OA 12-1-98

IN THE SUPREME COURT OF FLORIDA

ETIRZA EVERSLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 92,624

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On September 27, 1996, the state filed an information in the Circuit Court for Hillsborough County charging the petitioner, Etirza Eversley, in Count One with manslaughter for causing the death of Isaiah Eversley by failing to obtain necessary medical care, and in Count Two with felony child abuse for depriving Isaiah Eversley of necessary medical treatment causing great bodily harm. Both offenses were alleged to have occurred between February 5 and 6, 1996. [I, R 21-22][1]

Eversley was tried by jury before Circuit Judge M. William Graybill on October 3 and 4, 1996. [III, T 111, 114; V, T 425] At the close of the state's case, defense counsel moved for a judgment of acquittal on both counts on the ground that the state failed to prove that Eversley was culpably negligent. [IV, T 349-354] The court denied the motion, but expressed concern about the state's proof of causation. [IV, T 354-355] At the close of all the evidence, defense counsel renewed the motion for judgment of acquittal, adding that there was insufficient evidence of causation. [V, T 440-441] The court again denied the motion, except that it reserved ruling on the element of causation. [V, T 444]

The court instructed the jury on manslaughter by culpable negligence, child abuse causing great bodily harm by culpable negligence, and child abuse by culpable negligence. [V, T 511-514]

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[1] Page references to the record on appeal are designated by a Roman numeral for the volume number, R for the record on appeal, and T for the trial transcript. References to the appendix to this brief are designated by A and the page number.

The jury found Eversley guilty of manslaughter and child abuse causing great bodily harm. [I, R 50; V, T 545-546] The court directed defense counsel to set post-trial motions for hearing on November 4. [V, T 550] The court again reserved ruling on the sufficiency of the evidence to support the jury finding that culpable negligence caused the death of the child. [V, T 551]

On November 4, 1996, defense counsel filed a renewed motion for judgment of acquittal as to both charges on the grounds that the state's evidence was insufficient to establish culpable negligence and to show that the failure to obtain medical care caused the death of the child. [I, R 87-88] Counsel also filed a memorandum of law in support of the motion. [I, R 75-80] On the same date, the court heard arguments of counsel [VI, T 557-582] and granted the motion as to both charges, relying upon the authority of Bradley v. State, 84 So. 677 (Fla. 1920), and Boyce v. State, 638 So. 2d 98 (Fla. 4th DCA 1994). [I, R 87; VI, T 582-584] The court found that the evidence supported a conviction under Count Two for the lesser included offense of misdemeanor child abuse. [VI, T 584] The court adjudicated Eversley guilty of misdemeanor child abuse and sentenced her to 364 days in jail with credit for time served. [I 81-86; VI, T 587]

The state filed a notice of appeal from the order granting Eversley's renewed motion for judgment of acquittal on November 7, 1996. [I, R 89] Defense counsel filed a notice of cross-appeal from the same order on November 22, 1996. [I, R 93]

On January 28, 1998, the Second District Court of Appeal issued its decision reversing the order granting the judgment of acquittal. [A 1-8] The district court reinstated Eversley's convictions for manslaughter and felony child abuse. [A 8] On March 4, 1998, the district court denied Eversley's motion for rehearing or certification of conflict. [A 9]

On March 16, 1998, counsel for Eversley served a notice to invoke this Court's discretionary jurisdiction. On June 22, 1998, this Court entered an order accepting jurisdiction.

STATEMENT OF THE FACTS

Carey Barron was the baby sitter for Etirza Eversley's two young children. At the time of trial, William was four years old and Rayala was three years old. [III, T 151-153] Eversley called Barron and explained that she was pregnant, she was being evicted, and she was trying to work. Eversley said she was considering putting the baby up for adoption, but she was reluctant to do that. She asked Barron to care for the baby, and Barron agreed. [III, T 162-164] Eversley also said she felt like she wanted to hurt herself and her children. [III, T 174] In Barron's deposition, she said Eversley said, "And sometimes I feel like I want to hurt myself and hurt my baby." [III, T 178-179]

On November 25, 1995, Barron and Eversley entered a written agreement for Barron to get custody of the baby when he was born. [III, T 169] Eversley's baby, Isaiah, was born on December 3, 1995. [III, T 152, 165] On December 8, 1995, Barron and Eversley entered a second written agreement giving Barron parental consent to care for Isaiah. Isaiah came to live at Barron's home the same day. [III, T 169-170] Barron and Eversley entered a third written agreement for Barron to have custody of Isaiah on January 10, 1996. [III, T 170] Isaiah did not have any health problems other than diaper rash and a rash on his face when he lived with Barron. [III, T 155, 185-186]

On Sunday, February 4, 1996, Eversley came to Barron's home and insisted on taking Isaiah home with her. Barron and Eversley entered another written agreement giving Eversley full responsibil-

ity for Isaiah. [III, T 158-159, 170-171] According to Barron, Isaiah was not having any problems breathing and did not have a cold at that time; he was fine. [III, T 160, 186-187]

Eversley's aunt, Georgina Butts, saw Isaiah that Sunday afternoon when Eversley brought him over. He appeared to be a normal, well-developed baby. He was not in distress, and did not have a cold or sniffles. [IV, T 276-278]

Eversley's other aunt, Jennifer Scott, testified for the defense that Eversley brought her baby to Scott's house on Sunday, and he appeared to be "a little sick," like he had "a little cold." [IV, T 359-362] Eversley went to the supermarket to get milk for the baby, returned to Scott's house for awhile, then went home. [IV, T 362-363]

On February 5, 1996, Eversley took Isaiah to the Sulphur Springs Health Clinic and told the desk clerk, James Keasling, that she wanted her baby to be seen. [III, T 214-215] Keasling observed that the baby seemed to be having difficulty breathing and went to get a nurse. [III, T 232-234]

Nurse Carmen Augustine saw Eversley and Isaiah at the clinic between 10:00 and 11:00 that morning. [III, T 237-239] Augustine observed that Isaiah was not breathing right. [III, T 239] She told Eversley to go to the emergency room at Tampa General or St. Joseph's. Augustine called Dr. Delossantos and insisted that Eversley should get treatment for the baby. [III, T 240] Augustine took Isaiah's pulse and did not notice anything abnormal. [III, T 243] Augustine could not remember whether she took

Isaiah's temperature, but in her deposition she said that she did and the baby did not have a fever. [III, T 243, 247-248] She did not think the baby was in distress because he was not discolored. [III, T 249-250] She told Eversley to take the baby to the emergency room because they did not have the equipment at the clinic to take a chest X-ray to determine if he had pneumonia. [III, T 251] Augustine knew that Eversley was with someone and thought she had transportation. She did not think that they needed to call an ambulance. [III, T 241]

