

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

AUG 06 2013

SC Court of Appeals

\_\_\_\_\_  
Appeal from Pickens County

\_\_\_\_\_  
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMIE EDWARD MORRIS,

APPELLANT

APPELLATE CASE NO. 2012-212630

\_\_\_\_\_  
FINAL BRIEF OF APPELLANT

\_\_\_\_\_  
ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF ISSUE ON APPEAL .....	1
STATEMENT OF THE CASE .....	2
ARGUMENT .....	3
CONCLUSION .....	13

## TABLE OF AUTHORITIES

### **Cases**

<u>Evans-Smith v. Taylor</u> , 19 F.3d 899, 906 (4 <sup>th</sup> Cir. 1994).....	10
<u>Francis v. Franklin</u> , 471 U.S. 307, 105 S.Ct. 1965 (1985).....	12
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781 (1979).....	9
<u>Orr v. J. K. Saylor</u> , 253 S.C. 155, 169 S.E.2d 396 (1969).....	12
<u>Sandstorm v. Montana</u> , 442 U.S. 510, 99 S.Ct. 2450 (1979).....	12
<u>State v. Brown</u> , 267 S.C. 311, 227 S.E.2d 674 (1976).....	10
<u>State v. Brown</u> , 289 S.C. 581, 347 S.E. 2d 882 (1986).....	12
<u>State v. Buckmon</u> , 347 S.C. 316, 555 S.E.2d 402 (2001).....	11
<u>State v. Edwards</u> , 298 S.C. 272, 379 S.E.2d 888 (1989), <u>cert. denied</u> , 493 U.S. 895, 110 S.Ct. 246 (1989).....	9
<u>State v. Littlejohn</u> , 228 S.C. 324, 89 S.E.2d 924 (1955).....	9
<u>State v. Martin</u> , 340 S.C. 597, 533 S.E. 2d 572 (2000).....	10
<u>State v. Matarazzo</u> , 262 S.C. 662, 207 S.E.2d 93, <u>cert. denied</u> , 420 U.S. 945 (1974).....	10
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E. 2d 450 (1984).....	10
<u>State v. Sloan</u> , 278 S.C. 435, 298 S.E. 2d 92 (1982).....	12
<u>State v. Smith</u> , 359 S.C. 481, 597 S.E.2d 888 (2004).....	9, 11
<u>State v. Totherow</u> , 263 S.C. 275, 210 S.E.2d 228 (1974).....	10
<u>State v. Turner</u> , 117 S.C. 470, 109 S.E. 119 (1921).....	10
<u>United States v. Ortiz</u> , 445 F.2d 1100, 1103 (10 <sup>th</sup> Cir. 1971).....	10
<u>United States v. Varoz</u> , 740 F.2d 772 (10 <sup>th</sup> Cir. 1984).....	10
<u>Yates v. Evatt</u> , 500 U.S. 391, 111 S.Ct. 1884 (1991).....	12

**Constitutional Provisions**

U.S. Const. amend. XIV ..... 9

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of homicide by child abuse, aiding and abetting, when the State failed to present any substantial evidence beyond a reasonable doubt that appellant aided and abetted in homicide by child abuse?

## STATEMENT OF THE CASE

Appellant was indicted for homicide by child abuse, aiding and abetting at the December 2008 term of the Pickens County Grand Jury. Co-defendant Phillips and co-defendant Honeycutt were both indicted for homicide by child abuse. Trial of all three proceeded on July 23 – 27, 2012, before the Honorable D. Garrison Hill. Appellant and co-defendant Phillips were found guilty as charged. Co-defendant Honeycutt was found not guilty. Appellant was sentenced to twelve (12) years, suspended to eight (8) years with two (2) years' probation thereafter. Co-defendant Phillips was sentenced to twenty-five (25) years. John W. DeJong, Esquire, represented appellant. Doug Richardson, Esquire, and Jenny Barwick, Esquire, were the assistant solicitors.

This appeal follows.

## ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of homicide by child abuse, aiding and abetting, when the State failed to present any substantial evidence beyond a reasonable doubt that appellant aided and abetted in homicide by child abuse.

On Friday afternoon, March 14, 2008, appellant picked up his twenty-two month old male child from his ex-wife's mobile home and brought him over to the mobile home he lived in with his mother for a weekend visit. On March 16, appellant took the child back over to his mother's house that Sunday evening. On the next Monday morning, March 17, the child's mother went in to check on him around 8:00 a.m. and the child was asleep and she changed his diaper while he was sleeping. Around 10:00 – 10:30 a.m., the mother went back into his room and found the child comatose. She called 911.

The child's mother, Latasha Honeycutt (Latasha), lived with her boyfriend, Brandon Roper (Brandon) and an infant, Ava Roper. The mother was charged with homicide by child abuse. Appellant's mother, Donna Phillips (Donna), and the child's grandmother was also charged with homicide by child abuse. Appellant was charged with homicide by child abuse, aiding and abetting.

The first witness at trial was Patience Johnson, a supervisor involved with intake operations at the Pickens County Department of Social Services (DSS). She received a report of the child's fatality on March 17 and she initiated an investigation. She said there was a voice mail from appellant on March 15 to DSS wanting a Medicaid card for the child because he was sick. (R. 20, line 5 – R. 26, line 7).

Julie Sailors testified that she was a paramedic who responded to Latasha's residence on March 17. She asked Latasha questions about the child, but she was not

getting clear answers. (R. 61, lines 13 – 21; R. 80, lines 4 – 13). She put the child in the ambulance and she and her partner took him to Palmetto Health Baptist Easley. She said Latasha did not go to the hospital with them. Ms. Sailors said most parents are very hysterical, screaming, crying. They do not want to give up the child or they are jumping in the ambulance. (R. 63, line 11 – R. 64, line 13). When Ms. Sailors and her partner had gone into the child's bedroom, the mother did not follow them in there and Ms. Sailors thought that was not right. (R. 79, lines 15 – 20). She said that in all twenty cases she had handled of this type, the caregivers were consistently agitated. This case, though, was unlike anything she had ever seen. (R. 88, line 21 – R. 89, line 3).

Kathy Purdessy, the emergency room nurse, testified that when the child arrived, his heart was not beating. There was no parent there at the emergency room and that was not normal. The child was intubated and they were bagging him to breathe for him. He was lifeless. They took a urine sample. (R. 92, line 15 – R. 93, line 21). She said when the mother did arrive at the hospital, she said the mother seemed to act inappropriate to her. Latasha's answers were so vague. She wasn't crying. She was not even standing near her child. (R. 95, line 2 – R. 96, line 19). Later, the nurse said a drug screening of the child's urine revealed that opiates were present. (R. 98, line 25 – R. 99, line 4).

On cross-examination, the nurse said she had never seen a parent act the way the mother did. She seemed to be very detached from the child. She was emotionless. (R. 106, lines 5 – 17).

Detective Rita Burgess testified that she spoke to all of the defendants and took statements from them. She first talked to Latasha, who told her that the child had been with appellant from Friday, March 14 until Sunday, March 16 between 8:00 and 9:00 p.m. She

said when the child got back, he was extremely sleepy and pitching a fit. She put him in his crib and closed the door. She checked on him later and he was still fussy. She put him to bed and he slept all night. Latasha said she woke up Monday morning around 8:30 or 9:00 and the child was still sleeping at that time. She went back to bed and woke back up around 11:00 and checked on the child and he was unresponsive. She called Brandon for help and also called 911. (R. 136, line 7 – R. 137, line 14).

On March 27, Latasha gave Detective Burgess a written statement. (R. 138, lines 8 – 21). The written statement was not much different from the verbal statement, but she did add that when she checked on the child Monday morning around 8:00, she did change his diaper and he was still asleep. (R. 144, line 1 – R. 147, line 3). Latasha also told Burgess when appellant dropped the child off on Sunday evening, he told her the child was sick and should go to the doctor because he was congested. He gave her the Medicaid card. Latasha told her the child did sound congested and he had a runny nose. (R. 142, lines 2 – 10).

Detective Burgess said she talked to the grandmother, Donna, Monday evening at the hospital. She told her on Friday, they had trouble getting the child to sleep. She said the child would have “frightmares” during the night where he would wake up fighting and crying. On Sunday, she said the child was coughing and congested and appellant had given him some children’s Tylenol. A couple of times she said she hoped the child did not get any of her Lortab. She also said her sister takes Lortab and she hoped the child did not get her sister’s Lortab. (R. 147, line 20 – R. 148, line 25). She said on Sunday, she told Latasha that the child was sick and needed to go to the doctor. Latasha just acted like he was having a temper tantrum. Appellant gave Latasha the Medicaid card for the doctor. Latasha put the child in the crib. When Donna went to the hospital to see the child, someone said the child

had opiates in his system. Latasha told Donna at the hospital that the child went to sleep Sunday night after fifteen minutes after they dropped him off and he slept through the night. Donna told Brandon she had some Lortab, but she didn't think the child could have gotten it. Brandon told her he had been prescribed Lortab two weeks before, but they were all gone. (R. 153, line 23 – R. 155, line 25). Donna said at the funeral home, Brandon said the child woke up four times during the night. (R. 156, lines 3 – 4).

Detective Burgess spoke with appellant next. Appellant said the child was fine all weekend and around 3:00 p.m. Sunday, he started crying and acting ill. Around 4:00 p.m., the child started wheezing and was congested. He was concerned. Around 3:45 p.m., he gave the child a dropper-full of infant Tylenol. (R. 157, line 17 – R. 158, line 2). Later, on April 4, appellant met Detective Burgess at the station. Again, he said the child was fine Friday and Saturday. It was not until around 3:30 p.m. Sunday that he started crying and acted sleepy. He tried to calm him down. The child's head and back of his head felt hot. He gave him the infant Tylenol. He still would not calm down. They were at his sister's and decided to leave. They took the child back to their house. Then they took him to Latasha's house. His breathing was congested. He gave Latasha the Medicaid card and told her to get the child to the doctor. She said his doctor needed his medical records before he could see him. Appellant said he told her that he should see one soon because his breathing sounded bad. (R. 158, lines 11 – 18; R. 161, line 18 – R. 163, line 8). Appellant's mother, Donna, brought to the police the bottle of the infant Tylenol. (R. 163, lines 10 – 25).

On cross-examination, Detective Burgess said there was nothing in her investigation that would indicate that even if the child had eaten Donna's Lortab, that appellant had any knowledge of it. And, if hydrocodone was found or given by anybody, there was nothing in

her investigation that revealed that appellant knew anything about that. (R. 182, lines 21 – R. 183, line 24). She also said when Latasha was in the emergency room with her child, she showed no emotion. (R. 189, lines 12 – 17).

Deputy Albrecht, from forensics, went by Donna's residence after March 17 and she gave him a bottle of Tussionex. (R. 199, lines 8 – 24). Lt. Robinson said the Tussionex cough syrup is a prescription medicine. (R. 210, lines 14 – 15). The medicine was prescribed to Donna. (R. 212, lines 2 – 5).

Jeff Hollifield with Micro Analytical, testified that he analyzed what was in the Tussionex bottle and found it contained hydrocodone and chlorpheniramine, which were consistent with the drug Tussionex. (R. 238, lines 4 – 9).

William Gassman, the supervisor of chemistry and toxicology at the hospital testified that they analyzed the child's urine and found opiates in it. (R. 257, line 11 – R. 260, line 21).

Dr. James Mahanes, the coroner for Pickens County, testified that the child died from an overdose of hydrocodone contained in Tussionex. (R. 275, lines 2 – 19).

Michael Lark, an investigative consultant, testified that he spoke with appellant and appellant told him his mom, Donna, kept her Tussionex in a pumpkin in a hard-to-reach place in her closet. His mom got the medication down twice when the child was in the room, but he did not see the child get any of the medication. He said the tops were on the medication, but the child was playing with the bottles. He did not see any medication come out of the bottles because the tops were on them. (R. 293, line 13 – R. 294, line 3). While appellant did say he was with his mother all weekend, the investigator did not take that to

mean they were on top of each other 24/7 or that they were in eyesight of each other all weekend. (R. 296, line 10 – R. 297, line 8).

Robert Foery, a consultant in forensic toxicology, analyzed the blood and urine samples taken from the child. He found hydrocodone was the opiate that was in the blood. He found hydrocodone, hydromorphone, and chlorpheniramine in the urine. Hydromorphone is a metabolite of hydrocodone. There was only enough in the blood specimen to confirm the presence of hydrocodone. The hydrocodone and chlorpheniramine are found in Tussionex and it was a time released formula. (R. 330, line 1 – R. 333, line 10). The concentration of hydrocodone in the victim's blood was found to be 102 nanograms per milliliter. The therapeutic range for an adult would be 10 to 40 nanograms per milliliter. It would take 10 to 12 hours for the drug to be completely absorbed by the body. (R. 334, line 1 – R. 335, line 8). The expert said that in his opinion, to a reasonable degree of medical certainty, the drug was given on Sunday, sometime between midnight on Sunday up until the time the child was found. By midnight on Sunday, he meant midnight Saturday going into Sunday. (R. 336, lines 2 – 13). Because the drug was time-released, some effect would probably be felt in an hour. (R. 349, lines 8 – 10).

Dr. Michael Ward, the Greenville County medical examiner, testified the the high level of the drugs in the child would make him comatose. (R. 383, lines 13 – 17). In his opinion, the child was comatose at 8:00 a.m. (R. 384, lines 20 – 21).

