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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT IN REPLY

In its brief the State argues that this Court should deny Appellant a directed verdict of acquittal because the prosecution "presented direct evidence of Appellant's guilt." Resp't. Br. p. 16. This direct evidence was testimony from Appellant's ex-boyfriend, Richard Bowman, that Appellant "hit [Minor] several times during the day, including several stomach punches around lunchtime which caused [Minor] to fall and hit his head and several blows to [Minor's] head in the car that afternoon." *Id.*

In sum, the State's argument on appeal is that Minor could have sustained the fatal injuries at almost any time during December 29, 2017. Resp't. Br. p. 17. Their claim cannot be reconciled with the medical evidence and Bowman's testimony. Even taking the evidence in the light most favorable to the State, the evidence conclusively shows that the last time Appellant struck Minor in the head was too far removed from the onset of symptoms to have caused Minor's death.

Tragically, Minor died from extensive head trauma caused by three to four severe blows to the head. R. 729, ll. 2-20. The pathologists, Dr. Ross and Dr. Riemer, agreed that that Minor died within an hour of receiving the head injuries. R. 762, l. 8 – 763, l. 2; R. 857, l. 4 – 865, l. 6. The pathologists also agreed that, based on the CAT scan done at the emergency room, the head injuries were likely sustained contemporaneously during a single incident. R. 753, ll. 3-20; R. 857, l. 4 – 865, l. 6.

The pathologists believed that any one of the three to four different blows to Minor's head could have individually been fatal. R. 724, ll. 16-23; R. 739, ll. 15-19; R. 846, ll. 6 - 24. Dr. Ross averred that the head injuries would have rendered Minor unconscious either immediately

or within minutes. R. 745, l. 24 – 746, l. 17. Dr. Riemer concurred and concluded that Minor would have been dead "within a period of minutes" of being struck in the head. R. 857, ll. 4-18.

Both Dr. Ross and Dr. Riemer testified that, after receiving the head injuries, Minor would not have been responsive to questioning, able to walk, able to eat, or capable of resisting being placed into a car seat. R. 746, l. 2- 747, l. 7; R. 852, l. 4 – 855, l. 23. Dr. Ross and Dr. Riemer stated that if an adult was unaware of the head injuries, it would not have been obvious that Minor was seriously injured. Minor would simply appear to be asleep. R. 742, l. 24 – 744, l. 17; R. 864, l. 23 – 865, l. 25.

Minor's autopsy revealed that Minor had a small amount of corn in his stomach. *Id.* Dr. Riemer and Dr. Ross both stated that Minor would not have eaten after receiving either the head wounds or the wounds to his abdomen and genitals. *Id.* The injuries to Minor's head and abdomen would have stopped the digestive process.

Based on the corn, Dr. Ross believed that Minor sustained one of these serious wounds within an hour to a half-hour of eating. R. 725, l. 3 – 728, l. 23. Dr. Riemer disagreed and believed that the corn could have remained in Minor's system for up to three hours after eating. R. 879, l. 3 – 883, l. 8. However, both pathologists testified that – at a minimum – the fatal head wounds and the serious abdomen injuries had to have occurred sometime after Minor last ate.

Dr. Holiday, who attempted to revive Minor at the emergency room, believed that Minor had likely been dead for – at most – two hours prior to his arrival at 1:38 a.m. R. 81, l. 16 – 82, l. 23. Dr. Holiday's testimony strongly suggested that the earliest possible time for Minor's death was 10:38 p.m. and that it could have been as recent as 1:15 a.m. *Id.* However, the doctors all conceded that precisely calculating the time of death based solely on factors such as rigor mortis was difficult.

Despite the uncertainty about the exact time of death, the medical evidence conclusively established that: (1) Minor died as a result of blunt force trauma to the head; (2) the three to four head wounds Minor sustained were each individually fatal; (3) the head wounds were all inflicted around the same time during a single incident; (4) the head injuries would have stopped Minor's digestive system; (5) given the level of head trauma Minor would have lost consciousness either immediately or within a few minutes; (6) after losing consciousness Minor would not be responsive or able to interact with people; and (7) Minor would appear to be asleep to someone unaware of the head trauma.

Bowman and Appellant were the only adults with Minor on December 29th. R. 534, l. 20 – 544, l. 24. Bowman reluctantly admitted that he was the only adult who was alone with Minor on December 29th. R. 521, l. 17 – 522, l. 23. Minor, Appellant, and Bowman ate dinner around 5:00 p.m. to 6:00 p.m. R. 366, l. 13 – 367, l. 18. They had steak and either corn or mash potatoes. *Id.* Minor ate at dinner.

