

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC93348
	)	
	)	
SHARNIQUE N. JONES,	)	
	)	
Appellant.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION TWENTY  
THE HONORABLE COLLEEN DOLAN, JUDGE

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APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Appellant, Sharnique Jones, was convicted following a jury trial in the Circuit Court of St. Louis County of murder in the second degree, Section 565.021, endangering the welfare of a child in the first degree, Section 568.045, and assault in the second degree, Section 565.060.<sup>1</sup> The Honorable Colleen Dolan sentenced Sharnique to concurrent terms of imprisonment of fifteen, seven and seven years respectively. The Eastern District Court of Appeals reversed Sharnique's conviction for second degree murder and affirmed the other convictions. After rehearing *en banc*, the Court of Appeals adopted the panel opinion and transferred the cause to this Court. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

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<sup>1</sup> Statutory citations are to RSMo 2000.

## STATEMENT OF FACTS

Sharnique Jones was charged with the murder of her infant, Shaquir Jones-Boyd, and the assault and endangerment of her infant, Demond Whitehead (L.F. 8-9). Sufficiency of the evidence is at issue, as is the sufficiency of proof of the corpora delicti to justify the admission of Sharnique's statement to Detective Clayborn.

Shaquir was born on January 3, 2008 (Ex. 4). Her mother brought her into St. Louis Children's Hospital emergency room three days later with jaundice (Tr. 326).<sup>2</sup> She appeared to be yellowing and Sharnique told the staff that the baby was not feeding as well as she had been (Tr. 328-329). The baby was examined and her bilirubin was tested, but she was not admitted as her bilirubin level was not high enough to require treatment for the jaundice (Tr. 330-332).

Sharnique brought the baby in again two days later on January 8, for jaundice and not feeding as well (Tr. 333-334). Her bilirubin was lower than before (Tr. 334). Sharnique reported some mucousy vomit, maybe slightly red (Tr. 335). The hospital staff had no explanation for that as her vital signs were normal (Tr. 336). Sharnique was told to give the baby smaller more frequent feedings and burp between them (Tr. 336).

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<sup>2</sup> Shaquir's medical records were admitted as Exhibit 11 and are filed with this Court.

Sharnique brought the baby into the ER on the 16<sup>th</sup> of January, reporting decreased feeds and irritable, with 100.5 degree temperature (Tr. 337-338). She did not have a temperature in the ER, but since she was so little, they admitted her to run tests and rule out a bacterial infection (Tr. 339). The hospital put Shaquir on antibiotics and did a spinal tap, chest x-ray, and checked her urine, blood, and nasal passages (Tr. 340). She was released from the hospital on the 19<sup>th</sup> after all tests were negative for a bacterial infection (Tr. 340-341). The doctor assumed it was a virus and reported that the baby did well in the hospital and ate well (Tr. 341-342).

While the baby was in the hospital, a lactation consultant talked to Sharnique about breastfeeding (Tr. 342). They also talked to her about Nurses for Newborns (a newborn crisis assistance program), Parents as Teachers, and safe sleep practices to prevent sudden infant death syndrome (Tr. 342-345).<sup>3</sup>

Sharnique brought Shaquir into the hospital on January 27, with a report that she had possibly taken too much Zantac (Tr. 347). Zantac is given to babies who have reflux or spit up (Tr. 347). According to Sharnique, a man who had

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<sup>3</sup> The pediatrician who testified at trial said that SIDS is not something specific that kills babies – it just means unexplained infant death (Tr. 345). He testified that research has found that overwhelmingly SIDS deaths were from unsafe sleeping – face down, or with someone else, or with pillows around their faces (Tr. 346).

previously raped her came into the house and took the baby off the couch (Tr. 348). He took the baby into the bathroom then went into the bedroom and got the Zantac (Tr. 348). He went back into the bathroom and stayed there for about ten minutes with the door locked (Tr. 348). Sharnique pounded on the door, trying to get him out (Tr. 348). He came out and handed her the baby (Tr. 348). The baby had what looked like Zantac on her mouth and her clothing (Tr. 348). The man ran out of the house, and Sharnique went straight to the hospital with Shaquir (Tr. 349).

The baby was admitted to the hospital and had a drug screen, but she did not have anything in her system (Tr. 350). Other tests were normal, and she was discharged on the 28<sup>th</sup> (Tr. 352). Her next admission was on February 4, when her mother brought her in with a fever (Tr. 352). In the emergency room, the baby's temperature was 103 to 104, so lab work was run this time as well, and she was given antibiotics (Tr. 353-354). She was discharged on the 7<sup>th</sup> as healthy (Tr. 354).

