at approximately 1:30 a.m. R. p. 689.

Dr. Michelle Curry (Dr. Curry), the emergency physician at Self-Memorial Hospital, testified that Brandon admitted that everyone in the house was asleep while he remained awake. He claimed to have found Audrina at 1:30 a.m. R. pp. 284-285. She also testified that Ashley kept asking "how could this happen." R. p. 286. Finally, Dr. Curry stated that Audrina was transported to Greenville Memorial Hospital at approximately 3:45 a.m. R. p. 287.

B. Cause of Death

Dr. Curry also testified that, in her opinion, Audrina was a victim of "non-accidental trauma." R. pp. 284-285. Additionally, three (3) of Audrina's treating physicians at Greenville Memorial Hospital testified and agreed with Dr. Curry's assessment.[2]

[2] Dr. Robert M. Seigler, the Medical Director of the Pediatric Intensive Care Unit at Greenville Memorial Hospital, testified that Audrina was a victim of "non-accidental trauma." R. p. 400. Dr. Mary-Fran Croswell, a pediatrician in the Greenville Memorial Hospital division of forensic pediatrics child abuse and neglect, testified that she determined Audrina's injuries were the result of child abuse. R. p. 431. Dr. Anthony Johnson, a pediatric ophthalmologist, testified that based on his examination of Audrina he determined her injuries were caused by "non-accidental trauma." R. pp. 469-470.

Dr. Michael Ward (Dr. Ward), the medical examiner who conducted Audrina's autopsy, corroborated the other doctor's testimony. Dr. Ward stated that the autopsy confirmed Audrina died as a result of injuries caused by abuse and that he classified the case as a "homicide." R. p. 592. He also noted that the autopsy revealed fingernail marks on Audrina's back and stated that he believed these marks were caused by the perpetrator. However, in his expert opinion, it was not possible to determine whether the perpetrator had long or short fingernails. R. p. 600.

C. Attempts to Incriminate Ashley

In an attempt to demonstrate that Ashley had previously abused Audrina, the State called Dr. Christine Philpott (Dr. Philpott), a pediatrician at the Children's Center in Greenwood, to the stand. Dr. Philpott testified that she and others at the Children's Center had seen Audrina for her routine visits. R. p. 478. Dr. Philpott testified that Ashley brought Audrina to the Children's Center on multiple occasions less than one month before her death and inquired about the source of a rash on Audrina's neck. R. p. 482. Dr. Philpott testified that the Children's Center staff noted the possibility of child abuse, but she said that "it was just one of the things we had to think about." R. pp. 486-487. Ultimately, Dr. Philpott did not suspect that the rash was caused by child abuse. She also

testified that Ashley brought Audrina back to the Children's Center so that additional tests could be conducted to determine the cause of the rash. R. p. 483.

Daniel testified that his relationship with Ashley was a rocky one. Over Ashley's objection, Daniel answered questions concerning an altercation between them that occurred in Washington State nine (9) months prior to Audrina's death. Daniel stated that he attempted to commit suicide and that Ashley came to see him shortly thereafter. After he was released from in-patient psychiatric care, the two went out with friends in his company. They drank heavily, got in a fight, and Ashley hit him. R. p. 553. She hit him because he told her he had slept with someone that she knew while they were still together and that he had slept with multiple people since she returned to South Carolina. R. p. 1000. Daniel also testified, however, that he had never seen Ashley "be violent with [their] children." R. p. 541.

Rita Hepburn (Rita), Daniel's mother, testified that in the weeks prior to Audrina's death she noticed that Audrina had a chipped tooth, a rash on her neck, and a bruise on her forehead.[3] R. pp. 507, 509-510. She

[3] Rita testified that she confronted Ashley about Audrina's chipped tooth and that Ashley denied that she knew where they came from. R. p. 508. Ashley denied that Rita questioned her about it, but admitted Rita was around when Ashley talked about taking Audrina to the dentist to have it repaired. R. p. 884.

offered no testimony that linked these injuries to any particular person or cause.