Dr. Lydia Delossantos saw Eversley and Isaiah in the triage room at the clinic. [IV, T 260-264] She observed that the baby was grunting, but she listened to his chest with a stethoscope and did not hear any rales. [IV, T 265, 267-270] She told Eversley that the baby needed to be in the emergency room right away. [IV, T 265] She told the nurse that the baby was serious in Eversley's presence. [IV, T 266-267] She did not offer to provide transportation to the hospital because the nurse said Eversley had a friend with her. [IV, T 267] Dr. Delossantos did not call ahead to the hospital to let them know the child was coming, nor did she tell anyone else to do so. No ambulance was called because she did not hear rales and she trusted Eversley to go to the emergency room. The baby did not need to have emergency medical technicians to give him oxygen nor to come get him. [IV, T 271] Grunting is a symptom of respiratory distress, but it is not the same thing. Dr. Delossantos did not anticipate that the baby would die. [IV, T 272] She told Eversley that she had to go to the emergency room,

but not that the baby might die. [IV, T 273] She expected Eversley to carry out her instructions and did not know she was unreliable. [IV, T 274]

Eversley called Jennifer Scott around 2:30 a.m. on Tuesday. She was screaming and said something was wrong with the baby, he was not responding. Scott told her to call 911, then Eversley hung up. [IV, T 363] Eversley called 911 and reported that her baby was dead. [V, T 437-438]

Paramedics Craig McTavish and George Martinez testified for the defense that they responded to Eversley's house at 3:00 a.m. on February 6, 1996. [V 428-430, 432-433] McTavish said Eversley was sitting on the couch, holding and rocking the baby. She was crying and somewhat upset. The baby was not breathing, had no pulse, and was in cardiac arrest. He was stiff and cold with fixed, dilated pupils. [V, T 430] Eversley continued rocking the baby. She appeared to be shocked and distraught, and did not realize the baby was dead, even after Martinez told her. [V, T 431, 434]

Scott called back to find out where Eversley was living, then went to her house. Paramedics were already there. Eversley was sitting on the couch crying. The baby was on the couch, and the paramedic was kneeling down beside Eversley. [IV, T 364-365] Scott asked what was wrong. The paramedic said the baby was dead. Scott told Eversley to calm down. [IV, T 365]

Tampa Police Officer Jon Touchton received a call around 3:15 a.m. on February 6 and arrived at Eversley's house at 3:22 a.m. [III, T 190-192, 198] The emergency medical people were leaving

when Touchton arrived. [III, T 193] He found Officers Parry and Newberry speaking with Eversley in the living room. She was sitting on the couch holding the baby. [III, T 191, 195] She appeared to be very calm and collected. [III, T 197, 200] Touchton looked at the baby after another officer moved him back to the bed. The baby was cold and stiff. [III, T 192] Touchton saw no signs of physical abuse or trauma, such as bruises or cuts. [III, T 199] The baby was pronounced dead at the scene. [III, T 193-194]

Officer James Parry was a child abuse investigator assigned to investigate Isaiah Eversley's death. He went to the scene around 3:20 a.m. on February 6. A fire rescue unit was leaving as he arrived. [III, T 202-203, 208, 211] Aside from other officers, Eversley, Scott, Butts, and Eversley's brother Ernesto were there. [III, T 203-204] Eversley was calm, her eyes were not red or swollen, and it did not appear that she had been crying. [III, T 204, 209, 211] Parry interviewed her about what occurred. [III, T 204] Eversley said the baby was hers, but he had been in Barron's custody because Eversley had to work and could not take care of him. [III, T 205] Eversley said the baby was fine when she picked him up, but Barron told her the baby had been sick. [III, 205-206] Her friends drove her to the WIC Center to apply for a program to get milk, food stamps, and immediate care. [III, T 205] Eversley said the nurse at the clinic looked at the baby and told her to take him to the hospital because he was sick. Her friend Walker drove her to the St. Joseph's Hospital emergency

room. Eversley went into the emergency room, saw it was crowded, and left. Walker drove her home. [III, T 206-207] Eversley said she fed the baby a bottle around midnight, and he was having trouble breathing. Isaiah drank half the bottle, then Eversley laid him on the bed with her. [III, T 207] Her brother came over around 3:00. Eversley then noticed that the baby was not breathing. She called her aunt, who told her to call 911. She then called 911. [III, T 208]

Detective John Yaratch, a child abuse investigator, went to Eversley's house between 3:00 and 3:30 a.m. [IV, T 280-281, 312] He interviewed Eversley. [IV, T 283] She said Barron had been taking care of Isaiah. Eversley got him back on February 5, and he was fine. [IV, T 285-287] Eversley said she took Isaiah to the Sulphur Springs Clinic on Monday morning. [IV, T 287] She spoke to the nurse and the doctor. She was told the baby needed to go to the hospital because they did not have the proper equipment to take care of him. Walker dropped her off at the emergency room at St. Joseph's. [IV, T 288] Eversley said she knew Isaiah needed to be taken care of. She walked in the door and saw several people waiting in line. She did not want to wait, so she walked back out and went home in a cab. [IV, T 289] Eversley said she noticed that Isaiah was having a hard time breathing when she fed him later in the evening, but she did not seek medical attention. [IV, T 290] Eversley said Isaiah had not had any prior problems except for a rash several weeks before when he was with Barron. Barron had been caring for him because Eversley was having problems, she

was trying to work, and she did not feel she could leave the baby with her brother. Eversley was very calm during the interview. She was not crying. [IV, T 291]

On April 2, 1996, Yaratch arrested Eversley, advised her of her Miranda rights, and conducted a tape recorded interview. [IV, T 292-295, 299-303, 317-318] Eversley said she picked up Isaiah from Barron around 9:00 p.m. on Sunday, February 4. [IV, T 303-304] On Monday morning, Eversley took the day off from work and took Isaiah to the Sulphur Springs Clinic to sign him up for WIC. [IV, T 304, 310] He was wheezing and not breathing right, so she asked the nurse to look at him. The nurse told her to take him to the emergency room. [IV, T 304] The doctor also looked at Isaiah. Eversley was told to take him to the emergency room for X-rays because it seemed like a cold, but they did not have the equipment to see what was wrong. [IV, T 305, 307] Walker dropped Eversley off at the emergency room at St. Joseph's. [IV, T 305-306] When Eversley entered the emergency room it was full, and she saw two or three people in line ahead of her. [IV, T 304, 306-307] She did not want to wait because she thought Isaiah just had a cold based on what she was told at the clinic. [IV, T 304, 307] Eversley said she was impatient. She understood that they would have put hér in front if she told them her baby had difficulty breathing. [IV, T 311] She left and took a cab home. [IV, T 304, 306-307] Eversley agreed that Isaiah was having difficulty breathing when she fed him that evening. However, she said after she fed him at 5:00 p.m. he was not wheezing. He was acting right, smiling, and

talking. [IV, T 307] Isaiah drank half of his bottle at midnight. His breathing was all right. She did not give him any medication other than baby Tylenol. [IV, T 308] Isaiah went to sleep in her bed after she fed him. Her brother came to her house between 2:00 and 2:30. Eversley picked up the baby and found that he was too relaxed. He just fell out of her arms. [IV, T 309]

