The Supreme Court of South Carolina

Robert Palmer, Petitioner,

v.

State of South Carolina, Horry County, and David Weaver, Defendants,

Of which State of South Carolina is the Respondent.

Appellate Case No. 2019-001316

ORDER

(Filed May 28, 2021)

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY [Illegible]
CLERK

Columbia, South Carolina
May 28, 2021

cc: Gene McCain Connell, Jr., Esquire
Roger Dale Johnson, Esquire
Lisa Arlene Thomas, Esquire
Andrew F. Lindemann, Esquire
Robert D. Cook, Esquire
J. Emory Smith, Jr., Esquire
Alan McCrory Wilson, Esquire
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Palmer, Appellant,

v.

State of South Carolina, Horry County,
and David Weaver, Defendants,

Of which State of South Carolina is the Respondent.

Appellate Case No. 2017-000567

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5641
Heard December 6, 2018 – Filed April 17, 2019

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, and Roger Dale Johnson, of Law Office of Roger Johnson, of Conway, both for Appellant.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith, Jr., and Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, all of Columbia; Lisa Arlene Thomas, of Thompson & Henry, PA, of Conway, for Respondent.

KONDUROS, J.: Robert Palmer appeals the circuit court's dismissal of his complaint under Rule 12(b)(6), SCRCP. He contends the circuit court erred in finding no constitutional or civil remedy exists for a previous wrongful conviction. We affirm.

FACTS/PROCEDURAL HISTORY

Palmer and Julia Gorman—his girlfriend—were caring for Gorman's seventeen-month-old grandson (Victim) while Gorman's daughter traveled across the country. After suffering from ant bites and allergies on July 1, 2008, Victim was prescribed a liquid anti-histamine (Xyzal), which has a sedative effect. The prescribed dosage of Xyzal was half a teaspoon per day. Victim was regularly given more than the prescribed dosage, up to 2.5 teaspoons per day—five times the prescribed amount. On July 14, Palmer was alone with Victim while Gorman was at work. Gorman returned home at 4 p.m. that day and observed Victim sleeping and breathing normally. Gorman checked on victim again at 6 p.m. and found him "slack," making "really strange noises," and with saliva at his mouth. Victim was treated at multiple hospitals before finally being removed from life support by his parents on July 16. Doctors that examined Victim before death and during the autopsy found evidence indicating he received hits to the head as well as atypical bruises on various portions of his body.

Palmer and Gorman were tried jointly for the death of Victim. At the conclusion of trial, both were

convicted of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct towards a child. On appeal, this court reversed both Palmer's and Gorman's aiding and abetting convictions but affirmed their homicide and unlawful conduct convictions.

On July 29, 2015, the South Carolina Supreme Court affirmed the reversal of both Palmer's and Gorman's aiding and abetting convictions but overturned Palmer's convictions for homicide and unlawful conduct towards a child. *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015). Palmer initiated a civil action against the State, alleging malicious prosecution, false arrest, negligence, and violation of 42 U.S.C. § 1983. Palmer also sought a declaratory judgment, requesting the circuit court declare a remedy existed for wrongful conviction in South Carolina under both the United States and South Carolina Constitutions. The State moved to dismiss under Rule 12(b)(6), SCRCP. The circuit court granted the State's motion on November 17, 2016, with prejudice. Palmer moved the court to reconsider, which the court denied. This appeal followed.[1]

STANDARD OF REVIEW

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state

[1] On November 28, 2017, the State moved to certify this case for immediate review by the South Carolina Supreme Court pursuant to Rule 204(b), SCACR. The supreme court denied the motion on February 1, 2018.

facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), [SCRCP,] an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Spence*, 368 S.C. at 116, 628 S.E.2d at 874.

LAW/ANALYSIS

I. Consideration of Novel Issue under Rule 12(b)(6), SCRCP

Palmer argues the circuit court erred in dismissing his case because it presented a novel issue of whether the South Carolina or the United States Constitutions require South Carolina to provide a civil monetary remedy for a wrongful conviction. We disagree.

"[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). "Where, however, the dispute is not as to the under-lying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

In this case, neither party disputes Palmer raises a novel issue. However, the issue is solely one of constitutional interpretation. In his brief, Palmer does not argue that any factual issues exist. Therefore, because the issue concerns the interpretation of the law, we find the circuit court did not err in dismissing the case pursuant to Rule 12(b)(6) in spite of it being a novel issue.

II. Takings Clause

Palmer contends the circuit court erred in dismissing his action because the Takings Clauses of the United States Constitution and the South Carolina Constitution provide his right to a remedy for a wrongful conviction in South Carolina. We disagree.

The Takings Clause from the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation." U.S. Const. amend. V. The takings clause of the South Carolina Constitution states: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3.

"The Fifth Amendment is implicit in the due process clause of the Fourteenth Amendment to the United States Constitution and applicable to the states." *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 429 n.3, 548 S.E.2d 595, 601 n.3 (2001). "The Fifth Amendment to the United States Constitution provides that 'private property shall not be taken for public use, without just compensation.'" *Id.* (quoting U.S. Const. amend. V). "Because both a Takings Clause cause of action and substantive due process cause of action focus on a party's ability to protect their property from capricious state action, parties claiming both of these violations must first show that they had a legitimate property interest." *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 437, 661 S.E.2d 73, 79 (2008).

We find the circuit court correctly determined Palmer's argument has no merit. In his appellate brief, Palmer attempts to equate the prohibition against governmental takings of property without just compensation to wrongful imprisonment.

However, Palmer fails to cite any statutory or case law to demonstrate he has a legally protected property interest. Furthermore, Palmer concedes no state supreme court throughout the nation has found a civil remedy for wrongful imprisonment exists under the Takings Clause of any state constitution or the United States Constitution. Because Palmer fails to provide any supporting law for his claim, we affirm the circuit court's finding on this issue.

III. South Carolina Constitution

Palmer asserts the circuit court erred in dismissing his action because the South Carolina Constitution protects his right to a remedy for a wrongful conviction by way of an implied right of action for money damages. We disagree.

"The general presumption of law is that all constitutional provisions are self-executing, and are to be interpreted as such, rather than as requiring further legislation, for the reason that, unless such were done, it would be in the power of the Legislature to practically nullify a fundamental of legislation." *Beatty v. Wittekamp*, 171 S.C. 326, 332, 172 S.E. 122, 125 (1933) (quoting *Brice v. McDow*, 116 S.C. 329, 331, 108 S.E. 84, 87 (1921)). "A self[-]executing provision is one which supplies the rule or means by which the right given may be enforced or protected, or by which a duty enjoined may be performed." *Id.* (quoting 8 Cyc. 753).

A constitutional provision is self-executing as to a civil remedy when it "provides any rules or procedures

by which its declaration of rights is to be enforced, and, in particular, whether it provides citizens with a specific remedy by way of damages for its violation in the absence of legislation granting such a remedy." *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 1454 (Ct. App. 1988). A constitutional provision

> must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the [c]onstitution itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the [l]egislature for action; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation.

Id. (quoting *Taylor v. Madigan*, 53 Cal. App. 3d 943, 951 (1975)).

> In essence, a self-executing constitutional clause is one that can be judicially enforced without implementing legislation. To ascertain whether a particular clause is self-executing, we consider several factors. This court has stated as follows
>
> > [a] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have

> immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. . . ." Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.

Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist., 16 P.3d 533, 535 (Utah 2000) (alterations by court) (quoting *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996)). "[A] constitutional provision that prohibits certain government conduct generally qualifies as a self-executing clause 'at least to the extent that courts may void incongruous legislation.'" *Id.* (quoting *Bott*, 922 P.2d at 738).

The court in *Spackman* recognized "the Utah Constitution does not expressly provide damage remedies for constitutional violations," and thus, "there is no textual constitutional right to damages for one who suffers a constitutional tort." *Id.* at 537. It further noted the legislature had declined to "enact[] any laws authorizing damage claims for constitutional violations in general." *Id.* The court concluded "a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law." *Id.* at 538.

Both parties recognize South Carolina has not previously addressed this issue. Our review of cases throughout various jurisdictions shows that states are divided on whether a civil remedy can exist for the

violation of a constitutional provision without enabling legislation. We will not create an implied cause of action for wrongful conviction in South Carolina because it is not for this court to create such an action when the legislature has specifically declined to do so.[2] Considering the South Carolina Constitution does not provide for monetary damages for civil rights violations and the legislature has not enacted an enabling statute, we affirm the circuit court on this issue.

IV. Tort Claims Act

Palmer argues the circuit court erred in dismissing his action because the South Carolina Tort Claims Act (SCTCA) cannot override a constitutionally implied right of action. We find this issue to be abandoned.

