THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Robert Addy, Jr., Circuit Court Judge

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Case No.10-GS-30-1929

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State of South Carolina ..... Respondent,

vs

Richard Brandon Lewis ..... Appellant

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# FINAL BRIEF OF APPELLANT

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Question I: Did the trial court err in failing to direct a verdict in favor of Brandon Lewis when no testimony existed that he aided, abetted, or assisted Ashley Hepburn in inflicting the injuries upon Audrina Hepburn?

Question II: Did the trial court err in failing to charge the jury that the State had to prove that Brandon Lewis had a legal duty to protect Audrina Hepburn before they could convict him of aiding and abetting homicide by child abuse?

Question III: Did the trial judge err in failing to declare a mistrial when a witness for the state testified, over the objection of the Defendant Brandon Lewis, that a statement by Mr. Lewis had "the possibility of guilt behind it?"

Question IV: Did the trial court err in failing to require the State to open fully on the law and the facts and then to reply to matters brought up in the closing argument of the defendants?

## Statement of the Case

*Procedural Facts*

On September 18, 2010 the state arrested Brandon Lewis on the charge of homicide by child abuse and aiding an abetting homicide by child abuse in violation of S. C. Code § 16-3-85. He was tried along with the co-defendant, Ashley Hepburn, on February 22 to March 3, 2011 before the Honorable Frank Addy and a jury. Counsel for both defendants objected to trying the defendants together. Ms. Hepburn was convicted of homicide by child abuse. She was sentenced to 45 years in prison. He was convicted of aiding and abetting homicide by child abuse. He was sentenced to seven years in prison.

The Notice of Appeal was filed on March 4, 2011.

*Factual History*

Brandon Lewis started dating Ashley Hepburn in early 2009. They had previously dated for a short period of time in early 2008. Rec. on App. at 845, ll 13-22. Ms. Hepburn was married to Daniel Hepburn but was separated from him at the time she and Mr. Lewis dated. Ms. Hepburn had two children with Mr. Hepburn, Owen and Audrina. She lived in Cross Hill with her mother Doris Davis and David Crumley, Ms. Davis' boyfriend. The relationship between Ms. Hepburn and Mr. Lewis progressed to the point he was staying at her house two or three nights a week. Rec. on App. at 846, ll 21-25 to 847, ll 1-5.

On October 12, 2009 Mr. Lewis came by the residence of Ms. Hepburn on his way home from school. While there, they had an argument that was described by Ms. Hepburn as playful and by Mr. Lewis as resulting in her slapping him for the first time in the relationship. Rec. on App. at 851, ll 9-23. After Mr. Lewis went to his grandmother's house, where he lived,

he talked to Ms. Hepburn on the phone. He later returned to the her home. Rec. on App. at 852, ll 852, ll 19-25 to 854, ll 1-21

After Mr. Lewis returned to the residence, he helped Ms. Hepburn with the children in preparing them for bed. Audrina was placed in her crib and Ms. Hepburn retired to her room to read to Owen. Rec. on App. at 673, ll 3-23. Mr. Lewis stayed up to watch football and a movie. Ms. Davis and Mr. Crumley had retired before Mr. Lewis came back to the residence. The evidence is undisputed that both Ms. Davis and Mr. Crumley were in bed asleep during the events that led to these charges.

Later in the evening Mr. Lewis checked on Audrina. At that time she was fine. He also awoke Ms. Hepburn and asked her if she wanted to watch a movie. Ms. Hepburn declined. Ms. Hepburn had been up most, if not all, of the previous night. Rec. on App. at 747, ll 12-25 to 748, ll 1-2. She had only slept for a few hours on the afternoon before the events leading to the charges. Both she and Mr. Lewis also had recently lost an employment opportunity with a company in Greenwood, SC. Rec. on App. at 746, ll 12-25 to 977, ll 1-9.

While watching a movie, Mr. Lewis heard Audrina cry and then heard Ms. Hepburn stomp down the hall to Audrina's room. He then heard a sound which he described as a baby being shaken. Rec. on App. at 861, ll 7-13. This opinion was based upon information he learned at the hospital as to what happened to the child. He did not at the time perceive the incident to be a baby being shaken. Rec. on App. at 863, ll 5-13; Rec. on App. at 956, ll 9-11. As he testified, he did not believe that Ms. Hepburn would do anything to hurt her child. Rec. on App. at 914, ll 4-6.