On January 30, Sharnique took Shaquir to Cardinal Glennon Children's Hospital, then on February 16, back to St. Louis Children's Hospital with reports of vomiting and diarrhea (Tr. 355-356). She was sent home without treatment, and Sharnique was encouraged to give her fluids (Tr. 357).

Two days later, the baby came in by ambulance (Tr. 357-358). Sharnique said that she was sleeping and she went to check on her, and the baby did not look as if she was breathing (Tr. 358). Her lips looked blue (Tr. 362). She was

breathing when she was brought in and the ambulance reported she looked totally normal, but the hospital admitted her and discharged her on the 20<sup>th</sup> (Tr. 359-361). There were no instances of not breathing, called “apnea,” while she was in the hospital (Tr. 361). Nothing would explain why she had an episode of apnea (Tr. 362). A swab of her nose on that admission ended up growing rhinovirus, which is a common cold (Tr. 365).

Amanda Simon of the Children’s Division got a referral from the hospital for a newborn crisis assessment (Tr. 598-601). Simon met with Sharnique at the hospital, who explained that the walk-in pediatric clinic was not open at the right times for her (Tr. 605-607). The explanation seemed appropriate to Simon (Tr. 607).

Sharnique brought Shaquir into the ER two days later saying that the baby was not breathing (Tr. 366). She would not breathe for about five second and then cough, and there was blood mixed with saliva in her mouth afterwards (Tr. 367). The ER observed that the baby was breathing a little fast and grunting and her nostrils were flaring (Tr. 367). Babies will do that when they are struggling to breathe (Tr. 367). She did not have any true apneic spells in the ER, just the intermittent grunting (Tr. 358).

The medical team was concerned about so many hospitalizations and ER visits and such a young age (Tr. 371). Sharnique brought the baby in again on March 9 with another report of apnea at home, so they gave her a neurology work-up (Tr. 373, 425).

The neurologist was suspicious there was the possibility of seizures (Tr. 426). Shaquir's records indicated the interruption of her level of alertness and some stiffening of the extremities and her eyes would become fixed (Tr. 426-427). About three percent of newborns are going to have seizures related to labor and delivery, and others have underlying causes (Tr. 428). Infants can have seizures that are not observable (Tr. 431).

The neurologist examined Shaquir and an EEG clearly demonstrated that she did in fact have seizures (Tr. 433-434). She was started on phenobarbital to control them (Tr. 437).

Sometime in mid-March Amanda Simon of the Children's Division did a home visit (Tr. 609). The baby was sleeping on the couch on her back with a blanket wrapped around her (Tr. 611). Simon did not consider that a safe sleep practice and talked to Sharnique about that (Tr. 612).

Sharnique brought the baby in on March 19, saying she was vomiting, had diarrhea, and a fever (Tr. 375). The staff thought she looked well and she had no fever, but they admitted the baby (Tr. 375). She did well and she was discharged on the 20<sup>th</sup> (Tr. 376). She was diagnosed with stomach flu, although the labs were negative and she did not have any diarrhea or vomiting in the hospital (Tr. 377).

She had another admission on March 21 when she stopped breathing at home (Tr. 378). She was brought in the ambulance and so the neurologist did more tests and another EEG (Tr. 440). She had three seizures during the EEG itself (Tr. 441). The neurologist did not feel at the time that they were life-

threatening seizures (Tr. 446). He did not believe that the apneic episodes would have been the cause of the seizures (Tr. 451).

On April 7, paramedics and police were called to Sharnique's home because Shaquir was not breathing (Tr. 290-291). Pine Lawn police chief Collins was the first on the scene, and he found Shaquir lying on a twin bed just below the pillows (Tr. 293-295). A bassinet was in the room as well (Tr. 295). Collins gave the baby CPR until the paramedics arrived (Tr. 295). She was pronounced dead at Children's Hospital (Tr. 311, 379).

The pathologist who autopsied Shaquir found lividity on her back, which did not mean she was on her back when she died (Tr. 499). He found no malnutrition or brain injury (Tr. 501). There was a therapeutic level of phenobarbital in her bloodstream (Tr. 504). Dr. Ariel Goldschmidt ruled the cause of death as natural causes: seizure disorder, and Dr. Michael Graham signed the death certificate (Tr. 511, 517).

Sharnique gave birth to Demond Whitehead on January 17, 2009 (Ex. 5). He came to the hospital ER on January 20 by ambulance (Tr. 382).<sup>4</sup> He was a little jaundiced and dehydrated and he was admitted (Tr. 383). Sharnique reported that he was lethargic at home; he was not waking himself up to feed (Tr. 384).

