STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT PALMER,

APPELLANT

APPELLATE CASE NO. 2011-203766

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in refusing to enforce a proffer agreement made between the State and appellant when it was binding on the parties?

II. Whether the trial court erred in refusing to grant a directed verdict to the charges of homicide by child abuse, aiding and abetting the same, and unlawful conduct toward a child when the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that appellant committed the acts?

STATEMENT OF THE CASE

Appellant was indicted along with a co-defendant, Julia Gorman, for homicide by child abuse, homicide by child abuse-aiding and abetting, and unlawful conduct toward a child at October 2008 and May 2010 terms of the Horry County Grand Jury.

On June 10, 2010, a hearing was had on the enforceability of a proffer agreement before the Honorable Benjamin H. Culbertson. He held that the solicitor was allowed to withdraw the proffer and that it was not an immunity agreement.

On January 11-12, 2011, a hearing was held before the Honorable Larry B. Hyman on appellant's motion to have appellant's two polygraphs admitted as being scientifically reliable. Appellant passed both a SLED polygraph and an independently performed polygraph. On May 26, 2011, a hearing was held on respondent's motion to amend Judge Hyman's order excluding evidence of the two polygraph examinations pursuant to Rule 702 and the Jones factors. Judge Hyman granted respondent's motion to amend the order.

On October 31, 2011, a hearing was held on the co-defendant's motion to sever, on various voir dire questions, an amendment of the indictments in reference to the date of the incident, a discussion on autopsy photos, and an in camera hearing on the admissibility of appellant's and the co-defendant's statement. The statements were held admissible.

On November 14-18 the jury trial proceeded. Both appellant and the co-defendant were found guilty as charged. They were both sentenced to thirty-five (35) years for homicide by child abuse, to twenty (20) years for aiding and abetting, and to ten (10) years for unlawful conduct toward a child.

This appeal follows.

FACTS

Appellant and Julia Gorman were indicted for homicide by child abuse for inflicting fatal injuries to a seventeen (17) month old male child on July 14, 2008. Appellant and Gorman were also indicted for aiding and abetting under the homicide by child abuse statute and for unlawful conduct toward a child in relationship to the injuries that occurred to the victim.

Just how did the victim come into the care of appellant and Julia Gorman? Appellant and Gorman lived together. The victim was Gorman's grandson. The victim's mother was Cesalee Carnaghie. She gave appellant and Gorman temporary guardianship of the victim so she could visit her husband, Richard Grimes, who was stationed in the military and the father of the victim.

Mr. Grimes said he was notified by phone on the night of July 14 by Gorman that the victim was on his way to the hospital because he was having a seizure when they tried to wake him up for dinner. (R. p. 81, line 9 – p. 82, line 1). Cesalee said she tried to call Gorman but she would either ignore the call or she would push the end button and never answer the call. When she got back to South Carolina, Cesalee went to the Medical University of South Carolina (MUSC). Her husband and mother were there. Gorman said something about all the animosity that has been created. (R. p. 157, line 23 – p. 158, line 21). Cesalee had no idea what the animosity comment meant. (R. p. 160, lines 19-23). After consulting with the doctors, she and Richard decided to donate the victim's organs and cease life support. The victim died on July 16. Before he died they had him baptized. Cesalee invited and begged her mother to come, but she said she had other things to do. (R. p. 160, line 24 – p. 162, line 2).

On cross-examination Cesalee said that her mother did not handle stress well. She lets things bottle up and then goes into a fit of rage. (R. p. 181, line 17 – p. 182, line 2).

Dr. Jody Hutson testified that he was a family physician at Aynor Family Medicine. On July 1, Cesalee and Gorman brought in the victim because he had ant bites, allergies, and congestion. Otherwise, the victim looked normal. (R. p. 204, line 9 – p. 205, line 16). The doctor prescribed a steroid cream and antihistamines for the victim. (R. p. 207, lines 12-23). The victim was to be given ½ teaspoon a day of xyzal, the antihistamine. A side effect of the antihistamine is sedation. (R. p. 210, lines 6-25).