After hearing Ms. Hepburn stomp down the hall, he entered her room and asked

her if she wanted any barbecue his grandmother had prepared. She told him no. He heated the barbecue for himself. After eating he started to go to bed. Before he went to bed he checked on Audrina. When he entered her room he noticed that she was lying in an unusual position. He described it as perpendicular in the crib rather than lying horizontal. Upon closer examinations when he picked her up, he noticed she was not breathing right and had some blood around her mouth. Rec. on App. at 863, ll 12-25 to 866, ll 1-15.

He then carried the child into Ms. Hepburn's room to notify her. Ms. Hepburn took the child from him. The cries of Mr. Lewis and Ms. Hepburn then awoke Ms. Davis and Mr. Crumley. Audrina was placed on the floor in the living room, Mr. Crumley placed the call to 911. When asked, Mr. Lewis informed Mr. Cumley that he had found the child unresponsive and believed that she had a seizure. This opinion by Mr. Lewis was based upon the fact that he had previously suffered from a seizure that led to his discharge from the Navy. Rec. on App. at 842, ll 13-19; 867, ll 5-10.

EMS arrived at about 1:40 a.m. Rec. on App. at 31, ll 14-15. They transported Audrina to Self Regional Hospital. The doctors immediately suspected a brain injury which was confirmed by a CAT scan. The doctors also suspected abusive head injury caused by Audrina being shaken. They notified the Laurens Sheriff's office and the Department of Social Services. Rec. on App. at 63, ll 6-18; 209, ll 7-23.

During the early morning hours of the incident. Mr. Lewis told the doctors, the officers and the Department of Social Services that he had found the child unresponsive. He did not tell them that he had heard Ms. Hepburn stomp down the hall and into her room shortly before he found her. Ms. Hepburn was present during many of these conversations. Rec. on App. at 60,

ll 14-19.

The condition of the child was such that she was transferred to Greenville Memorial Hospital shortly after being examined. Rec. on App. at 59, ll 4-25. She survived for three days before being removed from life support. She then died. Before the child died, Ms. Hepburn had been charged with child abuse. This charged was changed to homicide by child abuse after the child died. On October 17, 2009, she was also charged with aiding and abetting homicide by child abuse.

At about 6:20 a.m. on the morning of the incident, law enforcement asked Mr. Lewis to come by the police station. Rec. on App. at 385, ll 12-17. He did and at that time gave the police a statement. The initial statement did not mention that he had heard Ms. Hepbun stomp down the hall. State's Exhibit 30. The officers, not believing they had received correct information from Mr. Lewis, asked him to stay at the sheriff's office. Mr. Lewis asked to see his grandmother, Ms. Carol Starnes. She had been trying to contact her grandson. She was ultimately contacted by law enforcement and came to the sheriff's office. She spoke with her grandson and urged him that if he knew anything about the case to tell the officers what he knew. Rec. on App. at 984, ll 24-25 to 985, ll 1-24. After talking with his grandmother, he gave the officers further information. Defendant's Exhibit 2.

At about 11:45 a.m. Mr. Lewis gave the officers additional information concerning the incident. He told them about the events of the evening. He advised the officers that he had heard Ms. Hepburn stomp down the hall and, based upon information he had learned at the hospital, believed that the sounds he had heard were those of Audrina being shaken. After giving the officers this statement, Mr. Lewis was permitted to leave. He was not arrested until about 11

months later on September 18, 2010.

Ms. Hepburn testified that she had been asleep until she was awaken by Mr. Lewis. She testified that she did not harm her child and that Brandon Lewis was the only person who could have harmed her child. Rec. on App. at 700, ll 3-5. She testified that Officer Robert Plexico, with the Laurens Sheriff's Department, showed her the second statement given by Brandon Lewis. Rec. on App. at 774, ll 14-25 to 775, ll 1-8. Officer Plexico testified that when the statement was shown to her, she stated "Oh my god it is true. I did not mean to hurt my child." Rec. on App. at 993, ll 18-19 She testified that when first shown the statement she stated that the statement concerning putting Owen to bed and the difficulty brushing his teeth were true. Rec. on App. at 774, ll 7-13. Contrary to two other officers she testified that she was not given the opportunity to give a written statement. Ms. Hepburn's testimony contradicted several other witness testimony, including that of her former husband Daniel Hepburn. SLED agent Casey Kirkland testified Ms. Ashley told her that Mr. Lewis was "watching TV during all of this." Rec. on App. at 1035, ll 2-7.

