STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THEIA DARION MCARDLE,

APPELLANT

APPELLATE CASE NO 2016-000843

FINAL BRIEF OF APPELLANT

Wanda Carter
Appellate Defender
JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the State failed to present any direct or substantial circumstantial evidence that Appellant committed homicide by child abuse under S.C. Code Ann. § 16-585(A)(1).

STATEMENT OF THE CASE

On April 2, 2015, the Newberry County Grand Jury indicted Appellant for homicide by child abuse. R. 1082 - 1083. On April 4-8, 2016, Appellant proceeded to trial before the Honorable Frank R. Addy Jr., and a jury.

Charles Verner represented Appellant, and Solicitor David Stumbo and Assistant Solicitor Taylor Daniel represented the State. The jury found Appellant guilty as charged. The trial court sentenced Appellant to thirty years imprisonment.

ARGUMENT

The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the State failed to present any direct or substantial circumstantial evidence that Appellant committed homicide by child abuse under S.C. Code Ann. § 16-585(A)(1).

Relevant Facts

At 1:38 a.m. on December 30, 2014, Appellant and her boyfriend and pimp, Richard Bowman rushed Appellant's three year-old son, Minor, to the Newberry Hospital emergency room. Bowman carried the non-responsive Minor into the hospital while Appellant parked her car and joined them one minute and thirty-five seconds later. R. 28, ll. 4 - 18; R. 40, l. 6 - 42, l. 7.

Minor was not breathing and his circulatory system had shut down. R. 66, l. 23 - 71, l. 6. Dr. Duncan Holaday, the ER doctor, attempted to revive Minor, but was unsuccessful. Holaday recalled at trial that Minor had a large amount of viscous brown matter stuck in his mouth. Holaday also recalled that Minor was cold to the touch. *Id.* Minor 1 was pronounced dead at 2:06 a.m. on December 30, 2014. R. 78, ll. 1 - 9.

Following several hours of interrogation, where neither implicated the other, Appellant and Bowman were arrested and charged with homicide by child abuse.

Dr. Duncan Holaday's Trial Testimony

Holaday concluded that, due to the lack of rigor mortis, Minor had been dead or in a "non-resuscitateable state" for two hours or less from the time that he first began triage. R. 79, ll. 5-23. Holaday observed bruising on Minor's head and abdomen. Most alarmingly, Holday's examination revealed extensive bruising and damage to Minor's genitals. R. 93, l. 1 - 94, l. 17. Based on the genital bruises' location, Holaday surmised that anyone who bathed the child would have noticed the injuries, but that they would not be readily apparent when Minor was clothed. *Id.*

Holaday testified that Minor died due to extensive head trauma. R. 81, l. 16 – 82, l. 23. He determined that Minor would have been dead within thirty minutes to an hour after the head injuries occurred. *Id.* A closer inspection of the injuries to Minor's abdomen revealed that he had a ruptured small intestine and duodenum. R. 95, ll. 10-23. Had Minor not died from the head trauma, these internal injuries to his gastrointestinal tract would have been fatal in a matter of days. *Id.*

Trial Testimony of Richard Bowman

The State's key witness was Richard Bowman. Bowman was the only one with Minor for the window of time during which the fatal head trauma could have been inflicted on Minor. Bowman was unemployed at the time of Minor's homicide. He was dependent on Appellant for food, shelter, and clothing. R. 342, l. 2- 346, l. 25. He did not have his own car or phone. While Appellant went on prostitution calls, Bowman babysat Minor. *Id.*

By his own testimony Bowman was alone with Minor from 8:35 p.m. to 11:00 p.m. and again from 12:22 a.m. to 1:00 a.m. in the hours leading up to his death. Over the course of law enforcement's investigation, Bowman made multiple inconsistent statements about the events culminating in Minor's death. R. 346, ll. 13 - 25. Two weeks before Appellant's trial. Bowman settled on the version of events he would use at trial. *Id.*