Dr. Laura Hair, the medical examiner, arrived at Eversley's house at 5:48 a.m. on February 6 and found that Isaiah was dead. She conducted an autopsy later that day. [IV, T 321-324] Dr. Hair examined microscopic slides of sections of his lungs and found fluid and macrophages, cells that eat debris, in the air spaces. [IV, T 326] Microbiology cultures showed Group B hemolytic Streptococcus bacteria in both lungs and blood. Dr. Hair concluded that Isaiah died of Streptococcus pneumonia. [IV, T 327] Streptococcus pneumonia may not show any symptoms other than a grunting sound. [IV, T 330-331] This bacteria is fast growing, so an illness could progress very quickly. It can cause death within 24 hours. [IV, T 331-332]

Dr. Lola Bahar-Posey was a pediatric emergency physician at Bayfront Medical Center and the Child Protection Team Medical Doctor for Hillsborough County. [IV, T 336-337] She participated in a review of Isaiah's death, in which she was provided some general information about the events that led to the death. Results from the medical examiner's office were not present. She followed up by calling Dr. Hair. [IV, T 338-339] Isaiah's death was caused by the growth of Strep pneumonia bacteria in the blood

and lungs. [IV, T 339-340] Strep pneumonia is the most common cause of illness and bacterial infections in children. It causes ear infections, sinusitis, throat infections, and pneumonia. When it causes pneumonia, there is a progression of illness. Initially the child is fretful and cranky. His appetite will decrease. He might have a stuffy nose. As the illness progresses, the child becomes air hungry and starts using additional muscles to help breathing. The abdominal and chest wall muscles start working harder. The child starts grunting and has nasal flaring. [IV, T 340, 345-346] If she saw grunting in an infant, she would be very concerned because it would mean impending respiratory problems, requiring more aggressive intervention to prevent the child from getting worse and progressing to death. [IV, T 341] In the pre-antibiotic era, the mortality rate in infants was between 20 and 50 percent. Since antibiotics became available, the mortality rate has dropped to one percent. [IV, T 341-342] How rapidly Streptococcus pneumonia progresses depends on the strain and other factors such as the child's immune system. A child could die within 32 hours. [IV, T 342-343] Grunting is a symptom of respiratory distress. It can be caused by pneumonia, shock, or anemia. [IV, T 343, 346-347] Unless a child was in shock, he would not become cyanotic until the very end. [IV, T 344] It is possible that a two month old infant would die even with antibiotics, but the incidence is much less because you can arrest the progression of the disease with antibiotics. [IV, T 348]

Dr. Edward Willey testified for the defense. [IV, T 366] He was a medical examiner for four years and a hospital pathologist for over twenty years. For the past ten years he practiced consultation medicine. [IV, T 367-368] Dr. Willey reviewed Dr. Hair's autopsy and laboratory reports, depositions of nurse Augustine, Dr. Delossantos, and Dr. Bahar-Posey, and information from the Child Protection Team. [IV, T 370-371] Isaiah was a small child, slightly more than two months old, with an infection in lung and blood of Group B Streptococcus. [IV, T 371-372] Group B Streptococcus is a common, very dangerous infection in young children, which is commonly fatal. [IV, T 372, 401, 410] The infection is dangerous because of how quickly it can grow and because it is not as easily treated as other bacterial organisms. [IV, T 374] Isaiah had a less than normal inflammatory response, which made him more vulnerable to the bacteria. [IV, T 371-374, 376] A two month old child might not display any symptoms initially, then have symptoms and rapidly deteriorate. [IV, T 374-375] Grunting indicates some difficulty breathing and requires investigation. [IV, T 375, 378-379] Streptococcus B pneumonia is a very dangerous, possibly fatal infection in a two month old child with a lack of inflammatory response. [IV, T 375-376] In very early cases, as many as half die even with treatment. At two months of age, perhaps a quarter die. [IV, T 376] There is no way to determine whether Isaiah would have survived even if he had gotten antibiotics within a short period of time after leaving the Sulphur Springs Clinic. [IV, T 377] Dr. Willey could not say

whether Isaiah would have survived if he had gotten treatment at the hospital. [IV, T 397] The chances of survival would be better with antibiotics. [IV, T 400]

Dr. Willey disagreed that the mortality rate for an infant with antibiotic therapy for Streptococcus pneumonia was less than one percent. [IV, T 400-401, 413] He consulted the Textbook of Pediatric Infectious Diseases by Feigin and Cherry, and they did not indicate anything like that favorable a result. He was familiar with Nelson's Textbook of Pediatrics, but he did not look there for the prognosis and mortality rate. [IV, T 401] The Feigin textbook stated that the mortality rate among infants with Streptococcus B was 50 percent for infants with infection immediately after birth and 25 percent for infants infected after they leave the hospital, as in this case. [IV, T 408-409, 411] Dr. Willey explained that Dr. Bahar-Posey mistakenly thought Isaiah had S pneumonia, while Group B Strep is a different and more dangerous organism. [IV, T 414-417, 420]

SUMMARY OF THE ARGUMENT

Issue I. The state is required to prove each essential element of a crime beyond a reasonable doubt. Causation is an essential element of both manslaughter and felony child abuse. The medical examiner determined that Isaiah's death was caused by Group B hemolytic Streptococcus pneumonia. The state's evidence did not establish that Eversley's failure to obtain prompt medical attention for Isaiah caused his death. The state's evidence raised a reasonable hypothesis that Isaiah probably would have recovered if he received antibiotic treatment, but it did not refute the reasonable hypothesis raised by Dr. Willey's testimony for the defense that it could not be determined whether he would have survived even with antibiotic treatment. The trial court correctly granted Eversley's renewed motion for judgment of acquittal for manslaughter and felony child abuse.

Issue II. Culpable negligence is an essential element of manslaughter, felony child abuse, and misdemeanor child abuse. Culpable negligence requires proof that the accused knew, or reasonably should have known, that her actions would result in death or great bodily harm. Dr. Delossantos and nurse Augustine saw Isaiah at the clinic and instructed Eversley to take him to the emergency room, but they did not think that it was necessary to call an ambulance. They did not tell Eversley that failure to obtain prompt medical care would result in death or great bodily harm. Dr. Delossantos did not anticipate that Isaiah would die, so a reasonable mother could not be expected to anticipate that he

would die. Eversley's statements to the police did not show that she actually knew that Isaiah would die or suffer great bodily harm without medical treatment. The evidence was legally insufficient to establish culpable negligence, so the trial court's order granting Eversley's renewed motion for judgment of acquittal should be affirmed. However, the judgment and sentence for misdemeanor child abuse should be reversed, and Eversley should be discharged.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY GRANTED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT HER CONDUCT CAUSED THE DEATH OF HER BABY.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358 (1970). "It is axiomatic that the state has the burden of proving each of the various elements of the offense, and that it must, in order to avoid the entry of a judgment of acquittal, produce legally sufficient evidence of each element." Penton v. State, 548 So. 2d 273, 274 (Fla. 1st DCA), rev. denied, 554 So. 2d 1169 (Fla. 1989).