Prior to his arrest, Brandon Lewis was deposed by Bryan Able, the attorney for Ashley Hepburn in both her family court matter and her attorney in the criminal action. On May 18, 2010 he also testified as a witness for the South Carolina Department of Social Services when the state sought to place Ms. Hepburn's name on the central registry. He was again cross - examined by Mr. Able.

Ms. Hepburn blamed Mr. Lewis for the injuries and resulting death of her child and Mr. Lewis said Ms. Hepburn shook the child. Neither defendant testified that the other one aided or assisted or encouraged the other in shaking the child, causing any injuries to the child, or

denying the child health care.

## Argument

### Question I

**Did the trial court err in failing to direct a verdict in favor of Brandon Lewis when no testimony existed that he aided, abetted, or assisted Ashley Hepburn in inflicting the injuries upon Audrina Hepburn?**

*a. The state never established Richard Brandon Lewis took any affirmative action to aid Ashley Hepburn in the commission of the crime.*

By its verdict, the jury found that Brandon Lewis did not cause the injuries to Audrina Hepburn that caused her death. They believed his testimony that Ashley Hepburn stomped down the hall, shook her child, and then returned to her bed. To convict Brandon Lewis of aiding and abetting homicide by child abuse, the state is required to produce credible evidence that Brandon Lewis " *knowingly* aids and abets another person to commit child abuse or neglect . . . ." S. C. Code § 16-3-85 (A) (2)(emphasis added). This burden is not met by simply producing evidence that Mr. Lewis did some act that aided and abetted Ashley Hepburn in committing child abuse. The State must prove he committed an act that he knew aided and abetted an act of Ashley Hepburn in committing the act of child abuse.[1] Simply, put there is no such evidence in this case.

The South Carolina child abuse act arguably does not contain a mens rea for a person that commits child abuse. The legislature did not use the word "knowingly" in defining child abuse. They did use the word "knowingly" in defining the requirement of what the state

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[1] The jury found that Ms. Hepburn did an act that caused the death of her child. The question of whether aiding and abetting by Mr. Lewis can be committed by an act of omission will be discussed later.

must prove for one aiding and abetting the commission of the crime. The question is under this record, what evidence exists that shows Mr. Lewis knowingly aided and abetted the commission of the crime.

The medical testimony establishes that the minor child would have been symptomatic immediately upon receiving the injuries. The doctors at Self Regional Hospital quickly and correctly diagnosed what was wrong with the minor child. No medical testimony exists in this record that shows the child would have survived had she received treatment earlier or if someone had told the medical personnel at the hospital the child had been shaken.

Mr. Lewis did not tell the complete truth at the time he was asked by the medical personnel what happened to the child nor to law enforcement several hours later. Hiding the involvement of Ashley Hepburn in the incident may make Mr. Lewis guilty of accessory after the fact, but that fact does not make him guilty of aiding and abetting her in the commission of the crime of homicide by child abuse. At the time he made his incorrect statement, the crime had occurred. Covering up the crime does not aid, assist or abet one in the actual commission of the crime.

The South Carolina Supreme Court has held to establish liability under aiding and abetting the state must prove a defendant is "[p]resent at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some *overt* act.." *State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2008) (emphasis added)

The statute does not define the term "aiding and abetting" differently from the traditional definition that has been used by the courts. In fact, in *State v. Smith*, 391 S.C. 353, 705 S.E.2d 491 this court held that traditional law concerning the aiding and abetting applies to the

statute. Aiding and abetting means to aid in the commission of the crime and not to aid in the cover up of a crime.

The reliance by the State at trial upon *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (2004) is misplaced. This case is entirely different from *Smith* in several important respects. In *Smith* the defendants did not accuse each other of the crime. They both defended by saying the state has to prove which one of us did the crime.[2] The jury never had to make the decision as to which defendant was telling the truth. The facts proved that both defendants gave statements they were both with the child at the time the injury occurred. In addition, the evidence disclosed that the defendants had also engaged in covering up the crime. As both were present and neither testified, plus there was evidence of a cover-up, the jury had some evidence that either or both aided and abetted the crime. [3]

In this case each defendant accused the other of inflicting the injury that caused the injury. The jury determined that Ashley Hepburn actually inflicted the injury. The record in this case simply does not support any affirmative act by Mr. Lewis that aided or abetted Ms. Hepburn in causing the death of Audrina Hepburn. If he sat in the chair watching television while he knew that Ashley Hepburn was shaking her child, he would not be guilty of aiding and abetting homicide by child abuse. He did not commit an overt act that furthered the crime.

