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ISSUE PRESENTED

Did the Court of Appeals err in reversing the denial of the trial court for a directed verdict when the record failed to contain any evidence of any overt act committed by Richard Brandon Lewis to support a finding of aiding and abetting homicide by child abuse?

ARGUMENT

Did the Court of Appeals err in reversing the denial of the trial court for a directed verdict when the record failed to contain any evidence of any overt act committed by Richard Brandon Lewis to support a finding of aiding and abetting homicide by child abuse?

In viewing the evidence in the light most favorable to the State, the evidence in this case established that in the early morning hours of October 13, 2011, Ashley Hepburn stomped into her child's room who was crying, violently shook the child causing the horrific injuries and then stomped back to her room. During the entire time of this violent act by Ms. Hepburn, Mr. Lewis was in the living room next to the bedroom. He never entered the child's bedroom where the shaking by Ms. Hepburn was occurring. Rec. on App. at 865, ll 7-19.

About 20 to 30 minutes after Ms. Hepburn entered the room, Mr. Lewis entered the child's room and found her in an unusual position in the bed. He approached her and found her comatose. Rec. on App. at 867, ll 12-25 to 870, ll 1-15 He then picked her up, carried her to Ms. Hepburn. Emergency Medical Services were called and the child was carried to Self Regional Health Services. Rec. on App. at 871, ll 11-23.

At the time the EMS personnel were at the residence and later at the hospital, Mr. Lewis did not tell anyone about hearing Ms. Hepburn stomp into the room and hearing the child make sounds that he later learned may have been her shaking the child. Late on the morning of October 13, 2013 he gave a statement that was consistent with his trial testimony. Rec. on App. at 880, ll 4-23.

The above stated facts have to be the true facts found by the jury. If they believed

Ms. Hepburn's testimony they would have acquitted her and convicted Mr. Lewis of homicide by child abuse. The jury, therefore, found as a fact that Ms. Hepburn committed the physical act that caused her child's death. To exonerate Mr. Lewis of homicide by child abuse the jury had to find Mr. Lewis did no act or omission that would make him guilty of homicide by child abuse under S. C. Code § 16-3-85.

Under the South Carolina law, if Mr. Lewis did any act of child abuse or neglect that caused the child to die, he would have been guilty of homicide by child abuse and not aiding and abetting homicide by child abuse. The acts and omissions that make one guilty of homicide by child abuse include actually inflicting injuries, failing to supply health care and abandoning the child resulting in death of the child. Thus, under the verdict of the jury Mr. Lewis did not actually inflict any injuries nor did he fail to supply health care, even assuming he had such a duty. Nor did he fail to protect the child from abuse.

In South Carolina the courts have long declared that before a person can be convicted of aiding and abetting a crime, the state must prove an overt act. *See, State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010); *State v. Austin*, 299 S.C. 456, 385 S.E.2d 830 (1989). The aiding and abetting homicide by child abuse statute contains no language showing an intention by the legislature to change that principle. When enacting the statute, the legislature used a phrase well established in both the common law and decisions of this Court. "[W]here a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridges*, 329 S.C. 11, 13, 329 S.E.2d 196, 198 (1997).

The State now argues that the homicide by child abuse statute includes aiding and

abetting by both an overt act and an act of omission. Pet. for Cert. at 14. This assertions does not make logical sense under the plain wording of the statute and would be completely contrary to the common law. Under the statute an act of omission makes one guilty of homicide by child abuse and not aiding and abetting.

South Carolina Code § 16-3-85 provides that “homicide by child abuse” occurs when death of a child is caused “while committing child abuse or neglect” The statute then says “child abuse or neglect” means an act or *omission* by any person which causes harm to the child’s physical health or welfare.” (emphasis added) Thus, if one does an act of omission that resulted in the death of a child, that person is guilty of actual homicide by child abuse and not aiding and abetting.¹ An act of omission by a person can never make one guilty of aiding and abetting. If an act of omission means one can be guilty of aiding and abetting homicide by child abuse, the “mere presence” charge is meaningless or confusing at best.

The two subsection have different *mens rea*. Under (A)(1) the law does not require that one act “knowingly” in respect to their actions or omissions. The state need only prove that the person acted or failed to act with “extreme indifference.” The state is not required to prove the person “knowingly” acted or failed to act with extreme indifference. Under (A)(2) the state is required to prove the person “knowingly” aided and abetted the commission of homicide by child abuse. Thus, the state is required to prove that the accused knew they were aiding and abetting “child abuse or neglect” and that their conduct was in fact aiding and abetting

¹ Mr. Lewis is not conceding his argument before the Court of Appeals that “any person” cannot apply to one who has no legal duty to the child. Under the interpretation urged by the Satte, every citizen who watches an act of child abuse, even in the grocery store aisle, who did not stop the act, would be guilty of homicide by child abuse. This Court need not reach that issue to decide this appeal.

that abuse or neglect.

The State's petition cites several examples of what it contends Mr. Lewis did to aid and abet the commission of homicide by child abuse. The state, however, fails to state one fact that would show an overt act to commit the aiding and abetting. The facts stated by the State would make Mr. Lewis guilty of either homicide by child abuse or accessory after the fact to homicide by child abuse, a crime for which he was not charged.