Demond had a complete septic work-up in the ER (Tr. 679). Nothing tested positive for infection (Tr. 384). Sharnique told the staff that she was

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<sup>4</sup> Demond's hospital records are Exhibit 13.

feeding him about 20 ccs every three to four hours (Tr. 679). They were concerned that was insufficient calories and he was undernourished (Tr. 679).

Demond was in the hospital until the 24<sup>th</sup> (Tr. 384-385). His mother kept reporting that he did not want to eat at home, but he ate orally at the hospital (Tr. 385). The hospital found him difficult to feed – he took a lot of effort and time, and he would tire easily sucking (Tr. 679-681). Sharnique’s perception was that he should be given just as much as he would take and no more, but he was getting about 80 calories per day when he needed about 250-275 (Tr. 681).

The hospital put a naso-gastric (NG) tube in Demond to drip formula directly into his stomach (Tr. 681). Sharnique thought that was force-feeding him (Tr. 681). She thought it made him cry, and it caused a stomach-ache and he would spit up (Tr. 681). So on the 24<sup>th</sup>, Sharnique took Demond out of the hospital against medical advice (Tr. 385, 683). The staff was unable to talk her out of it, and made her sign a form (Tr. 388, 683, Ex. 13A). They had decided that Demond was younger gestationally than they originally thought, actually premature, and Sharnique would need to be extra diligent feeding him (Tr. 390).

Demond was brought to the hospital on January 26 by ambulance for being apneic, as reported by Sharnique (Tr. 391). She said she was feeding him when he suddenly became apneic and cyanotic (Tr. 391). They gave him oxygen in the ambulance, and he was not in respiratory distress in the ER (Tr. 391). He was admitted to the hospital, because they were concerned there was an infection (Tr.

392). The neurologist examined Demond and found no evidence of a seizure disorder nor evidence of any apnea (Tr. 462-463).

A social worker met with Sharnique during this second hospitalization and expressed concern that she was underfeeding the baby (Tr. 644-645). Sharnique appeared angry (Tr. 648). There had been a hotline call to the Children's Division (Tr. 648). There were multiple attempts by medical staff to talk with Sharnique about feeding Demond more, but she continued to believe it was force-feeding and did not want to participate (Tr. 649).

The social worker wrote a letter to the juvenile officer with an affidavit from the pediatrician, stating that Demond was suffering from nutritional neglect (Tr. 649-652, 695, Ex. 21, Ex. 22). They were concerned that Demond was not going to be fed enough at home, and they had determined not to let him be removed from the hospital against medical advice this second time (Tr. 697, 702). They informed Sharnique that the courts were taking protective custody of Demond (Tr. 393, 703). He went to foster care, where the foster mother reported that they had to wake him every couple of hours to feed him, he had trouble sucking, and he would just rather sleep (Tr. 589, 595).

Detective Harolton Clayborn of the St. Louis County Police Department was assigned to investigate the nutritional neglect case of Demond (Tr. 726-732). He went to speak to Sharnique at her home with another officer (Tr. 736). They told Sharnique they were doing an investigation involving Demond and asked if

she would come to headquarters to speak with them (Tr. 737-739). She agreed and rode in the car with the detectives back to the station (Tr. 739-741).

Sharnique was placed in an interview room which was locked whenever the officers left the room (Tr. 14, 744). She appeared to understand what was going on and signed and initialed the rights warning and waiver form (Tr. 748-754).

Sharnique told about Demond missing feedings and taking him to the hospital (Tr. 760). She was feeding him less than an ounce at a time (Tr. 760). The nurse came by and saw that Demond had chapped lips and a dry mouth, and suggested Sharnique take him to the hospital (Tr. 760). At the hospital, they told her he was malnourished (Tr. 761). Sharnique felt they were accusing her of not taking care of Demond (Tr. 761).

She thought they were force feeding him through a tube, and she objected (Tr. 762). She took Demond out of the hospital against doctor's orders, and they told her he would be in jeopardy if she took him out of the hospital (Tr. 762-763). She said she knew what she was doing (Tr. 763). Sharnique accused Detective Clayborn of coming at her about not taking care of her child; she was agitated; she said she had taken care of children before and she was a good mother (Tr. 763-764).

Sharnique brought up Shaquir (Tr. 765). She said she had a child before who passed away, and she was fearful about Demond because of what happened to Shaquir (Tr. 765-766). She was sad when she talked of Shaquir (Tr. 766).

Clayborn showed her the letter and affidavit from the hospital, and Sharnique admitted that she had missed feedings (Tr. 766-767). Between the 19<sup>th</sup> and 20<sup>th</sup> she missed six feedings, and between the 25<sup>th</sup> and 26<sup>th</sup> she missed five feedings, because the baby was not eating (Tr. 769). On the 26<sup>th</sup>, the day he went to the hospital the second time, Sharnique said that she was burping him on her lap and she was distracted by the television (Tr. 769). When she looked back, he was face down in the burp rag and was not breathing (Tr. 769-770). She performed CPR and blew in his face; his face was blue (Tr. 770).