The State attempted to present direct evidence identifying Audrina's abuser. SLED forensic scientists testified that Audrina's DNA was on the bedding recovered from her crib, but that they did not find Ashley's DNA on the materials they examined.[4]

The State rested its case. The testimony of these witnesses and a few supporting trial exhibits was the sum total of the evidence presented to the jury. Ashley moved for a directed verdict pursuant to Rule 19, SCRCrim.P. R. p. 786. The trial court denied this motion. R. p. 809.

III. ASHLEY'S DEFENSE

After the trial court denied her motion for a directed verdict, Ashley presented her defense. Ashley called Brenda Wulfekotte (Wulfekotte) to testify. R. p. 820. Wulfekotte was a nurse practitioner at the Children's Center in Greenwood. She testified that Ashley brought Audrina to the Children's Center on September 11, 2009 for her routine "well visit." R. p. 821. She said that Ashley asked her about a rash on Audrina's neck. R. p.

[4] **Prosecutor**: "And finally what was the only known DNA profile or known DNA profiles to be recovered in this particular case?"
Matt Fitts (SLED DNA Analyst): "Those of Audrina Hepburn."
R. p. 784.

822. Wulfekotte testified that Ashley brought Audrina back the next day because she thought the rash had spread. R. p. 827.

Ashley took the witness stand and maintained her innocence. R. pp. 938-940. Consistent with every other statement she had given to medical personnel, Chaplain Brown, law enforcement officials, and DSS caseworkers, Ashley testified that on the night in question she was asleep while Brandon was watching television. R. p. 939. Ashley concluded that Brandon was the only person who could have abused Audrina. R. p. 940.

On cross-examination, the State attempted to put into evidence a picture of Ashley taken while she worked at Hooters in Greenville in 2007.[5] R. p. 1035. The prosecutor claimed the photograph showed that Ashley had long fingernails and argued that it was probative because Dr. Ward, the medical examiner, found fingernail marks on Audrina's body. In the photograph, Ashley is wearing a Halloween costume that exposed a great deal of cleavage. (State's Exhibit 65). The actual photograph presented by the State was printed on copier paper and was of very poor graphic quality. Id. Ashley objected pursuant to Rule 403, SCRE. R. p. 1035. The trial judge overruled Ashley's objection despite the fact that the

[5] Ashley's counsel objected and stated that the photograph was from October 2008. The record makes clear that he was mistaken. Ashley worked at Hooters in October 2007, not 2008. R. p. 854. In October 2008 Ashley had just returned from Washington State to Cross Hill and was not working anywhere. R. p. 863.

photograph was taken years prior to Audrina's death and, as even he admitted, was of very poor quality. R. p. 1035.

After Ashley testified, she called Deal and Hill, the DSS workers who had previously testified in the State's case-in-chief, back to the stand. R. pp. 1043 and 1052. Deal testified that he interviewed both Ashley and Brandon shortly after Audrina was taken to the hospital and that both of them stated that Ashley went to bed at approximately 10:00 p.m. and Brandon was the only one awake in the house after that point. R. pp. 1045-1046. Hill testified that in an interview he conducted at Self Memorial Hospital Ashley told him that she fell asleep with Owen in her bed while reading him stories sometime after 9:45 p.m. R. p. 1054. Hill also testified that Ashley related to him that after she had been asleep for a while Brandon woke her up and asked if she wanted to eat and watch a movie with him. She told him "no" and went back to sleep. Id. Hill said Ashley told him that Brandon later woke her up holding Audrina in his arms. Id. Hill also testified that Ashley told him that Audrina initially liked Brandon, but that over the past few months Audrina did not want to go to sleep when Brandon was around. R. p. 1055. Ashley rested her case. R. p. 1062.

IV. BRANDON'S DEFENSE

After Ashley rested her case, Brandon called family and friends to the stand. Donna Lawson Prince (Prince) - the mother of Brandon's half-brother, but not his mother - testified that she saw Brandon interact with Ashley's children at a birthday party for her grandchild on August 22, 2009. R. p. 1063. She testified that Brandon interacted well with both Owen and Audrina and that Ashley didn't speak to her. R. p. 1064. Stephanie and Casey Womble - life-long, family friends - were also at the birthday party on August 22, 2009. R. pp. 1069-1079. Both testified and corroborated Prince's testimony. Id.