"An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal

[2] A bill creating a cause of action for wrongful conviction was introduced in the South Carolina Senate but was not passed. *See* S. 1037, 119th Gen. Assemb., Reg. Sess. (S.C. 2012), to amend Chapter 13, Title 24 of the South Carolina Code to read "Article XXII Compensation for a Wrongful Conviction." The bill passed in the senate but did not pass the house of representatives.

authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Palmer provides a conclusory argument that the SCTCA cannot override an express constitutional provision or implied cause of action under the South Carolina Constitution. However, Palmer failed to cite any law in his brief to support his assertion. For this reason—and pursuant to our discussion in Section III—we affirm the circuit court's decision.

CONCLUSION

Based on the foregoing, the circuit court did not err in dismissing the case under Rule 12(b)(6), SCRCP. First, the circuit court did not err in dismissing this case despite Palmer's raising a novel issue. Additionally, the circuit court did not err in finding Palmer had no remedy under the Takings Clauses of the South Carolina Constitution and the United States Constitution. Moreover, the circuit court did not err in finding the South Carolina Constitution did not provide Palmer a remedy. Finally, Palmer abandoned his argument that the circuit court erred in finding the SCTCA barred his claim. Thus, the circuit court's order is

AFFIRMED.

MCDONALD and HILL, JJ., concur.

STATE OF SOUTH CAROLINA COUNTY OF HORRY Robert Palmer, Plaintiff, vs. State of South Carolina, Horry County, and David Weaver, Defendants.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A NO.: 2016-CP-26-01614 **ORDER OF DISMISSAL AS TO THE STATE OF SOUTH CAROLINA** (Filed Nov. 17, 2016)

THIS MATTER CAME BEFORE the Court on June 14, 2016 pursuant to the Defendant State of South Carolina's Notice of Motion and Motion to Dismiss. The State of South Carolina, and all named Defendants, were represented by Lisa A. Thomas, Esquire, of the law firm of Thompson & Henry, P.A. The Plaintiff was represented by Gene M. Connell, Jr., Esquire, of the law firm of Kelaher, Connell & Connor, P.C.

This matter arose after Plaintiff was charged, tried by a jury, and convicted of homicide by child abuse. He appealed to the South Carolina Supreme Court who vacated his conviction, *State v. Palmer*, 413 SC 410 (2015). The Supreme Court opinion stated there was no evidence Palmer was present when the victim was injured or alone with the victim later and aware of the victim's injuries. Plaintiff contends he was wrongly convicted and held for four years.

He brings this suit as to the State of South Carolina alleging that the prosecutor in his criminal trial charged and prosecuted him with no evidence he had committed the crimes. He contends there was no probable cause to charge him because the prosecutor proceeded under a theory that they did not know which of the two Defendants was the principal and which aided and abetted after witnessing the injuries to the child, and failed to seek help.

Plaintiff brings this action for false imprisonment, negligence, malicious prosecution, false arrest, and a violation of his civil rights under 42 U.S.C.A. § 1983. Further, he seeks a declaratory judgment that the State of South Carolina and United States Constitutions provide remedies for wrongful conviction including damages, even though South Carolina has no statutory scheme for wrongful conviction.

DEFENDANT'S ARGUMENT

The State of South Carolina argued it is entitled to dismissal pursuant to the South Carolina Rules of Civil Procedure, Rule 12(b)(6) for several reasons. This action is based on the decisions of a prosecutor in charging and trying a defendant.

The Tort Claims Act is the exclusive remedy in a suit against the state for the actions of an employee, S.C. Code Ann § 15-78-70. The exclusions from the waiver of immunity enumerated in the Tort Claims Act state in part, the governmental entity is not liable for a loss resulting from legislative, judicial, or

quasi-judicial action or inaction, S.C. Code § 15-78-60(1). Furthermore, "a prosecutor's typical duties are 'judicial' or 'quasi-judicial' in nature." *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001). The solicitor is entitled to common law prosecutorial immunity as well. The Plaintiff has not alleged that any employees of the State of South Carolina committed any wrongdoing or acted outside the course and scope of their employment. The prosecutor's decision making occurred as a quasi-judicial function.

In addition, the State asserted this matter should be dismissed due to common law prosecutorial immunity. The Tort Claims Act states that all other immunities applicable to a governmental entity, its employees, and agents are expressly preserved, S.C. Code Ann. § 15-78-20(b).

The State argued the 42 U.S.C.A. § 1983 cause of action must be dismissed as no "person" as defined by the statute was named.

Finally, the South Carolina Court of Appeals has definitively ruled on all these issues in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (SC App. 2001). The Court noted that S.C. Code § 15-78-20(b) expressly preserves common law judicial immunity (Id. at 247). The Court of Appeals recognized that the United States Supreme Court concluded that state prosecutors are clothed with immunity and they enjoy absolute immunity (Id at 241).

The Court of Appeals concluded a prosecutor in the employ of the state is immune from personal

liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant while acting as an advocate (Id at 250).

The Court of Appeals further concluded a prosecutor could not be sued in his or her official capacity under either § 1983 or the South Carolina Tort Claims Act for money damages when their actions were judicial or quasi-judicial in nature (Id at 250).

The State argued the declaratory judgment action should be dismissed because Plaintiffs attempt to have the judiciary construct a law for wrongful conviction, when he admits the state does not have such a statutory scheme, under the guise of a declaratory judgment action, is clearly outside the scope of the Declaratory Judgment Act (S.C. Code Ann § 15-53-10) and authority of the judiciary. Plaintiff invites the judiciary to invade the province of the legislature with no precedent nor statutory authority.

PLAINTIFF'S ARGUMENT

The Plaintiff, Robert Palmer, argued that this case presented novel issues and novel issues should never be decided on a 12(b)(6) motion. He cited *Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015) wherein he claims the South Carolina Supreme Court held that when novel issues are raised they should never be resolved by the trial court on a motion to dismiss for failure to state facts sufficient to constitute a cause of action.

Plaintiff argues the State of South Carolina should not be dismissed as a named Defendant because Plaintiff is making a constitutional claim and the tort claims act does not limit the constitution. He also cites numerous cases allowing suits against municipalities.

Plaintiff contends in *Connick v. Thompson*, 131 S.Ct. 1350, 1356 (2011) the United States Supreme Court allowed suit for malicious prosecution and g 1983 for failure to train a prosecutor. He interprets the case to state a pattern of violations by untrained employees is necessary to demonstrate deliberate indifference for purposes of failure to train. Plaintiff asserts the Prosecutor's decision to charge under an erroneous theory of the law amounts to a policy subjecting the state to liability and demonstrates a failure to train.

Plaintiff argues that Article 1, Section 3 of the South Carolina Constitution protects Plaintiff's right to a remedy in this case and that Article 1, Section 10 provides Plaintiff a remedy for wrongful conviction.

Likewise, Plaintiff contends the US Constitution provides a remedy under the Fifth Amendment. He asserts that if just compensation is required for taking property for public use, that there should be compensation for depriving a person of his liberty, especially since no state law provides it. He also analogizes it to a *Bivens* action under the Fourth Amendment insisting there is an implied cause of action for a violation of a person's right to be free from an unreasonable search

and seizure, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 455 F.2d 1339 (1972).

DEFENDANT'S RESPONSE

Defendant State of South Carolina asserts this action does not present novel issues and was definitively decided as to both state and federal causes of action by *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001).

The cases cited in Plaintiff's memorandum for the proposition of not dismissing the State, all pertain to municipalities. It has long been settled law that municipalities may be subject to § 1983 suits under the circumstances set forth in case law. Plaintiff cites no cases extending authority for such suits to states.

Plaintiff's reliance on *Connick v. Thompson*, 131 S.Ct. 1350, 1356 (2011) is misplaced. In Connick, the prosecutor was sued individually, not the state. Also, a one time decision by a prosecutor regarding the handling and charging in his case does not evidence a pattern of misinterpreting the law or failure to properly train.

Both state and federal legislatures have not crafted any remedy for wrongful conviction. The fact that Plaintiffs conviction was vacated does not entitle him to damages from any state or federal law or common law. The fact that some states may have statutory remedies has no precedential value in South Carolina.

Plaintiff received due process. His conviction was vacated and he was released. He received all the due process available in South Carolina. Furthermore, South Carolina was not silent on the issue. Prosecutorial immunity is preserved in both sections 15-78-60(1) and 15-78-20(b) of the Tort Claims Act.

Plaintiff's analogies to the State and US Constitutions lack statutory or case law support. The South Carolina Court of Appeals explicitly declined to extend it as to the Tort Claims Act and 42 U.S.C.A. § 1983 in *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001).

CONCLUSIONS

1. The State is immune from suit under the Tort Claims Act. S.C. Code Ann. §§ 15-78-20(b) and 15-78-70(c).

2. Suit against the State is barred by prosecutorial immunity. Williams v. Condon, 347 S.C. 227, 249, 553 S.E.2d 496 (SC App. 2001) and § 15-78-60(1) (no liability for judicial or quasi-judicial action).