Clayborn told her he did not think she was telling the whole truth about what happened (Tr. 771). Sharnique was crying and yelling and saying she would never hurt her son (Tr. 771). She said his face was down in the burp rag; Clayborn believed that she had said it was turned to the side the first time she told him (Tr. 772). Sharnique was scared because of what had happened to Shaquir (Tr. 774).

The interrogation continued until after lunch (Tr. 776-778). She had signed the rights waiver at 9:47 a.m. (Ex. 1). After a lunch break, they “went over the burping incident again” (Tr. 776-779). Sharnique again told Clayborn what happened, and again said that she was scared because she had lost Shaquir the year before (Tr. 779-780). Clayborn knew that Shaquir’s death had been ruled from natural causes, but he decided to interrogate Sharnique about her death (Tr. 780-781). He said that things seemed “kind of odd” and he did not think that Shaquir passed away due to the seizures (Tr. 781-784).

Sharnique started to cry (Tr. 784). She said that after the burial, a friend had told her that someone dropped Shaquir (Tr. 784). She had no contact information for the friend, which Clayborn thought to be suspicious (Tr. 785-786). He told Sharnique he did not believe her and did not think she was telling the truth (Tr. 788). She asked if she was going to jail, and he said yes, he was going to arrest her for what happened to Demond (Tr. 791). Sharnique cried (Tr. 791).

Clayborn said that Sharnique “owed Shaquir a better explanation for what happened” (Tr. 793). Sharnique said that she laid Shaquir down on a pillow on the bed with her face turned to the side and then went downstairs (Tr. 793). She was downstairs for fifteen or twenty minutes, then went back upstairs and discovered Shaquir (Tr. 795).

Clayborn told Sharnique again that she was not telling the truth and she was responsible for Shaquir’s death (Tr. 795-796). Sharnique then said that she was overwhelmed and frustrated, and Shaquir had been crying (Tr. 796). She could not stop her from crying, so she laid her down face down in the pillow (Tr. 796). She went downstairs thinking about killing herself (Tr. 797-798). Two boys came home and interrupted her, so she went back upstairs and found Shaquir not breathing (Tr. 798-799). Clayborn confronted her about “being a good mother” and said if she was, she “knew if you place a child face down in a pillow, you knew you’re going to harm that child” (Tr. 801). Sharnique said “I didn’t think twice about what was going to happen to her or me” (Tr. 801).

Clayborn asked Sharnique to tape a confession, and she agreed (Tr. 803). The tape ended at 5:07 p.m. (Ex. 24).<sup>5</sup>

Sharnique was charged with the murder in the second degree of Shaquir, assault in the first degree for the burp rag incident with Demond, and endangering the welfare of a child for not feeding Demond properly (L.F. 8-9). The medical examiner amended Shaquir's death certificate to "homicide" (Tr. 548). A motion to suppress statements was overruled after a hearing (L.F. 10-13, Tr. 4).

At trial, defense counsel presented the testimony of forensic pathologist Janice Ophoven, who examined the medical and DFS records of both Shaquir and Demond as well as Sharnique's medical records (Tr. 850-863). Shaquir was born on the small side (Tr. 866). Her mother had a chlamydia infection and a forceps delivery of the baby (Tr. 866). Within three days, Shaquir showed signs of not thriving (Tr. 866).

She came back to the hospital, her bilirubin was elevated and she was listless (Tr. 868). She was a little dehydrated and they checked for infection (Tr. 869). A newborn crisis assessment was done, because the mother was insecure about her ability to do what she needed to do (Tr. 870). She was told she was over-feeding the baby, causing her to spit up, which would not have added to

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<sup>5</sup> The tape was played for the jury with a transcript provided (Tr. 808, 813, Ex. 2, 24).

Sharnique's confidence (Tr. 871-872). Shaquir was prescribed Zantac for the spitting up, which is common (Tr. 872).

In March, Shaquir was diagnosed with seizures and apnea (Tr. 876). Dr. Ophoven testified that seizures can cause breathing to stop intermittently (Tr. 877). She died face-down from indications of livor mortis, but in Dr. Ophoven's opinion, the cause of death is undetermined (Tr. 878-879). There were no signs of SIS or suffocation (Tr. 878-879). Lying a baby face down in a pillow is not indicative of intentional suffocation, because parents still believe that face down sleeping will keep a baby from choking if it spits up (Tr. 883-885). Dr. Ophoven testified that SIDS is not asphyxia – SIDS is unknown death, which can be tied to unsafe sleeping (Tr. 886).