"Manslaughter requires an element of causation." Id. One of the elements the state must prove to establish a defendant's guilt of manslaughter is a causative link between the death and the defendant's culpable negligence. Hodges v. State, 661 So. 2d 107, 109 (Fla. 3d DCA 1995), rev. denied, 670 So. 2d 940 (Fla. 1996); Cunningham v. State, 385 So. 2d 721, 722 (Fla. 3d DCA 1980), rev. denied, 402 So. 2d 613 (Fla. 1981).

The elements of felony child abuse relevant to this case include: (1) willfully, or by culpable negligence; (2) depriving a child of necessary medical care; and (3) causing great bodily harm or permanent disability. § 827.04(1), Fla. Stat. (1995); see Boyce

v. State, 638 So. 2d 98, 99 (Fla. 4th DCA 1994). Thus, felony child abuse also requires proof of a causative link between the actions of the parent and the great bodily harm.

In the present case, Dr. Laura Hair, the medical examiner, testified that two month old Isaiah Eversley died on February 6, 1998. She conducted an autopsy later that day. [IV, T 321-324] Dr. Hair examined microscopic slides of sections of his lungs and found fluid and macrophages, cells that eat debris, in the air spaces. [IV, T 326] Microbiology cultures showed Group B hemolytic Streptococcus bacteria in both lungs and blood. Dr. Hair concluded that Isaiah died of Streptococcus pneumonia. [IV, T 327] Streptococcus pneumonia may not show any symptoms other than a grunting sound. [IV, T 330-331] This bacteria is fast growing, so an illness could progress very quickly. It can cause death within 24 hours. [IV, T 331-332] Dr. Hair did not testify that failure to obtain medical care for Isaiah caused his death. [IV, T 321-332]

The state attempted to establish a causative link between the failure to obtain medical care and Isaiah's death with the testimony of Dr. Lola Bahar-Posey, a pediatric emergency physician at Bayfront Medical Center and the Child Protection Team Medical Doctor for Hillsborough County. [IV, T 336-337] Dr. Bahar-Posey participated in a review of Isaiah's death, in which she was provided some general information about the events that led to the death. Results from the medical examiner's office were not present. She followed up by calling Dr. Hair. [IV, T 338-339]

Dr. Bahar-Posey testified that Isaiah's death was caused by the growth of Strep pneumonia bacteria in the blood and lungs. [IV, T 339-340] Strep pneumonia is the most common cause of illness and bacterial infections in children. It causes ear infections, sinusitis, throat infections, and pneumonia. [IV, 340] In the pre-antibiotic era, the mortality rate in infants was between 20 and 50 percent. Since antibiotics became available, the mortality rate has dropped to one percent. [IV, T 341-342] How rapidly Streptococcus pneumonia progresses depends on the strain and other factors such as the child's immune system. A child could die within 32 hours. [IV, T 342-343] It is possible that a two month old infant would die even with antibiotics, but the incidence is much less because you can arrest the progression of the disease with antibiotics. [IV, T 348]

Dr. Edward Willey, a pathologist and former medical examiner, testified for the defense. [IV, T 366-368] Dr. Willey reviewed Dr. Hair's autopsy and laboratory reports, depositions of nurse Augustine, Dr. Delossantos, and Dr. Bahar-Posey, and information from the Child Protection Team. [IV, T 370-371] Dr. Willey testified that the autopsy report and laboratory reports showed that Isaiah was a small child, slightly more than two months old, with an infection in lung and blood of Group B Streptococcus. [IV, T 371-372] Group B Streptococcus is a common, very dangerous infection in young children, which is commonly fatal. [IV, T 372, 401, 410] The infection is dangerous because of how quickly it can grow and because it is not as easily treated as other bacterial

organisms. [IV, T 374] Isaiah had a less than normal inflammatory response, which made him more vulnerable to the bacteria. [IV, T 371-374, 376] Streptococcus B pneumonia is a very dangerous, possibly fatal infection in a two month old child with a lack of inflammatory response. [IV, T 375-376] In very early cases, as many as half die even with treatment. At two months of age, perhaps a quarter die. [IV, T 376] There is no way to determine whether Isaiah would have survived even if he had gotten antibiotics within a short period of time after leaving the Sulphur Springs Clinic. [IV, T 377] Dr. Willey could not say whether Isaiah would have survived if he had gotten treatment at the hospital. [IV, T 397] The chances of survival would be better with antibiotics. [IV, T 400]

Dr. Willey disagreed that the mortality rate for an infant with antibiotic therapy for Streptococcus pneumonia was less than one percent. [IV, T 400-401, 413] He consulted the Textbook of Pediatric Infectious Diseases by Feigin and Cherry, and they did not indicate anything like that favorable a result. He was familiar with Nelson's Textbook of Pediatrics, but he did not look there for the prognosis and mortality rate. [IV, T 401] The Feigin textbook stated that the mortality rate among infants with Streptococcus B was 50 percent for infants with infection immediately after birth and 25 percent for infants infected after they leave the hospital, as in this case. [IV, T 408-409, 411] Dr. Willey explained that Dr. Bahar-Posey mistakenly thought Isaiah had

S pneumonia, while Group B Strep is a different and more dangerous organism. [IV, T 414-417, 420]

In her renewed motion for judgment of acquittal, defense counsel argued that the state's evidence was insufficient to establish that Eversley was culpably negligent in not obtaining medical attention for her child and to establish that this failure to obtain medical attention caused the death. [I, R 87] At the hearing on the motion, defense counsel argued that the state was required to overcome every reasonable hypothesis of innocence. (VI, T 560-61) She argued that the evidence established the reasonable hypothesis of innocence was that the child died of Group B Streptococcus pneumonia, it could not be determined whether the child would have survived, and the lessened immune response and the strength of that particular bacteria would have heightened the chances for him to succumb to the illness. [VI, T 561-568] The state failed to overcome that reasonable hypothesis of innocence and failed to present a prima facie showing that the failure to obtain medical attention caused the death of Isaiah Eversley. [VI, T 568-569]