3. The State is not a person subject to suit under 42 U.S.C.A. § 1983, and sovereign immunity bars this suit.

4. Plaintiff has failed to state any claim upon which relief may be granted as to the Defendant State of South Carolina.

ORDER

Based on the Complaint presented and arguments of counsel, it is hereby

ORDERED that Defendant The State of South Carolina is hereby dismissed with prejudice from the above-captioned matter pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*, and that the declaratory judgment action is dismissed.

IT IS SO ORDERED.

/s/ Benjamin H. Culbertson
Benjamin H. Culbertson
Judge for the
Fifteenth Judicial Circuit

Nov. 10, 2016
~~Conway~~ [Georgetown], South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

Robert Palmer, Petitioner/Respondent.

Appellate Case No. 2014-000954

and

The State, Petitioner/Respondent,

v.

Julia Gorman, Respondent/Petitioner.

Appellate Case No. 2014-001008

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 27552
Heard June 17, 2015 – Filed July 29, 2015

AFFIRMED IN PART; REVERSED IN PART

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Petitioner/Respondent.

Appellate Defender Robert M. Pachak, of Columbia, for Respondent/Petitioner, Robert Palmer.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent/Petitioner, Julia Gorman.

JUSTICE PLEICONES: Petitioners Julia Gorman and Robert Palmer were tried jointly for the death of Gorman's seventeen month-old grandson (victim). Palmer and Gorman, who lived together but were not married, were each convicted of homicide by child abuse (homicide), aiding and abetting homicide by child abuse (aiding and abetting), and unlawful conduct towards a child (unlawful conduct). On direct appeal, the Court of Appeals reversed both Palmer's and Gorman's aiding and abetting convictions, and a majority affirmed both petitioners' homicide and unlawful conduct convictions. *State v. Palmer*, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014). Judge Pieper dissented, and would have reversed all of the petitioners' convictions on the ground "the State did not present any direct or circumstantial evidence to reasonably prove which codefendant harmed the child." We granted both petitioners' and the State's petitions for writs of certiorari to review the directed verdict issues.[1] We affirm the Court of Appeals' reversal of both aiding and abetting convictions, and

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[1] While we also granted Palmer's petition to review a proffer issue, Palmer did not brief the proffer issue on certiorari and it is therefore deemed abandoned. *See* Rule 208(b)(1)(D), SCACR; *see also Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

affirm the decision to uphold the denial of Gorman's homicide and unlawful conduct directed verdict motions. We reverse the Court of Appeals' affirmance of Palmer's convictions for homicide and unlawful conduct finding he was entitled to a directed verdict on both charges.

FACTS

The only contested issues here are the identity of the individual who harmed the victim and whether the other individual was aware of the abuse. Since this matter involves directed verdict questions, we begin with a review of the evidence in the light most favorable to the State. *E.g. State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001). In our review we rely solely on evidence from the State's case-in-chief in order to avoid any of the directed verdict issues that can arise when jointly tried codefendants blame each other in their defense cases. *See State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) (waiver rule bars consideration of codefendant's testimony in reviewing denial of mid-trial directed verdict motion). Here, Gorman testified in her own defense and stated that Palmer was alone with the victim during the time when the fatal injury must have been inflicted. We do not rely on her trial testimony because it cannot be used against Palmer, and because no evidence adduced in the defense cases are necessary to a determination whether Gorman's directed verdict motions were properly denied.

The evidence shows Gorman's eighteen year-old daughter Cesalee traveled by bus to South Carolina with her child, the victim, in late June 2008. Cesalee and her mother had a difficult relationship and had long been estranged. On July 2, Cesalee flew back to her home in Arizona, leaving the victim in the petitioners' care. While there was overwhelming evidence that Gorman agreed to keep the victim while Cesalee packed her family's belongings for a move to the East Coast, Gorman told several people after the victim's injuries that Cesalee had abandoned the victim to her.

On July 1, the victim was taken to the doctor's office by Cesalee and Gorman, suffering from ant bites and allergies. He was prescribed a cream for the bites and a liquid antihistamine (Xyzal) for his allergies. The prescribed dosage for the Xyzal, which has a sedative effect, was 0.5 teaspoon per day. An appointment was set for July 8 so that he could receive immunizations. On July 7, after Cesalee had returned to Arizona, Gorman took the victim to the emergency room reporting he was suffering from projectile vomiting. The victim was observed, given a Pedialyte popsicle, and released.

When Gorman brought the victim back to the family practitioner on July 8, the office was aware of the emergency room visit the night before. The family practitioner examined the victim, determined he had recovered from the bites, the allergies, and the nausea, and administered the vaccinations. She testified that she had examined the victim's head as part of the check-up and had no concerns, and also that while the

victim was small for his age he was not malnourished. The doctor also testified she had no concerns about child abuse when she saw the victim in July.

Gorman repeatedly told medical personnel the victim was lethargic, and Palmer's statements also indicated the victim was not an energetic toddler. There was evidence from which a jury could find the victim's lethargy after July 1, when he was prescribed the sedating Xyzal, was attributable to Gorman's overdosing. At the emergency room visit on July 7, Gorman told medical personnel the victim was being given 1.5 teaspoons of Xyzal per day rather than the 0.5 teaspoons he had been prescribed. After the victim was fatally injured on July 14, Gorman told an emergency room (ER) nurse that the victim had been on Xyzal, and that she had been administering a dose of 2.5 teaspoons, five times the prescribed amount. In this statement, Gorman said the last dose had been given at 9:00 pm on July 11. On the other hand, while en route to the hospital on the 14th, Gorman told the EMT she had given the victim Xyzal on the 14th. The family doctor testified that when she saw the victim on July 8, he was no longer in need of this antihistamine.

On July 14, Gorman went to work, arriving at about 6:00 am, leaving Palmer alone with the sleeping victim. There was evidence that the victim was tired all day, and somewhat whiney. He ate breakfast and lunch, but according to Palmer, having been awakened at about 9:30 am, the victim did not fall asleep again until about 3-3:30 pm. Gorman arrived home around 4:00 pm. Gorman stated she went straight into the

victim's room to check on him as she normally did when she first got home, and saw him sleeping soundly and breathing normally. Later she and Palmer checked on him from the doorway. Palmer agreed that-they had checked on the sleeping victim from the doorway after Gorman arrived home, and that no one checked on him again until after they had eaten dinner around 6:00 pm. Both petitioners maintained that after dinner Gorman returned to the bedroom alone, and she told officers she found the victim "slack," making "really strange noises," and with saliva at his mouth. She picked him up, and brought him to Palmer. Palmer said the victim was limp but seizing intermittently, with his fists balled up. Gorman agreed the victim was fine until she alone checked on him around 6:00 pm.

Horry County Fire and Rescue were dispatched at 6:07 pm following a 9-1-1 call made by Gorman, and arrived at the home at 6:13 pm. When they arrived, Palmer was holding the victim who was actively seizing and whose "pretty grave" condition was immediately apparent. Petitioners told the responder the victim had not been sick and had been found in this condition during a nap. The responder started an I.V. and gave oxygen, noting the victim was making unusual breathing sounds. EMS paramedics took over at 6:20 pm when the first responder brought the victim to their ambulance as it arrived. The victim was still seizing and 'posturing,' an involuntary movement where the limbs extend and retract that only occurs in intracranial injury cases. He also exhibited a "right side gaze," with his eyes pointing towards the injured

side of the brain. His pupils were dilated but responded sluggishly and the seizures stopped as Valium was administered.

The EMS medic testified Gorman rode in the front of the ambulance to the hospital. Gorman said the victim had not been sick recently and had not fallen, but that she had given him a dose of Xyzal that day. Gorman told her about the ant bites and stated the victim had been whiney and lethargic since then. She also made a statement which the medic paraphrased as "She's raised several children in her lifetime and never seen such a bad one." When the ambulance arrived at the hospital at about 7:00 pm, the victim was still posturing, his right-side gaze had not changed, his pupils were more dilated, he was still breathing very rapidly, and his heart rate was elevated.

The ER nurse testified that on arrival the victim was unresponsive, posturing, seizing, and had dilated pupils. Gorman responded to the nurse's questions. She said the victim had not fallen or hit his head on anything before the seizures started. She also told the ER nurse that he was on Xyzal, but she had not given him any since administering 2.5 teaspoon on July 11. The nurse observed Palmer was very concerned and wanted to talk to and touch the seizing victim, in contrast to Gorman's behavior.

The ER nurse testified that upon the victim's arrival at the Conway Hospital at 7:02 pm another nurse had scored the victim at a 5 on the Glasgow Coma Score. At 8:30 pm his score had dropped to a 3.