Dr. Ophoven testified that Demond had an APGAR of 6 when he was born and was premature (Tr. 887-889). Premature babies have poor muscle tone and the ability to coordinate swallowing is not good (Tr. 890). They tend to tire out quicker than they can get all the food in, so they have to have a tube down them (Tr. 890). The baby needed to be assisted in caloric intake (Tr. 892). There were a lot of reasonable explanations for why this baby had a rough start besides the suggestion that it was foul play or intentional (Tr. 892).

The jury returned verdicts of guilty of murder second, endangering in the first degree, but the lesser of assault in the second degree Tr. 1021, L.F. 52-54). On October 20, 2011, the Honorable Colleen Dolan sentenced Sharnique to

concurrent terms of imprisonment of fifteen, seven and seven years (Tr. 1025, 1027, L.F. 60-62). Notice of appeal was filed October 28, 2011 (L.F. 64).

The Missouri Court of Appeals, Eastern District, issued an opinion of October 2, 2012, reversing the conviction of second degree murder. *State v. Jones*, 2012 WL 4497968 (Mo. App., E.D., Filed Oct. 2, 2012). After a rehearing en banc, the Court of Appeals readopted its opinion but transferred the appeal to this Court.

**POINTS RELIED ON**

**I.**

**The trial court erred in overruling defense counsel’s motions for judgment of acquittal and sentencing Sharnique on her conviction of murder in the second degree, because there was insufficient evidence from which a rational finder of fact could find Sharnique guilty beyond a reasonable doubt, in violation of her right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the state’s evidence failed to prove that Sharnique knew or was aware that her conduct was practically certain to cause the death of Shaquir when she put her face down on a pillow on the bed.**

*State v. Mattingly*, 573 S.W.2d 372 (Mo. App., St. L. D. 1978);

*State v. Patterson*, 443 S.W.2d 104 (Mo. banc 1969);

*State v. Johnston*, 868 S.W.2d 226 (Mo. App., W.D. 1994);

*State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 18(a);

Sections 562.016 and 565.021; and

MAI–CR 3d 313.04.

## II.

The trial court erred in overruling defense counsel's motion for judgment of acquittal and sentencing Sharnique for endangering the welfare of a child in the second degree, because this violated her right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the state's evidence failed to establish beyond a reasonable doubt that she acted knowingly in failing to provide Demond with adequate nutrition such that it created a substantial risk to his life or health.

*State v. Kuhn*, 115 S.W.3d 845 (2003);

*State v. Hunter*, 939 S.W.3d 542 (Mo. App., E.D. 1997);

*State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993);

*State v. Whalen*, 49 S.W.3d 181 (Mo. banc 2001);

U.S. Const., Amend. XIV; and

Mo. Const., Art. I, Sec. 10.

### III.

The trial court erred in overruled defense counsel's motions for judgment of acquittal and sentencing Sharnique on her conviction of assault in the second degree, because there was insufficient evidence from which a rational finder of fact could find Sharnique guilty beyond a reasonable doubt, in violation of her right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the state's evidence failed to prove that Sharnique acted recklessly when Demond's face fell into the burp rag while feeding, causing him to stop breathing.

*State v. Fitzgerald*, 778 S.W.2d 689 (Mo. App., E.D. 1989);

*State v. Lowrey*, 764 S.W.2d 957 (Mo. App., E.D. 1989);

*State v. Ludwig*, 18 S.W.3d 139 (Mo. App., E.D. 2000);

*State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 18(a); and

Section 562.016.

#### IV.

The trial court plainly erred in admitting Sharnique's extrajudicial statement into evidence as substantive evidence of guilt of murder in the second degree of Shaquir, because this deprived Sharnique of her right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was no independent proof of the *corpus delicti* of the offense -- that Shaquir died as a result of homicide rather than from natural causes. Because Sharnique's statement could not be used as substantive evidence, the evidence was not sufficient to find her guilty beyond a reasonable doubt of the murder.

*State v. Sardeson*, 220 S.W.3d 458 (Mo. App., S.D. 2007);

*State v. Madorie*, 156 S.W.3d 351 (Mo. banc 2005);

*State v. Applegate*, 668 S.W.2d 624 (Mo. App., S.D. 1984);

*State v. White*, 552 S.W.2d 33 (Mo. App., St.L.D. 1977);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

Rule 30.20.

## ARGUMENT

### I.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and sentencing Sharnique on her conviction of murder in the second degree, because there was insufficient evidence from which a rational finder of fact could find Sharnique guilty beyond a reasonable doubt, in violation of her right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the state's evidence failed to prove that Sharnique knew or was aware that her conduct was practically certain to cause the death of Shaquir when she put her face down on a pillow on the bed.