According to Bowman, Minor appeared groggy, but otherwise normal at dinner. *Id.* At some point, Minor complained to Bowman that his genitals hurt. Bowman claimed that he told Minor to tell his mother. R. 367, l. 1 – 368, l. 24. After dinner, Minor and Bowman both got sick and vomited. *Id.* Bowman believed that it was likely food poisoning from something they ate. *Id.*

After Minor got sick, Appellant asked Bowman to give Minor a bath as she had already arranged to meet a prostitution client. R. 541, l. 2 – 545, l. 25. Bowman was evasive at trial about whether he helped Minor take a bath or if Minor bathed himself. *Id.*; R. 554, l. 1 – 556, l. 25. During the bath Minor defecated in the tub. Taking the evidence in the light move

favorable to the State, Appellant told Bowman to spank Minor. *Id.* Bowman spanked Minor, causing Minor's head to hit the side of the plastic tub. *Id.*

At trial, Bowman was adamant that Minor did not hit the tub hard. Bowman said that Minor appeared "ok" after the bath and was able to put himself to bed. R. 368, l. 2 – 369, l. 1; R. 513, l. 16 – 522, l. 23. Appellant left to meet her client before Minor finished the bath. Minor and Bowman fell asleep. *Id.*

Thirty to forty minutes after leaving, Appellant returned unexpectedly to their residence with a stray cat. *Id.* She stayed only a few minutes to drop off the cat and did not return until after 11:00 p.m. Minor did not wake up during Appellant's brief return. *Id.* Bowman was again alone with Minor from around 8:00 p.m. until after 11:00 p.m. *Id.*

Bowman confessed to killing Minor. R. 534, l. 14 – 536, l. 14. When first questioned, he told police that he was mad at Minor for defecating in the bath tub, so he beat Minor while Appellant was out of the house meeting the prostitution client in Spartanburg. R. 534, l. 20 – 541, l. 16. This attack occurred sometime after dinner, but before 11:18 p.m. At trial, Bowman claimed that he falsely confessed as to protect Appellant. *Id.*

Accepting Bowman's confession as false and viewing his many different versions of events in the light most favorable to the State, Bowman testified that Minor appeared "ok" when Appellant left to meet a prostitution client in Spartanburg. R. 515, l. 9 – 522, l. 14. Bowman testified that Appellant returned from Spartanburg between 11:00 p.m. and 12:00 midnight. *Id.* He and Minor were asleep when she arrived. Appellant was loud and irritated when she returned, waking up Bowman and Minor. R. 525, l. 18 – 527, l. 19. Appellant and Bowman argued about whether Minor and Bowman needed to accompany Appellant to Newberry.

Eventually, Bowman agreed to go to Newberry. R. 523, l. 2 – 524, l. 24. In his various stories, Bowman prevaricated as to whether he or Appellant placed Minor in the car seat for their trip to Newberry. R. 374, l. 16 – 375, l. 11; R. 525, l. 18 – 527, l. 13. Bowman first stated that he placed Minor into his car seat while Appellant got ready for her next client. At trial, he claimed that Appellant placed Minor in the car seat. R. 527, l. 2 – 531, l. 15.

Regardless of who placed Minor in the car seat, Bowman claimed that Minor refused to buckle his car seat and that Appellant punched Minor in the stomach as punishment. *Id.* Bowman consistently testified that Minor was upset about being woken up. *Id.* Minor was cranky and wined during the drive down I-26 to Newberry before falling asleep around Clinton. *Id.*

Once Appellant, Minor, and Bowman arrived at the Newberry client's house, Appellant went inside. Bowman remained in the car alone with Minor. R. 549, l. 13 – 551, l. 11. Bowman claimed that he fell asleep for an indeterminate amount of time. He was awoken by a noise from outside the car. When he woke up, he checked on Minor, who was snoring loudly. *Id.*

Bowman testified that Minor told him he was ok and went back to sleep. R. 379, l. 14 – 380, l. 16; R. 440, l. 10 – 441, l. 14. Bowman fell asleep again. He woke up as Appellant was leaving the client's house. *Id.* When Appellant got into the car, Bowman asked her if Minor had sleep apnea. According to Bowman, they realized shortly thereafter that Minor was not breathing. R. 539, l. 4 – 540, l. 7.

Accepting only Bowman's testimony which most favorable to the State's case, Bowman claimed Appellant last struck Minor in the head at around lunchtime on December 29th. R. 573, ll. 1-16. This was over twelve hours before Minor was pronounced dead and over ten hours before Bowman claimed that Minor first lost consciousness. It was also between six and eight

hours before Appellant, Minor, and Bowman ate dinner. Even accepting this testimony as true, the incident occurred too early in the day for the slaps to the back of Minor's head to be the source of the fatal head trauma.

Likewise Minor's head lightly impacting the side of the plastic tub also could not have been the source of the fatal head injury. R. 541, l. – R. 556, l. 25. This incident could not have been fatal. The medical evidence was unequivocal. Minor was killed by three to four severe blows to the back and side of the head and would have lived, at the very most, one hour after suffering the head injuries. R. 724, ll. 1-23.