Bowman testified that on December 27th, two days before it was medically possible for Minor to have experienced the fatal head injuries, he, Appellant, and Minor drove to meet Appellant's mother for a late Christmas gift exchange in Asheville, North Carolina. R. 347, l. 4 - 351, l. 23. Appellant's mother gave Minor roller skates. Bowman claimed that Minor fell and hit his head on ground while on using the skates. *Id.*

The prosecutor then had Bowman recount all of the instances on December 27th where he claimed that Appellant hit Minor. Bowman claimed that, on the morning of the 27th, Minor was

getting dressed, but put his shoes on wrong. Bowman alleged that Appellant hit Minor several times on the back of the head with her open hand. R. 348, ll. 6-20. Next, as they were getting ready to leave for Asheville, Minor did not correctly buckle his car seat. According to Bowman, Appellant hit Minor in the chest. *Id.* at ll. 22-25.

Bowman had to be prompted by the solicitor to remember the next supposed instance of abuse from the 27th:

> Q: Did you say -- when she smacked his head did you say something about a coffee table?
>
> A: Yes, sir. . . . [Minor's] head had bounced off the coffee table that day. She had smacked him in the back of the head and his head had hit off the coffee table. The front of his head hit off the coffee table.

R. 349, ll. 1-18. Bowman also recalled that Appellant had allegedly hit Minor in the chest after they returned to their trailer in Enoree from visiting Appellant's mother because Minor had repeated from Bowman that Appellant was a prostitute. R. 350, l. 12 - 351, l. 23.

Moving to the 28th, Bowman testified that Appellant hit Minor after he got in a dispute with another child at the Laurens McDonalds. Bowman next claimed that Appellant hit Minor in the genitals after Minor grabbed his groin so as to mimic an insult Bowman had just made. R. 354, ll. 2-23.

Turning to December 29th, Bowman stated that he woke up and began cleaning their trailer. He then fixed breakfast for himself and Minor. According to Bowman, Minor attempted to wake-up Appellant. Appellant responded by striking Minor in the chest. R. 358, l. 14 - 359, l. 13. Bowman then claimed that Appellant woke-up around 11:30 a.m. and spanked and bit Minor again for trying to play with her while she was eating. R. 359, l. 15 - 360, l. 24.

Bowman then testified that, as they were preparing for dinner around 5:00-6:00 p.m., Minor "did make a reference to his groin. He said ouch. He grabbed himself. And I said, 'Go show it to you mom,' and she goes and -- he goes in there to tell his mom. She sends him back in there with me. She says, 'Go watch the movie with your dad.'" R. 362, ll. 21-25. This is Bowman's first recollection of any problems with Minor's groin.

Bowman stated that Minor did not eat all of his food at dinner. "He seemed like he was groggy and kind of sluggish. I just figured it, too, he might have been tired or something." R. 363, ll. 3-8. Bowman recalled that Minor threw up after dinner. R. 363, l. 16 - 365, l. 6. Bowman also got sick and vomited. According to Bowman, Appellant punished Minor throwing up by spanking him. R. 365, ll. 3-6.

Bowman asked Minor if he was feeling alright after vomiting and Minor said he was. R. 367, ll. 7-18. Bowman then gave Minor a bath and for the first time, "noticed some bruising on his testicles." *Id.* Bowman told Appellant about the bruising, but he claimed she was unconcerned. When Bowman returned to take Minor out of the bath, he realized that Minor had defecated in the batg. R. 368, l. 5-19.

At Appellant's insistence, Bowman spanked Minor for defecated in the bathtub. While he was being spanked, Minor's head hit the plastic tub of the trailer. *Id.* Bowman testified that Minor's head did not hit the tub hard. *Id.* At around 8:30 - 9:00 p.m., Appellant went to meet a prostitution client in Spartanburg, approximately forty minutes away. Appellant stopped at a nearby gas station and picked up a stray cat that she took back to their trailer before finally heading out to meet the "John". R. 369, l. 15 - 371, l. 18.