#### *Standard of review*

When reviewing the sufficiency of the evidence, this Court must consider the evidence and all reasonable inferences reasonably drawn from the evidence in the light most favorable to the verdict. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The test is whether the evidence, so viewed, was sufficient to make a submissible case from which rational jurors could have found beyond a reasonable doubt that Sharnique was guilty. *State v. Hopkins*, 841 S.W.2d 803, 804 (Mo. App., S.D. 1992). To support the conviction, the State must prove beyond a reasonable doubt that Sharnique committed each element of the offense charged.

*State v. Johnson*, 741 S.W.2d 70, 73 (Mo. App., S.D. 1987). A challenge to the sufficiency of the evidence to support a finding of guilt is based in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

### *Analysis*

Baby Shaquir had a documented seizure disorder (Tr. 433-434). She had apnea spells which were observed in the hospital, not just reported by her mother (Tr. 436). When she died at home at the age of three months, the medical examiner declared that she died of natural causes from a seizure disorder (Tr. 511-517).

After almost eight hours of interrogation, her mother, Sharnique Jones, told the detective that she put the baby face down on a pillow on the bed when the baby would not stop crying (Tr. 796). This statement caused the medical examiner to change the death certificate to “homicide” and the State of Missouri to charge Sharnique with murder in the second degree (Tr. 548, L.F. 8-9).

In considering whether the evidence was sufficient to support the conviction, this Court must view the record in the light most favorable to the state, and accept as true all evidence and inferences therefrom. *Grim*, 854 S.W.2d at 405. To convict Sharnique of murder, the state had the burden to prove both the substantive elements of the crime and Sharnique’s criminal involvement. *State v. Duvall*, 787 S.W.2d 798, 800 (Mo. App., E.D. 1990). This Court may not supply

missing evidence, or give the state the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181 (Mo. banc 2001).

The jury was instructed that to find Sharnique guilty of murder in the second degree, they had to find that Sharnique caused the death of Shaquir by suffocating her, and that she knew or was aware that her conduct was practically certain to cause Shaquir's death (L.F. 33). The question therefore is this: in the light most favorable to the verdict, does Sharnique's statement establish beyond a reasonable doubt that Sharnique knew or was aware that her conduct was practically certain to cause Shaquir's death? The statement is this:

I tried to get her to stop crying. I tried feeding her, changing her clothes, changing her pampers, giving her a bath, rocking her, putting her in her swing and I was getting frustrated.

[Frustrated] to the point where I felt like harming myself or her.

I laid her down on the bed on her stomach.

Her face was in the pillow.

I didn't think twice what would happen to me or her.

I ran downstairs to look for some pills because I was going to try to kill myself.

My godmother, her son and grandson came home.

I thought about Shaquir.

(Ex. 24 at page 3).

Here, to make a submissible case on second degree murder, the State was required to show that Sharnique knowingly caused Shaquir's death. Section 565.021.1(1). Submissibility on the mental element of knowledge entailed showing that she knew or was aware that her conduct was causing or was practically certain to cause Shaquir's death. MAI-CR 3d 313.04; Section 562.016.3(2). One who acts "knowingly" does not necessarily desire by her conduct to cause death; rather she is aware that her conduct is practically certain to cause death. *State v. Johnston*, 868 S.W.2d 226, 228 (Mo. App., W.D. 1994). In showing the requisite mental state, the State need only establish that Sharnique must have known that death was practically certain to follow from her conduct. *State v. Harris*, 825 S.W.2d 644, 647 (Mo. App., E.D. 1992).

In some other cases involving the death of a child, the only evidence of the defendant's intent to kill the child is prior abuse. *See, e.g. State v. Mattingly*, 573 S.W.2d 372, 374 (Mo. App., St. L. D. 1978) (holding that evidence of defendant's prior mistreatment of child was admissible on the issue of intent where defendant was charged with the child's murder); *State v. Patterson*, 443 S.W.2d 104, 107 (Mo. banc 1969) (holding that where defendant was charged with assaulting a child by beating her with a dog collar, evidence that he previously beat her with a pole and other objects was admissible to prove motive and intent). Here, the evidence was the opposite.

The hospital staff and social workers were clearly frustrated with Sharnique. Sharnique brought Shaquir into the hospital emergency room as often

as every other day. She seemingly did not understand what they were telling her to do, or they perceived her as disagreeing with it or ignoring it. Be that as it may, this was a young mother who was seeking help for a baby whom she thought was sick. This was not a case of prior abuse.

Instead, this is a case where the words of Sharnique's statement are the only evidence of a homicide. And when parsed, they simply do not establish beyond a reasonable doubt that she knew or was aware that her conduct was causing or was practically certain to cause Shaquir's death. At most, they establish reckless behavior in putting Shaquir down on a pillow when she had been told that this was not a safe sleep technique.