Gorman brought the victim back in to see the doctor on July 8 with complaints of nausea and vomiting. The victim had an emergency room visit the night before. Dr. Hutson examined him and he seemed very well. He was not concerned about him. (R. p. 211, line 8 – p. 214, line 16).

Lt. Rainbolt worked for Horry County Fire and Rescue. He was dispatched to the Gorman residence at 6:07 p.m. on July 14 and he arrived at 6:13 p.m. The dispatch mentioned shortness of breath or a seizure. (R. p. 235, line 2 – p. 236, line 19). When Rainbolt walked inside the residence, he saw appellant sitting on the couch holding the victim. (R. p. 237, lines 3-7). He said the victim was in a pretty grave condition and appeared to be having a seizure. (R. p. 238, lines 8-10). He asked appellant if the victim had been sick or had a fever. Appellant said, no. He said the victim was put down for a nap at 3:30 p.m. He had just risen from the nap and that was how they found him. (R. p. 239, lines 13-15).

Erica Rosenthal, a firefighter/paramedic, responded to the scene at 6:20 p.m. in medical transport unit. She testified the victim was "very lethargic, still seizing"… "He had

a right-sided gaze..." The victim was put in the ambulance and Gorman rode in the front passenger seat. (R. p. 253, line 8 – p. 254, line 9). She said that the victim "had suffered fire ant bites previously in the week and was treated for that." She said "he had not been sick, he had not struck his head, he had not fallen..." (R. p. 254, lines 22-25). Later, Gorman told her that the victim had been whiny and lethargic since the ant bites and she also said she had "raised several children in her lifetime and never seen such a bad one." She said that the statement stuck with her. (R. p. 256, line 18 – p. 257, line 13). Rosenthal did not notice any bruises on the victim. (R. p. 258, lines 17-22).

Tina Millan was a registered nurse in the emergency room at Conway Hospital where the victim was taken. She noticed the victim was unresponsive, posturing, and seizing, he had no response whatsoever and his pupils were dilated. The prognosis was very critical. (R. p. 264, lines 6-25). Gorman said the victim had not fallen or anything. (R. p. 266, lines 4-5). The nurse noticed that Gorman "was very anxious, pacing back and forth... seemed very upset." Appellant was "very concerned about the child. While the child was seizing he actually wanted to approach the bed and I told him he could go ahead and talk to the child and he was holding his hand." At first Gorman did not do the same but then she later did. (R. p. 267, lines 7-22).

A CAT scan of the victim revealed cranial skull factures and bleeding in the back of the head. That sort of trauma could be caused by a fall from a second story building or being thrown out of a car or any kind of abuse to a child. Nurse Millan also saw some bruising on parts of the body. (R. p. 271, line 5 – p. 272, line 19). At 10:33 p.m. the victim was transferred by air flight to MUSC. (R. p. 275, lines 6-14).

Dr. Cacace was the emergency room doctor at Conway Medical Center. Gorman seemed to indicate a possible cause for the victim's condition was the victim's mother who had left him a week earlier. (R. p. 293, lines 1-6). The doctor said the head trauma was severe, impending death. (R. p. 295, lines 17-23). The injury was not accidental. (R. p. 296, lines 15-16). The victim was posturing due to neurological trauma. (R. p. 299, lines 9-13).

Dr. Donna Roberts testified that it would take severe traumatic force to cause the victim's skull fractures. (R. p. 335, line 22 – p. 336, line 1). A person with this type of injury would be severely symptomatic immediately. Symptoms would be a loss of consciousness, alteration in breathing, and likely seizures. The child would not be able to walk, move, play with toys, or eat. A person could foam at the mouth. (R. p. 345, lines 3-14). She said there were fractures on both sides of the head but she could not give an opinion as to what caused them. (R. p. 349, lines 1-2). If the victim had been checked on around 4:30 and was sleeping fine the injury would have to have occurred after that. (R. p. 353, lines 13-22). If someone came up to the victim and hit him on both sides of the head it could cause the injury if severe force was used. (R. p. 354, lines 17-25). If the victim had been shaken and the shaking were violent the injury could have been caused if there was also an impact. (R. p. 362, line 25 – p. 363, line 7).