If the jury concluded that Mr. Lewis knew Ms. Hepburn was shaking her child and

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[2] The defendant was convicted of both homicide by child abuse and aiding and abetting homicide by child abuse. The defendant did not appeal the issue of whether the defendant could be convicted of both crimes. The case also indicates that neither party testified.

[3] The defendant in *Smith* did not raise the issue of whether he had a duty to protect the child. Also the defendant in *Smith* did not raise the issue of whether aiding and abetting can be committed by an act of omission.

causing the injuries and that he had a legal duty to prevent that act, Mr. Lewis is not guilty of aiding and abetting but guilty of homicide by child abuse. This is so because the statute makes an act of omission the actual commission of homicide by child abuse. The statute does not make an act of omission an element of aiding and abetting the commission of the crime.

*b. The state cannot prove that Richard Brandon Lewis was guilty of aiding and abetting homicide by child abuse by an act of omission.*

As a general proposition when one aids and abets another in the commission of a crime, the aiding and abetting is done in an affirmative manner. One simply cannot aid and abet the commission of a crime by an act of omission. If the law were otherwise, then a charge of mere presence would have no meaning. If one is merely present when the crime is committed, then he neither aids nor abets another in the commission of a crime. This crime is no different.

The wording of the statute shows that an act of omission cannot make one guilty of aiding and abetting the commission of the crime of homicide by child abuse. The S. C. Code § 16-3-85(A)(1) defines "child abuse or neglect" as "an act or *omission* by any person which causes harm . . . ." (Emphasis added) If a person commits an act of omission which causes harm, and that person is under a legal duty to act, and the act of omission results in the death of the child, that person is guilty of homicide by child abuse.[4] So, aiding and abetting simply cannot be committed by an act of omission. That would be actual child abuse. The statute and the case law require an affirmative act by the person that aids the commission of child abuse before a person is liable under the statute for aiding and abetting.

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[4] The issue of whether the statute as to an omission applies only when there is a legal duty, is discussed later.

Even if by some theory, an act of omission can create liability for aiding and abetting homicide by child abuse, the state never proved any act of omission by Brandon Lewis knowingly caused any harm to the minor child. The sole act of omission that may have been proven in this case is that Mr. Lewis watched television while Ms. Hepburn stomped into the child's room and shook her. Under those facts, the state has not proven that Mr. Lewis knew that Ms. Hepburn was going to commit the act of child abuse when she entered into the child's room. As there was no proof that Mr. Lewis knew Ms. Hepburn had in fact abused her child in the past, there was no reason for him to know she would do so on that night. Even assuming that he should have re-acted when he heard the sounds from the room, nothing in this record suggests that the unfortunate outcome for Audrina Hepburn would have been different had he entered the room immediately after the shaking. Certainly not responding after being told by Ms. Ashley not to interfere with her disciplining her child, does not evidence a circumstance manifesting "an extreme indifference to human life" as required by S. C. Code § 16-3-85.

*The state failed to prove any alleged aiding and abetting of homicide by child abuse because of any alleged overt act by Richard Brandon Lewis to assist Ashley Hepburn in failing to provide health care for Audrina Hepburn.*

As to be discussed later, as a boy friend who stays over two or three nights, Richard Brandon Lewis had no legal duty to render medical aid for the minor child. The trial judge instructed the jury that they may find Mr. Lewis guilty for an alleged failure to provide health care. In this case, Mr. Lewis did in fact assist in providing health care as soon as he found the child to be injured. Secondly, if a person fails to provide health care for a child where there is a duty to do so, that person is guilty of homicide by child abuse and not aiding and abetting

homicide by child abuse. To be guilty of aiding and abetting homicide by child abuse under this provision, the state must prove that Mr. Lewis somehow did an overt act to assist Ashley Hepburn in failing to provide Audrina Hepburn with health care. And under this record, what is that overt act? As discussed above, an act of omission is not sufficient to convict one of aiding and abetting.