In her closing argument, the prosecutor asserted to the jury that the State does not charge every mother whose baby dies while sleeping on its stomach (Tr. 971). The State chose to charge Sharnique – not for recklessly doing so, but for knowingly causing the death of her child. The State failed to prove this offense beyond a reasonable doubt. This Court should reverse Sharnique's conviction of murder in the second degree and discharge her from that sentence.

## II.

The trial court erred in overruling defense counsel's motion for judgment of acquittal and sentencing Sharnique for endangering the welfare of a child in the second degree, because this violated her right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the state's evidence failed to establish beyond a reasonable doubt that she acted knowingly in failing to provide Demond with adequate nutrition such that it created a substantial risk to his life or health.

### *Standard of review*

The due process clause protects a defendant 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, 364 (1970). In reviewing a challenge to sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App., W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001).

### *Analysis*

A person commits the offense of child endangerment in the first degree, as charged in this case, when she knowingly acts in a manner that creates a substantial risk to the life, body or health of a child less than seventeen years old. Section 568.045. Sharnique was charged specifically with knowingly failing to provide Demond with adequate nutrition, and thereby knowingly creating a substantial risk to his life or health (L.F. 8-9, 38).

Demond was brought to the hospital by ambulance when he was three days old (Ex. 5, Tr. 382). He was a little jaundiced and dehydrated and he was admitted (Tr. 383). Sharnique reported that he was lethargic at home; he was not waking himself up to feed (Tr. 384). She told the staff that she was feeding him about 20 ccs every three to four hours (Tr. 679). They were concerned that was insufficient calories and he was undernourished (Tr. 679).

Demond was in the hospital until the 24<sup>th</sup> (Tr. 384-385). His mother kept reporting that he did not want to eat at home, but he ate orally at the hospital (Tr. 385). The hospital found him difficult to feed – he took a lot of effort and time, and he would tire easily sucking (Tr. 679-681). Sharnique's perception was that he should be given just as much as he would take and no more, but he was getting about 80 calories per day when he needed about 250-275 (Tr. 681).

The hospital put a naso-gastric (NG) tube in Demond to drip formula directly into his stomach (Tr. 681). Sharnique thought that was force-feeding him (Tr. 681). She thought it made him cry, and it caused a stomach-ache and he

would spit up (Tr. 681). So on the 24<sup>th</sup>, Sharnique took Demond out of the hospital against medical advice (Tr. 385, 683). The staff was unable to talk her out of it, and made her sign a form (Tr. 388, 683, Ex. 13A). They had decided that Demond was younger gestationally than they originally thought, actually premature, and Sharnique would need to be extra diligent feeding him (Tr. 390).

Demond was brought to the hospital on January 26 by ambulance for being apneic, as reported by Sharnique (Tr. 391). A social worker met with Sharnique during this second hospitalization and expressed concern that she was underfeeding the baby (Tr. 644-645). There were multiple attempts by medical staff to talk with Sharnique about feeding Demond more, but she continued to believe it was force-feeding and did not want to participate (Tr. 649). The juvenile court took protective custody of Demond so that Sharnique could not take him home again (Tr. 393, 703). He went to foster care, where the foster mother reported that they had to wake him every couple of hours to feed him, he had trouble sucking, and he would just rather sleep (Tr. 589, 595).

There is no bright line test to determine whether a person's actions knowingly create a substantial risk to the health of a child. *State v. Kuhn*, 115 S.W.3d 845 (2003). In *Kuhn*, the question was whether the child was at substantial risk in being present in a home with materials used to manufacture methamphetamine. 115 S.W.3d at 851. This Court found the evidence insufficient. *Id.*, see also, *State v. Hunter*, 939 S.W.3d 542, 545 (Mo. App., E.D. 1997) (Although finding it reprehensible, we did not find that forcing the child to

drink a small glass of beer did not, in and of itself, create a substantial risk to her health, and without further evidence, did not rise to the level of endangering the welfare of a child in the first degree).

Here, the question is not so much the risk to Demond as it is Sharnique's knowledge. In the light most favorable to the verdict, the evidence still shows a mother trying to feed her child and seeking medical attention when he will not eat enough. The State has prosecuted this case because she did not want a feeding tube put into Demond, but she clearly did not believe that was in his best interests. She may have been wrong, but she did not *knowingly* put him at substantial risk.

This Court should reverse Sharnique's conviction of first degree child endangerment and discharge her.