Dr. Cynthia Schandl, a forensic pathologist at MUSC, testified that the victim had fractures on both sides of the head. (R. p. 382, line 20). She could not tell if there had been one big hit or two hits, one on either side of the head. (R. p. 387, lines 13-21). The cause of death was inflicted blunt head trauma. The manner of death was homicide. (R. p. 393, line

12 – p. 394, line 12). On cross-examination, she said attempts to resuscitate the victim could cause bruising. (R. p. 402, lines 3-8).

Dr. Ann Abel, an expert in child abuse pediatrics at MUSC, testified next. She said the degree of force inflicted on the victim was massive and she would expect him to be unconscious immediately. (R. p. 417, lines 21-24). The victim had multiple bruises, some of which were not typical of normal falling. Some of the bruises could very well have been accidental. She said one cannot date or time a bruise by its color. (R. p. 418, line 13 – p. 427, line 25). She put in her final report that the victim's injury was caused by inflicted head trauma. (R. p. 432, lines 19-24). She said Gorman told her the victim had severe developmental and behavioral problems but his records did not indicate those problems. Gorman also said the victim was clingy and whiny and wanted to be held all the time. (R. p. 435, line 17 – p. 436, line 7).

On cross-examination, Dr. Abel testified that the victim's bruises could have occurred the same times as the skull fractures. The victim's skull fractures could have occurred within one (1) hour of him being seen by EMS. And it would take less than a minute for the injuries to occur. If a layperson did not see the damage being inflicted, they would have no knowledge how it was done. (R. p. 437, line 25 – p. 440, line 9). A risk factor to a toddler is somebody with a low tolerance to stress and a low tolerance to the demands of a toddler. (R. p. 440, line 18 – p. 441, line 11). On redirect, Dr. Abel said the injuries occurred to the victim within three (3) hours of his being taken to the emergency room. (R. p. 455, line 24 – p. 456, line 18).

Marsha Bessant, a friend of appellant's and Gorman's, testified that Gorman was very stressed because of financial problems with appellant not working. (R. p. 466, line 21 – p. 467, line 3).

Brad Whiteis was a supervisor for the child protective services investigations at the Department of Social Services (DSS). He briefly spoke to Gorman over the phone after the victim was at MUSC. While she worked during the day, appellant took care of the victim. On Monday the 14th, she got home around 3:00 p.m. She said the victim was asleep. She checked on him shortly thereafter. She said the victim was acting weird. Foamy saliva was coming from his mouth. When she noticed this, she took the victim to appellant and told him something was wrong. She said after the victim started to have some form of seizure. She called 911 at 6:06 p.m. (R. p. 498, line 18 – p. 499, line 13).

Yvette Brown, an investigator with DSS, was assigned the case and she went to MUSC. She noticed bruises on the victim's thigh and on his lower legs. She asked Gorman about the bruises and she said the victim likes to pinch himself. (R. p. 509, line 13 – p. 510, line 1). Gorman described the victim while he was in her care as being cranky, underweight, undernourished, and that his head had a squishy feeling to it like it didn't have bone structure. Ms. Brown thought that was odd. (R. p. 513, lines 18-24). When she talked to appellant, she observed that "he was just stunned, bewildered." She asked him what had taken place on July 14 that the victim ended up in the hospital. He said he did not know. He just didn't know. (R. p. 516, line 18 – p. 517, line 7).

Detective Troxell with the Horry County Police Department testified that he interviewed appellant and Gorman on July 18. Gorman brought a notebook with her to the interview with issues she was having with her daughter. The detective found this

information irrelevant because the victim was injured after his mother had left. (R. p. 555, line 7 – p. 556, line 9).

Appellant was interviewed first. He testified that Gorman got up around 4:45 a.m. on Monday, July 14 because she had to be at work around 6:00 a.m. Appellant woke the victim up around 9:30 a.m. The victim was tired, as though he never slept. Appellant took him to the kitchen and got him something to eat. Around 11:30 a.m. to 12:00 p.m. he fed the victim lunch. Again the victim seemed tired and appellant let him lie down for about 30 minutes to see if he would sleep. The victim kept whining and held his hands out to be picked up. Appellant picked him up and took him to the living room to watch some television. The victim was whining and tired acting. Around 3:30 appellant laid the victim down again and he went to sleep. Gorman came home around 4:15 p.m. They both checked on the victim and he was asleep. (R. p. 565, line 7 – p. 567, line 23).

