

The Supreme Court of South Carolina

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April 20, 2016

The Honorable Harold P. Welborn, Jr.
PO Box 215
Pickens SC 29671-0215

REMITTITUR

Re: The State v. Donna L. Phillips
Lower Court Case No. 2008GS3902052
Appellate Case No. 2015-000351

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Daniel E. Shearouse
85

CLERK

cc: E Charles Grose, Jr., Esquire
John Benjamin Aplin, Esquire

The Supreme Court of South Carolina

The State, Respondent,

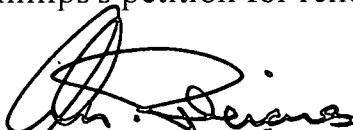
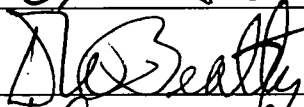
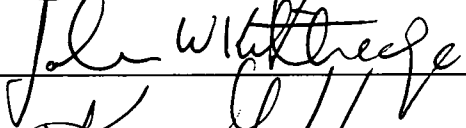
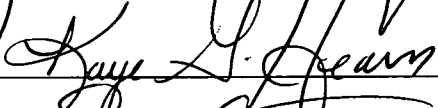

v.

Donna Lynn Phillips, Petitioner.

Appellate Case No. 2015-000351

ORDER

After careful consideration of the cross-petitions for rehearing, the Court grants the State's petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter. With regards to Phillips's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Phillips's petition for rehearing is denied.

	C.J.
	J.
	J.
	J.
	A.J.

Columbia, South Carolina

April 20, 2016

cc: E. Charles Grose, Jr., Esquire
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
The Honorable Jenny Abbott Kitchings
The Honorable Harold P. Welborn, Jr

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Donna Lynn Phillips, Petitioner.

Appellate Case No. 2015-000351

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
The Honorable D. Garrison Hill, Circuit Court Judge

Opinion No. 27607
Heard December 3, 2015 – Re-Filed April 20, 2016

AFFIRMED AS MODIFIED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for
Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney
General J. Benjamin Aplin, both of Columbia, for Respondent.

JUSTICE HEARN: Donna Lynn Phillips was convicted of homicide by child abuse and sentenced to twenty-five years' imprisonment in the death of her grandson (Child). The court of appeals affirmed her conviction. *State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014). Phillips now argues the court of appeals erred in affirming the denial of her motion for directed verdict because it considered the testimony offered by a co-defendant as well as Phillips' own testimony in its analysis. Although we agree the court of appeals erred in disregarding *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), we ultimately find the denial of Phillips' directed verdict motion was proper and we affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

On Monday, March 17, 2008, paramedics responded to a 911 call reporting a child not breathing. Upon arriving at the house, paramedics encountered Latasha Honeycutt, Child's mother, outside on the porch. After entering the home they discovered twenty-one-month-old Child lying on the floor of his bedroom "all alone, cold, not breathing, no pulse, just laying [sic] there." Child was transported to Baptist Easley Hospital and was determined to be in an opiate-induced cardiac arrest. After resuscitation, Child was taken by helicopter to Greenville Memorial Hospital. Ultimately Child was pronounced brain dead and removed from life support; the cause of his death was documented as a hydrocodone¹ overdose.

During the course of the police investigation, it was discovered that Child had been in the care of his father, Jamie Morris, and his paternal grandmother, Phillips, the weekend preceding his death. At that time, Phillips had a prescription for Tussionex², which contains hydrocodone and she was eventually arrested and charged with homicide by child abuse. The State proceeded to trial against Phillips, who was tried jointly with Morris, who was charged with aiding and abetting homicide by child abuse, and Honeycutt, who was likewise charged with homicide by child abuse.