Bowman claimed that he and Minor fell asleep waiting on Appellant to return from visiting her client. R. 371, l. 6 - 374, l. 18. Despite Spartanburg being over a half-hour drive from their

trailer, Bowman testified that Appellant was not gone for more than 35 to 40 minutes. *Id.* When Appellant returned she explained to Bowman that they were going to see a "John" in Newberry who had contacted her earlier that day. *Id.*

Bowman recollected that he did not want to go with Appellant, but that Appellant was nervous about the "John" because she had never been to Newberry. Bowman recalled that Minor woke up when Appellant returned and that "[h]e sounded like he was tired and he could have been ill the way he was crying, whining." R. 373, ll. 9-19. **However, Bowman stated that Minor was able to communicate and did not have any "developmental delays."** *Id.*

Bowman stated that Appellant took Minor and placed him into his car seat located behind the driver's seat. R. 374, l. 1 - 376, l. 20. When Minor continued to wine about being woken up and was unable to buckle his car seat, Appellant hit him twice in the chest. *Id.* The three finally left for Newberry around 11:00 p.m. Minor slept for the drive, Bowman claimed he could hear him snoring. *Id.*

Appellant was driving and had a hard time locating the "John's" house. R. 377, l. 3 - 382, l. 20. When they arrived at the house sometime after midnight, Appellant went inside while Bowman remained with Minor. *Id.* According to Bowman, he and Minor both fell asleep. *Id.* At some point while Appellant is still inside with the "John" Bowman woke up:

> A: I dozed off for a little bit, and I -- I'm not sure how long. I ended up hearing a noise outside the car. I'm thinking it was her. wake up. And I don't hear [Minor] snoring back there no more, so I turn around and I shake him a little bit, "Hey, Buddy, you okay back there?" **He wakes up. He's like uh-huh, and he goes back to sleep**. So I got back to sleep myself. . . .
>
> Q: You wake him up?
>
> A: Yes, sir.

Q: And ask if he's okay?

A: Yeah.

Q: And he says uh-huh?

A: Yes, sir. He says uh-huh like - -

Q: Like he's okay?

A: Yeah.

R. 379, l. 14- 380, l. 8 (*emphasis added*). Bowman then fell back asleep. A short time later, Appellant left the "John's" house and got back into the car. When she returned, Bowman asked her if Minor had sleep apnea because it sounded to Bowman like Minor may have briefly stopped breathing.

Bowman recalled that Appellant dismissed his concerns and believed that Minor was "probably just sleeping hard." R. 380, ll. 10-25. Bowman then claimed that he tried to wake Minor up to tell him that they were heading home, but Minor was unresponsive with a brown substance coming out of his nose and mout. *Id.* According to Bowman, he was the first to realize that they need to take Minor to the hospital. R. 381, l. 2 - 382, l. 8.

Appellant initially believed that they should take him to Laurens Hospital because she knew where it was. Eventually Bowman convinced her to start looking for a hospital in Newberry. *Id.* After driving around for a few minutes, they saw a sign for the Newberry Hospital and followed it. Bowman carried Minor into the emergency room while Appellant parked the car.

At trial, Bowman admitted to lying to police about the circumstance regarding Minor's death. He claimed that he lied to protect Appellant and that he loved Minor. R. 388, ll. 9-20. On cross-examination, Bowman admitted that he initially told police that he bathed and showered naked with Minor regularly. R. 482, l. 24 - 485, l. 21. At trial, Bowman clarified that he had only

showered or bathed naked with Minor on a few occasions. He conceded that he had showered naked with Minor on December 29th and noticed "some bruise" on Minor's genitals. *Id.*

Bowman repeatedly justified his lack of concern about this alleged genital bruise by stating that he was afraid of being called a child molester and that he had been molested as a child. R. 489, l. 8 - 491, l. 7; R. 506, l. 1 - 507, l. 21. Bowman was also forced to admit on cross-examination that he had previously told police that Appellant was not home when he got mad at Minor and hit him after he defecated in the tub on the night of the 29th. R. 535, ll. 5-21.