If such an overt act can be found in the record, that does not end the inquiry. The state must then establish that the failure to render health care "causes a physical injury or condition resulting in the child's death." S.C. Code § 16-3-85 (B)(2)(b). There is no evidence in this case that any act by Ms. Hepburn failed to supply health care that caused a physical injury or condition that resulted in the death of Audrina Hepburn. And if there is no criminal action by the principle, then there can be no aiding and abetting by Mr. Lewis. The jury found that Ms. Hepburn caused the physical injury or condition. Mr. Lewis committed no overt act to assist Ms. Hepburn in failing to supply health care that caused the physical injury or condition.

The State argued that the death of Audrina was caused by the failure of Mr. Lewis to obtain prompt medical care. The State argued "that when a child goes for a long period of time without medical assistance or significant period of time without medical assistance that that is the result of hypoxia and cerebral edema that we saw in Audrina." Rec. on App. at 1108, ll 5-9. The State had early urged that the failure to provide medical care section of the statute is appropriate because the "testimony from Dr. Ward that the hypoxia or swelling from the brain condition set in because she did not receive immediate resuscitation." Rec. on App. at 1074, ll 2-4. Dr. Michael Ward never testified to such. He simply stated that a brain injury will cause the brain to swell. He never testified that had the child received medical treatment sooner she would have survived. Rec. on App. at 372, ll 11-23. If Brandon Lewis had immediately notified EMS after he heard

the baby being shaken, the record is devoid of any testimony that the result would have been different.

**Question II**

**Did the trial court err in failing to charge the jury that the State had to prove that Brandon Lewis had a legal duty to protect Adrina Hepburn before they could convict him of aiding and abetting homicide by child abuse?**

At the trial below, the State took the position that there was no need for the State to prove that the defendant Richard Brandon Lewis had any legal duty toward Audrina Hepburn in order for the jury to convict Mr. Lewis of aiding and abetting homicide by child abuse or actual child abuse. In objecting to the requested Charge № 2 the state said "As to charge number two, the implication of this charge is that there should be some type of duty and that is not this statute." Rec. on App. at 1074, ll 19-22. The State further argued "This Statute is meant to be broad, it is meant to apply to a person [who] is guilty of homicide by child abuse without any legal duty or responsibility to the child."[5] Rec. on App. at 1077, ll 20-23. As a result of these arguments, the trial judge did not inform the jury that they had to find that Mr. Lewis had a legal duty toward the child before they could convict him of aiding and abetting homicide by child abuse. In fact, in her closing argument, the attorney for the State argued that the law, as to an act of omission, applies to anyone. Rec. on App. at 1114, ll 1-9.

Under the facts as found by the jury in this case, Mr. Lewis did not cause the injury to the child that resulted in her death. In fact, the State in closing did not argue that Mr. Lewis

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[5] Under the State's theory, the legislature could eliminate the "mere presence rule" and pass a statute that everyone has the duty to prevent a crime when one occurs in their presence.

directly caused the death of the child. Rec. On App. at 1171 ll 4-11. The State in that argument simply said as a basis for convicting him of aiding and abetting "[H]e was simply covering up this crime . . . . ." Rec. on App. at 1171, l 9. That is not aiding and abetting.

The State contended that Mr. Lewis had a duty to protect the child and failed to do so when he did not stop Ashley Hepburn from shaking the child. Rec. on App. at 1114, ll 1-9. In the closing argument the State urged the jury to convict Mr. Lewis simply because he "was in the home regardless of the fact he is not legally a parent." Rec. on App. at 1114, ll 7-9. On this issue the state has simply argued an improper interpretation of the statute.

Criminal liability for an act of omission in permitting another to injure or kill a person can only arise when there is a duty on the part of the defendant to protect the person injured or killed. While morally anyone should take action to protect a child, the law requires that a duty to protect the person first must exist before one can be criminally liable. Such a duty cannot be found to apply to a boyfriend who stays only two or three nights a week. This principle dates from early case law in the United States and the English common law. *See, U.S. v. Sabhnani,* 599 F.3d 215 (2nd Cir. 2010); *Jones v. United States,* 308 F.2d 307 (D.C.Cir.1962); *People v. Beardsley*, 150 Mich. 206, 113 N.W.1128 (1907); *State v. Lisa,* 391 N.J.Super. 556, 919 A.2d 145 (2007); Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. LAW REV. 547 (1988)