Bowman maintained at trial that Minor was alive, conscious, and interacting with him after they arrived in Newberry around 12:22 p.m. R. 698, ll. 1-9. After sustaining the head injuries Minor would have been unconscious within minutes. R. 724, ll. 1-23; R. 853, l. 19 – 854, l. 11. Minor would not have been able to communicate, eat, or function as Bowman testified he did throughout the afternoon and into the night of December 29th. R. 855, l. 15 – 860, l. 15.

The disconnect between the medical evidence and the State's evidence implicating Appellant in Minor's death mirrors the failure of proof in *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015) and *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013). In *Hepburn*, the Supreme Court issued held that:

> Every State witness placed Appellant asleep at the time that the victim sustained the fatal injuries. While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two co-defendants inflicted the victim's injuries, but not that Appellant harmed the victim.

Hepburn, 406 S.C. at 440, 753 S.E.2d at 415.

In *Palmer*, the Supreme Court issued a directed verdict of acquittal for Palmer's boyfriend, Gorman, for homicide by child abuse while denying a directed verdict to Palmer for

the same charge. 413 S.C. at 418, 776 S.E.2d at 562-563. The medical evidence narrowed "window of opportunity during which the fatal injury must have been inflicted to between 4:00 p.m. and 6:05 p.m." *Id.* at 420, 776 S.E.2d at 563.

Unlike in Appellant's case, both Palmer and Gorman were home during the window of opportunity and medical testimony suggested that the injuries to the deceased may not have been obvious to a layperson. *Id.* Out of the two defendants, only Gorman was ever alone with the deceased during the window of opportunity. *Id.* Furthermore, as with Appellant's case, the fatal blows to the deceased in *Palmer* had to have been inflicted immediately before the expression of symptoms.

Therefore, this Court found that there was sufficient evidence for a jury to conclude that Gorman beat the deceased during one of the two periods of time when she was alone with the deceased during the window of opportunity. *Id.* With respect to Palmer, there was no evidence that he was ever alone with the deceased during the window of opportunity and, thus, a directed verdict of acquittal was merited. *Id.* at 421, 776 S.E.2d at 563.

Bowman's testimony simply cannot be reconciled with the medical evidence. In one of his few points of consistency, Bowman unfailingly testified that Minor was conscious and able to respond to his questions until sometime after 12:20 a.m. on December 30th. R. 698, ll. 1-9.

Setting aside the fact that Appellant's slaps to the back of Minor's head could not account for the fatal injuries to the side and front of Minor's skull, this incident – if it happened – was simply too far removed from the window of opportunity established by the medical evidence to be the cause of Minor's death. *See Palmer*, 413 S.C. at 421, 776 S.E.2d at 563.

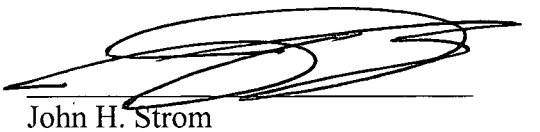
Like in *Hepburn* and *Palmer*, the State's evidence against Appellant shows that, while she was present with Minor throughout the day, Appellant was never alone with Minor during

the window of opportunity for the fatal injuries. R. 556, l. 17 – 559, l. 19. Bowman was present whenever Minor and Appellant were together. *Id.* Despite his seemingly best efforts, Bowman never identified – in all of his sundry versions of events – an injury that he saw Appellant inflict or order to be inflicted on Minor that would be consistent with the uncontroverted medical evidence on Minor's cause of death.

Accordingly, even "[a]dmitting as true every fact and circumstance relied on by the state to be true, without reference to whether it was competent or not, there is not sufficient evidence to warrant," Appellant's conviction for homicide by child abuse. *State v. Turner*, 117 S.C. 470, 109 S.E.2d 119, 120 (1921) (granting a directed verdict in a murder conviction and holding that "[n]either the evidence nor the circumstances warrant [defendant's] conviction; while the whole case raised a suspicion, and a grave one at that, it does not warrant a verdict of guilty. The state failed to connect [defendant] with the actual killing, or that he was present aiding and abetting at the time of the killing, or that he had anything to do with it at all, until after the killing occurred.").

CONCLUSION

For these additional reasons, Appellant respectfully requests that this Court reverse her conviction and issue a directed verdict of acquittal.



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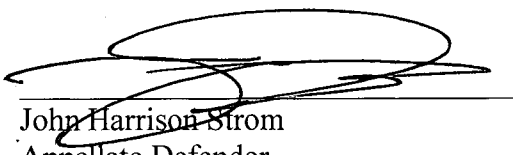
This 5th day of September, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply 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



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