Appellant and Gorman let the victim sleep as they prepared dinner. They sat down around 6:00 p.m. to eat. After dinner, Gorman went to get the victim and she found him having a seizure. Appellant said the victim's head was limp, his arms were bowed up, it looked like a seizure. He had never seen anything like it. He told Gorman to call 911 and she did. The paramedics came and took the victim to Conway Medical. (R. p. 568, line 2 – p. 569, line 8).

Appellant testified Gorman had been upset with her job on an almost daily basis. (R. p. 575, lines 6-20). When Gorman comes home from work, she takes over caring for the victim. (R. p. 575, line 21 – p. 576, line 9). He did not know what happened to the victim. He did not hurt him. (R. p. 577, lines 19-22). Detective Troxell told appellant he was not

accusing him of anything. He did not think he had a malicious bone in his body. He had never been in trouble before. (R. p. 581, line 23 – p. 582, line 2).

The detective told appellant he showed compassion as opposed to Gorman who was stone cold and straight faced when he talked to her. (R. p. 592, lines 6-10). Appellant again said he did not do anything to the victim. He just tried to care for him. (R. p. 594, lines 24-25).

The next interview was with Gorman. She testified that Monday morning she got up 4:30 to 4:45. She checked on the victim and he was sleeping well. She went to work. Appellant called her around 9:00 to 9:30 a.m. to tell her he woke the victim up and fed him breakfast. Appellant called again later when he fed him lunch. She got home from work around 4:00 to 4:30 p.m. and checked on the victim. He was sleeping and breathing fine. She and appellant checked on him a little later and everything was still fine. She cooked dinner and they decided to eat before getting the victim. Appellant took the dog out and she went back in the bedroom to wake the victim up. She said the victim was "making the really strange noises and slack looking, saliva." Something happened between dinner and 6:00 p.m. after which she called 911 on appellant's phone. (R. p. 617, line 17 – p. 740, line 3).

Gorman testified that on Saturday she got home from work around 3:00 p.m. She said she "walked in the door, of course, victim's making his whine, whine, whine, you know. It just gets louder when I get home, but that's just the way he is, you know. If, if I walk in the door he starts, I mean he, he, he makes noises but it just seems like when a woman walks in it just gets more loud and he comes over and starts trying to climb up my leg and cause he wants to be carried and we don't carry him because we are trying to break a habit." (R. p. 624, line 11 – p. 625, line 8).

Detective Troxell confronted Gorman with jail time and he noted that was the first tear he had seen from her. (R. p. 629, lines 4-46). Later, Troxell told her, "there's not a bit of remorse coming from you..." (R. p. 635, lines 17-18).

Detective Weaver asked Gorman if appellant gets frustrated and she said no that he had better patience than she did. She had to walk out of the house because of the victim's whining and crying. The whining and crying does not faze appellant. (R. p. 660, line 13 – p. 661, line 6). Gorman then admitted she may have shook the victim but she did not think she did it hard. (R. p. 661, line 7 – p. 666, line 7; R. p. 669, lines 13-15; R. p. 670, lines 4-7). She then demonstrated how she shook him but claimed she did not shake him on Monday. (R. p. 671, lines 7-22; R. p. 674, lines 1-2; R. p. 683, lines 8-24). She said the victim cries everyday, he is cranky everyday, he whines everyday. (R. p. 676, lines 18-19). If she shook the victim, she did not tell appellant. (R. p. 688, lines 13-14).

On cross-examination Detective Troxell admitted appellant answered all questions and was cooperative. He said if appellant was not in the residence when Gorman shook the victim, or whatever she did to him, he would not have any knowledge of it. (R. p. 697, line 7 – p. 698, line 2). There was no evidence to show appellant was present when the injuries occurred. (R. p. 698, lines 7-12). Troxell admitted appellant freely consented to a search of the trailer. He admitted there was no direct evidence that appellant was the one who inflicted the injuries and Gorman was adamant that appellant had not inflicted any injuries. (R. p. 699, line 22 – p. 700, line 25).