Defense counsel argued and the prosecutor agreed that the same issues are involved in the child abuse as in the manslaughter. [IV, T 581-582] The trial court granted the motion for judgment of acquittal as to both charges, relying upon the authority of Bradley v. State, 84 So. 677 (Fla. 1920), and Boyce v. State. [I, R 87; VI, T 582-584]

In Boyce, a mother and father were each convicted of one count of felony child abuse for physically and/or verbally abusing their daughter, causing her to develop encopresis, a disease where a person involuntarily or deliberately soils herself, and a second count of felony child abuse for failing to have their daughter evaluated by a physician or psychologist to ascertain the cause of the encopresis, causing her to suffer permanent psychological damage. The Fourth District found the evidence proved the parents showed reckless disregard for the life of their daughter, deprived her of necessary medical treatment, and inflicted physical and mental injury to her. However, the court found the evidence was insufficient to show that the parents' treatment of their daughter caused the encopresis or permanent psychological damage. Although a psychologist testified about the disease and its causes, he did not examine the daughter nor testify that her parents' actions caused her to develop the disease. The pediatrician who examined the daughter admitted he could not find the actual cause of the disease. Id., 638 So. 2d at 99. The Fourth District concluded that the trial court should have granted the parents' motion for judgment of acquittal and reversed their convictions on the four counts of felony child abuse. Id., at 99-100. Thus, the Fourth District found that the parents' failure to provide medical care was insufficient to prove felony child abuse in the absence of a causative link between that failure and the great bodily harm suffered by the child.

In Bradley, the defendant's epileptic daughter fell into a fire and was seriously burned while suffering a seizure. For more than a month the defendant kept his daughter at home, declined to secure treatment by a doctor, and refused to allow others to do so, relying on prayer instead. When the daughter was finally sent to a hospital, she died after three weeks of treatment. The doctors who treated her testified that her death resulted from the burn, and in their opinion she would have recovered if she had received medical attention promptly after being burned. Id., 84 So. at 679-680. This Court reversed the defendant's manslaughter conviction, holding that his refusal to provide medical treatment did not cause the death of his daughter:

> Manifestly the death of the child was caused by the accidental burning in which the father had no part. The attentions of a physician may or may not have prevented the burning from causing the death of the child; but the absence of medical attention did not cause "the killing" of the child, even if the failure or refusal of the father to provide medical attention was "culpable negligence" within the intent of the statute.

Id., 84 So. at 679.

Applying the reasoning of Bradley, Isaiah Eversley's death was caused by Group B Streptococcus pneumonia in which his mother had no part. Medical care may or may not have prevented the illness from causing his death, but the absence of medical care did not cause him to be killed, even if his mother's failure to provide medical attention was culpable negligence.

In reversing the trial court's order granting Eversley's renewed motion for judgment of acquittal, the Second District

purported to distinguish Bradley on the ground that Florida law governing child abuse has changed since Bradley was decided. [A 4] The Second District further ruled, "Modern manslaughter cases have broadly construed the causation requirement. Instead of the old 'but for' test for causation, causation may be satisfied when a defendant's action is a material contributing factor in the victim's death." [A 5] The Second District held that "a defendant may be charged with manslaughter arising out of a failure to obtain medical attention for a child in need of same." [A 5] Moreover, the Second District held that the state's evidence in this case was sufficient for the jury to find that Eversley was guilty of manslaughter on the ground that her failure to obtain medical care for Isaiah was a material contributing factor in the child's death, and that the trial court's reversal of the jury's verdict on the authority of Bradley was error. [A 5-7] The Second District also held that the trial court erred by reducing the felony child abuse conviction to a misdemeanor, finding that Eversley deprived Isaiah of medical services and that this deprivation was "at least a contributing cause of Isaiah's death." [A 7]

The Second District's holding in this case effectively overrules this Court's decision in Bradley. The Second District's decision makes a parent who fails to obtain medical attention for a sick or injured child who subsequently dies from the illness or injury liable for conviction for manslaughter, while such a parent cannot be convicted for manslaughter under Bradley. This is an

important change in the criminal law of Florida which should not have been made by the Second District.

The Second District had no authority to overrule this Court's decision. District courts are bound to follow the case law set forth by the Florida Supreme Court. Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973). "Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise." State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976). "The constitutional system of courts in this State contemplates that only the Supreme Court may overrule its own decisions." Gilliam v. Stewart, 291 So. 2d 593, 594 (Fla. 1974).

Despite the relative antiquity of the decision in Bradley, the validity of its conclusion is supported by contemporary standards for determining a defendant's guilt or innocence of manslaughter. In Hodges v. State, 661 So. 2d at 110, the Third District found that the traditional "but for" test should be applied to determine whether the defendant's conduct was a cause-in-fact of death in a manslaughter case. The court quoted its own prior decision in Velazquez v. State, 561 So. 2d 347, 350 (Fla. 3d DCA), cause dismissed, 569 So. 2d 1280 (Fla.), rev. denied, 570 So. 2d 1306 (Fla. 1990):

> "Under this test, a defendant's conduct is a cause-in-fact of the prohibited result if the said result would not have occurred "but for" the defendant's conduct; stated differently, the defendant's conduct is a cause-in-fact of a particular result if the result would not

> have happened in the absence of the defendant's conduct."

Hodges, at 110. In a footnote, at 110 n. 3, the court explained the exception to this rule:

> In cases where two defendants acting independently and not in concert with one another commit two separate acts each of which alone is sufficient to bring about the prohibited result, the courts have abandoned the "but-for test" in favor of the "substantial factor test."

Under Hodges, the exception allowing application of the substantial factor test does not apply to Eversley's case because this case does not involve two defendants acting independently who committed two separate acts each of which alone was sufficient to bring about the prohibited result.

Applying the "but for" test to the present case, the state's evidence was insufficient to establish that Eversley's failure to obtain medical care caused Isaiah's death. Neither Dr. Hair nor Dr. Bahar-Posey testified that Isaiah would have lived if he had received antibiotic treatment or other medical care. The state's only evidence suggesting a causative link between Eversley's failure and Isaiah's death was Dr. Bahar-Posey's testimony that since antibiotics became available, the mortality rate for infants with Streptococcus pneumonia has declined to one percent. This was not competent, substantial evidence that Isaiah Eversley had a 99 percent chance of survival with antibiotic treatment because Dr. Hair's testimony and Dr. Willey's testimony established that he died from a different, more dangerous infection from Group B Streptococcus pneumonia for which the mortality rate for a child

his age is 25 percent. Moreover, Dr. Bahar-Posey admitted that it is always possible that a two month old infant with a Streptococcus pneumonia infection would have died even if he had received antibiotic treatment. This evidence did not prove beyond a reasonable doubt that Isaiah would not have died but for Eversley's failure to obtain medical care.

