STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Certiorari to Newberry County

Honorable Frank R. Addy, Circuit Court Judge

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Opinion No. 2018-UP-439 (S.C. Ct. App. Filed December 5, 2018)

2015-GS-36-0133

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THE STATE,

RESPONDENT,

V.

THEIA DARION MCARDLE,

PETITIONER

APPELLATE CASE NO 2019-000431

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# APPENDIX

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

The State, Respondent,

v.

Theia Darion McArdle, Appellant.

Appellate Case No. 2016-000843

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Appeal From Newberry County
Frank R. Addy, Jr., Circuit Court Judge

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Unpublished Opinion No. 2018-UP-439
Submitted October 1, 2018 – Filed December 5, 2018

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**AFFIRMED**

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Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

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**PER CURIAM:** Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Bailey*, 368 S.C. 39, 44, 626 S.E.2d 898, 901 (Ct. App. 2006) ("On appeal from the denial of a directed verdict, an appellate court must view the

evidence in the light most favorable to the State."); *id.* at 44-45, 626 S.E.2d at 901 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight."); S.C. Code Ann. § 16-3-85(A)(1) (2015) ("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."); *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."); *State v. Nesmith*, 213 S.C. 60, 67, 48 S.E.2d 595, 598 (1948) ("Direct evidence is testimony, which if believed, tends directly to prove a fact in issue. Circumstantial evidence on the other hand, while not tending directly to prove a fact in issue[,] gives rise to a legal inference that such a fact does exist.").

**AFFIRMED.**[1]

**LOCKEMY, C.J., and THOMAS and GEATHERS, JJ., concur.**



[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

THEIA DARION MCARDLE,

APPELLANT

APPELLATE CASE NO 2016-000843

---

Appeal from Newberry County

Honorable Frank R. Addy, Circuit Court Judge

---

Opinion No. 2018-UP-439

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PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding on appeal that there was evidence tending to prove that appellant was guilty of homicide by child abuse because to the contrary, appellant was working and not alone with the minor during the three-hour window of time (from 10:30 p.m. on December 29, 2014 to 1:30 a.m. on December 30, 2014) during which the fatal head injuries were inflicted upon the minor, and appellant was unaware that the head injuries existed. In support of this petition, counsel for appellant would submit the following facts.

At 1:38 a.m. on December 30, 2014, appellant and her boyfriend Richard Bowman brought appellant's three-year-old son (hereinafter referred to as the Minor) to the Newberry Hospital Emergency Room. The Minor was pronounced dead at 2:06 a.m. on that same date. R. 28, lines 4-18; R. 40, lines 6- p. 42, l. 7; R. 78, lines 1-9. It was determined that three or four different blows to the minor's head could have been fatal and that the minor had been dead for two hours or less before the Minor was brought to the hospital. The Minor died from extensive head trauma. R. 79, lines 5-23; R. 81, lines 16-p. 82, l. 23; R. 734, l. 2- p. 738, l. 12; R. 724, lines 16-23; R. 739, l. 15-19, R. 846, l. 6- 24. Only appellant and boyfriend Bowman were with the Minor during December 29-30, 2014. At 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 the Minor and specifically that Bowman never testified that appellant hit the Minor within the three-hour window of opportunity that the state's medical experts had identified or that appellant knew about the head injuries and their severity, failed to seek medical treatment. R. 801, l. 25 - 824, l. 23.

On appeal, appellant raised the following issue:

> 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).

This Court issued the following opinion:

> PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Bailey*, 386 S.C. 39, 44 626 S.E.2d 898, 901 (Ct. App. 2006)("On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State."); S.C. Code Ann. §16-3-85(A)(1)(2015)("A person 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."); *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)("If there is any direct evidence or any substantial circumstantial evidence reasonably

> tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."); *State v. Nesmith*, 213 S.C. 60, 67 48 S.E.2d 595, 598 (1948)("Direct evidence is testimony, which if believed, tends directly to prove a fact in issue. Circumstantial evidence on the other hand, while not tending directly to prove a fact in issue[,] gives rise to a legal inference that such a fact does exist.").

However, this Court might have overlooked the fact that appellant was not alone with the minor during the three-hour window of time in which the injuries were inflicted. Bowman and appellant were the only adults with the minor on December 29-30, 2014. R. 534, l. 20-p. 544, l. 24. Here, the state alleged that appellant either inflicted the fatal blunt force trauma to the Minor's head or knew that the 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 the Minor would have lived - at most - an hour after the blunt force trauma to the head. Dr. Holaday testified that he believed that the Minor had been dead for - at most - two hours before being brought to the emergency room. The medical evidence establishes that the earliest that the 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 the Minor 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.

Appellant testified that she worked as a prostitute and that on December 29, 2014, 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 the 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 the Minor appeared to be asleep. Bowman put the Minor in the car seat and it never occurred to her that the 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 the Minor threw up after dinner. Thirty to forty minutes after leaving, appellant returned unexpectedly to their residence with a stray cat. She stayed only a few minutes to drop off the cat and did not return until after 11:00 p.m. The Minor did not wake up during appellant's brief return. Bowman was again alone with Minor from around 8:00 p.m. until after 11:00 p.m. R. 895-995.

No substantial circumstantial evidence exists that established that appellant fatally injured minor or that the appellant knew that the Minor was being struck about the head by Bowman. According to Bowman's testimony, appellant struck the Minor everywhere except the about the head. The evidence presented by the State was that the injury to the Minor occurred after 10:35 p.m on December 29, 2014, and before 1:35 a.m. on December 30, 2014. During this time, appellant was never alone with the 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 the Minor during this time was Bowman. This is a substantial factual distinction from *Smith supra* and places appellant's case "on all fours" with *Palmer supra.*

The disconnect between the medical evidence and the state's evidence implicating appellant in the 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 the 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 the 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 the Minor during the window of opportunity for the fatal injuries. R. 556, l. 17 – 559, l. 19. Bowman was present whenever the 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 the Minor that would be consistent with the uncontroverted medical evidence on the 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.").

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. S.C. Code Ann. §16-3-85(A)(1).

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 the 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 the 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 Myrtle 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.

Here, in the case at bar, based on the medical evidence and appellant's testimony, clearly 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 the Minor, and also based on Bowman's testimony as follows, it became more clear that appellant was not guilty as charged.

At trial, Bowman was adamant that the 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.* The state's key witness was Richard Bowman. Bowman was the only one with the Minor for the window of time during which the fatal head trauma blows could have been inflicted on the Minor. R. 342, l. 2- 346, l. 25. By his own testimony Bowman was alone with the 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 the 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 claimed that the Minor fell and hit his head on ground while on using the skates on December 27, 2014. R. 347, l. 4 - 351, l. 23. Bowman testified that on the morning of the 27th, when the Minor put his shoes on wrong, appellant hit the 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, the Minor did not correctly buckle his car seat. According to Bowman, appellant hit the Minor in the chest. *Id.* at ll. 22-25. Bowman also recalled that Appellant had allegedly hit the Minor in the chest on December 27, 2014, because the Minor said appellant was a prostitute and that appellant had previously hit the Minor at the back of his head and that the front of his head hit the coffee table earlier on that same date. p. R. 350, l. 12 - 351, l. 23; R. 349, lines 1-18.

Bowman testified that appellant hit the minor on December 28, 2014, after he got in a dispute with another child at the Laurens McDonalds. Bowman next claimed that appellant hit the Minor in the genitals after Minor grabbed his groin so as to mimic an insult Bowman had just made. R. 354, ll. 2-23.

On December 29, 2014, Bowman stated the Minor attempted to wake-up appellant and appellant responded by striking the 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 the Minor again for trying to play with her while she was eating. R. 359, l. 15 - 360, l. 24.

Bowman then testified that after dinner appellant punished the Minor throwing up by spanking him. R. 365, ll. 3-6 R. 362, ll. 21-25; R. 363, ll. 3-8; R. 363, l. 16 - 365, l. 6; R. 367, ll. 7-18. Then, when Bowman returned to take the Minor out of the bath, he realized that the Minor had

defecated in the bathtub. R. 368, l. 5-19; At appellant's insistence, Bowman spanked the Minor for defecated in the bathtub. While he was being spanked, the Minor's head hit the plastic tub of the trailer. *Id.* Bowman testified that the 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. R. 369, l. 15 - 371, l. 18. Bowman claimed that he and the 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 the 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 the Minor was able to communicate and did not have any "developmental delays."** *Id.*

Bowman went on to explain that appellant took the Minor and placed him into his car seat located behind the driver's seat. R. 374, l. 1 - 376, l. 20. When the 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. the Minor slept for the drive, Bowman claimed he could hear him snoring. *Id. a*ppellant 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 the Minor. *Id.* According to Bowman, he and the Minor both fell asleep. *Id.* At some point while appellant was still inside with the "John" Bowman woke up and then 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 the Minor had sleep apnea because it sounded to Bowman like the Minor may have briefly stopped breathing. Bowman recalled that appellant dismissed his concerns and believed that the Minor was "probably just sleeping hard." R. 380, ll. 10-25. Bowman then claimed that he tried to wake the Minor up to tell him that they were heading home, but the Minor was unresponsive with a brown substance coming out of his nose and mouth. *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. In a short re-direct, the solicitor had Bowman repeat the times that appellant purportedly hit Minor in the days leading up to the Minor's death. R. 588, l. 10 - 591, l. 8. Bowman claimed that on December 27, 2014, appellant hit the Minor multiple times in the stomach. On the 28th, appellant hit the Minor in the groin. Finally, according to Bowman, appellant hit the 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.**

**Bowman confessed to killing Minor.** R. 534, l. 14 – 536, l. 14. When first questioned, he told police that he was mad at the Minor for defecating in the bath tub, so he beat the 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 only Bowman's testimony which most favorable to the state's case, Bowman claimed appellant last struck the Minor in the head at around lunchtime on December 29, 2014. R. 573, ll. 1-16. This was over twelve hours before the Minor was pronounced dead and over ten hours before Bowman claimed that the Minor first lost consciousness. It was also between six and eight hours before appellant, the 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 the Minor's head to be the source of the fatal head trauma.

Likewise the 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. The 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 the Minor would have been unconscious within minutes. R. 724, ll. 1-23; R. 853, l. 19 – 854, l. 11. The 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 29, 2014. R. 855, l. 15 – 860, l. 15.

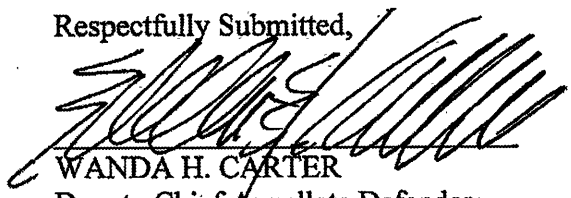
Our Supreme Court has held that when reviewing a trial judge's denial of a motion for a directed verdict, the appellate court is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there 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).

WHEREFORE, based on the foregoing points, chiefly that appellant was not alone with or in the presence of the minor during the three-hour period of time when the minor received the fatal head injuries in question, clearly, there was insufficient proof of any direct evidence or substantial circumstantial evidence reasonably lending to prove any guilt on appellant's behalf.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 20th day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Newberry County

Honorable Frank R. Addy, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

THEIA DARION MCARDLE,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Theia Darion McArdle, #367770, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 20th day of December, 2018.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 20th day of December, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Theia Darion McArdle, Appellant.

Appellate Case No. 2016-000843

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ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
David Matthew Stumbo, Esquire
William Frederick Schumacher, IV, Esquire
Wanda H. Carter, Esquire
The Honorable Frank R. Addy, Jr.

FILED
February 15, 2019