At trial, the State presented the testimony of Detective Rita Burgess of the Pickens County Sheriff's Office, who interviewed and took statements from the three defendants. Honeycutt told her Child was with Morris and Phillips from the afternoon of Friday, March 14, 2008, until the evening of Sunday, March 16, 2008. She stated that when Child arrived home around 8:00 p.m. or 9:00 p.m., he was fussy and extremely sleepy; therefore, Honeycutt immediately put him to bed. She checked on him when she woke up around 8:30 a.m. or 9:00 a.m. the following morning, but he was still sleeping. She returned at 11:00 a.m., found Child unresponsive, and awoke Brandon Roper, her boyfriend who lived with her; at that point she called 911.

Phillips spoke with Detective Burgess at Greenville Memorial Hospital and told her Child had trouble sleeping and experienced "frightmares" where he would wake up fighting and crying. Phillips further stated Child had a cough and seemed congested, so

¹ The opiate hydrocodone is an antitussive used to treat coughs. *Physicians' Desk Reference* 3443 (64th ed. 2010).

² Tussionex is a prescription medication used for the relief of cough and upper respiratory symptoms. *Physicians' Desk Reference* 3443 (64th ed. 2010).

Morris gave him generic Tylenol³ on Sunday. Detective Burgess also noted that during their conversation, Phillips made "random statements" about Lortab, and that she hoped "[Child] didn't get any of her Lortab" or "she hoped [Child] did not get her sister's Lortab."⁴

Charlie Lark, an investigative consultant in Pickens County, also testified about his interviews with Phillips and Morris. He noted that Morris informed him Phillips had a prescription for cough medication, but Morris stated he never saw Phillips medicate Child over the course of the weekend. Morris further explained Phillips kept her Tussionex in a wire-mesh pumpkin at the top of her closet. Although Phillips retrieved the medication on two occasions in Child's presence, Morris did not see Child ingest any of Phillips' medication; however, he did note that Child played with the Tussionex bottle while Phillips had it out of the pumpkin. Additionally, Lark stated Phillips informed him Child played with her "medicine bottles," but the tops were on them so she did not believe he could have ingested anything. She further stated although she was concerned she may have dropped a bottle on the floor and Child picked it up, she never witnessed him consume any medication.

Two witnesses testified as to the results from the tests performed on Child's blood and urine samples. The supervisor of the chemistry department at Baptist Easley Hospital testified about the drug screen performed on Child's urine and noted the results indicated the presence of hydromorphone, which is a metabolite of the opiate hydrocodone. Robert Foery, a forensic toxicologist, testified as to tests performed on the urine and blood taken from Child. Foery stated the tests revealed chlorpheniramine⁵ and hydrocodone in the blood, as well as hydrocodone, hydromorphone, and chlorpheniramine in the urine. Foery stated hydrocodone and chlorpheniramine are both found in Tussionex. He further testified that the concentration of hydrocodone in Child's blood was 102 nanograms per milliliter and that the therapeutic range for an adult is 10 to 40 nanograms per milliliter. Foery could not opine on the dosage that was likely administered to Child, but stated he believed this could have been a repetitive dosing. Additionally, he testified the first dose would have been given some twenty-four to thirty-six hours prior to the blood being drawn at 12:30 p.m. on Monday, March 17, 2008. On cross-examination, Foery also stated that Lortab contained acetaminophen

³ Tylenol contains acetaminophen, which is used for the treatment of minor aches and pains, nasal congestion, headaches, and temporarily reduces fever. *Physicians' Desk Reference* 1950 (59th ed. 2005).

⁴ Lortab, a combination of acetaminophen and hydrocodone, is a prescription medication for the relief of moderate to moderately severe pain. *Physicians' Desk Reference* 3240 (59th ed. 2005).

⁵ Chlorpheniramine is an antihistamine. *Physicians' Desk Reference* 3443 (64th ed. 2010).

in addition to hydrocodone, and because there was no acetaminophen found in the samples, he did not believe Child ingested Lortab.