Brandon took the stand and told a story that was completely inconsistent with the one he previously told medical staff, law enforcement, Chaplain Brown, and DSS personnel in the hours after the incident. Brandon testified that in the early morning hours of October 13, 2009 he heard Ashley enter Audrina's room and that he heard Audrina make sounds that he now knows were caused by Ashley shaking her. R. pp. 1102-1104. He also embellished his original story and claimed that Ashley "jerked" Owen by the arm and drug him to the bathroom before she spanked him for refusing to brush his teeth. R. p. 1137. Furthermore,

he denied that he told Dr. Vernetta Hill Jacobs (Dr. Hill) that he "saw" Ashley enter Audrina's room and abuse her. R. p. 1160. Later, Dr. Jacobs took the stand and disagreed, stating that her notes were accurate and that he did in fact tell him that he "saw" Ashley enter Audrina's room. R. p. 1304.

Also in his defense, Brandon called Lieutenant Plaxico to the stand.[6] R. p. 1236. Lieutenant Plaxico testified that late in the day on October 13, 2009 he showed Ashley the statement Brandon had made earlier in the day in which he provided basic details concerning the night but also stated that he heard Ashley enter Audrina's room and shake her. R. p. 1237. Lieutenant Plaxico then testified that Ashley responded to reading Brandon's statement by saying, "Oh my god, all of this is true but I don't remember hurting my baby." Id.

This statement that Lieutenant Plaxico attributed to Ashley was first memorialized in a "Second Supplemental Report" created by Lieutenant Plaxico on October 11, 2010 one (1) year after he actually interviewed Ashley. There is a great deal of evidence in the record that suggests Ashley never made this statement contained in Lieutenant Plaxico's

[6] Lieutenant Plaxico had previously testified in the State's case. R. pp. 768-775.

second supplemental report.[7] First, the initial interview was not recorded, no one other than Lieutenant Plaxico was present, and he took no notes. R. p. 1251. Second, on October 19, 2009, Lieutenant Plaxico created a First Supplemental Report concerning his interview of Ashley on October 13, 2009 and he did not state that Ashley said, "Oh my god, all of this is true but I don't remember hurting my baby." The First Supplemental Report simply says that Ashley stated she didn't harm her child. R. p. 1254. Therefore, despite the fact that Lieutenant Plaxico had an entire year to attribute this statement to Ashley, it was first memorialized on October 11, 2010 when he created his Second Supplemental Report.

At the close of Brandon's case, Ashley renewed her motion for a directed verdict. It was denied and the parties presented their closing arguments.

V. CLOSING ARGUMENT AND JURY VERDICT

The State and Ashley presented predictable closing arguments. However, in Brandon's closing, his attorney referred to Ashley and a video montage she had presented earlier in the case. He said, "[n]ow, the

[7] This second supplemental report was admitted into evidence over Ashley's objection pursuant to Jackson v. Denno, 378 U.S. 368 (1964). R. p. 191. The trial judge explained that his inquiry was limited to whether the State had shown by a preponderance of the evidence that the statement was given voluntarily, and that he determined that it had carried this burden. Id. Furthermore, the trial judge stated that "[i]t is for the jury to determine whether or not the statement was given beyond a reasonable doubt." Id. Finally, the trial judge conceded to Ashley's counsel that "[o]bviously I think that you have a great deal of areas that . . . you could cross-examine [Lieutenant] Plaxico." Id.

defense made a nice presentation, pictures of Audrina, playing and walking with her mother, with her brother. I am sure that Susan Smith had produced the same pictures before that inexplicable. . . ." R. p. 1408. Ashley's counsel interrupted to object and the trial judge weakly told Brandon's attorney, ". . . if you can avoid perhaps fact specific illusions to other cases. That might be proper." Id. The trial judge offered no curative instruction. The case went to the jury and they found Ashley guilty of homicide by child abuse and Brandon guilty of aiding and abetting homicide by child abuse. The trial judge sentenced Ashley to forty-five (45) years in prison. R. p. 1466. He sentenced Brandon to ten (10) years in prison. Id.