After the state rested, and the judge denied the directed verdict motion, appellant called Adrian Robertson to testify. She worked with appellant. She had an eleven (11) year old daughter who was non verbal who had seizures and mental and physical disabilities.

Appellant was very caring for her. (R. p. 731, line 14 – p. 733, line 28). Ms. Robertson also had a five (5) year old daughter and a nine (9) month old daughter. Appellant was around them everyday at the office and interacted with them. She had no hesitation in having appellant around them or in leaving them alone with him. (R. p. 734, line 7 – p. 735, line 18).

James Palmer, appellant's father, testified that appellant interacted well with his own son Dylon. Appellant was good natured and never hit Dylon. (R. p. 742, lines 4-24). Appellant brought the victim over on Sunday, July 13th, to go swimming. Mr. Palmer said the victim was very pale and did not show any bruises. (R. p. 743, lines 5-12). On cross-examination, Mr. Palmer was asked if he knew appellant's ex-wife had filed a restraining order against appellant and he did not know about it. (R. p. 749, lines 3-25).

Appellant's mother, Gail Palmer, testified that she too observed the victim on Sunday with his swimming trunks on. She did not see any bruises. (R. p. 757, line 22 – p. 758, line 10).

Co-defendant Gorman was the last person to testify. She again brought up her strange concern over the victim's head being "soft and squishy." (R. p. 780, line 21 – p. 781, line 11). On Monday, July 14, she said she got up around 4:15 a.m. She checked on the victim and he was asleep. She went on to work. (R. p. 787, lines 16-22). She clocked out at work 3:45 p.m. to go home. (R. p. 790, lines 8-12). She got home around 4:30 – 4:45. (R. p. 790, lines 20-25). She checked on the victim and he was asleep.

Now, after over three (3) years, her story started to change. She claimed that she left the house and went to the IGA to get something for dinner then she stopped at the video store and picked up a movie. She came home and cooked dinner and she and appellant

decided to sit down and eat dinner before waking up the victim. (R. p. 791, lines 2-19). She did say appellant called her at work during the day to tell her what the victim had for breakfast and lunch. (R. p. 791, line 20 – p. 792, line 7). She introduced into evidence a check she wrote out to the IGA on July 14, 2008. (R. p. 793, line 15 – p. 794, line 14). The time stamped on the check from the IGA cash register said 15:52 which would be 3:52 p.m. She thought maybe she cashed the check at 4:52 p.m. (R. p. 796, line 25 – p. 797, line 17). By the time she went to the video store, got home, and sat down to eat dinner it must have been around 5:30 p.m. (R. p. 797, line 18 – p. 800, line 21).

Gorman said she then prepared the victim's plate and went down the hallway to get him. She found him laying on his side, breathing really funny. He was heavy and saliva was hanging out of his mouth. She did not know what was wrong. She picked him up real quick and flipped him over her arm. All of a sudden he was seizing. She called appellant and said something was wrong. She told him to call 911. He took the victim and she grabbed the first phone she could find to call 911. (R. p. 800, line 24 – p. 806, line 15). She said at one point appellant had taken the dog outside. Appellant told her he took the dog out while she was prepping the food. (R. p. 801, line 21 – p. 802, line 6). Now, Gorman said she did not know why she demonstrated shaking the victim. She said she never shook the victim. (R. p. 824, line 20 – p. 825, line 6).

On cross-examination by the solicitor, Gorman said she did not know if she ever told the detectives, the people who treated the victim, Dr. Abel, or DSS over three years ago that she went to the IGA and the video store. She agreed that none of the officers who were looking into the death of the victim brought up the fact that she had gone to the IGA and the video store. (R. p. 833, line 19 – p. 834, line 24). When she was asked where the victim's

head was squishy, she said it was squishy all over. (R. p. 840, line 19 – p. 841, line 2). She denied telling medical personnel she gave the victim 2 to 2 ½ times the antihistamines she was supposed to give him. (R. p. 841, line 24 – p. 842, line 25). She admitted that she put appellant out of the house walking the dog on the day the victim was injured. (R. p. 850, lines 10-14).