At most, Dr. Bahar-Posey's testimony was circumstantial evidence from which a hypothesis of guilt could have been inferred, i.e., that Isaiah probably would have lived if Eversley had obtained proper antibiotic treatment for him from a doctor. This hypothesis was not sufficient to support a conviction unless the evidence negated every reasonable hypothesis to the contrary. In State v. Law, 559 So. 2d 187, 188 (Fla. 1987), this Court ruled,

> A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.

See also, Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995), cert. denied, 116 S. Ct. 823, 33 L. Ed. 2d 766 (1996). In Barwick, at 695, this Court also ruled, "To meet its threshold burden, the State must introduce competent evidence which is inconsistent with the defendant's theory of events." In Law, at 189, the Court explained, "It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences."

In Golden v. State, 629 So. 2d 109 (Fla. 1993), the issue was whether the state's circumstantial evidence was sufficient to establish that the drowning death of the defendant's wife was the result of a homicide rather than an accident. The Court explained,

> The corpus delicti of a homicide consists of three elements, i.e., "first, the fact of death; second, the criminal agency of another person as the cause thereof; and third, the identity of the deceased person." . . . The corpus delicti must be proved beyond a reasonable doubt. . . . Moreover, when circumstantial evidence is used to prove the corpus delicti, "it must be established by the most convincing, satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt." . . . By its very nature, circumstantial evidence is subject to varying interpretations. It must, therefore be sufficient to negate all reasonable hypotheses as to cause of death and show beyond a reasonable doubt that the death was caused by the criminal agency of another person. [Citations and footnotes omitted.]

Id., at 111. This Court concluded that the state's circumstantial evidence was insufficient to overcome Golden's hypothesis that his wife's drowning resulted from an accident, vacated the conviction, and directed Golden's release from custody. Id., at 111-112.

In this case, the testimony of the defense expert, Dr. Willey, as set forth above, presented the reasonable hypothesis of innocence that it cannot be determined whether Isaiah would have lived if he had received prompt medical care. Dr. Hair's autopsy and laboratory reports showed that Isaiah was a two month old child with a Group B Streptococcus infection in the lungs and blood and an inadequate inflammatory response. Group B Streptococcus is a very dangerous infection, very possibly fatal, especially for a two

month old infant with a lessened inflammatory response. It can grow quickly and is not as easily treated as other bacteria. At two months of age, a significant number, perhaps a quarter, would die. Isaiah was more vulnerable than average because of the lack of inflammatory response. There was no way to determine whether Isaiah would have survived even if he had gotten antibiotics within a short period of time after leaving the Sulphur Springs Clinic.

Regarding the mortality rate for infants, Dr. Willey explained that initially there was confusion about what type of Streptococcus organism was present. The Child Protection Team doctor, Dr. Bahar-Posey, testified in deposition that it was S pneumonia, while the lab reports revealed that it was Group B Strep, which is a different and more dangerous organism.

Dr. Bahar-Posey's testimony did not refute the reasonable hypothesis of innocence. As argued above, her testimony about the mortality rate for Streptococcus pneumonia did not address the disease from which Isaiah actually died, Group B hemolytic Streptococcus pneumonia. Also she conceded that it was possible that an infant with Streptococcus pneumonia would die even with antibiotic treatment. Under these circumstances, the state's evidence failed to negate the reasonable hypothesis of innocence that it cannot be determined whether Isaiah would have lived if he had received prompt medical care.

The Second District construed the expert testimony in this case to mean that "Isaiah had at a minimum, a seventy-five percent chance of survival, depending on the strain of pneumonia he had

contracted." [A 7] From this, the court found, "There was a significant chance that, given medical aid, Isaiah could have survived his bout with pneumonia." [A 7] While Isaiah would have had a better chance for recovery with antibiotic treatment, that does not establish that he would have survived with such treatment, nor that failure to obtain treatment caused his death. The court confused Isaiah's chances for recovery with the constitutional requirement that Eversley's guilt for causing his death must be proved beyond a reasonable doubt. The state failed to prove beyond a reasonable doubt that Eversley's failure to obtain medical care caused his death. The trial court's order granting Eversley's renewed motion for judgment of acquittal on the charges of manslaughter and felony child abuse should be affirmed.

ISSUE II

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT WAS CULPABLY NEGLIGENT.

Pursuant to the court's instructions to the jury in this case, culpable negligence was an essential element of manslaughter, felony child abuse, and misdemeanor child abuse. [V, T 511-514] See Hodges v. State, 661 So. 2d 107, 109 (Fla. 3d DCA 1995), rev. denied, 670 So. 2d 940 (Fla. 1996); Boyce v. State, 638 So. 2d 98, 99 (Fla. 4th DCA 1994); § 782.07, Fla. Stat. (1995); and §§ 827.04(1) and (2), Fla. Stat. (1995).

At trial, defense counsel moved for a judgment of acquittal as to both manslaughter and child abuse on the ground that the evidence was insufficient to establish culpable negligence. The court denied the motion. [IV, T 349-355; V T 440-441, 444] Defense counsel's renewed motion for judgment of acquittal was also based in part upon insufficient evidence of culpable negligence. [I, R 87; IV, T 560, 579-80] In granting the renewed motion, the court did not expressly address the sufficiency of the evidence of culpable negligence, but the court found the evidence sufficient to support a conviction for misdemeanor child abuse. [IV, T 582-584]

In Leet v. State, 595 So. 2d 959, 964 n. 3 (Fla. 2d DCA 1991), the Second District observed that culpable negligence involves an objective standard. The state is not required to prove the defendant's actual knowledge that his omission would lead to death or great bodily harm, so long as his conduct was gross and

flagrant, evincing a reckless disregard for human life if committed by the ordinary reasonable man.

The Fifth District defined culpable negligence in a manslaughter case as follows:

> Culpable negligence is consciously doing an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person, even though done without the intent to injure any person but with utter disregard for the safety of another.

Marasa v. State, 394 So. 2d 544, 545 (Fla. 5th DCA), rev. denied, 402 So. 2d 613 (Fla. 1981), overruled on other grounds, Dellinger v. State, 495 So. 2d 197 (Fla. 5th DCA 1986).

Similarly, the standard jury instruction for manslaughter includes the following definition:

> Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

Fla. Std. Jury Instr. (Crim.), pp. 69-70.

Thus, the state was required to prove that Eversley knew or reasonably should have known that failure to obtain prompt medical care for Isaiah was likely to result in death or great bodily injury.