VI. MOTION FOR RECONSIDERATION OF SENTENCE

Ashley filed a Motion for Reconsideration of her sentence. R. p. 1470. A hearing on that Motion was held on March 18, 2011. Id. After argument by counsel and statements by family and friends, the trial judge admitted that he had considered a life sentence for Ashley but said that he did not sentence her to such a term because of her "limited involvement" in the matter. R. p. 1485. He took the motion under advisement. R. p. 1486. The trial judge denied Ashley's Motion. This Appeal followed.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED ASHLEY'S MOTION FOR A DIRECTED VERDICT

The trial court erred when it denied Ashley's motion for a directed verdict at the close of the State's case. It is well settled that "[a] defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Cherry, 361 S.C. 588, 593 (2004); citing State v. McKnight, 352 S.C. 635, 642 (2003). Unless there is direct evidence or "substantial circumstantial evidence reasonably tending to prove the guilt of the accused" a trial judge should grant a directed verdict. See State v. Harris, 351 S.C. 643, 653 (2002). The State did not produce any direct evidence and the circumstantial evidence that it produced was not "substantial."

A. "Substantial" Circumstantial Evidence is Required

The State did not present any substantial circumstantial evidence in its case against Ashley. In the last year, the South Carolina Supreme Court has issued two opinions clearly defining what is meant by "substantial circumstantial evidence" when reviewing the denial of a directed verdict motion. In State v. Bostick, 392 S.C. 134 (2011), the South Carolina Supreme Court found that where circumstantial evidence merely raises a "suspicion" that the accused is guilty, the State has failed to present

"substantial circumstantial evidence." Further defining the term "substantial circumstantial evidence," the Supreme Court recently reiterated that circumstantial evidence is "substantial" when it "reasonably tend[s]" to prove the guilt of the accused. State v. Odems, 395 S.C. 582, 587, 720 S.E.2d 48, 51 (2011), citing State v. Lollis, 343 S.C. 580, 585 (2001). A description of the evidence presented by the State in Bostick and Odems is instructive in this case because it clearly demonstrates that the evidence presented by the State against Ashley falls woefully short of the standard set forth by the Supreme Court for what constitutes "substantial circumstantial evidence."

(i) Bostick - mere suspicion is not enough

In Bostick, the State relied on four pieces of circumstantial evidence to acquire a conviction of the defendant on a charge of murder: (1) the victim's personal items were found in a burn pile in a nearby house that was owned by the defendant's mother, (2) a heavy petroleum product was used as an accelerant in the burn pile and the defendant's mother did not use such accelerants, (3) gasoline was used as an accelerant to start a fire in the victim's home after she was struck by her assailant and gasoline was found on the defendant's shoes, and (4) blood was found on the defendant's jeans and an expert testified that although she could not

conclusively determine that the blood was that of the victim, there was a ninety-nine percent chance that it was the victim's blood. The trial judge denied the defendant's motion for a directed verdict. Bostick, 329 S.C. 134 (2011). The South Carolina Supreme Court found that even when "[a]nalyzing the evidence presented by the State in the light most favorable to it," "the State's evidence . . . raised only a suspicion of guilt . . .." Id. at 141. The Supreme Court reversed the defendant's conviction.

(ii) Odems - evidence must "reasonably tend" to prove guilt

In Odems, the State relied on four pieces of circumstantial evidence to acquire a conviction of the defendant on charges of robbery in the first degree, grand larceny, criminal conspiracy, and malicious injury: (1) the defendant was located in the getaway car shortly after the time of the robbery, (2) the items stolen from the victim's home were found in the getaway car, (3) the defendant fled from law enforcement when the car was pulled over, and (4) the defendant enlisted the assistance of an uninvolved individual in his attempt to evade arrest. Odems, 395 S.C. at 586-87. According to the Supreme Court, "[t]he circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence

that is not substantial is insufficient to go to a jury." Id. The Supreme Court reversed the defendant's conviction.