When cross-examined by appellant's attorney, Gorman said when she first got home on Monday after work the victim was asleep and she did not hear any gurgling or strange sounds. There was normal breathing. (R. p. 863, line 9 – p. 864, line 5). She said appellant was agreeable to having the victim stay at their home. He was very loving, caring and patient with the victim. (R. p. 864, line 18 – p. 865, line 1).

After Gorman's testimony, defense counsel for appellant introduced a restraining order concerning appellant and his ex-wife to refute the paper work the court took judicial notice of earlier that Gorman's counsel had brought up. The order also gave appellant liberal visitation rights with his own son. (R. p. 873, line 20 – p. 874, line 11).

ARGUMENT I

The trial court erred in refusing to enforce a proffer agreement made between the State and appellant when it was binding on the parties.

On April 22, 2009, respondent extended the opportunity of a proffer to appellant. The offer provided that appellant submit himself to agents of the State for purpose of debriefing regarding the neglect and death of the victim. He was required to be completely truthful concerning his involvement and the involvement of all other individuals in this matter. He was required to truthfully and completely answer all questions posed by agents of the State and provide without prompting all information concerning this matter.

Appellant was required to submit to a polygraph examination(s) to verify all information provided to the State. The polygraph examiner(s) shall be selected by the State and will be designated agents of the State. Any statements made by appellant may be used against him by the State for any purpose.

Appellant was required to appear as a witness in the trial of all witnesses who were designated as defendants by the State. Appellant shall testify truthfully, completely, and consistently with prior statements made to the State.

In return, the State shall consider the extent and degree of cooperation by appellant in the election of charges and at sentencing and shall advise the Court of appellant's extent and degree of cooperation.

The State provided that this proffer was the entire agreement between the parties. Both appellant and his attorney accepted the proffer by their signatures on May 4, 2009.

On June 4, 2010 appellant's attorney filed a Motion for Hearing to Enforce Proffer Agreement. The motion noted that on May 4, 2009, appellant was interviewed by

investigator Carmen Burke-Mureddu and on a separate occasion by Assistant Solicitor, Candice Lively. At no time had appellant refused to be interviewed and he had even offered to be interviewed again. The motion noted that appellant was ready to testify in a trial against the co-defendant.

On September 24, 2009, appellant submitted to a polygraph examination administrated by Richard Charles of SLED. Appellant passed the polygraph examination.

The motion also noted that new evidence of when the time frame of the injuries occurred came about and appellant gave a brief summary of additional details concerning the new timeline and an invitation to reinterview appellant was made.

On May 11, 2010, Assistant Solicitor Candice Lively informed appellant's attorney that it was her intent to revoke the proffer.

On June 10, 2010, a hearing was held on the motion. The State noted that originally the co-defendant, Julia Gorman, was charged with homicide by child abuse and appellant was charged with unlawful neglect of a child. New evidence, however, led the State to believe that appellant may have had some knowledge or been involved in some way. The State inartfully tried to explain that they now had talked to the pathologist and the radiologist and it was their opinion that appellant was "potentially" involved in the injuries to the victim. The pathologist and radiologist were not at the scene and there is no way they could say appellant, as opposed to the co-defendant, was involved. The solicitor somehow "determined that the medical evidence clearly was contradiction? Or if not contradiction? the failure of the Defendant, this Defendant to provide us additional information led me to believe that he had to have had some knowledge or be involved." This is why the State unilaterally revoked its own proffer agreement. Instead of the State going to bat for

appellant on a lesser charge, they now wanted to go after appellant on the highest charges of homicide by child abuse and homicide by child abuse, aiding and abetting. (R. p. 2, line 2 – p. 3, line 24).

The trial court denied the motion to enforce the proffer. It said the State's obligation was to consider appellant's cooperation when they elect charges and at the time of sentencing. But it did not see where appellant was prejudiced. (R. p. 15, lines 1-7). That ruling was in error.