The State also presented testimony from a chemistry expert who analyzed the Tussionex bottle retrieved from Phillips' home and who opined it contained both chlorpheniramine and hydrocodone. The coroner also testified, stating he concluded Child's death was a homicide caused by an overdose of hydrocodone. Without objection, he also noted that the hydrocodone "came from the grandmother's home . . . in the form of Tussionex." He determined Tussionex caused the death because of the presence of chlorpheniramine and hydrocodone in Child's bloodstream.

At the close of the State's evidence, Phillips moved for directed verdict arguing there was no evidence presented "she gave any drugs to anybody" nor was evidence presented from which a jury could conclude she did so with extreme indifference to human life. The trial court denied the motion.

Each defendant presented a defense. Phillips testified she did not give Child any medication, stating "I was not raised that way. I would not give a child any kind of medicine that was not prescribed for them. I would never give a child anything under the age of two years old." She further stated there was no way for Child to have gotten into the pumpkin without her knowledge because it was on the top shelf out of his reach and because they never left him alone.

Honeycutt called Kayla Roper, her boyfriend's sister, in her defense, who testified as to the events of Monday, March 17, 2008. She specifically described how at Baptist Easley Hospital she was near Phillips and Morris and overheard Phillips indicate that she gave Child some cough medicine over the weekend, stating "surely to God that's not what is wrong."

At the close of the evidence, Phillips again moved for directed verdict, which was denied. The jury ultimately convicted Phillips and she was sentenced to twenty-five years' imprisonment.⁶

Phillips appealed, arguing the State failed to present substantial circumstantial evidence that she acted with extreme indifference. Prior to oral argument at the court of appeals, but subsequent to the filing of her initial brief, this Court decided *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), which adopted the waiver rule, but

⁶ Honeycutt was acquitted. Morris was found guilty of aiding and abetting homicide by child abuse and sentenced to twelve years' imprisonment, suspended to eight years. His convictions were affirmed on appeal and he did not petition this Court for certiorari. *State v. Morris*, Op. No. 2014-UP-112 (S.C. Ct. App. filed Mar. 12, 2014).

noted an exception to when testimony is offered by co-defendants.⁷ *Id.* at 436, 752 S.E.2d at 412. Phillips' appellate counsel submitted a letter to the court listing *Hepburn* as a supplemental citation, but did not specify the proposition for which it was being cited. During oral argument, the court of appeals focused on Kayla Roper's testimony and the fact it provided direct not circumstantial evidence, ignoring that under *Hepburn*, her testimony could not be considered in reviewing the denial of directed verdict.

Ultimately, the court of appeals affirmed her conviction. Specifically, the court found Kayla Roper's testimony provided direct evidence of child abuse therefore, relying on Phillips' testimony that she would never give medicine to Child coupled with the medical evidence of the extreme levels of hydrocodone within Child's blood, there was direct and circumstantial evidence presented of extreme indifference sufficient to withstand Phillips' directed verdict motion. *Phillips*, 411 S.C. at 134–36, 767 S.E.2d at 448–50. Phillips filed a petition for rehearing, arguing the court of appeals erred in failing to apply the waiver rule enunciated in *Hepburn* and in considering Phillips' testimony as well as evidence presented by Honeycutt. The court of appeals denied the petition. This Court granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in affirming the denial of Phillips' directed verdict motion?

LAW/ ANALYSIS

Phillips argues the court of appeals failed to apply applicable precedent and therefore erred in its affirmance of the trial court's denial of her directed verdict motion. Although we agree the court of appeals should have applied *Hepburn*, we nevertheless hold sufficient evidence was presented to withstand Phillips' motion for directed verdict. We therefore affirm the court of appeals as modified, writing only to reiterate an appellate court's proper framework in analyzing the denial of directed verdict in cases where *Hepburn* is implicated.