B. Circumstantial Evidence Against Ashley was not "Substantial"

The circumstantial evidence presented by the State raised only a suspicion of guilt and did not reasonably tend to prove Ashley was guilty. The State presented three pieces of circumstantial evidence intended to incriminate Ashley: (1) there was a rash on Audrina's neck several weeks prior to her death, R. pp. 482-485, (2) Rita noticed a few bruises on Audrina and that she had a chipped tooth, R. pp. 507, 509-510, and (3) Daniel and Ashley got in a fight nine (9) months prior to Audrina's death and Ashley struck him after he provoked her. R. p. 553. None of this evidence reasonably tends to prove that Ashley was guilty of homicide by child abuse and merely raises a suspicion that she committed the crime.

The State failed to present any evidence, direct or circumstantial, that linked Ashley to the rash on Audrina's neck. In fact, according to the State's own witnesses, Ashley took Audrina to the doctor three times in order to determine the cause of the rash and the medical personnel who examined Audrina suspected that the rash was not caused by child abuse. R. pp. 482-485. Additionally, the State failed to produce any evidence that linked Ashley to the bruises Rita noticed on Audrina and her chipped

tooth. Furthermore, evidence of the fight between Ashley and Daniel has no connection to Audrina's abuse, particularly considering the fact that Daniel admitted that he never saw Ashley "be violent" with their children. R. p. 541. Finally, all of the evidence in the State's case established that Ashley was asleep and Brandon was awake and alone at the time Audrina suffered the abuse that caused her death. R. pp. 145-146, 152-153, 166, 380, and 439. According to the State's witnesses, even Brandon admitted that Ashley was asleep until he entered her room with Audrina in his arms. R. pp. 369, 372, 380.

It is undeniable that the State proved Audrina was a victim of homicide by child abuse. However, even viewing the evidence in the light most favorable to it, the State's evidence merely raised a suspicion that Ashley was the perpetrator. None of the evidence reasonably tended to prove her guilt. This is clear in light of the facts presented in Bostick and Odems. Thus, this Court should reverse the trial judge's denial of Ashley's motion for a directed verdict.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED DANIEL TO TESTIFY CONCERNING AN ALTERCATION BETWEEN HIM AND ASHLEY IN WASHINGTON STATE THAT OCCURRED NINE (9) MONTHS PRIOR TO AUDRINA'S DEATH

Daniel testified about an incident in which Ashley struck him. This incident occurred in Washington State in February 2009, approximately

nine (9) months prior to Audrina's death. Both individuals were drinking heavily and Ashley struck Daniel only after he provoked her by admitting that he had slept with a mutual friend while they were still living as husband and wife and that he had slept with multiple people since they had separated.

Ashley's counsel objected on three grounds: (1) Rule 402, SCRE, or relevance; (2) Rule 403, SCRE, or that its probative value was substantially outweighed by its prejudicial effect; and (3) Rule 404(b), SCRE, or that it was an inadmissible, prior bad act. Brandon's counsel argued that he was entitled to ask Daniel about the incident because he had a right present a "third-party guilt defense." R. p. 550. The trial judge allowed Daniel to testify about the incident finding that the evidence was relevant, that the danger of its unfair prejudicial effect did not outweigh its probative value, and that it was not inadmissible prior bad act evidence under Rule 404(b), SCRE. This was error.

A. The trial judge erred by overruling Ashley's objection as to Rule 402, SCRE.

Rule 402, SCRE, provides that "[e]vidence that is not relevant is not admissible." Evidence is relevant "if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Judy v. Judy, 384 S.C. 634, 641 (Ct. App. 2009); citing Crowley v.

Spivey, 285 S.C. 397, 410 (Ct. App. 1985). Evidence that Ashley and Daniel had a fight nine (9) months prior to Audrina's abuse does not make Ashley's guilt more or less probable. The irrelevance of evidence concerning this particular fight is made clearer by the fact that Ashley was inebriated at the time of this fight and there is no evidence that she had been drinking on the night of Audrina's abuse. Also, Daniel provoked Ashley to strike him thus making that situation completely incomparable to the issue of child abuse. The trial judge erred by overruling Ashley's objection as to relevance.