Bowman also stated on cross-examination that he only discovered that Minor was not breathing as Appellant returned to the car after finishing with the "John" in Newberry. "I figured he wasn't responding when she got in the car. . . . We took him immediately to the emergency room." R. 539, ll. 10-22.

In a short re-direct, the solicitor had Bowman repeat the times that Appellant purportedly hit Minor in the days leading up to Minor's death. R. 588, l. 10 - 591, l. 8. Bowman claimed that on the 27th, Appellant hit Minor multiple times in the stomach. On the 28th, Appellant hit Minor in the groin. Finally, according to Bowman, Appellant hit Minor in the stomach again on the 29th causing him to fall to the ground and hit his head around lunchtime. **Notably absent from Bowman's many different claims is any allegation that Appellant hit Minor in the head from 10:30 p.m. on the 29th until Minor's death.**

Trial Testimony of Dr. Janet Ross

Dr. Janet Ross, a forensic pathologist, performed Minor's autopsy. Like Dr. Holaday, Dr. Ross concluded Minor died from respiratory depression cause by a subdural hematoma putting pressure on the regions of the brain responsible for regulating breathing and blood flow. R. 729, ll.

3-20. Also like Dr. Holaday, she believed that the internal injuries to Minor' abdomen would have been fatal if left untreated, but did not kill Minor. *Id.*

Minor had bruises on the left side of his forehead, his left cheek, under his chin, and around both eyes. R. 708, l. 14 - 709, l. 21. Blunt force trauma caused all of the bruising. There was no pattern to the bruises. *Id.* The bruising on Minor's genitals covered his penis, left scrotum. Minor also had internal bleeding and bruising around his bladder. R. 710, ll. 2-7. This suggested that the injuries to the genitals required a substantial amount of force.

There was no pattern to the bruises on his abdomen that spanned his right hip. The autopsy also revealed that Minor's stomach contained undigested vegetable matter. This led Dr. Ross to believe that at least one of the major injuries to Minor occurred within an hour of eating and stopped the digestive process.

In her expert medical opinion, Minor would not have been eating or functioning normally after experiencing the injuries to his abdomen, head, or genitals. Dr. Ross believed that there may have been defensive wounds on Minor's left elbow. R. 712, ll. 14-21.

With respect to the fatal head injuries, Dr. Ross concluded that Minor would have died within an hour of experiencing the head trauma and:

> It would be minutes to maybe as much as an hour. The time of death -- the time of injury is difficult. It's very difficult to age a bruise, even microscopically. Although all the bruises looked to be about the same. They were very, very recent. So the only thing that I could analyze as far as time of death or time of injury is the fact that he had food in his stomach still, and he had some -- 100 CCs of liquid and corn kernels.

R. 724, ll. 16-23. Mirroring, Dr. Holaday's conclusions, Dr. Ross reported that Minor died anywhere from two hours to just minutes after the blows to his head. R. 734, l. 2 - 738, l. 12. Looking at the various bruises, she could not determine whether a single blow or combination of

blows to Minor's head were fatal. R. 739, ll. 5-24. She concluded that bruises appeared to have happened roughly contemporaneously.

When asked on cross-examination, Ross testified that she would have expected Minor to be unconscious for "some period of time" before dying. R. 743, ll. 2-11. **She also stated that a person who was unaware that the child had been beaten could reasonably believe that the child was asleep rather than unconscious.** R. 744, ll. 3-17.