In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. *State v. Curtis*, 356 S.C. 622, 633 591 S.E.2d 600, 605 (2004). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). However, the trial

⁷ Under the waiver rule, a defendant who presents evidence in his own defense waives the right to have the court review the denial of directed verdict based solely on the evidence presented in the State's case-in-chief. *Hepburn*, 406 S.C. at 431, 753 S.E.2d at 410.

court must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

As we recently stated in *State v. Bennett*, "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." Op. No. 27600 (S.C. Sup. Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19). The jury's focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). The trial court must view the evidence in the light most favorable to the State when ruling on a motion for directed verdict, and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Id.* at 329, 89 S.E.2d at 926. As we noted in *Bennett*, while "the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *Bennett*, Op. No. 27600 (S.C. Sup. Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19).

In *Hepburn*, the appellant argued that in reviewing the propriety of the trial court's denial of her mid-trial motion for directed verdict, the appellate court should only review the evidence presented by the State in its case-in-chief. The State sought to augment the evidence presented in its case-in-chief with evidence offered by a co-defendant and with evidence offered by appellant in opposition to the co-defendant's evidence. Accordingly, the appellant requested we overrule the decision in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), wherein the court of appeals held that when a defendant presents evidence in his own defense, he waives the right to limit the appellate court's consideration of the denial of his motion for directed verdict to only the evidence presented in the State's case-in-chief. Declining the appellant's invitation, we expressly adopted the reasoning in *Harry* and the waiver rule propounded therein.

Consistent with the approach taken in other states, we also acknowledged in *Hepburn* the inapplicability of the waiver rule to evidence offered by a co-defendant. Thus, we held that although we adopted the waiver rule, because the co-defendant's testimony implicated appellant, and because appellant's testimony merely rebutted the testimony of the co-defendant, neither testimony could be considered in assessing the propriety of the trial court's denial of appellant's directed verdict motion.

The State contends Phillips has not preserved her *Hepburn* argument because this precise point—that the testimony offered by a co-defendant should not be considered in reviewing a motion for directed verdict—was never squarely presented to the court of appeals. We acknowledge Phillips never specifically argued until her petition for rehearing that the review of her motion should be limited to the evidence presented in the State's case; however, this does not preclude her from arguing this now, nor, more fundamentally, can it prevent this Court from applying the proper standard of review. Phillips has consistently argued the denial of her motion for directed verdict was in error. Requesting that the Court consider *Hepburn* in its analysis is not a distinct argument, but merely adds nuance to the inquiry engaged in by the appellate court. Further, it is incumbent upon the court of appeals to apply this Court's precedent. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Simply because a party does not expressly articulate the relevance of a particular case does not excuse the court of appeals from failing to apply controlling precedent. While it may have been preferable for Phillips to make this argument during oral argument, the court of appeals should not have overlooked recent case law—especially where it was expressly cited. Moreover, the court of appeals had the opportunity to correct its error on rehearing but declined to do so. We therefore reject the State's argument that Phillips' reliance on *Hepburn* is not preserved.

Turning first to Phillips' contention that her own testimony should be excluded, we disagree and find it falls squarely within our articulation of the waiver rule in *Hepburn*. In support of her argument, Phillips asserts her testimony was a preemptive response to Honeycutt's defense. Temporally, her defense preceded Honeycutt's; we do not find her testimony can be considered responsive to Honeycutt. Accordingly, under *Hepburn*, Phillips waived her right to have this Court review the sufficiency of the State's case based solely on its case-in-chief when she chose to testify in her own defense.

However, we find it was improper for the court of appeals to consider the testimony of Kayla Roper in reviewing the denial of the directed verdict motion. The State argues *Hepburn*'s exception to the waiver rule is limited to the testimony of a co-defendant and does not extend to other witnesses called by a co-defendant. Specifically, it contends that unlike calling a defendant, the State could have called Kayla Roper in reply and presented precisely the same testimony. We disagree. Although in the discussion of the waiver rule the Court noted the unfairness of allowing the State to use to its advantage evidence it could not otherwise elicit—testimony of a co-defendant—it also clearly stated that "[t]he rationale behind the co-defendant exception pertains to control." *Id.* at 435, 753 S.E.2d at 412. It further explained,

Requiring the defendant to accept the consequences of his decision to challenge directly the government's case affirms the adversary process. But the decision of a co[-]defendant 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 (quoting *United States v. Belt*, 574 F.2d 1234, 1237 (5th. Cir. 1978) (emphasis added)). Thus, in *Hepburn* we grounded our holding in the notion that the defendant has no control over the testimony of a co-defendant *or his witnesses*, and it would therefore be unfair to allow the State to use that evidence to support its case. Nor do we accept the State's misplaced argument that it could have called Kayla Roper in reply; it did not and it cannot now rewrite history and rely on that testimony simply because it *could* have called her as a witness. Accordingly, we do not consider Kayla Roper's testimony presented by Honeycutt in reviewing Phillips' directed verdict motion, and it was error for the court of appeals to have done so. Today we clarify our holding in *Hepburn* that the waiver rule is inapplicable not only to testimony of a co-defendant but also to testimony *offered* by a co-defendant, as in this case, Kayla Roper's testimony.

However, considering the evidence presented in the State's case-in-chief and in Phillips' defense, we hold the trial court properly denied her motion for directed verdict. Section 16-3-85 of the South Carolina Code (2003) provides "A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . ." "[I]ndifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). For purposes of this statute, "extreme indifference" has been characterized as "a mental state akin to intent characterized by a deliberate act culminating in death." *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *Jarrell*, 350 S.C. at 98, 564 S.E.2d at 367).

We find there is direct and circumstantial evidence that, when construed in the light most favorable to the State, could allow the jury to conclude Phillips acted with extreme indifference in administering the medication that caused Child's death. The testimony indicates the administration of multiple doses of Tussionex and a concentration of at least two-and-a-half times the therapeutic amount of the drug in Child's blood. It is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous. Importantly, Phillips herself testified she would never give Child medication not prescribed to him and nor

would she give any medication to a child under the age of two. There is no question that Child was in the care and custody of Phillips and her son at the time of the lethal dose; Phillips herself testified he was never alone during the weekend. Accordingly, the evidence was sufficient to allow a reasonable juror to conclude Phillips acted with extreme indifference to human life in administering the Tussionex.

CONCLUSION

We affirm as modified the court of appeals' opinion, holding that under *Hepburn*, Phillips' testimony, but not Kayla Roper's, can be considered in the Court's review of the denial of directed verdict. Because there was sufficient evidence under that standard to withstand Phillips' directed verdict motion, we affirm her conviction and sentence.

PLEICONES, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice Jean H. Toal, concur.

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

The State, Respondent,

v.

Donna Lynn Phillips, Appellant

Appellate Case No. 2012-212663

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

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

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, for Respondent.

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

I. Facts and Procedural History

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

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

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

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

II. Evidence Presented at Trial

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

A. Defendants' Statements Made to Police

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

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

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

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

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

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

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

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

B. Medical Evidence

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

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

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

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

C. Phillips' Testimony

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

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

D. Other Witnesses' Testimony

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

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

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

III. Directed Verdict Motion

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

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

A. The Evidence Proving Child Abuse

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

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

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

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

² The State also asserts Phillips' failure to seek medical care after giving the child multiple doses of Tussionex constituted child abuse or neglect. *See* § 16-3-85(B) (defining "child abuse or neglect" as "an act *or omission* by any person which causes harm to the child's physical health," and stating "harm" includes the "fail[ure] to supply the child with adequate . . . health care" that causes a "condition resulting in death" (emphasis added)). We need not address this argument because we find the State presented direct evidence that Phillips committed child abuse by giving the child multiple doses of Tussionex. *See State*

B. The Evidence Proving Mental State

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

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

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

v. Hepburn, 406 S.C. 416, 428 n.14, 753 S.E.2d 402, 408 n.14 (2013) (declining to decide other issues when the determination of one issue was dispositive).

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

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

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

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

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

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

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

IV. Conclusion

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

THOMAS and LOCKEMY, JJ., concur.

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