B. The trial judge erred by overruling Ashley's objection as to Rule 403, SCRE.

Rule 403, SCRE, provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Even if this testimony was relevant, it had very little probative value given that it involved a fight that occurred nine (9) months before Audrina's death, involved two inebriated adults, and Ashley was provoked. Testimony concerning this altercation is highly prejudicial because it portrayed Ashley as a lush. Ashley's drinking, or lack thereof, is completely irrelevant and not probative of

anything in this case. Therefore, the prejudicial effect of this evidence substantially outweighs the probative value of the testimony, which was none.

C. The trial judge erred by overruling Ashley's objection as to Rule 404(b), SCRE.

The law on the admissibility of evidence of a prior bad act is clear:

> "South Carolina law precludes evidence of a defendant's . . . other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends establish the other, or (5) the identity of the perpetrator."

State v. Martucci, 380 S.C. 232, 251-52 (Ct. App. 2008); citing State v. King, 334 S.C. 504 (1999). Evidence of prior bad acts is inadmissible . . . , "where the record does not support any relationship between the crime and [prior bad acts]." State v. Hough, 325 S.C. 88 (1997). Also, for evidence of a prior bad act to be admissible "it is important that the temporal proximity of the prior bad act be closely related to the charged crime." State v. King, 334 S.C. 504, 513 (1999).

There is no evidence in the record of a relationship between Audrina's death and the fight between her parents in Washington State. Furthermore, Ashley and Daniel's fight in Washington was too attenuated

from the circumstances of Audrina's death and testimony about it should have been excluded. The incident in Washington happened nine (9) months prior to Audrina's death. Both Ashley and Daniel were highly intoxicated at the time of the incident. There is no evidence that Ashley was intoxicated, let alone that she had a single drink, on the night of Audrina's abuse. Ashley was provoked by Daniel. There is simply no law in South Carolina that says a co-defendant's right to present a third-party guilt defense trumps evidentiary rules concerning relevance, prejudice, and prior-bad acts. The trial court's decision to allow testimony concerning this incident is a clear abuse of discretion.

III. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF A PHOTOGRAPH DEPICTING ASHLEY IN A REVEALING HALLOWEEN COSTUME

When cross-examining Ashley, the State presented a photograph of her in a revealing Halloween costume and argued that it should be admitted into evidence because it purportedly showed that she had long fingernails and that it was probative of guilt because Audrina had fingernail marks on her back. R. pp. 1034-1035. Ashley objected and argued that the photograph should not be admitted into evidence because the danger of the photograph's prejudicial effect far outweighed its

probative value. The trial court overruled Ashley's objection. This was error.

Rule 403, SCRE, provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A. The photograph had no probative value.

The photograph of Ashley in a revealing Halloween costume had no probative value. Evidence is probative if "it tends to prove or disprove an element of the case." State v. Cherry, 348 S.C. 281, 298 (Ct. App. 2001). The State proffered the photograph as proof that Ashley caused the fingernail marks on Audrina's back. R. pp. 1034-1035. The photograph did not have the probative value that the State claimed for three reasons. First, the picture was of such poor quality that Ashley's fingernails were not visible and their length could not be determined.[8] Second, Dr. Ward testified that the fingernail marks he discovered on Audrina's back could have been caused by someone with long or short fingernails. R. p. 600.

[8] Examination of the actual photograph marked as Exhibit 65 and presented to the jury is instructive. The photograph is printed on regular copy paper and is of incredibly poor quality.

Third, the photograph was taken two (2) years prior to Audrina's death. Thus, the photograph had no probative value.

B. The photograph created a danger of unfair prejudice.

It is clear that the admission of the photograph created a danger of unfair prejudice. "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Kelly, 319 S.C. 173, 178 (1995); (quoting State v. Alexander, 303 S.C. 377, 382 (1991)). Despite the fact that the photograph was of such poor graphic quality that no one could see the detail of Ashley's fingernails, the photograph clearly showed Ashley wearing a very revealing Halloween costume. Certainly the jury saw Ashley as a wild and provocatively dressed Hooters waitress after they viewed the photograph. Because the picture had no probative value and created a danger of unfair prejudice, the trial court erred when it allowed it to be admitted into evidence.