When Eversley took Isaiah to the Sulphur Springs Clinic, nurse Augustine told her to go to the emergency room at Tampa General or St. Joseph's because the clinic did not have the equipment to do a chest X-ray to determine if the baby had pneumonia. [III, T 240, 251] However, Augustine also testified that the baby's pulse was

normal, and he did not have a fever. [III, T 243, 247-248] She did not think that the baby was in respiratory distress. [III, T 249] She did not think it was necessary to call an ambulance. [III, T 241]

Dr. Delossantos also told Eversley the baby needed to be in the emergency room right away. [IV, T 265-266, 273] She told the nurse in Eversley's presence that the baby was serious. [IV, T 266-267] However, she did not tell Eversley anything else about the baby's condition, [IV, T 266] even though she thought he could have pneumonia. [IV, T 270] She did not offer to provide transportation because the nurse said Eversley had a friend with her. [IV, T 267] She did not call ahead to the hospital to let them know the baby was coming. She did not call an ambulance because she did not hear rales and because she trusted that Eversley would go to the emergency room. [IV, T 271, 274] The baby did not need emergency medical personnel to come get him or to give him oxygen. [IV, T 271-72] Grunting is a symptom of respiratory distress, but it is not the same thing. Dr. Delossantos did not anticipate that the baby would die. [IV, T 272] She did not tell Eversley that he might die. [IV, T 273]

The testimony of nurse Augustine and Dr. Delossantos did not support a finding that Eversley reasonably should have known that failure to secure prompt medical attention for Isaiah would result in death or great bodily harm. Dr. Delossantos did not anticipate that he would die, so a reasonable mother with no medical training could not be expected to anticipate his death. While both the

nurse and the doctor told Eversley that Isaiah needed to go to the emergency room, neither medical professional thought that the situation was so urgent that an ambulance should be called. Nor did they instruct Eversley that Isaiah could suffer great bodily harm unless he received medical care right away.

Eversley's statements to Officer Parry and Detective Yaratch do not show that she had actual knowledge that Isaiah would die or suffer great bodily harm without prompt medical care. She said Isaiah was wheezing and not breathing right when she took him to the clinic. [IV, T 304] The nurse and the doctor told her to take Isaiah to the emergency room because he was sick. [III, T 206] The nurse or the doctor told her to take him to the emergency room to get some X-rays because it seemed like a cold, but he was not breathing right, and they did not have the equipment to see what was wrong. [IV, T 304-305, 307] Eversley knew that Isaiah needed to be taken care of when she went to the emergency room. [IV, T 289] The emergency room was crowded when she arrived, although there were only two or three people in line ahead of her to talk to someone, and she knew that she could get prompt attention if she told someone her baby was having trouble breathing. She left and went home because she was too impatient to wait and she believed it was just a cold. [III, T 206-207; IV, T 288-289, 304, 306-307, 311] Eversley also said Isaiah was having trouble breathing when she fed him at midnight and in an earlier feeding. [III, T 207; IV, T 290] Thus, Eversley's statements show that she was aware that Isaiah was having trouble breathing, but she believed he just

had a cold. The statements do not show that she knew that failure to comply with the instructions to take him to the emergency room would result in death or great bodily harm.

Because the state's evidence did not establish that Eversley actually knew or reasonably should have known that failure to obtain prompt medical care would result in Isaiah's death or great bodily harm, it was insufficient to establish culpable negligence. The trial court's order granting Eversley's motion for judgment of acquittal on manslaughter and felony child abuse should be affirmed. The judgment and sentence for misdemeanor child abuse should be reversed, and Eversley should be discharged.

CONCLUSION

Petitioner respectfully requests this Honorable Court to quash the decision of the Second District Court of Appeal, affirm the trial court's order granting Eversley's motion for judgment of acquittal on manslaughter and felony child abuse, and reverse the judgment and sentence for misdemeanor child abuse with directions to discharge Eversley.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA)
)
Appellant/Cross-Appellee,)
)
v.) CASE NO. 96-04693
)
ETIRZA EVERSLEY)
)
Appellee/Cross-Appellant,)
)
)

Opinion filed January 28, 1998.

Appeal from the Circuit Court for Hillsborough County; M. William Graybill, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica A. Raffel, Assistant Attorney General, Tampa, for Appellant/Cross-Appellee.

James Marion Moorman, Public Defender, and Paul C. Helm, Assistant Public Defender, Bartow, for Appellee/Cross-Appellant.

QUINCE, Judge.

Etirza Eversley was charged with and convicted of manslaughter and felony child abuse arising out of the death of her infant son, Isaiah. In response to

Eversley's motion for judgment of acquittal, the trial court overturned the jury's verdict of manslaughter and reduced the child abuse conviction to a misdemeanor. Our review of the record indicates there is sufficient evidence to support the jury's determination of guilt on both counts. Therefore, we reverse the order of the trial court granting the judgment of acquittal and reducing the child abuse charge.

Baby Isaiah was two months old when his mother retrieved him from Carey Barron, the woman to whom she had given him immediately following his birth. Eversley had originally given Isaiah away because she had to work and could not care for him. As evidence of her relinquished custody, Eversley had entered into a written agreement stating that Ms. Barron would be caring for Isaiah. On Sunday, February 4, 1996, Eversley decided to care for Isaiah and went to Ms. Barron's home to retrieve the baby. The evidence regarding whether Isaiah showed signs of ill health at that time is conflicting. Eversley told a police officer that when she picked up Isaiah, Ms. Barron told her he was sick. Ms. Barron, however, testified that he was not sick on Sunday. And, Eversley's aunt, who saw the child around 4:00 p.m. on Sunday, said he was not sick at that time.

Isaiah was clearly exhibiting signs of being ill the next morning. According to Officer James Parry of the Tampa Police Department, Eversley took Isaiah to a nearby clinic to obtain some formula and while there a nurse told Eversley to take Isaiah to the hospital. However, a clerk at the clinic testified that Eversley asked to have a staff member examine Isaiah. A nurse was called and she observed Isaiah and determined that he was having difficulty breathing. Isaiah was breathing in a

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labored, raspy fashion and "grunting" for breath. The nurse summoned a doctor to further examine Isaiah. Both the nurse and a doctor repeatedly advised Eversley that she must take Isaiah to the emergency room. The nurse specifically told Eversley that the clinic did not have the equipment to verify whether Isaiah had pneumonia and that she must take him directly to the hospital. Both the doctor and the nurse stressed more than once that Isaiah's condition required immediate medical assistance.

In response to their directions, Eversley left the clinic and took Isaiah to the St. Joseph's Hospital emergency room. Upon entering, Eversley noticed there were two or three patients in line ahead of her. Eversley immediately became impatient and left the hospital without attempting to obtain medical aid for Isaiah.

Around midnight, Eversley attempted to feed Isaiah. He was still having difficulty breathing. Isaiah had exhibited similar breathing difficulty during a prior feeding earlier that evening. Nevertheless, Eversley lay down on her bed with Isaiah and went to sleep. At a few minutes before 3:00 a.m., Eversley's brother came home and she awoke. At that point Eversley noticed Isaiah was not breathing and called her aunt, who directed Eversley to call 911 for emergency assistance.

At approximately 3:05 a.m. on February 6, 1996, the paramedics arrived at Eversley's home. They found Isaiah stiff, cold, without a pulse and with fixed, dilated pupils. He seemed to have been dead for quite some time.