The State's proffer and appellant's acceptance of it is a contract and it is subject to contract principles. Reed v. Becka, 333 S.C. 676, 511 S.E. 2d 396 (1999). United States v. Irvine, 756 F.2d 708 (4th Cir 1985). Where the language in a contract is perfectly clear, that language determines the full force and effect of the document. State v. Gates, 299 S.C. 92, 382 S.E. 2d 886 (1989) citing, Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E. 2d 445 (1984). The State was obligated to fulfill its end of the agreement. Like the solicitor in Gates above, the solicitor here in her own words said, "He has not provided us, he has not given us the smoking gun in this case." (R. p. 12, lines 4-5). The terms of the agreement, however, do not require a "smoking gun." They require appellant to be truthful, to be debriefed, to answer all questions by agents of the State, to submit to a polygraph which he passed. The solicitor even admitted that after the time line changed, appellant did give more details. (R. p. 12, lines 8-9). And he offered another interview. He could not tell them what he did not know. But he did live up to his end of the bargain, except for testifying at trial against the co-defendant, which he was not allowed to do because the State broke their end of the agreement and violated due process of law under Article I, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

Appellant was prejudiced by the State's failure to keep their part of proffer in the following respects:

1. Appellant was not allowed to testify against the co-defendant at trial. Instead, he had to sit at the co-defendant's table with the co-defendant and be tried under the doctrine of "guilt by association." **The Solicitor has freely admitted that they did not know who did this crime so they were prosecuting both parties!** (R. p.23, line 22-p.25, line 9; R. p.34, line 25- p. 35, line 9). They obviated their burden of proof by trying appellant under the doctrine of "guilt by association." There was not sufficient evidence to convict appellant by trying him alone.
2. Instead of the State having to elect favorable charges in return for appellant's cooperation, they were now able to go after appellant on the highest charges.
3. The State offered no help at sentencing contrary to their agreement.
4. The State was able to gain information through their debriefing of appellant and their interviews to try to make a case against appellant.

The State cannot unilaterally withdraw the proffer. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971); United States v. Simmons, 537 F.2d 1260 (4th Cir 1976). There was no breach by appellant and he was prejudiced by the State's withdrawal. The trial court erred in denying appellant's motion to enforce the proffer.

ARGUMENT II

The trial court erred in refusing to grant a directed verdict to the charges of homicide by child abuse, aiding and abetting the same, and unlawful conduct toward a child because the State failed to present any substantial circumstantial evidence beyond a reasonable doubt that appellant committed the acts.

This case proceeded on a strained theory of the law. The solicitor explained at an early motion hearing on May 26, 2011, that she did not know who inflicted the injuries on the victim so she was going after appellant and Gorman because they each had access to the victim and no one else was around. (R.. p. 24, line 25 – p. 10, line 18). At another motion hearing held on October 31, 2011, the solicitor again said she was trying both parties together because she did not know who inflicted the injuries. (R. p. 32, line 19 – p. 16, line 9).

The solicitor is using res ipsa loquitur as her theory of the case. "The thing speaks for itself." This creates a rebuttable presumption/inference that appellant and Gorman had to disprove.[1] 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

[1] See, Fiumefreddo v. McLean, 496 N.W. 2d 226 (Wisc App. 1993). Requirement for application of res ipsa loquitur that agent or instrumentality be in exclusive control of defendant was met in, medical malpractice action brought against two physicians who performed thymectomy, even though it was not shown which physician was guilty of the negligent act which caused the injury, as they were in a better position to know the cause than was patient, all persons who could possibly have been causally negligent were defendants in the action, and **shifting burden** of proof of individual causation was not unfair.

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); Sandstorm v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). "No right is move 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). The solicitor summed up her case in opening argument about the victim and the defendants: "He died in their care, no reasonable explanation for it but you listen for that yourself." (R. p. 48, lines 5-6). That is how this trial started and proceeded.

At the conclusion of the State's case defense counsel moved for a directed verdict because the State failed to prove appellant was the person who inflicted the injuries on the victim. The State failed to prove he was aiding and abetting, or that he unlawfully neglected the victim. (R. p. 726, line 15 – p. 727, line 23). The trial court denied the motion. It said, "I don't know how this case will go, that's why we have juries." (R. p. 727, line 24 – p. 728, line 21). The trial court's 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 constutite "any evidence form 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 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th 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 (4th Cir. 1994).