The State argues that "The record reflects that Lewis failed to report to Dr. Curry or any medical responders or treatment providers that he was aware the mother was stressed or agitated because she did not get an anticipated job, that she reacted angrily and physically against Lewis and her other child earlier in the evening, or that he heard and felt the mother stomp angrily into the victim's bedroom in response to the victim's whimpering or that the victim began to cry louder and harder once the mother entered the room or that this was followed by loud, broken cries from the victim as though the victim was being shaken." Pet. for Cert. at 11. Much of what the State contends is simply not evidence of homicide by child abuse or aiding and abetting homicide by child abuse. If Mr. Lewis had a duty to respond and failed to stop Ms. Hepburn, by that act of omission he is guilty of homicide by child abuse. The jury acquitted Mr. Lewis of that crime. If he withheld information after Ms. Hepburn shook the child, he was guilty of accessory after the fact and the state did not charge him with that crime.

The State further argues "Dr. Seigler testified that the lack of resuscitation near the time of the injury causes the child to experience difficulty breathing leading to a reduction in the oxygen level in the brain and resulting in brain damage." Pet. for Cert at 12. If by this the State is contending that Mr. Lewis failed to render medical care to the child, again assuming he

had a legal duty, then Mr. Lewis would have been guilty of homicide by child abuse and not aiding and abetting.²

The State again contends “Lewis was more than a by-stander but actively participated in advancing the crime, including false words, information concealed and support provided to protect the mother while medical treatment was critical.” Pet. for Cert. at 17. But these acts would make Mr. Lewis guilty of accessory after the fact to homicide by child abuse, a crime the state elected not to bring against Mr. Lewis.

The State also contends that “He aided and abetted when he failed to prevent the victim’s injury.” Pet. for Cert. at 19. Assume, for the sake of this argument, that Mr. Lewis knew Ms. Hepburn was going to injure her child and was in a position to prevent her act. Under those facts Mr. Lewis would have been guilty of homicide by child abuse under S. C. Code § 16-3-85(A)(1). He would not have been guilty of aiding and abetting. He would have committed an act of “omission by any person which causes harm to the child’s physical health or welfare.”

The jury by its verdict of guilty of aiding and abetting homicide by child abuse, acquitted him of that act of omission.³ The trial judge specifically said the questions of failure to prevent an injury

² The State asserts on page 17 of their Petition for Certiorari that “The correct information was crucial to the victim’s medical treatment and ultimately led to her death.” The record simply does not support this broad statement. The doctors at the emergency room at Self Regional determined the likely cause of the injury was child abuse. Rec. on App. 59, ll 21-25 to 60. L 1-5. *See, also* testimony of Dr. Michael Ward, Rec. on App. at 375, ll 7-23.

³ The trial judge in his charge did not treat the aiding and abetting as a lesser included of homicide by child abuse. The jury was required to elect between either charge or not guilty. Thus, a finding of guilty of aiding and abetting homicide by child abuse was an acquittal on the charge of homicide by child abuse. Rec. on App. at 1093, ll 24-25 to 1094, ll 1-22. Interestingly, the state, never gave an explanation as to the facts sufficient to send the charge of aiding and abetting homicide by child abuse by Ashley Hepburn to the jury. Rec. on App. at 1097, ll 6-25 to 1098, ll 1-4. This issue was mooted when the jury convicted her of homicide by child abuse.

and the failure to render medical aid would have made Mr. Lewis guilty of homicide by child abuse. Rec. on App. at 1079, ll 1-14.

The State's reliance upon *State v. Smith*, 359 S.C. 481, 490 S.E.2d 888 (Ct. App. 2004) is misplaced. First the Court of Appeals never discussed, because it was apparently not raised, whether the defendants could in fact be convicted of both charges. Here the jury was specifically told they could not convict of both charges. Secondly, the issue of whether aiding and abetting homicide by child abuse requires an overt act was also apparently not raised. If a court does not discuss an issue, it cannot stand for the proposition that the court decided the issue. As former Court of Appeals Chief Justice Alex Sanders said "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162,182, 325 S.E.2d 550, 562 (Ct. App. 1984).

In addition in *Smith* both parties admitted that they were the only two people who were with the child during the critical time and neither did anything to harm the child. Here the testimony was the exact opposite. Both pointed the accusing finger at the other as to who inflicted the actual harm. The jury resolved that factual dispute against Ms. Hepburn.

The Court of Appeals correctly said "However, an overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held liable for a failure to act." *State v. Lewis*, 403 S.C. 345, 356, 743 S.E.2d 124, 130 (Ct. App. 2013). The State now contends that an over act is not required, but cites no authority for the proposition.

The State's reliance upon the alleged "flight" and the suicide attempt is also misplaced. First, even if the alleged acts were relevant, they do not take the place of the required overt act. Secondly, the alleged flight is indicative of what crime? Homicide by child abuse, for

which he was acquitted, aiding and abetting homicide by child abuse, for which he was convicted or accessory after the fact for which he was not charged. No facts in this record makes the alleged flight attributable to one crime more likely than the others. Under these facts the evidence is not substantial.

The suicide attempt is speculative at best if it is any indication of guilt. Nothing in the testimony of Dr. Vernetta Jacops, the psychiatrist who treated Mr. Lewis at the veterans hospital, supports any indication of guilt for a crime as causing his suicide attempt. Dr. Jacops testified that Mr. Lewis was simply being overwhelmed by the event sin his life which included the loss of a child he had become close to, the loss of his girlfriend and his having to testify against his girlfriend. Rec. on App. at 1062, ll 15-25. with testimony from his psychiatrist as to the cause of his attempted suicide, any inference that it was caused by his guilt over committing a crime is simply speculative at best.

CONCLUSION

As the Court of Appeals correctly concluded, in keeping with the precedent in this state, that the state failed to prove an overt act as required by the charge of aiding and abetting, this Court should deny the Petition for Writ of Certiorari filed by the State.

October 1, 2012

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