The scale runs from 15 to 3, and anything below a 9 is "gravely concerning." The victim's breathing was labored and grunting, and the nurse testified that human life cannot be maintained at that level of effort. His heart rate never dropped below 142, when a normal rate would have been 110 to 115. The ER nurse watched as the C.A.T. scan was performed, immediately saw the skull fractures, and some bleeding at the back of the brain, and called the ER doctor. She testified the fractures and bleeding were consistent with violent trauma, and she also observed some abnormal bruising on the victim's body. Palmer reported the victim had been dragging his foot earlier in the day. Gorman told the nurse the victim's mother was a drug addict who dropped the victim off and whose whereabouts were unknown. The victim, who was very thin, remained at the Conway Hospital from 6:58 pm until he was helicoptered to the Medical University of South Carolina (MUSC) in Charleston at 10:33 pm.

The Conway ER doctor testified the victim arrived "in extremist [sic] immediately evident" "showing signs of a severe neurological injury." The victim appeared to be breathing on his own but was posturing. He was immediately intubated to maintain breathing. The C.A.T. scan showed severe trauma to the skull and brain such that "impending death is what it [sic] was concerned." The brain had hemorrhages and edema and there was a loss of gray-white matter distinction indicating the death of brain tissue.

The victim's father arrived in Charleston from Virginia on Monday, July 15, after Gorman called him

during the evening of July 14 to say the victim was being airlifted to MUSC. After this conversation, the father called to speak to the doctor at the Conway Hospital, and based on that conversation, the father filed a police report. The father called Cesalee in Arizona but neither Palmer nor Gorman had tried to reach her. Cesalee flew to Charleston, and after consulting with the doctors who told them only machines were keeping the victim alive, the parents had him baptized and then donated his organs. The victim was removed from life support on July 16.

A MUSC neuro-radiologist testified as an expert witness, having examined the medical reports and C.T. scans performed at Conway Hospital on July 14 and at MUSC on July 15. Those scans showed the victim suffered comminuted fractures,[2] severe swelling of the brain, blood around the brain, and the loss of gray-white differentiation which indicates brain tissue has died. The victim's skull fractures were the result of severe traumatic force of a type most commonly seen following an automobile accident. The victim had no chance for a meaningful recovery. The bleeding was acute and the fractures showed no signs of healing.

The neuro-radiologist testified a person suffering the type of injury inflicted upon the victim would be immediately severely symptomatic, exhibiting:

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[2] In a comminuted fracture the bone is broken into multiple pieces.

(1) alteration or loss of consciousness;

(2) alteration in breathing;

(3) likely seizures;

(4) inability to walk, move, or eat;

(5) possible foaming at the mouth; and

(6) no purposeful movement.

The expert testified the severity of the fractures were of a type caused either by an automobile accident, by having been dropped from a two-story building, or from intentionally applied force. While she could not give an exact time, the onset of symptoms would have been very soon after the injury, if not immediate.

The forensic pathologist autopsied the victim's body on July 19, 2008. She found the head injuries were caused either by a single hit or compression, or possibly by one hit on each side of the victim's head. She testified the injury occurred between July 11 and July 14.[3]

Finally, a MUSC doctor who serves as director of the Violence Intervention and Prevention Division in the pediatric department testified. She observed the victim on July 15, finding him very thin, on a respirator, and totally unconscious with fixed and dilated pupils. In addition to the skull fractures, she found a number of unexplained/atypical bruises on the victim: one on his upper right thigh close to his buttocks; one

[3] The State amended the indictments before trial to specify the fatal injury occurred on July 14.

close to his waist; and one on the inside of his leg. The bruises could have been inflicted contemporaneously with the head injuries. The head injuries had to have been inflicted on July 14, and it would have taken less than a minute to fracture the victim's skull. Finally, this doctor opined that the injury must have been inflicted on the 14th as the victim would have died very soon after if not placed on a respirator. She estimated the injuries were inflicted within three hours of his arrival at the Conway Hospital ER at 6:58 pm on July 14.

ISSUE

Whether the Court of Appeals erred in failing to reverse petitioners' convictions for homicide by child abuse and unlawful conduct towards a child, and in reversing the petitioners' convictions for aiding and abetting homicide by child abuse?

ANALYSIS

In this case we are primarily concerned with whether the State presented any evidence of identity to support the submission of the three charges to the jury. Since the issues all involve a directed verdict, we review the evidence in the light most favorable to the State. *State v. Buckmon*, *supra*. We begin with the homicide by child abuse charges.

A. Homicide by Child Abuse.

The application of the directed verdict standard in a circumstantial evidence case where one of two persons must have killed a child is set forth in *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013):

> Homicide by child abuse cases are difficult to prove because often the only witnesses are the perpetrators of the crime. What separates this case from a case like *Smith*[4] 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*.

In *Smith*, the mother and her boyfriend were jointly tried for the death of the mother's young daughter. Both defendants were convicted of homicide by child abuse and aiding and abetting that offense. On appeal, the boyfriend argued he was entitled to a directed

[4] *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

verdict on both counts as the evidence showed, at most, his mere presence at the crime scene. The Court of Appeals disagreed, finding the evidence showed the two defendants were together with the child for the entire period during which the child was shaken with sufficient force to kill her, and suffered more than one blow to the head inflicted with sufficient force to fracture her skull. Further, the evidence showed that her impairment would have been obvious. In addition, there was "evidence of a probable cover-up."

Here, the State's evidence narrowed the window of opportunity during which the fatal injury must have been inflicted to between 4:00 pm and 6:05 pm on Sunday, July 14. The State's evidence placed both petitioners at the home during this period. Just as the only evidence in *Hepburn* was that the appellant was asleep at all critical times, the only evidence here was that the child was sleeping and breathing normally until Gorman found him in distress shortly after 6:00 pm. Further, the present cases are distinguishable from *Smith* in that petitioners were not together at all relevant times, and unlike *Smith*, where the only evidence was the child's injuries would have been immediately apparent, here there was evidence that a layperson might not be able to distinguish between a sleeping child and an unconscious one. Finally, unlike *Smith*, the State presented no "evidence of a probable cover-up."

We hold there is sufficient evidence to uphold the Court of Appeals' ruling that the motion for a directed verdict on homicide by child abuse charge was properly

denied as to Gorman, but hold there is no evidence to support the denial of Palmer's motion. The State's evidence places Gorman alone with the victim at 4:00 pm when she first returned home and again at 6:00 pm when the victim was found in grave distress. The medical evidence would support a finding that Gorman inflicted the fatal blow when she first returned home and that when she and Palmer checked on the child from the doorway at 4:15 pm, the victim's injuries may not have been apparent to a layperson. Alternatively, there was evidence that the blow(s) must have been inflicted immediately preceding the expression of symptoms, which is evidence from which a jury could conclude that Gorman injured the child when she went alone to check on him at 6:00 pm. Further, Gorman admitted mistreating the victim by shaking, spanking, and overdosing him, and numerous witnesses testified to her unusual affect and statements following the child's injury.

There was sufficient circumstantial evidence that Gorman committed homicide by child abuse, but there is no evidence in the case-in-chief that Palmer was alone with the victim after around 3:30 pm, when the victim fell asleep. Thus, as in *Hepburn*, the State produced no evidence that Palmer "was aware of the victim's injuries, let alone caused them." *Hepburn*, 406 S.C. at 442, 753 S.E.2d at 416.

B. Unlawful Conduct Towards a Child.

The Court of Appeals upheld the trial court's denial of both petitioners' motions for directed verdicts on the charges of unlawful conduct towards a child in violation of S.C. Code Ann. § 63-5-70 (2010).[5] This statute provides:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) willfully abandon the child.

We find there is no evidence in this record that Palmer either harmed the victim or was aware Gorman was harming him. In fact, the State does not contest Palmer's entitlement to a directed verdict on this charge in its respondent's brief on certiorari. On the other hand, Gorman told at least two people that she was continuing to give the victim Xyzal, which has a sedative effect, after it was no longer medically

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[5] At the time of the petitioners' indictment this statute was codified as § 20-7-50.

indicated, and in amounts three to five times the recommended dosage. This alone is some evidence she placed the victim at an unreasonable risk of harm. Further, she admitted lacking patience, smacking the victim on his hands and his diapered behind, and shaking him, but not hard. From this evidence, a jury could find Gorman acted maliciously in causing bodily harm, as reflected in the unusual bruises found on the victim's body on July 14.

We affirm the Court of Appeals' decision to affirm the trial court's denial of Gorman's directed verdict motion on the charge of unlawful conduct towards a child, but reverse its decision as to Palmer's motion.

C. Aiding and Abetting Homicide by Child Abuse.

The Court of Appeals reversed both petitioners' convictions for aiding and abetting homicide by child abuse, stating simply "we find the State presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse." *State v. Palmer*, 408 S.C. at 234, 758 S.E.2d at 205. The State contends the Court of Appeals erred in reversing these convictions. We disagree.

A person aids and abets homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(2) (2003) when he "knowingly aids and abets another person to commit child abuse or neglect [which] results in the death of a child under the age of eleven." The State would have

the Court speculate, despite the absence of any evidence, that both petitioners actually entered the victim's bedroom around 4:30 pm where one abused him in the presence of the other, who thus aided and abetted the perpetrator by failing to seek medical help for an hour and a half. *Compare Smith*, *supra*. There is no evidence other than rank speculation that such an incident occurred. Moreover, while "omission which causes harm" can constitute aiding and abetting child abuse or neglect (§ 16-3-85(B)(1)), there is no evidence that more prompt treatment would have mitigated the victim's injuries and thus we do not perceive potential liability for the non-abuser even if he or she were aware of the abuse. For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that any delay in seeking medical attention by Gorman caused the victim harm beyond that inflicted by the perpetrator. Finally, *State v. Lewis*, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013) *cert. dismissed as improvidently granted* 411 S.C. 647, 770 S.E.2d 398 (2015), establishes that neither knowledge of another's intent to commit a crime nor failure to act to stop abuse are sufficient to deny a directed verdict on a charge of aiding and abetting homicide by child abuse. *Lewis*, 403 S.C. at 356, 743 S.E.2d at 129-130.

We therefore affirm the Court of Appeals' decision to reverse the trial court's denial of each petitioner's motion for a directed verdict on the charge of aiding and abetting homicide by child abuse.

CONCLUSION

We affirm the Court of Appeals' ruling on the aiding and abetting homicide by child abuse convictions. We affirm the Court of Appeals' decision to the extent it upholds the denial of Gorman's directed verdict motions on the charges of homicide by child abuse and unlawful conduct towards a child, but reverse its decisions as to Palmer. For these reasons, the decision of the Court of Appeals is

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Palmer and Julia Gorman, Appellants.

Appellate Case No. 2011-203707

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

Opinion No. 5198
Heard October 9, 2013 – Filed February 12, 2014

AFFIRMED IN PART, REVERSED IN PART

Appellate Defenders Robert M. Pachak, of Columbia, for Appellant Robert Palmer, and Susan Barber Hackett, of Columbia, for Appellant Julia Gorman.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

FEW, C.J.: Robert Palmer and Julia Gorman were convicted in a joint trial of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful

conduct toward a child, in connection with the death of Gorman's seventeen-month old grandson. The State proved conclusively that the child died from blunt force head trauma while in the exclusive custody of Palmer and Gorman. Palmer and Gorman contend, however, the trial court erred in denying their directed verdict motions because the State's evidence was insufficient to prove (1) which defendant inflicted the child's injuries, and (2) that either of them aided or abetted the other.[1] We affirm their convictions for homicide by child abuse and unlawful conduct toward a child. However, we find insufficient evidence of aiding and abetting, and therefore, we reverse those convictions. We affirm all other issues pursuant to Rule 220(b), SCACR.

I. Standard of Review

Our task on appeal is to determine whether the trial court committed an error of law in denying Palmer and Gorman's motions for a directed verdict. *See State v. Cope*, 405 S.C. 317, 334, 748 S.E.2d 194, 203 (2013) ("In criminal cases, the appellate court sits solely to review errors of law."); *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013) (stating "the appellate court sits to review errors of law only"). Our supreme court recently summarized the standard we employ in reviewing a trial court's decision to deny a motion for a directed verdict:

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[1] We consolidated their appeals pursuant to Rule 214, SCACR.

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. During trial, when ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

On appeal, when reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. *See State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented . . . substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. *Cf. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to submit the case to the jury if there is '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 removed) (citation omitted).

State v. Hepburn, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 17, 28-29) (some citations and internal quotation marks omitted).

II. Facts and Procedural History

On July 2, 2008, the child's mother—Gorman's daughter—left the child in Palmer and Gorman's custody under a temporary guardianship.[2] On the evening of July 14, 2008, Gorman made a 911 call from her home reporting the child had "shortness of breath." A member of the Horry County Fire and Rescue team testified that when he arrived at Gorman and Palmer's home, the child was seizing and in "a pretty grave condition." A doctor who treated the child at Conway Medical Center testified the child showed signs of "severe neurological injury," the cause of which "would have to be tremendous force to the skull." A CT scan of the child's head revealed skull fractures and swelling of the brain, which the doctor indicated "raise[d] the concern of child abuse." Due to the severity of the injuries, the child was flown to the Medical University of South Carolina (MUSC), where he was kept on life support for two days. His parents decided to cease support, and the child died July 16, 2008.

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[2] The child's mother left town to visit her husband, the child's father, who was stationed out-of-state on military duty.

A forensic pathologist performed an autopsy on the child and found skull fractures on both sides of the child's head. She concluded the child died from blunt force head trauma, and the manner of death was homicide.

A. Palmer's and Gorman's Statements to Police

On July 18, 2008, Palmer and Gorman gave statements to the police. Palmer told police he did not know what happened to the child and denied hurting him. Similarly, Gorman told police she did not know how the injury occurred, but neither she nor Palmer hurt the child.

When asked whether the child's injuries could have been caused by being shaken, Gorman denied ever shaking the child. However, after the police continued to question her, she admitted she may have shaken the child and demonstrated how she shook him. She stated she did not think she shook him hard and denied shaking him the day he went to the hospital.

Palmer and Gorman both gave police a timeline of what occurred the day of July 14. According to Gorman's statement, she checked on the child at approximately 5:30 a.m. before she left for work and found him sleeping. According to Palmer's statement, he woke the child at 9:30 a.m., fed him breakfast and lunch, then laid the child down for a nap at 3:30 p.m. Gorman confirmed this, stating Palmer called and told her that he fed the child in the morning and again around noon.

Gorman and Palmer both stated Palmer was alone with the child all day while Gorman was at work.

Gorman arrived home between 4:00 and 4:30 p.m. Gorman claimed she checked on the child as soon as she got home, and, similarly, Palmer stated he and Gorman walked to the "edge of the door" and "peeked in" the child's room to check on him. Gorman stated the child "was breathing fine, everything was fine." She also told police that "a little bit later," she and Palmer checked on him again and "still everything was fine." Palmer's statement, however, does not mention that they checked on the child a second time. Instead, he claims they went outside to talk "for a little bit" and then Gorman prepared dinner, which they ate around 6:00 p.m.

Gorman told police that after dinner, Palmer took the dog outside while she went to wake the child. Palmer did not mention walking the dog, but only that after dinner, Gorman went to check on the child. According to Gorman, when she entered the child's room, she heard him making "really strange noises" and noticed he was "slack looking," with saliva coming from his mouth. She claimed she picked him up and "leaned him over [her] arm because [she] didn't know if he was choking or if he was going to throw up." She called out to Palmer that something was wrong. Palmer came to her and discovered the child was having a seizure. Gorman called 911 while Palmer held the child.

B. Medical Evidence

At trial, the State introduced medical experts who testified to the extent of the child's injuries. Dr. Donna Roberts, a neuro-radiologist with MUSC, testified the child had skull fractures on both sides of his head, which resulted from severe trauma that occurred the day the child arrived at the hospital. She testified it "required severe force to create [the skull fractures]," and likened it to falling from a three-story window or being involved in a car accident. She stated the fractures could not have been caused by merely shaking the child. She also testified a person with these injuries "would be immediately severely symptomatic" and display a loss of consciousness, alteration in breathing, seizures, and foaming at the mouth.

The State also called Dr. Ann Abel, the director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, who testified that she spoke with Gorman and Palmer at MUSC to gain more information about the child. She claimed they both denied that any injury or accident occurred the day the child went to the hospital. Medical evidence, however, indicated the injuries must have occurred sometime that day. Dr. Abel testified that, in her medical opinion, the head injury occurred no more than three hours before the child arrived at the hospital.

Dr. Abel further testified the child suffered "massive" blows to both sides of the head that could have been inflicted in "less than a minute." She stated that a person observing the injuries take place "would perceive

that this was a tremendous force" inflicted upon the child. However, she also testified that a person who did not see the force applied may not appreciate that something had happened to the child. She explained a person may be unable to discern whether the child was sleeping or unconscious if the person was not aware the head trauma had occurred.

Three of the State's witnesses testified they noticed bruises on the child while he was in the hospital, and Gorman could not account for them in her testimony. Dr. Abel testified the child had multiple bruises in places that were atypical for "normal childhood falling." Similarly, one of the nurses who treated the child in the emergency room testified she saw bruises on the child's body that "you wouldn't [typically] see." Additionally, a Department of Social Services employee investigating the case observed dark bruises on the child at the hospital, and when she asked Gorman how the bruising occurred, she responded the child "liked to pinch himself." However, the child's mother testified that, to her knowledge, the child had never intentionally hurt or pinched himself. Regarding whether the bruises were recently inflicted, Dr. Jody Hutson, the child's primary care physician, testified that when he saw the child on July 1 for ant bites and allergies and again on July 8 to administer vaccinations, the child had no bruises or any other injuries that would cause him to suspect child abuse. Furthermore, Palmer's parents testified that when the child came to their house to swim on July 13—the day before his injuries occurred—they did not notice any bruises on him.

C. Gorman's Trial Testimony

All of the evidence described above was presented by the State in its case in chief. Both Palmer and Gorman presented evidence at trial, although Palmer did not testify. Under the waiver rule recognized by this court in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), and recently confirmed by our supreme court in *Hepburn*, this court properly considers evidence presented by defendants unless an exception to the waiver rule applies. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 29-30 n.15, 32 (providing that when a defendant presents evidence, "the 'waiver doctrine' requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the [State's] case-in-chief" (citation omitted)); *Harry*, 321 S.C. at 277, 468 S.E.2d at 79 (stating "when the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone"). Neither Palmer nor Gorman argue any exception applies, and we find none applies.

Gorman testified at trial to a timeline of events that occurred on July 14, parts of which contradicted her statement to police. A time card introduced in evidence showed she clocked out from work at 3:45 p.m. Gorman testified she drove home immediately after leaving work, which took around forty-five minutes. When she arrived home at approximately 4:40 p.m., she "walked to the [child's] bedroom door" and saw the child was asleep. Although Gorman and Palmer's statements to police do not indicate that Gorman left the house after

checking on the child, Gorman introduced a check she signed made payable to a grocery store that was dated July 14 and had a time stamp of 3:52 p.m. Gorman explained she had forgotten to tell the police she went to the grocery store after checking on the child. Gorman claimed, however, that it was impossible for her to clock out of work at 3:45 p.m. and be at the grocery store by 3:52 p.m. She stated, though, it was "fair to say that maybe [she] cashed th[e] check at 4:52 p.m.," and the time stamp was off by one hour. While she was at the grocery store, Palmer stayed at home with the child.

According to Gorman's testimony, when she returned from the store, she did not check on the child again but instead began cooking dinner. She told the jury that when she and Palmer finished eating, she walked to the child's bedroom to wake him. When asked where Palmer was when she went to wake the child, Gorman testified that "at one point he took the dog outside to use the bathroom" but stated "he could have been already back inside the house." She went on to testify that when she discovered the child was injured and called out to Palmer, he arrived in the child's room in "seconds."

Gorman testified at trial she had never shaken the child. When asked why she demonstrated to police how she shook the child, she responded she "was just so tired and drawn out" that she "just reacted."

D. Directed Verdict Motions, Verdict, and Sentence

Palmer and Gorman both moved for directed verdicts on all charges, which the trial court denied. The jury found both Gorman and Palmer guilty of all charges. The court sentenced them each to ten years for unlawful conduct toward a child, twenty years for aiding and abetting, and thirty-five years in prison for homicide by child abuse, all to run concurrently.

III. Palmer's and Gorman's Directed Verdict Motions

Palmer and Gorman both assert the trial court erred in denying their directed verdict motions because the State did not present substantial circumstantial evidence to prove identity—whether it was Palmer or Gorman who inflicted the injuries that caused the child's death. They also assert the State did not prove that Palmer or Gorman aided and abetted the other in committing homicide by child abuse.

A. Homicide by Child Abuse

Subsection 16-3-85(A)(1) of the South Carolina Code (2003) provides that a person is guilty of homicide by child abuse when he or she "causes the death of a child . . . while committing child abuse." "Child abuse" is defined as "an act or omission by any person which causes harm to the child's physical health or welfare," S.C. Code Ann. § 16-3-85(B)(1) (2003), and "harm" occurs

when a person "inflicts or allows to be inflicted upon the child physical injury." § 16-3-85(B)(2)(a).

The State conclusively established by direct medical evidence that the child's fatal injuries were the result of child abuse. This evidence consisted of the following trial testimony: (1) the child died from intentionally inflicted blunt force trauma to the head; (2) the child suffered two skull fractures caused by "massive" blows to each side of the head, and exhibited multiple dark bruises that were atypical for "normal childhood falling"; and (3) the force used to inflict the skull fractures was comparable to falling from a three-story window or being involved in a car accident.

The State also conclusively established by direct evidence that the child's injuries occurred sometime on July 14. Both of the State's medical experts testified the injuries occurred that day. In fact, Dr. Abel testified the head injuries occurred within three hours before the child was taken to the hospital.

The State relies entirely on circumstantial evidence, however, to prove who inflicted the injuries that killed the child. Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries.

1. Evidence of Gorman's Guilt

We find the trial court correctly denied Gorman's motion for a directed verdict because there is substantial circumstantial evidence that she inflicted at least one of the child's injuries—specifically, while she was alone in his bedroom after dinner. Dr. Robert's testimony established the child would be "immediately severely symptomatic" after receiving the injuries and incapable of normal functioning, i.e., eating, walking, or playing. According to Gorman's statement to police, she observed nothing abnormal about the child when she left for work at 5:30 a.m. Similarly, Palmer told police the child functioned normally during the day—he ate breakfast and lunch and played. When Gorman returned home from work between 4:00 and 4:30 p.m., she claimed the child "was breathing fine, everything was fine," and when she checked on him again "a little bit later" with Palmer, "still everything was fine." Although she contradicted herself on this point at trial, Gorman's statement suggests Palmer was not alone with the child after she returned from work. Gorman entered the child's room to wake him around 6:00 p.m. that evening, and at 6:06 p.m., Gorman called 911 to report the child's symptoms. From this evidence, the jury could have "fairly and logically deduced" that Gorman inflicted the fatal injuries. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 29 ("The trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be

fairly and logically deduced." (quoting *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127)).

2. Evidence of Palmer's Guilt

We find the trial court also correctly denied Palmer's motion for a directed verdict because there is substantial circumstantial evidence that Palmer inflicted at least one of the child's injuries. There are two scenarios under the evidence that reasonably tend to prove Palmer's guilt. First, the evidence supports that Palmer injured the child while Gorman was at work. Palmer had the child in his care the entire day of July 14. Though Gorman stated the child was sleeping "and breathing fine" when she returned from work, Dr. Abel testified a person may be unable to differentiate a sleeping child from one who is unconscious. Thus, the child's injuries might not have been noticeable to her at this time, particularly given Gorman's testimony that she did not actually enter the child's room or go close enough to carefully observe the child.

As to the second scenario, Palmer could have injured the child while Gorman was at the grocery store. The time stamp on Gorman's check established that she went to the grocery store that evening, and according to her trial testimony, Palmer stayed at home with the child. She testified that when she returned from the store, she did not check on the child. From this evidence, the jury could have "fairly and logically deduced" that Palmer inflicted the fatal injuries. *See id.*

3. Other Circumstances of Guilt

The State also presented evidence at trial from which it argued the jury could infer "why someone would kill a seventeen-month old child." While this evidence is insufficient by itself to prove Palmer or Gorman's guilt, the evidence must be considered in combination with all the evidence to determine whether there is substantial circumstantial evidence of guilt. *See State v. Frazier*, 386 S.C. 526, 532, 533, 689 S.E.2d 610, 613, 614 (2010) (viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *State v. Cherry*, 361 S.C. 588, 595, 606 S.E.2d 475, 478 (2004) (finding the circumstantial evidence, when combined, was "sufficient for the jury to infer [guilt]"). Because the State relied on the evidence at trial, we summarize it here.

This evidence relates primarily to Gorman, and includes (1) evidence that Gorman was often frustrated and annoyed with the child's behavior because, as Gorman testified, he "crie[d] every day, [was] cranky every day, whine[d] every day;"[3] (2) evidence that Gorman disliked the child, shown through comments she made to others; (3) testimony that Gorman and Palmer were "stressed about money" and concerned about how the child would affect their financial problems; (4) Gorman's testimony that she did not have a good relationship with the child's mother; (5) Gorman's testimony

[3] Gorman told Dr. Abel the child was "clingy and whiny and want[ed] to be held all the time." Similarly, a paramedic testified Gorman told her that "she's raised several children in her lifetime and never seen such a bad one."

that she had never met the child before the child's mother left him with Gorman; and (6) Gorman's admission to shaking the child on a previous occasion.

As to Palmer, the State showed he was only thirty years old, unemployed, and experiencing financial difficulty at the time the child came to live with them. Palmer's father testified Palmer had a five-year old son who lived with Palmer's father and mother most of the time because he "didn't think that [Palmer] had any time for [the child]." Palmer's mother testified she and her husband "basically raise[d]" Palmer's son. Based on this evidence, the State theorized Palmer did not want to take on the responsibility of caring for a child, particularly one that was not his own.

4. Palmer's and Gorman's Statements

In Palmer's and Gorman's statements to police, they both deny causing the child's injuries and deny any knowledge of the other doing so. From the medical evidence and testimony presented at trial, however, it is not possible that both of these statements are true. While we are careful not to consider the falsity of a defendant's statement as positive evidence of the defendant's guilt, we find the impossibility that both statements are true is a circumstance the jury was entitled to consider in determining the guilt of both parties. Likewise, it is evidence the trial court and this court may properly consider in determining whether

there is substantial circumstantial evidence of each defendant's guilt.

5. Concerns Related to Proving the Identity of the Principal

Because these cases were tried jointly, we necessarily merged the evidence presented as to Palmer and Gorman into one discussion. This necessity highlights the difficultly of the question presented by this appeal—whether the evidence the State presented as to each defendant eliminates the possibility that the other defendant inflicted all of the injuries that killed the child. The essence of Palmer and Gorman's argument on appeal is the evidence does not eliminate that possibility. We agree it does not. However, we find the State presented substantial circumstantial evidence of each defendant's guilt on the charge of homicide by child abuse.

This court "sits solely to review errors of law," *Cope*, 405 S.C. at 334, 748 S.E.2d at 203, and therefore we must confine *our* decision to whether the trial court correctly made *its* decision. As the supreme court stated in *Hepburn*, "we are called by our standard of review to consider the evidence as it stood" when the trial court made the ruling that is now on appeal.[4] Shearouse Adv.

[4] We recognize the supreme court made this statement to indicate it was not considering evidence presented after the State rested its case in chief. However, the reasoning of the court applies here. The statement indicates a reviewing court must identify a point in time where its review is focused for the purposes of determining error. In this case, the relevant point in time is when

Sh. No. 52 at 42. In denying the defendants' directed verdict motions, the trial court considered the evidence as it stood at that time in regard to each individual defendant, and determined whether that evidence was sufficient to support each charge against each defendant. The possibility that the jury may later reach verdicts that are inconsistent between the defendants was outside the trial court's power to consider, as that would require the court to weigh the strength of the case against one defendant in considering the sufficiency of the evidence against the other. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 28 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." (quoting *Cherry*, 361 S.C. at 593, 606 S.E.2d at 477-78)); *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (stating our case law prohibits "inconsistent verdicts when multiple offenses are submitted to the jury, not when the jury returns disparate results for codefendants"). As the trial court was required to do, we independently analyze the evidence against each defendant. Because that independent review of the evidence as to each defendant reveals "substantial evidence which reasonably tends to prove the guilt of the accused, [and] from which his guilt may be fairly and logically deduced," *Hepburn*, Shearouse Adv. Sh. No. 52 at 29, we affirm the trial

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the trial court ruled on the directed verdict motion at the close of all evidence. We must analyze whether the trial court erred based on the evidence that was before it at that time, not retrospectively after the jury returned a verdict based on that evidence.

court's denial of each defendant's motion for a directed verdict for homicide by child abuse.[5]

B. Unlawful Conduct Toward a Child

We also find the evidence discussed above as to Palmer and Gorman supports the trial court's refusal to grant their directed verdict motions on the charge of unlawful conduct towards a child. *See* S.C. Code Ann. § 63-5-70(A)(2) (2010) (making it unlawful for a child's guardian to "do or cause . . . any bodily harm to the child so that the life or health of the child is endangered").

C. Aiding and Abetting Homicide by Child Abuse

Under subsection 16-3-85(A)(2) of the South Carolina Code (2003), a person is guilty of aiding and abetting homicide by child abuse when he or she "knowingly aids and abets another person to commit child abuse or neglect . . . [that] results in the death of a child." "Aid and abet" is defined as to "[h]elp, assist, or facilitate the commission of a crime," which can be rendered by "words, acts, encouragement, support, or presence,

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[5] The dissent relies on *Hepburn* as to the sufficiency of the evidence in this case. While we rely on *Hepburn* as to our standard of review, we find it distinguishable on the facts. In *Hepburn*, the supreme court found the State did not present sufficient evidence that Hepburn inflicted the child's injuries, stating, "Every State witness placed [Hepburn] asleep at the time the victim sustained the fatal injuries." *Id.* at 40. Based on this, the court concluded no inference could be drawn "that *Appellant* harmed the victim." *Id.*

actual or constructive." *State v. Smith*, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). "To be guilty as an aider or abettor, the participant must have knowledge of the principal's criminal conduct." *State v. Zeigler*, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005). Thus, "[m]ere presence at the scene is not sufficient to establish guilt as an aider or abettor." *State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (citation omitted).

While the State's evidence conclusively proved the child died from child abuse, we find the State presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse. Therefore, the trial court erred in denying Palmer's and Gorman's motions for a directed verdict on aiding and abetting. *See State v. Lewis*, 403 S.C. 345, 355-57, 743 S.E.2d 124, 129-30 (Ct. App. 2013) (reversing denial of directed verdict motion when evidence was insufficient to prove the defendant knowingly undertook an overt act to aid and abet his codefendant in committing homicide by child abuse).

The State contends *State v. Smith* controls and requires us to affirm. The supreme court's discussion of *Smith* in *Hepburn*, however, defeats the State's argument. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 40-42. As it relates to aiding and abetting, the key facts in *Smith* were that the defendants were never separated during the time the medical evidence proved the injuries occurred, and "the medical testimony indicated

that the victim['s] . . . symptoms would have been severe and immediate, and importantly, obvious to both Smith and the victim's mother very soon after the injuries were inflicted." *Hepburn*, Shearouse Adv. Sh. No. 52 at 41 (quoting and citing *Smith*, 359 S.C. at 491-92, 597 S.E.2d at 894). Here, Palmer and Gorman were separated for periods of time in which the injury could have occurred, and Dr. Abel testified the injuries may not have been apparent to someone who did not see them inflicted. Thus, we find this case distinguishable from *Smith*.

IV. Other Issues on Appeal

As to all other issues on appeal, we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

Regarding Palmer's argument that the State violated its agreement with him, we find it is not a "proffer agreement." *See United States v. Gillion*, 704 F.3d 284, 292 (4th Cir. 2012) (defining a "proffer agreement" as an agreement "intended to protect the defendant against the use of his or her statements," particularly when "the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement"). Regardless of this finding, we affirm on the basis that Palmer failed to demonstrate how enforcement of the agreement would affect him.

Turning to the issues raised by Gorman on appeal, we find the following:

(1) We find Gorman did not preserve for our review her argument that any statements she gave before being advised of her constitutional rights are inadmissible under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The record reflects Gorman objected only to the voluntariness of her statement at the *Jackson v. Denno*[6] hearing and renewed this initial objection at trial. Because Gorman did not allege a *Miranda* violation before or during trial, she cannot do so now. *See State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (stating an issue not raised to and ruled upon by the trial court is not preserved).

(2) Gorman asserts that any statements given after she waived her *Miranda* rights are tainted by the initial violation—being subjected to custodial interrogation without first being given her *Miranda* warnings—and are thus inadmissible. *See State v. Peele*, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989) (requiring police to advise suspects of their *Miranda* rights before initiating "custodial interrogation"); *State v. Lynch*, 375 S.C. 628, 633, 654 S.E.2d 292, 295 (Ct. App. 2007) (stating the State may not use statements gained from custodial interrogation in violation of *Miranda*). We find, however, the police did not interrogate Gorman before giving her *Miranda* rights and thus no *Miranda* violation occurred. *See Lynch*, 375 S.C. at 633, 654 S.E.2d at 295 (stating *Miranda* rights attach only when the

[6] 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

suspect is subjected to custodial interrogation); *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (defining interrogation as "express questioning, or its functional equivalent," consisting of words or actions by police that "are reasonably likely to elicit an incriminating response"); *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989) (holding defendant's statements to police were not the product of interrogation and were thus admissible).

(3) Gorman asserts her statement is inadmissible because it was not voluntarily given. *See Franklin*, 299 S.C. at 137, 382 S.E.2d at 913 ("The test of admissibility of a statement is voluntariness."). In finding the statement was voluntary, the trial court evaluated the totality of the circumstances and made the requisite findings. *See State v. Dye*, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (stating voluntariness of a statement is determined by examining the totality of circumstances surrounding the statement, including "background, experience, conduct of the accused, age, length of custody, . . . [and] threats of violence"). We affirm because each of these findings is supported by the record. *See State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (requiring appellate courts to review a ruling concerning voluntariness under an "any evidence" standard).

V. Conclusion

We affirm the trial court's refusal to grant Palmer's and Gorman's directed verdict motions on the charges

of homicide by child abuse and unlawful conduct toward a child, but reverse as to aiding and abetting homicide by child abuse. We affirm any other issues on appeal.

AFFIRMED IN PART, REVERSED IN PART.

KONDUROS, J., concurs.

PIEPER, J., concurring in part and dissenting in part.

I concur in the majority's decision to reverse Gorman and Palmer's convictions for aiding and abetting homicide by child abuse, as there was insufficient evidence that they were acting together or assisting one another. I also would find there was insufficient evidence of the codefendants' guilt for homicide by child abuse and unlawful conduct toward a child because the State did not present any direct or substantial circumstantial evidence to reasonably prove which codefendant harmed the child. *See State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) ("The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes."). The evidence establishes that Gorman and Palmer each had time alone with the child during the timeframe of the abuse, and therefore, the State has only demonstrated that each defendant had an opportunity to injure the child. Utilizing the

analysis of the supreme court in *State v. Hepburn*, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 38-40) and *State v. Lewis*, 403 S.C. 345, 352-56, 743 S.E.2d 124, 128-29 (Ct. App. 2013), I would find the only inference that can be fairly and logically deduced from the evidence is that one of the two codefendants inflicted the child's injuries. *See Hepburn*, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 40) ("While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two [codefendants] inflicted the victim's injuries, but not that *Appellant* harmed the victim. Thus, we reverse the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellant's guilt." (emphasis in original)); *Lewis*, 403 S.C. at 354-56, 743 S.E.2d at 129 (reversing the defendant's conviction when the State failed to offer any direct evidence or substantial circumstantial evidence of the defendant's guilt and the defendant's involvement amounted to mere presence at the scene). Accordingly, I would find the trial court erred by denying the defendants' directed verdict motions, and I would reverse the convictions for homicide by child abuse and unlawful conduct toward a child.

State of South Carolina County of Horry	In The Court of General Sessions
State of South Carolina, vs. Julia S. Gorman, Defendant.	08-GS-26-3756/08-GS-26-0841 10-GS-26-0041/10-GS-26-2194 TRANSCRIPT OF HEARING
State of South Carolina, vs. Robert A. Palmer, Defendant.	10-G5-26-2195/10-G5-26-2196 08-GS-26-04120

November 14-18, 2011
Conway, South Carolina

Before:

The Honorable, Larry B. Hyman, Judge

Appearances:

By: Candice A. Lively, Esq.
Nancy G. Cote, Esq.
Attorneys For State

BY: Carla F. Grabert-Lowenstein, Esq.
Attorney For Robert A. Palmer

BY: James C. Galmore, Esq.
J. Andrew Ritzier, Esq.
Attorneys For Julia S. Gorman

* * *

[846] that there was A homicide in this case. The State's case, the State has produced likewise a substantial amount of circumstantial evidence that really puts forth just in my view two scenarios. Number one, that Mr. Palmer injured the child and the child was unconscious when Ms. Gorman came home and she found him that way. Other –

Mr. Galmore: That doesn't mean she failed to act, Judge.

The Court: Other, other that Ms., the other is that Ms. Palmer came home and the child was as Mr. Palmer said, or Ms. Gorman came home and as Mr. Palmer said the child was fine and that she injured the child, who knows, I don't right now, but that's what a jury is for and I think this should go to the jury. Ms. Grabert-Lowenstein?

Ms. Grabert-Lowenstein: Your Honor, and if I may because this is an important situation, I am not, I am making my own separate motion for a directed verdict and, Your Honor, I have prepared a written motion. I think, frankly, Your Honor, you've hit it on the head, there has to be substantial evidence and –

The Court: Or both could have been involved in it, so there's three scenarios.

Ms. Grabert-Lowenstein: Your Honor, what we know is this did happen in a short time frame. What we know is that Mr. Palmer has, if I may, has always denied [847] any evidence. There's no direct or circumstantial evidence of him committing the injury and Ms. Galmore [sic], Ms. Gorman had always said he didn't do it, she never told him of anything. Your Honor, there is such a weak, weak string here that the State wants to drag him along.

There is evidence that he was outside and, and no other evidence that he knew or was involved at all. How can we when we're looking for a willful disregard say that there was willful disregard here? This man was part in getting this child to the doctor. The evidence is that there were no bruises when the emergency people picked him up. The first bruises weren't seen until seven, according to the testimony. There's no evidence that he had any knowledge of that child being injured. Ms. Gorman is emphatic about him having more patience. We have seen the demonstration of her as well as her own testimony about her propensity and, Your Honor, it was only for lack of being able to give information he didn't have that he was arrested that day. There is absolutely no, it has to be substantial circumstantial evidence and there's no direct or substantial circumstantial evidence. He is in a completely different situation than Ms. Gorman and we ask for the directed verdict.

The Court: Ms. Grabert-Lowenstein, what about this scenario, there's no question there's ample evidence [848] of his death by, brought on by these

fractures. We've heard evidence about what force it would take to cause these fractures. We've heard a lot of evidence about when this occurred, the time frame in which it occurred. Now we've heard Ms. Gorman who first of all says he wouldn't do that, but as you pointed out with your questions on cross examination how would she know, how would someone who wasn't there know? She says she came home after having been at work since 5:45 that morning, she came to the house, she did not touch the child. She had no contact with the child other than to look in on the child and then at 6:00 or approximately 6:00 when she picks the child up the child is afflicted. Now what is that evidence of? Does that not support a, a jury's verdict that would, of guilt of your client? What if they believe her when she says all I did was stick my head in, in fact believe your client when he says that's all she did was stick her head in, she goes in and picks up the child and comes out. I think that there is substantial circumstantial evidence. I don't know how this case will go, that's why we have juries.

Ms. Grabert-Lowenstein: Your Honor, I think given the evidence of the symptomology certainly and how quickly Donna Roberts, Dr. Abel say these injuries would have happened there would have been symptomology if this [849] had occurred prior to the time that it is said she got home.

The Court: Didn't she testify someone could look in and the child be unconscious and he could appear to be asleep, sleeping peacefully, but in reality the child was unconscious; how about that?

Ms. Grabert-Lowenstein: Your Honor, there's –

The Court: Did you counter that testimony with an expert?

Ms. Grabert-Lowenstein: She did say that this could have happened within an hour. The point is, Your Honor, that the State made great pains at, you know, making this as short as possible and that's the time that my client was out of the house; that's the point of the directed verdict at this point. There is no evidence to show that he inflicted the injury. His interview is replete that Detectives Weaver and Troxell because of information they had believed that it was Julia Gorman. There has to be, there's just no evidence that he had anything to do with it and while I understand the point the Court's making to allow this to go to the jury without the substantial circumstantial evidence –

The Court: There is substantial circumstantial evidence in my view, all right, thank you very much.

Ms. Grabert-Lowenstein: Thank you.

[850] The Court: All right, we'll take about five minutes for everyone to refresh themselves and we'll be right back, okay.

(Whereupon, a recess was taken and the following takes place on the record after the recess.)

The Court: Are we ready?

Ms. Lively: Your Honor, Mr. Galmore is not present at this time. Here he comes.

The Court: Okay, Mr. Galmore, Ms. Grabert Lowenstein, it's time to present the defense if you choose to do so. Have you discussed with your client, Mr. Galmore, her right to testify in this matter?

Mr. Galmore: Yea, sir, Your Honor.

The Court: Has she made a decision as to whether she will testify or not?

Mr. Galmore: Yes, sir.

The Court: And what is that decision?

Mr. Galmore: She will elect to take the witness stand.

The Court: Ms. Grabert-Lowenstein?

Ms. Grabert-Lowenstein: Your Honor, I have discussed it, I've discussed it many times with my client. I would ask that I have one other opportunity to consult with him prior to making that final decision. He's not made a decision at this point.

* * *

[1007] identification.)

The Court: All right, and that brings us to standard motions, Mr. Galmore?

Mr. Galmore: Yes, air, Your Honor, at this time we would renew our motion for a directed verdict. We made that motion at the end of the State's case, we

make it again at the end of all evidence presented in the case. We submit that the State has not produced any direct evidence of Ms. Gorman's involvement either as the person that inflicted the injuries or the person that aiding and abetting and failed to act in Mr. Palmer's infliction of these injuries.

There is another charge for unlawful conduct towards a child, we submit that the State has not produced any direct evidence that Ms. Gorman was the person responsible for any unlawful conduct towards victim.

With that said the State has to present substantial circumstances evidence, they have failed to do so. The evidence that they have, even circumstantial evidence, it does not point conclusively to the guilt of Ms. Gorman. At best it raises a mere suspicion of her guilt and, therefore, we ask. the Court to reconsider the directed verdict motions that we filed previously.

The Court: All right, and based upon the reasons that I gave earlier I would respectfully deny your [1008] motion, okay.

Mr. Galmore: Yes, sir.

The Court: I think there's ample evidence to take this to the jury. Ms. Grabert-Lowenstein?

Ms. Grabert-Lowenstein: Yes, Your Honor, our position would be we're in a different position than Ms. Gorman. The State took great pains to basically narrow the time frame here and one thing that's different at this juncture than from before is that we have

based on the medical testimony he wouldn't have been breathing if he had been in a coma. Ms. Gorman's testimony is walked into a small room and she heard normal breathing which was significantly different than later when she and my client walked in to check on victim. Based on that and based on our written memorandum we would respectfully request to grant Mr. Palmer a directed verdict at this juncture.

The Court: And again I would respectfully decline your motion. I think that there is substantial evidence by which a jury could return verdicts of guilty as to, these charges and I'm going to deny your motion.

Ms. Grabert-Lowenstein: Thank you, Your Honor.

The Court: All right, now, ladies and gentlemen, I have provided you already, I did so on yesterday, provided you with copies of my proposed charge. As is my practice I will be providing that charge with, to

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