The State rested its case after Dr. Ward's testimony. Defense counsel moved for a directed verdict because the State failed to present evidence that appellant aided and abetted in child abuse. The State only showed mere presence and guilt by association. They failed to prove that appellant had knowledge that anything was done. There was no evidence that

he knew or should have known that the child needed medical care other than the fact that the child had a runny nose and was coughing. The State was asking the jury to speculate as to guilt. (R. 399, line 20 – R. 400, line 22). The solicitor argued that the drugs were in possession of the grandmother and appellant knew of the drugs. He said there was testimony appellant was with the grandmother the entire time which indicated a failure to act on his part. Then he cited State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (2004) for the proposition that the case should go to the jury. (R. 401, line 9 – R. 402, line 8). The trial court denied the motion. (R. 402, lines 16 – 25). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires “that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is “sufficient to raise a strong suspicion of the guilt of the accused” is not sufficient to constitute “any

evidence from which the guilt of the accused may be fairly and logically deduced.” State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10<sup>th</sup> Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10<sup>th</sup> Cir. 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4<sup>th</sup> Cir. 1994).

In State v. Martin, 340 S.C. 597, 533 S.E. 2d 572 (2000), the Court granted a directed verdict where the State failed to place either defendant inside the apartment where a homicide was committed. The solicitor admitted to the trial judge, “We don’t know which person actually held [victim’s] head in that pan of water” and “Your Honor, the whole point is we don’t know if they acted in concert.”

In State v. Schrock, 283 S.C. 129, 322 S.E. 2d 450 (1984) the Court granted a directed verdict holding that the evidence presented “may raise a suspicion of Schrock’s guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to his guilt.” The Court noted earlier, “By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the crime.” The Court went on to say, “Coming into Court, Schrock

was clothed with the presumption of innocence. It was not incumbent upon him to prove that he was not guilty of these murders.”

In State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001), the Court directed a verdict to the charges of murder and attempted armed robbery. The Court wrote that “the circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt.” The Court noted that “suspicion” implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.”

In State v. Smith, 359 S.C. 481, 597 S.E. 2d 888 (2004) the Court held that there was sufficient evidence to sustain convictions for homicide by child abuse and aiding and abetting homicide by child abuse concerning defendant Smith who was tried with co-defendant, Celeste, who was the mother of the victim. The Court noted that “Smith and Celeste were the only two persons with Jordyn who could have possibly caused her injury. Celeste told investigators she was with Jordyn the whole time and, in his statement to the investigators, Smith referred to all of their actions that day as ‘we,’ never indicating a time when he and Celeste were not together during that weekend.”

In appellant’s case, there was no testimony that appellant was with his mother and the child 24/7. Surely appellant and his mother did not go to the bathroom together or take their showers together. The State also failed to present evidence of aiding and abetting by appellant. The indictment alleged he did aid and abet “by allowing and/or having knowledge of the said child’s ingestion of excessive amounts of opiates and/or the failure to get the said child medical treatment.” The State did not prove that appellant knew that his mother had given the child Tussionex. If he had no knowledge of this, he could not have allowed it or be responsible for failing to get the medical treatment. Just because appellant

was around does not prove his guilt. The State was, in effect, using res ipsa loquitur as their theory of the case. "The thing speaks for itself."

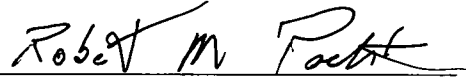
This creates a rebuttable presumption/inference that appellant had to disprove. The problem is that the doctrine of res ipsa loquitur is used in civil law in negligence cases, not in criminal cases. South Carolina does not even use the doctrine in civil cases. Orr v. J. K. Saylor, 253 S.C. 155, 169 S.E.2d 396 (1969). And shifting the burden of proof to the defense to rebut the presumption or disprove an inference is unconstitutional and in violation of due process of law. Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). "No right is more fundamental than the right of an accused to plead not guilty and put the State to its proof." State v. Sloan, 278 S.C. 435, 440, 298 S.E. 2d 92, 95 (1982); State v. Brown, 289 S.C. 581, 347 S.E. 2d 882 (1986).

There was just no proof by the State that appellant aided or abetted or that he had knowledge of what his mother did or that he failed to act.

CONCLUSION

A directed verdict should be granted in appellant's favor.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert M. Pachak". The signature is written in a cursive style with a horizontal line underneath it.

Robert M. Pachak  
Appellate Defender

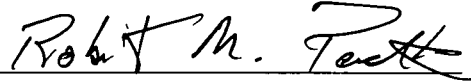
ATTORNEY FOR APPELLANT

This 6th day of August, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 6, 2013



Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

RECEIVED

AUG 06 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Pickens County

D. Garrison Hill, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

AUG 06 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

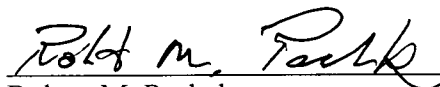
V.

JAMIE EDWARD MORRIS,

APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of August, 2013.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 6th day of August, 2013.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.