"It is a long-established principle that criminal law generally regulates action, rather than omission, and that '[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act-a legal duty and not simply a moral duty.'1 Wayne R. LaFave, *Substantive Criminal Law* 6.2 (2d ed.2008). This general principle, that omissions may serve as

the basis of criminal liability only if there is an affirmative duty to act, is equally applicable when the crime charged is aiding and abetting. *Sabhnani* at 237

The Supreme Court of Connecticut in *State v. Miranda*, 274 Conn. 727, 878 A.2d 1118 (2005) has adopted this position. In *Miranda* the court found that the defendant was more than a two or three night stay over boyfriend and had in fact " established a familial relationship with the victim's mother and her children and assumed the role of a father." *Id.* at 768. 878 A.2d at 1141. The court in *Miranda* found that the boyfriend had no legal duty to the child and therefore could not be criminally liable for the injuries inflicted by the mother of the child.

Even if this court were to adopt the position that if a non-parent, under certain circumstances, has assumed the duty of a parent and therefore can be held criminally liable for acts of omission, the trial judge failed to charge the jury that they could only convict Mr. Lewis for an act of omission if they found he had assumed a duty as to the minor child. *See* Defendant's Request to Charge № 2. Mr. Lewis specifically requested that the jury be required to make such a finding.

S. C. Code §16-3-85 does define "child abuse or neglect" as including an act of omission. But the statute cannot be interpreted to change the common law rule that first there must be a legal duty to the child before one can be criminally liable from an act of omission unless such intent is clearly expressed. Under the state's theory, a stranger watching a child being struck by a parent would be criminally liable for aiding and abetting homicide by child abuse if they did not intervene to stop the beating and the child died. No state in the union has so held. Under such a theory the statute would be unconstitutional as a violation of the due process clause of the Fifth Amendment to the Constitution of the United States of America and Article I, § 3 of the

Constitution of the State of South Carolina as being over broad. Under such a statute no citizen would know when they would be subject to criminal prosecution when they witness or know about a parent striking a child. Under the interpretation of the statute as urged by the State, is there any line that can be drawn so that a citizen knows that what they observe can result in their being criminally liable for the death of a child who is a stranger to the person?

**Question III**

**Did the trial judge err in failing to declare a mistrial when a witness for the state testified, over the objection of the Defendant Brandon Lewis, that a statement by Mr. Lewis had "the possibility of guilt behind it?"**

Alexander Brown was in a Chaplin training program at Self Regional Hospital when Audrina Hepburn was taken to the emergency room. As part of his duties, he counseled with the families of people admitted to the emergency room. In this capacity, he counseled with the family of Audrina Hepburn. Included in the conversation was Richard Brandon Lewis. Rec. on App. at 148, ll 12-19.

In direct examination, the State went into detail about Mr. Brown's background including the fact that he is a student at the Lutheran Theological Seminary in Gettysburg, Pennsylvania. He testified that he was employed at Self Regional Hospital as a Chaplin. He testified as to his role as Chaplin. Rec. on App. At 144, ll 6- 25 to 147, ll 1-7.

On cross examination by the attorney for Ashley Hepburn, he stated that Mr. Lewis made the statement concerning Audrina, "the baby she doesn't like me, but I love her." He stated that the statement caused him concern. Rec. on App. at 153, ll 23-25 to 153, ll 1-12. Counsel for Ms. Hepburn then asked "Why did it cause you concern?" Rec. on App. at 153, l 12. As this

question called for an opinion, an objection was made by counsel for defendant. Mr. Alexander was not qualified as an expert and his opinion as to why it caused him concern would not be admissible as lay opinion testimony under Rule 701 of the South Carolina Rules of Evidence. Instead of sustaining the objection, the trial judge instructed counsel for Ms. Hepburn to "lay a foundation a little bit more about how long he worked there . . . ." Rec. on App. at 153, ll 22-23. Then Mr. Brown explained in detail his training as a counselor and that his supervisor is certified by the American Clinical Pastoral Education. He further stated that he had been making weekly analysis of conversations with different patients since he had been employed at Self Regional Hospital. Rec. on App. at 154, ll 1-25.

After listing these qualification, Mr. Able again asked the question to which counsel again objected on the grounds the witness was not qualified and that the testimony would be speculative. This time, after the jury had heard about his qualifications, the objection was overruled. In response to the question, the witness stated that the statement made by Mr. Lewis "appeared to be a statement that had the possibility of having guilt behind it." Rec. on App. at 155, ll 18-19. This time the objection was sustained. A request for a mistrial was denied. The trial judge gave a curative instruction.