She agreed that a child who had sustained head injuries like Minor would not have been able to answer questions, but would be breathing. R. 746, ll. 2 - 24. Dr. Ross did not believe that Minor would have been able to kick or fight being put in a car seat. Minor also would not have been able to verbally communicate and would not have drifted in and out of consciousness. R. 746, l. 25 - 747, l. 9.

Moreover, in her expert opinion, a hit on the head two days before Minor's death would not have caused the fatal subdural hematoma. R. 750, ll. 6-16. She also believed that it would not have been possible to bathe Minor without noticing the bruises and damage to his genitals. R. 752, ll. 3-21. In brief re-direct, Dr. Ross summarized Minor's cause of death: "once that injury -- the bleeding starts in the head then you're talking minutes, whether it's five or 60. R. 761, ll. 21-25.

Additional State's Evidence

Historical cell tower data analysis of Appellant's phone showed that on the 29th, the Newberry "John" first called Appellant at 12:53 p.m. Appellant's phone "pinged" off of a tower near her trailer in Enoree for most of the day. However, at 8:52 p.m. her phone "pinged" off of a cellular tower around Spartanburg. R. 684, ll. 14-24. Her phone returned to "ping" off of the tower closest to her trailer at 11:19 p.m. *Id.* At 11:41 p.m. her phone "pinged" off of the tower closet to

her trailer for the final time. At 12:21 p.m., her phone "pinged" off of a cellular tower in Newberry. *Id.*

The Newberry "John" also testified at the trial. He recalled that Appellant had difficulty finding his house and that she did not arrive until around 12:30 p.m. R. 122, l. 1 - 126, l. 11. He reflected that he and Appellant engaged in some "small talk" before and after having sex. R. 129, l. 14 - 214, l. 20. He believed that the sex lasted for well under thirty minutes, and that Appellant left around 1:00 a.m. *Id.*

Trial Testimony of Appellant

Appellant's testimony was largely corroborative of the State's evidence. She testified that she worked as a prostitute and that on the 29th she met two clients. The first was a regular client in Spartanburg. They met at a hotel off of I-26. Bowman was alone with Minor from 8:35 p.m. until 11:00 p.m. The second client was the Newberry "John".

She testified that when she returned from the Spartanburg client, she hurriedly cleaned off to prepare to go Newberry and that Minor appeared to be asleep. Bowman put Minor in the car seat and it never occurred to her that Minor might be seriously injured. Her biggest point of deviation from Bowman's version of events was that she stated she was not home when Minor threw up after dinner.

Defense Directed Vertdict

As the close of the State's case, the defense moved for a directed verdict of acquittal arguing that the State had failed to present any direct or substantial circumstantial evidence that Appellant had caused the head injuries to Minor or, having known about the head injuries and their severity, failed to seek medical treatment. R. 801, l. 25 - 824, l. 23. The defense specifically argued that

Bowman never testified that Appellant hit Minor within the three hour window of opportunity that the State's medical experts had identified.

Trial Testimony of Defense Medical Expert Dr. Ellen Riemer

Like Dr. Holaday and Dr. Ross, Dr. Riemer's concluded that Minor died as a result of blunt force trauma injuries to the head. In agreement with the other medical experts, Dr. Riemer testified that Minor would not have survived for more than an hour after the injury. R. 840, l. 21 - 855, l. 23. Her only area of disagreement with Dr. Ross was that Dr. Riemer believed that the food matter found in Minor's stomach indicated that the injuries were likely sustained within two to three hours of eating. Dr. Ross had concluded that the injuries were likely sustained within one hour of eating. *Id.*

Discussion

The court erred in denying Appellant's motion for a directed verdict on the charge of homicide by child abuse as a principal where the State failed to produce any evidence that Appellant inflicted the fatal head trauma or was aware of the head trauma and failed to promptly seek medical attention for Minor.

Our Supreme Court has held that when reviewing a trial judge's denial of a motion for a directed verdict, the appellate court is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *see also, State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997). The accused is entitled to a directed verdict when the State fails to present evidence

to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004).

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. "When the State fails to produce ***substantial circumstantial evidence*** that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001)

Homicide by Child Abuse

Appellant was indicted for homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(1). "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."

Under § 16-3-85(B)(1) "child abuse or neglect" is defined as "an act or omission by any person which causes harm to the child's physical health or welfare." § 16-3-85(B)(1). "'Harm' to a child's health or welfare occurs when a person: (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment; (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or (c) abandons the child resulting in the child's death." S.C. Code Ann. § 16-3-85(B)(2).

Under South Carolina case law the requirement that "the death occurs under circumstances manifesting an extreme indifference to human life" can be established where the

State proves "the defendant performed a deliberate act that he or she knew would create a risk of death to the child." *State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014) *affirmed as modified by State v. Phillips*, 416 S.C. 184, 135, 785 S.E.2d 448, 449 (2016); *see also State v. Jarrell*, 350 S.C. 90, 564 S.E.2d 362, 367 (2002) (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 defendant's deliberate act "created a grave risk of death to her child, evidencing her extreme indifference to his life.").

Sufficiency of the Evidence in Homicide by Child Abuse Cases

In *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), this Court held there was sufficient evidence to uphold Smith's convictions for homicide by child abuse and aiding and abetting homicide by child abuse. Smith and his girlfriend, Celeste Durant, had taken Durant's two daughters on a trip to Myrtle Beach.

Durant claimed that the morning after they arrived at the beach she noticed that her younger daughter was "acting strangely." 359 S.C. at 483, 597 S.E.2d at 889. The minor was sleepy, unsteady on her feet, and refused to eat. *Id.* Smith and Durant took minor to the hospital. Doctors determined that she had a fever and a CAT scan in Myrtle Beach did not show any head injury, only what appeared to be an old skull fracture. *Id.*, 597 S.E.2d at 890. After they left the hospital, the minor still was not eating and slept for entire trip home. She was put to bed around 4:00-500 pm on the night the family returned home.

When Durant went to check on minor later that night, she had blood coming out of her mouth. Smith attempted to perform CPR on the minor until EMS arrived. A CAT scan taken a day after minor was admitted to the hospital revealed that minor had significant bleeding and swelling in her brain caused by a large skull fracture. Based on minor's injuries, doctors

believed that she was killed as a result of "child abuse, this child was shaken and this child received trauma to the head." *Id.* at 486, 597 S.E.2d at 891.

Based on the difference between the first CAT scan in Mrytle Beach and the second CAT scan doctors concluded that the fatal head injury occurred "within several hours of the first scan." *Id.* at 485, 597 S.E.2d at 891. Durant told investigators that minor was never out of her sight while they were in Myrtle Beach and that minor was never left alone with Smith or anyone else. *Id.*

House keepers from the hotel where Smith, Durant, and her children stayed told police that the family never wanted their room cleaned during their stay and that most of the linens, all of the towels, and all of the trash were missing when the staff went to clean the room. *Id.* at 487, 597 S.E.2d at 892. Police also discovered that a sheet and a pillowcase from Durant's house were missing. *Id.*

Smith appealed his conviction, in part, on the grounds that the trial court should have ordered a directed verdict of acquittal as there was "insufficient substantial circumstantial evidence presented by the State to allow the case to go to the jury, and his mere presence at the scene was insufficient to prove his guilt as a principal or as an aider or abettor." *Id.* at 490, 597 S.E.2d at 893. This Court disagreed:

> The evidence adduced at trial indicated [minor] sustained her devastating injury on Saturday, July 15, and that it had to have occurred within several hours of her first CAT . . . During this time period, Smith and [Durant] were the only two persons with [minor] who could have possibly caused her injury. [Durant] told investigators she was with [minor] the whole time and, in his statement to investigators, Smith referred to all of their actions that day as "we," never indicating a time when he and [Durant] were not together during that weekend.

Id. In addition, the Court noted that the injuries to minor would have been readily apparent to Smith.

"The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child's physical health." Accordingly, this Court held that there was substantial circumstantial evidence that Smith inflicted or allowed to be inflicted the physical harm that resulted in minor's death. *Id.* at 492, 597 S.E.2d at 894.

In *State v. Hepburn,* 406 S.C. 416, 753 S.E.2d 402 (2013), the Supreme Court was faced with a circumstance similar to Appellant's case, Hepburn and her boyfriend, Lewis, were charged with homicide by child arising out of the death of Hepburn's 16 month-old child. The State's evidence showed that Hepburn, Lewis, and Hepburn's 16 month-old child ate dinner with Hepburn's mother, the mother's boyfriend, and Hepburn's two year old son at around 8:00-8:30 p.m. on the night minor died. 406 S.C. at 419, 753 S.E.2d at 403.

Hepburn put minor to bed at around 9:00 p.m. Hepburn, Lewis, and Hepburn's two year old son then watched football until 10:00 p.m. Hepburn then put her two year old son to bed. *Id.* She fell asleep reading books to her son. Lewis continued to watch football. Lewis checked on minor at around 11:00 p.m., she appeared fine. Lewis then briefly checked on Hepburn, who was now asleep in her room. *Id.*

After checking on Hepburn, Lewis continued to watch T.V. Lewis checked on minor again at around 1:00 - 1:30 a.m. *Id.* Lewis initially thought minor was asleep, but became concerned when he saw that "she was laying on her stomach with her head on the rails of the crib." Hepburn awoke to Lewis holding a non-responsive minor in his arms. They called 911.

Doctors treating minor found numerous bruises, retinal hemorrhaging, labored breathing, and overall lack of responsiveness. Doctors soon realized that minor has suffered a subdural

hematoma extending from front to the back right side of minor's brain. *Id* at 420-421, 753 S.E.2d at 404. Medical experts determined that the injuries were most likely caused by "an acceleration-deceleration movement . . . or shaken baby syndrome." *Id.* Minor would not have appeared normal after sustaining these injuries. *Id.*

A chaplain at the hospital would testify that Hepburn and Lewis acted oddly and "they weren't overly emotional, they seemed collected." *Id.* at 422, 753 S.E.2d at 405. Lewis and Hepburn were tried together. Both testified and were convicted. Hepburn's testimony largely "corroborated the State's case". By contrast Lewis' testimony "painted a markedly different version of events" and inferred that Hepburn beat minor on the night before she died because she would not stop crying.

On appeal, the Supreme Court concluded that Hepburn had not waived the right to challenge the sufficiency of the State's evidence alone. Without the benefit of Lewis' testimony, the Court held that the "State did not present substantial evidence that Appellant killed the victim." Specifically, the Court found that every State's witness testified Hepburn was asleep at the time that minor sustained the fatal injuries and that the impact of the injuries would have been immediately apparent.

The Court then compared Hepburn's case to *Smith*:

> What separates this case from a case like *Smith* is that every piece of the State's evidence establishes (1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after Lewis retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself. As in *Smith,* medical testimony adduced at trial indicated that the victim would not have appeared "normal" within a short period of time after her injuries were inflicted due to the nature and extent of her neurological injuries. However, there is no evidence that Appellant herself was aware of the victim's injuries, let alone caused them. Thus, we find this case distinguishable from *Smith.*

Id. at 423, 753 S.E.2d at 405. In *State v. Lewis,* 416 S.C. 184, 785 S.E.2d 448 (2016), the companion case to *Hepburn*, the Supreme Court granted a directed verdict of acquittal to Lewis following his conviction for aiding and abetting homicide by child abuse. There the Court held that there was no evidence Lewis instigated or knew in advance that Hepburn was going to abuse minor. *Id.* at 356. 743 S.E.2d at 129-130.

Lastly, in *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015), the Supreme Court applied the factors outlined in *Hepburn* to a consolidated appeal by co-defendants' of their convictions for homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct toward a child. Julia Gorman and Robert Palmer were indicted for the death of Gorman's seventeen month old grandson. *Id.* at 412, 776 S.E.2d at 559.

The grandson was removed from life support on July 16. An autopsy revealed that the grandson died as a result of head injuries sustained sometime between July 11 and July 14. *Id.* at 418, 776 S.E.2d at 562. In addition to the skull fractures, there were a number of unexplained, atypical bruises on the grandson. *Id.* Expert medical testimony from the State's witness estimated that the fatal injuries were inflicted within three hours of the grandson's arrival at the emergency room at 6:58 p.m. on July 14.

Thus, the time frame for the infliction of the fatal injury began at 4:00 p.m. and ended at 6:00 p.m. when Gorman testified that she first noticed her grandson in distress. *Id.* at 420, 776 S.E.2d at 563. The State's evidence placed Gorman alone with her grandson at 4:00 p.m. and again at 6:00 p.m. Palmer was never alone with the grandson during the window of fatal injury and Gorman never testified that she saw Palmer abuse the grandson when they jointly checked on him at 4:15 p.m. and he appeared normal.

Based on the State's evidence, the Court concluded that Gorman inflicted the injuries either at 4:00 p.m. or at 6:00 p.m. The Court noted that unlike in *Smith*, Gorman and Palmer were "not together at all relevant times, and . . . there was evidence that a layperson might not be able to distinguish between a sleeping child and an unconscious one." *Id.* at 420, 776 S.E.2d at 563. The Court also found that there was no evidence of a cover-up. *Id.* Therefore, the Court ruled that Palmer was entitled to a directed verdict of acquittal, but that Gorman was not.

Here, the State alleged that Appellant either inflicted the fatal blunt force trauma to Minor's head or knew that Minor had suffered a serious head injury and failed to seek medical attention. The evidence adduced at trial supports neither of these theories.

Expert medical testimony unanimously established that Minor would have lived - at most - an hour after the blunt force trauma to the head. Dr. Holaday testified that he believed Minor had been dead for - at most - two hours before being brought to the emergency room. All of the doctors testified that, unless an individual was aware of the head injury, Minor would have appeared to be sleeping. R. 81, l. 16- 82, l. 23.

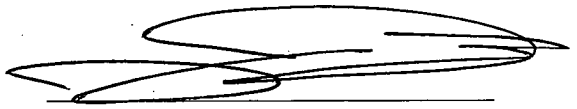
The medical evidence establishes that the earliest that Minor could have been killed was 10:35 p.m. All of the evidence at trial suggests that Appellant was in Spartanburg at 10:35 p.m. and did not return home until after 11:00 p.m. Moreover, Bowman never testified that Appellant struck Minor 1 in the head within the three hour time frame identified by the medical experts. Bowman also never testified that Appellant was alone with Minor in this time period.

Bowman likewise testified that Minor appeared fine while in the car on the way to Newberry and only started to exhibit symptoms of head trauma moments before Appellant returned to the car. He stated that once Appellant realized Minor was in distress, she immediately started driving towards the nearest hospital she knew.

No substantial circumstantial evidence exists that Appellant fatally injured minor. The evidence presented by the State was that the injury to Minor occurred after 10:35 p.m on December 29th and before 1:35 a.m. on December 30th. During this time, Appellant was never alone with Minor and the only witness to the events, Richard Bowman, never testified that Appellant struck Minor on the head. In fact, evidence showed that the only person alone with Minor during this time was Bowman. This is a substantial factual distinction from *Smith* and places Appellant's case "on all fours" with *Palmer*.

CONCLUSION

Based on the foregoing reason, Appellant respectfully requests this Court direct a verdict of acquittal.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 5, 2017

John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330