IV. THE TRIAL COURT ERRED IN FAILING TO FIND THAT S.C. CODE ANN. § 14-7-1110 IS UNCONSTITUTIONAL

Prior to selecting a jury, both Brandon and Ashley's counsel asked that their clients be afforded ten peremptory strikes, as opposed to the five they were provided pursuant to S.C. Code Ann. § 14-7-1110. They argued that S.C. Code Ann. § 14-7-1110 violated the Equal Protection clauses of the

United States and South Carolina constitutions because it afforded peremptory strikes to criminal defendants in an arbitrary and capricious manner. The trial judge insinuated that he agreed the statute appeared inequitable, but denied their motion noting that an appellate court would have to address it before he would deviate from the express terms of the statute. R. p. 80.

S.C. Code Ann. § 14-7-1110 is unconstitutional. It is a well-established legal maxim in the United States that the law cannot treat similarly situated persons differently without sufficient cause. This principle of law is embodied in the Equal Protection Clauses of both the South Carolina and United States Constitutions. The Fourteenth Amendment to the United States Constitution provides that "no state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. Similarly, South Carolina's Constitution provides that no person "shall...be denied the equal protection of the laws." S.C. Const. art. 1, 3.

Admittedly, the United States Supreme Court has made clear that the constitution does not guarantee peremptory strikes, of any number, to a criminal defendant. See Rivera v. Illinois, 556 U.S. 148 (2009). The right to peremptory strikes is, however, determined by state law. In fact,

"[s]tates may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.'" Rivera, 556 U.S. at 148; citing Georgia v. McCollum, 505 U.S. 42, 57 (1992). Ashley does not argue that there is a constitutional guarantee to peremptory strikes, however, because South Carolina has chosen to provide criminal defendants with a right to peremptory strikes it must do so in a manner that does not violate the Equal Protection Clauses of the United States and South Carolina Constitutions.

S.C. Code Ann. § 14-7-1110 does not satisfy the requirements of the Equal Protection Clauses of the United States and South Carolina Constitutions. In pertinent part, S.C. Code Ann. § 14-7-1110 states:

> Any person who is arraigned for the crime of murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as for grand larceny, perjury, or forgery is entitled to peremptory challenges not exceeding ten....

Any person who is indicted for any crime or offense other than those enumerated above has the right to peremptory challenges not exceeding five. S.C. Code Ann. § 14-7-1110. In other words, section 14-7-1110 creates two classes of criminal defendants - those who are afforded ten peremptory strikes and those who are afforded five. A reasonable person would think that individuals facing charges that carry the longest

potential sentences would be in the class that receives ten peremptory strikes and those facing shorter potential sentences would be in the class that is given five. S.C. Code Ann. § 14-7-1110 does not embody such reason. It draws the line between those who get five and those who get ten with no rational basis.

The South Carolina Supreme Court has held that "[t]o satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 480 (2006); citing Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 428 (2004); Jenkins v. Meares, 302 S.C. 142, 146-47 (1990). Because S.C. Code Ann. § 14-7-1110 does not satisfy all three requirements it must be declared unconstitutional.

A. S.C. Code Ann. § 14-7-1110 bears a reasonable relation to the legislative purpose sought to be achieved.

Although it does not say so expressly, the apparent legislative purpose sought to be achieved by S.C. Code Ann. § 14-7-1110 is to protect a defendant's right to a fair trial. Peremptory strikes afford a criminal defendant an enhanced ability to select a jury of his peers. Because S.C. Code Ann. § 14-7-1110 affords defendants the right to some peremptory

strikes, it bears a reasonable relation to this purpose sought to be achieved. However, it does so without any equity and therefore fails to pass muster of the final two requirements enunciated by the South Carolina Supreme Court in Sloan.