A key element of the offenses which the State had the burden of proving was the identity of the person who committed the offenses. In State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987), the Court dealt with a case where two defendants were charged as principals in vehicular homicide. The identity of the driver was disputed. The Court

wrote that when "two or more defendants are charged as principals in a vehicular crime, the jury must be instructed to first determine which of the defendants was the driver of the vehicle at the time of the offense." The Court went on to note that "the jury, faced with a difficult factual question as to the identity of the driver, could have resolved the issue by convicting both defendants to insure a conviction of the driver." In this case the solicitor did not know who committed the offenses. The judge also did not know.[2] The jury very likely also did not know and convicted both defendants.

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."

[2] At sentencing the trial court remarked, "Whoever did it, struck the blow, knew very well what you were doing or just did not care what you were doing..." (R. p. 990, lines 23-24).

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."

This present case is decidedly different. Appellant assumed the caregiving while Gorman was at work. When she came home from work, Gorman was the caregiver. There was simply no evidence that appellant struck the victim or aided and abetted in doing so. It was appellant who was the patient person and he did not have any resentment or frustration with the victim staying with them. He interacted well with other children and had liberal visitation with his own son. We know from Gorman's daughter of Gorman's difficulties in dealing with stress. She bottles it up until she explodes. When she walks in the door the victims whines, whines, whines. It gets louder when he sees her. The victim is clingy. He wants to be held. He tries to climb up her leg.

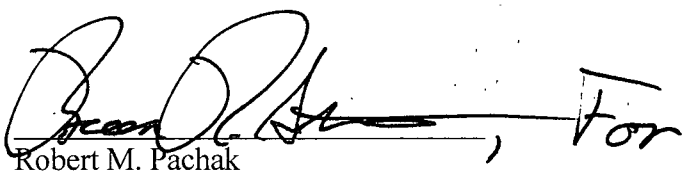
She was upset her daughter did not take the victim with her. They both checked on the victim when Gorman got home from work and he was fine and was breathing normally. They had dinner and then appellant went out to walk the dog. She went to wake up the victim who whines, whines, whines and is clingy. She had ample time to strike him once or twice or ram his head against the crib. Dr. Abel said the injuries would happen in a minute. Dr. Roberts said it was severe traumatic force. The victim would have been immediately severely symptomatic. She calls appellant who had gotten back from walking the dog. He sees the victim and tells Gorman to call 911. It is appellant who holds the victim until emergency medical personnel gets there. It was appellant, not Gorman, who was the first one at the victim's bedside at Conway Medical.

Yes, there was substantial circumstantial evidence that Gorman could have committed the crimes against the victim. There was insufficient evidence to tie appellant to these crimes. The trial judge said, "I don't know how this case will go, that's why we have juries." A jury is not supposed to speculate when the solicitor can not meet her burden and does not know who is guilty. The trial court should have granted a directed verdict in appellant's favor. Appellant's case should never have gone to trial.

CONCLUSION

Appellant should receive a new trial with enforcement of his contract with the State. (Issue I). Appellant should receive a directed verdict of acquittal. (Issue II).

Respectfully submitted,



Robert M. Pachak
Appellate Defender

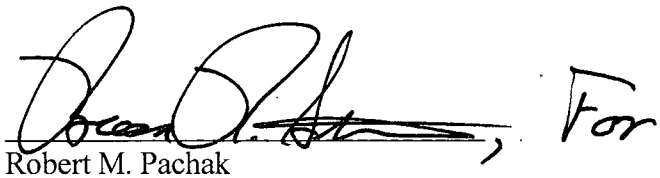
ATTORNEY FOR APPELLANT

This 4th day of February, 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."

February 4, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

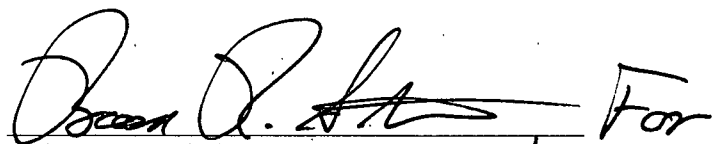
V.

ROBERT PALMER,

APPELLANT

CERTIFICATE OF SERVICE

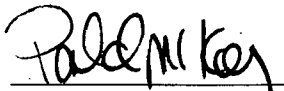
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of February, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2013



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .