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Question I

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

In an attempt to justify the verdict against Mr. Lewis, the state has argued that Mr. Lewis “instigated, abetted and witnessed Hepburn’s disciplinary outburst against her son and he instigated, abetted and witnessed Hepburn’s disciplinary outburst against her infant daughter.” Br. of Resp. at 10. No evidence in this case exists that Mr. Lewis “instigated” or “abetted” any conduct by Ms. Hepburn toward either child. No testimony exists that he witnessed the infliction of any abuse to Audrina Hepburn. The testimony shows that he had been upset with Ms. Hepburn concerning her conduct, but no testimony even remotely shows that he had any animosity toward either child.

The state also attempts to argue that because Mr. Lewis did not immediately get up when he heard stomp down the hall that he somehow aided and abetted her in committing this crime. The state in essence says that Mr. Lewis knew beyond a reasonable doubt that Ms. Hepburn was going to enter the room of her daughter and violently shake her daughter to death. A conviction in this case cannot be sustained on such a ground for the reason that no evidence exists that Mr. Lewis knew that Ms. Hepburn was going to shake her daughter in such a manner that the child would die. Even if Mr. Lewis had been the father of the child, he would not have had such a knowledge if he were sitting in the living room when he heard the mother of the child stomp into the room.

The state further argues that the evidence of flight and suicide show consciousness

of guilt and therefore sustains the conviction. First the flight was very brief. Mr. Lewis returned to his mother's residence a few minutes later. Rec. on App. at 763, 14-15. Mr. Lewis knew that he had not been completely truthful with the officer when they first interviewed him. The alleged flight in this case is not supportive of guilt of homicide by child abuse. Evidence existed he had committed the crime of accessory after the fact. The alleged flight was just as easily suggestive of that crime. The state further says the alleged suicide attempt was proof of his guilt of homicide by child abuse. Any probative value that may have existed by the alleged suicide was completely eliminated by the testimony of the psychiatrist who testified that his suicide attempt was related to his remorse over having to testify against Ms. Hepburn. Rec. on App. at 1288, 112-9. Again, these two facts are not sufficient to sustain a convictions in this case.

The state's next theory to sustain the conviction is that Mr. Lewis did not render aid when he heard the child crying. The state in its brief has pointed to no evidence that had Mr. Lewis immediately rushed into the bedroom to render aid, the result would have been any different. At the time of the crying, the actions of Ms. Hepburn had already caused the injury that lead to the child's death. The state has not even suggested any evidence that would have proven a prompt response would have saved the child. The only action that could have saved the child is for Mr. Lewis to have prevented Ms. Hepburn from going into the child's bedroom. The state presented no evidence that contradicted that statement.

The State concedes that mere presence is not sufficient to convict. *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010). Even if a defendant has knowledge that a crime is going to be committed, more than mere presence is required. As this Court has held "Mere presence and prior knowledge that a crime was going to be committed, without more, is

insufficient to constitute guilt.” *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (2007). Furthermore, the State is required to prove that Ms. Hepburn, who committed the crime, in fact knew Mr. Lewis was present for the purpose of aiding and abetting her in the commission of the crime. As the South Carolina Supreme Court has said “[T]he mere presence at the commission of a crime, with the intention to aid, but without preconcert, and without the knowledge of the person engaged in the crime, does not ordinarily of itself constitute such participation. *State v. Hunter*, 77 S.C. 119, ___, 57 S.E. 637, 638 (1907).

Finally, the State argues that Mr. Lewis failed to provide medical care. The State has simply not responded to the argument of Mr. Lewis in the opening brief that if he were guilty of failing to provide medical care, he would have been guilty of homicide by child abuse and not aiding and abetting homicide by child abuse. Nor has the state pointed to any testimony in the record that would establish that had Mr. Lewis told the EMS personnel what he had heard, that the result would have been any different for the minor child.

In the opening brief the Appellant argued that the state must prove an overt act by Mr. Lewis to make him guilty of aiding and abetting the crime of homicide by child abuse. The State has not argued to the contrary. The South Carolina courts have long held that the state must prove an overt act before a person can be found guilty of accomplice liability. *See, State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010); *State v. Austin*, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)(“[T]o find guilt for a crime a person must . . . be present at the scene of the crime and intentionally, or through a common design aid, abet or assist in the commission of that crime through some *overt act*.”)(emphasis added). The State has not shown any overt act Mr. Lewis committed to make him guilty of aiding and abetting homicide by child abuse.

Question II

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

As noted in the opening brief of Appellant, to make a stranger to a child responsible for an act of omission, is a change from the common law. Br. of App. at 15. The State has simply not responded to this argument or the due process argument of making a person liable for the death of a child when that person has no legal responsibility toward that child. The position of the State appears to be that literally a person who sees a child being abused must act or the failure to act can result in their being convicted of aiding and abetting homicide by child abuse.¹

The State has argued “Contrary to Lewis’ position, there is substantial circumstantial evidence that he aided and abetted Hepburn in committing child abuse, and the abuse or neglect resulted in the death of her infant daughter.” Br. of Resp. at 13. This statement simply does not address the question of whether under the facts of this case, the trial judge should have charged the jury that before they could have convicted Mr. Lewis, they would be required to find he owed a duty to the minor child. The question, unless the State is doing a harmless error argument, is not whether there was circumstantial evidence to convict Mr. Lewis, but was the jury required to find a duty by Mr. Lewis toward the child before they convict.

¹ Actually the person would have to be guilty of homicide by child abuse for their act of omission in permitting the abuse to occur. As noted previously, a person would have to commit a covert act that he knew aided the commission of the crime to be guilty of aiding and abetting homicide by child abuse.

Question III

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

In response to this argument the State simply takes the position that a curative instruction cures an improper statement. The State also argues that defense counsel should have asked for an additional charge if the charge given by the trial judge was not adequate. The position of Mr. Lewis at the trial below, and in this appeal, is that no curative instruction could have corrected the error. A Chaplin, that had been qualified by going into his background and training, which could only serve to increase his credibility, said that a statement by Mr. Lewis had the possibility of guilt behind it. No adequate curative instruction could be given.

An ordinary lay witness did not make this statement. A Chaplin did. The State has not argued that the statement was not prejudicial or harmless. They simply contend that the trial judge did not abuse his discretion. Under the facts of this case, the trial judge should have declared a mistrial.

The jury deliberated over nine hours before arriving at a verdict. Obviously they were struggling with the facts of this case. A statement by the Chaplin that he believed Mr. Lewis had made a statement indicating guilt, could have been the deciding factor for some jurors.

Question IV

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

The State has not discussed the due process argument the Appellant raised in his opening brief. Br. of App. at 22. Nor has the State responded to the Appellant's argument that the current practice of the state not being required to open fully, is founded on an improper reading of the precedent in our state. Nor has the state argued against the prejudice to the defendant when the state is permitted to sandbag the defendant by not giving their theory of the case in their opening.

Mr. Lewis can show prejudice in this case. In her final argument, the attorney for the state argued "Let's talk about aiding and abetting, it is aiding and abetting not only to cover up the crime but to do so in advance to the commission of the crime. And if his testimony is the truth then that is exactly what he was doing. He was covering up this crime even as Audrina was fighting for her life because he wanted to protect Ashely Hepburn. Assisting her, helping her in the worst way possible, in a way that gave Audrina no chance at all." Rec. on App. at 1408, ll 5-12. If the State had been required to open fully on law and facts, then defense counsel would have had an opportunity to respond to this mis-statement of the law and the facts.

CONCLUSION

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

June 25, 2012

C. Rauch Wise
305 Main St.
Greenwood, SC 29649
(864) 229-5010
rauch@simplepc.net
S. C. Bar № 06188

Attorney for Richard Brandon Lewis