What the jury heard was that a seminary student who had training with a counselor certified by American Clinical Pastoral Education and who had spent many months evaluating patient's responses, believed that Mr. Lewis was guilty. This was not an inadvertent statement. Counsel for Mr. Lewis made timely objections to the question before the answer was even given. The question shows that whatever the answer was to be given would not be admissible under any of the rules of evidence. Once the Chaplin for the hospital had said Mr. Lewis had a guilty

conscious, that fact simply could not be removed from the minds of the jurors. When Mr. Lewis testified the jury would receive his testimony with knowledge of the fact that the Chaplin had said he had a guilty conscious. No curative instruction could ever cure the prejudice.

As a general rule, "curative instructions usually cure any prejudice caused by the admission of incompetent evidence . . . ." *State v. Dawkins*, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989). But the rule is not rigid. By using the word "usually" the South Carolina Supreme Court has recognized that in some cases the curative instruction is not sufficient to cure the prejudice. This case is one of those cases.

First, there is no question but that the objected to statement is not admissible. Defense counsel raised a timely objection before the statement was made as the statement, regardless of what it was, would not be admissible under the rules of evidence. This was clear from the question asked. "Why did it concern you?" calls for an opinion. Generally opinion evidence is not admissible. Instead of sustaining the objection, the trial judge asked counsel for Ms. Hepburn to further qualify the witness as to his inadmissible statement. No qualification by any witness would ever have made the statement admissible.

The jury deliberated for one and a half days before reaching a verdict in this case. As noted earlier, the evidence against Mr. Lewis for aiding and abetting is slight at best. The fact that the Chaplin for the hospital believed Mr. Lewis had a "guilty conscious" while it may not have been used by the jury in arriving at their verdict, could easily have given the jury comfort in reaching the verdict that they did.

## Question IV

**Did the trial court err in failing to require the State to open fully on the law and the facts and then to reply to matters brought up in the closing argument of the defendants?**

Prior to the closing arguments, counsel for Richard Brandon Lewis requested that the State be required to open fully on the law and the facts. This was based upon the Due Process Clause of both the State and Federal Constitutions. As counsel argued "I would say if any case [c]ries out for the State to open fully on the law and the facts this is the one." Rec. on App. at 1092, ll 10-11. Counsel noted that after a week of trial he was still not sure exactly what theory the government was using to convict his client. He noted that it was unfair for the defendants to be required to present their theory of the case and then the government presents theirs with no chance for either defendant to refute the government's theory. The trial judge did not abuse his discretion in denying this request, because as the trial judge felt compelled to follow the law established by the appellate courts of our state, he did not use any discretion.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury. The practice of the State opening only on the law and then closing fully on the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the state to open fully on the law and the facts. In *State v. Atterberry,* 129 S.C. 464, 124 S.C. 648 (1924) the Supreme Court held that the failure to require the state to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the

points made, and authorities cited by the opposite party."[6] In reversing the conviction of the defendant the Court said "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorney's were required to make their arguments. This was refused. This was error." *Atterberry*, 129 S.C. at 471, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id.* at 473, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again the defense counsel requested that the state be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry,* Rule 59 of the Circuit Court Rules had been changed to Rule 58 and the rule then read "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact."[7] *Lee,* 318, 178 S.E..2d at 656. Thus began the more recent

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[6] Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

[7] Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

practice of requiring the state to open only on the law and not the facts.

Today Rule 43 (j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that "Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 1004 (internal citations omitted). The court further held "Application of these authorities to the facts at hand compels us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id.*

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see*, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). The treatise writers also support the requirement that the state open fully on the

law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.[8]

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing.

**CONCLUSION**

For the reasons stated in Question I above this case should be remanded with directions to enter a verdict of not guilty. As to Question II-IV this matter should be reversed and a new trial ordered.

August 6, 2012

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[8] The Florida Supreme Court also noted that forty-seven states follow the common law.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM LAURENS COUNTY
Court of General Sessions

Honorable Robert Addy, Jr., Circuit Court Judge

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Case No.10-GS-30-1929

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State of South Carolina ..... Respondent,

vs

Richard Brandon Lewis ..... Appellant

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## CERTIFICATE OF COUNSEL

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

August 15, 2012

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