At trial, causation was the pivotal issue. Eversley argued that pneumonia, not her actions, caused Isaiah's death. Following a jury trial and conviction, Eversley again raised the issue of causation. Conflicting testimony over the strain of pneumonia

Isaiah had contracted was cited to support statistics regarding the likelihood that a child will die as a result of having pneumonia.

Relying on Bradley v. State, 84 So. 677 (Fla. 1920), the trial court found that a parent's failure to provide medical care for a child suffering from an injury or illness is not the legal cause of the child's death; therefore, a charge of manslaughter would not lie in such a case. We believe Bradley is not applicable to the facts of this case; therefore, the trial court's reliance on Bradley was error.

The Bradley decision was premised upon the 1906 manslaughter statute and the state of the law regarding child abuse and neglect at the turn of the century. Since our supreme court authored the Bradley decision, the law has come to recognize the paramount importance of protecting the children under its jurisdiction. To that end, the legislature has enacted extensive child abuse regulations directed at enumerating and criminalizing acts of brutality and neglect perpetrated against children. Florida law specifically recognizes that the failure to obtain medical assistance for a sick child is an act subject to criminal penalties. See, e.g., § 827.04, Fla. Stat. Florida law has advanced considerably from the time when, as the Bradley decision itself acknowledged, "[t]here is no statute in this state specifically making the failure or refusal of a father to provide medical attention for his child a felony...." Id. at 679. Our decision today recognizes that Bradley's reasoning is no longer applicable to this State's view of the criminality of child abuse. Thus, we believe Bradley to be distinguishable and inapplicable to the present case.

We have determined that a defendant may be charged with manslaughter arising out of a failure to obtain medical attention for a child in need of same. However, our analysis does not end there. We must now determine whether Eversley's actions rose to the level of culpability required to support a manslaughter conviction.

Manslaughter may be proven by evidence that a defendant, (i) causes the death of a person, (ii) by culpable negligence, and (iii) without lawful justification. § 782.07, Fla. Stat. (1995). Culpable negligence occurs when a defendant recklessly or wantonly disregards the safety of another. Modern manslaughter cases have broadly construed the causation requirement. Instead of the old "but for" test for causation, causation may be satisfied when a defendant's action is a material contributing factor in the victim's death. Maynard v. State, 660 So. 2d 293 (Fla. 2d DCA 1995)(defendant whose victim died of heart attack brought about by assault was guilty of manslaughter).

In this case, the mother's failure to provide the medical attention needed contributed to the baby's death. Eversley testified that Isaiah was "not breathing right" throughout Monday and into the early morning hours of Tuesday. She said he was fussy and not eating. She confirmed that the clinic staff directed her to go immediately to the hospital and that she followed those directions. She further admitted that she failed to obtain medical care for Isaiah at the hospital because she was "impatient" and did not wish to wait until the hospital staff had assisted the two or three people in line ahead of her. Eversley even acknowledged that she was aware that if she had informed the hospital staff that Isaiah was ill and had been sent there by a doctor, the

hospital staff would have taken Isaiah first on an emergency basis. Despite this knowledge, Eversley made no effort to advise the hospital staff of Isaiah's condition.

Eversley attempts to excuse her behavior by alleging that she thought Isaiah only had a cold. However, this argument is belied by the testimony from the nurse at the clinic that she advised Eversley that the clinic's equipment was insufficient to determine whether Isaiah was suffering from pneumonia. Moreover, there is no evidence in the record that Eversley attempted to obtain medication to treat the ailment she allegedly believed Isaiah was suffering, namely a cold. We believe this behavior epitomizes willful and wanton recklessness.

Isaiah was an infant, dependant upon adults to care for his every need. Eversley's behavior demonstrated that she was aware of Isaiah's ill health. Eversley removed Isaiah from Ms. Barron's care, the only other caretaker who could have ensured he got the medical attention he needed. Eversley alone controlled Isaiah's ability to obtain medical assistance. It was for the jury to decide whether Eversley's failure to obtain medical services for Isaiah was a contributing cause of his death. The jury resolved that issue against Eversley.

The various experts who testified in this case concluded that Isaiah had at a minimum, a seventy-five percent chance of survival, depending on the strain of pneumonia he had contracted. Medical science has progressed significantly since the days when "it was not capable of being proven that if the child had had medical attention it would have recovered." Bradley, 84 So. at 679. There was a significant chance that, given medical aid, Isaiah could have survived his bout with pneumonia.

Eversley's withholding of medical care eliminated that chance. We are not persuaded that this chance was significantly impacted by Isaiah's weakened immune system. A defendant takes her victim as she finds him. Maynard, 660 So. 2d at 296. His condition does not erase the causative connection between Eversley's culpable negligence and Isaiah's premature death.

The jury heard substantial competent evidence from which it could have reasonably concluded that Eversley was criminally responsible for causing Isaiah's death. Id. The trial court's reversal of the jury's verdict upon the authority of Bradley was error.

We also find the trial court's reduction of the felony child abuse conviction to a misdemeanor to be error. Felony child abuse is proven by evidence that a person willfully or by culpable negligence deprives or allows a child to be deprived of medical treatment, and in so doing causes great bodily harm. § 827.04(1), Fla. Stat. Eversley's capricious decision to leave the emergency room, despite her knowledge that she could obtain immediate assistance, evidences a specific and willful intent to deny Isaiah medical services. Nicholson v. State, 600 So. 2d 1101 (Fla. 1992), cert. denied, 506 U.S. 1008 (1992)(defendant who controlled child victim's intake of food and denied the child food offered by others acted willfully); Leet v. State, 595 So. 2d 959 (Fla. 2d DCA 1991)(defendant who did nothing to protect child from mother's acts of abuse found culpably negligent). The deprivation in this case was at least a contributing cause of Isaiah's death. The jury appropriately convicted Eversley of felony child abuse.

We hereby reinstate Eversley's convictions for manslaughter and felony child abuse.

ALTENBERND, A.C.J., and FULMER, J., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

MARCH 4, 1998

STATE OF FLORIDA, Appellant(s), v. ETIRZA EVERSLEY, Appellee(s).	)	Case No. 96-04693

BY ORDER OF THE COURT:

Counsel for appellee/cross-appellant having filed a motion for rehearing or certification of conflict in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

Received By

[illegible]

[illegible]
Public Defender's Office

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

Wm. Haddad

WILLIAM A. HADDAD, CLERK

c: Erica M. Raffel, A.A.G.
Paul C. Helm, A.P.D.
Honorable Richard L. Ake

/PM

DISTRICT COURT OF APPEAL * SECOND DISTRICT * SAT CITO SI RECTE * STATE OF FLORIDA

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 1st day of July, 1998.

Respectfully submitted,

Paul C. Helm

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