B. S.C. Code Ann. § 14-7-1110 treats criminal defendants differently under similar circumstances.

All criminal defendants face the deprivation of their liberty if convicted by a jury selected for their trial. On its face, S.C. Code Ann. § 14-7-1110 separates this group similarly situated persons into two classes. One class is afforded five peremptory strikes, while the other class has the benefit of ten.

C. S.C. Code Ann. § 14-7-1110 creates two classifications of criminal defendants in a manner that rests on no rational basis.

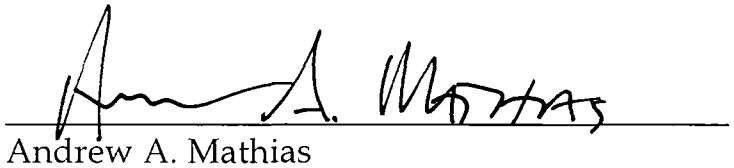
Pursuant to S.C. Code § 14-7-1110, a criminal defendant charged with homicide by child abuse faces a potential sentence of up to life in prison. See S.C. Ann. § 16-3-85. However, a defendant charged with breach of trust punishable as perjury faces a potential sentence that could be as light as a fine or, at the most, five years in prison. See S.C. Code Ann. § 16-9-10.

Incredibly, under S.C. Code § 14-7-1110, the defendant facing the potential of life in prison is afforded only five peremptory strikes, but the

defendant facing the possibility of a fine or no more than five years in prison is afforded ten peremptory strikes. There is simply no reason for this inequitable distinction, which is just one example of the inequity created by this statute. Because S.C. Code Ann. § 14-1-1110 creates two classes of similarly situated criminal defendants in a manner that rests on no rational basis and treats them inequitably, it is unconstitutional.

CONCLUSION

For the aforementioned reasons, it is clear that the trial judge abused his discretion when he denied Ashley's motion for a directed verdict at the close of the State's case. It is also clear that the trial judge erroneously allowed the admission of testimony concerning an altercation between Daniel and Ashley in Washington State, as well as a photograph of Ashley in a skimpy costume that had absolutely no probative value. Additionally, S.C. Code Ann. § 14-7-1110 is unconstitutional. Therefore, this Court should reverse Ashley's conviction.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 10-GS-30-1773 and 1774

The State.....Respondent,

v.

Ashley N. Hepburn.....Appellant.

PROOF OF SERVICE

I, Andrew A. Mathias, hereby certify that I served the Final Brief of Appellant by UPS, ground delivery, on September 6th, 2012, addressed to Respondent's attorneys of record, as follows:

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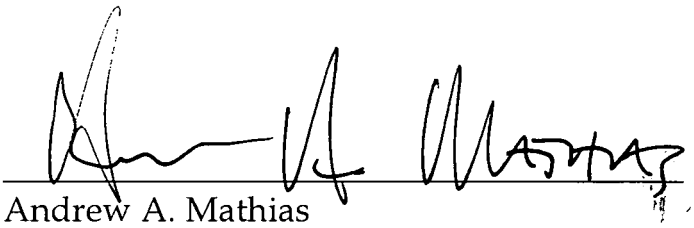

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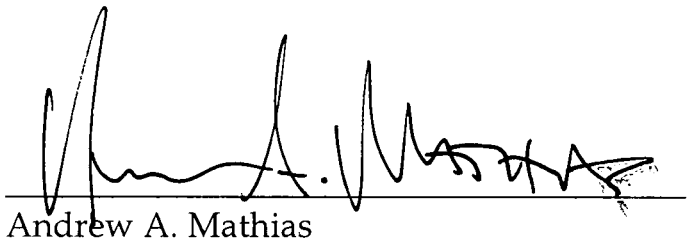

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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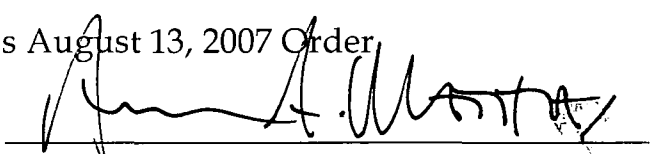
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant complies with South Carolina Supreme Court's August 13, 2007 Order.



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