### III.

The trial court erred in overruled defense counsel's motions for judgment of acquittal and sentencing Sharnique on her conviction of assault in the second degree, because there was insufficient evidence from which a rational finder of fact could find Sharnique guilty beyond a reasonable doubt, in violation of her right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the state's evidence failed to prove that Sharnique acted recklessly when Demond's face fell into the burp rag while feeding, causing him to stop breathing.

#### *Standard of review*

The due process clause protects a defendant 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, 364 (1970). In reviewing a challenge to sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App., W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or

give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001).

### *Analysis*

In order to find Sharnique guilty of assault in the second degree, the jury had to find that she recklessly caused serious physical injury to Demond by smothering him with a cloth until he stopped breathing (L.F. 44). A person acts recklessly when she consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. Section 562.016.4; *State v. Fitzgerald*, 778 S.W.2d 689 (Mo. App., E.D. 1989).

In *Fitzgerald*, the defendant challenged her conviction of the assault in the second degree of her infant, whose arm she had twisted violently, causing it to fracture. 778 S.W.2d at 692. In *State v. Lowrey*, 764 S.W.2d 957, 959 (Mo. App., E.D. 1989), this Court found sufficient evidence where the adult defendant struck a three-year-old child with enough force to knock him into a bedpost and to the floor.

Here, the only evidence regarding the burp rag incident came from Sharnique's statement to Clayborn. Sharnique said that she was burping Demond on her lap and she was distracted by the television (Tr. 769). When she looked

back, he was face down in the burp rag and was not breathing (Tr. 769-770). She performed CPR and blew in his face; his face was blue (Tr. 770).

Clayborn told her he did not think she was telling the whole truth about what happened (Tr. 771). Sharnique was crying and yelling and saying she would never hurt her son (Tr. 771). She said his face was down in the burp rag; Clayborn believed that she had said it was turned to the side the first time she told him (Tr. 772).

In her taped statement, Sharnique said:

Well, I had a burp rag in my hand and his face was sideways and I turned to look at the TV, I was watching the TV guide channel and then when I turned back around his head was directly in the burp rag and I went to pull him back and his lips started to turn blue and I laid him on my lap and I started to do CPR and my godsister called the police and then they gave and they gave him oxygen until they got to the hospital.

(Ex. 24 at page 2).

Nothing establishes reckless behavior. Nothing at all presented at trial establishes anything other than an accident. Carelessness and negligence do not equate to reckless behavior. *See, State v. Ludwig*, 18 S.W.3d 139 (Mo. App., E.D. 2000). The State failed to prove this offense beyond a reasonable doubt. This Court should reverse Sharnique's conviction of assault in the second degree and discharge her from that sentence.

#### IV.

**The trial court plainly erred in admitting Sharnique’s extrajudicial statement into evidence as substantive evidence of guilt of murder in the second degree of Shaquir, because this deprived Sharnique of her right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was no independent proof of the *corpus delicti* of the offense -- that Shaquir died as a result of homicide rather than from natural causes. Because Sharnique’s statement could not be used as substantive evidence, the evidence was not sufficient to find her guilty beyond a reasonable doubt of the murder.**

#### *Standard of review and preservation*

The trial court is afforded broad discretion in assessing the admissibility of evidence, and its ruling on the admissibility of the evidence will not be interfered with on appeal absent a clear abuse of discretion. *State v. Mozee*, 112 S.W.3d 102, 105 (Mo. App., W.D. 2003). Defense counsel moved to suppress Sharnique’s statement, but not on this basis (L.F. 10-12). Plain error review is requested. Rule 30.20 permits this court to examine a claim of error, notwithstanding a party's failure to preserve the issue for appeal, to determine if it resulted in manifest injustice or miscarriage of justice that affected a defendant's

substantial rights. Whether to grant plain error review lies within the reviewing court's discretion. *State v. Golden*, 221 S.W.3d 444, 446 (Mo. App., S.D. 2007).

### ***Corpus delicti rule***

“The corpus delicti rule deals specifically with whether the defendant’s confession of guilt may be considered substantive evidence of guilt. . . .

Generally, the State must prove the commission of a crime with evidence independent of a confession of the accused.” *State v. Culbertson*, 999 S.W.2d 732, 736 (Mo. App., W.D. 1999) (citations omitted). The requirement of corroboration to establish the *corpus delicti* is rooted in “a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.” *Smith v. United States*, 348 U.S. 147, 153 (1954). Extrajudicial statements, admissions or confessions, are both inadmissible and insufficient to sustain a conviction unless there is independent proof of the essential elements of the *corpus delicti*. *State v. McVay*, 852 S.W.2d 408, 414 (Mo. App., E.D. 1993).

The *corpus delicti* entails proof of a loss or injury brought about by criminal agency. *State v. Litterell*, 800 S.W.2d 7, 10 (Mo. App., W.D. 1990). But evidence that the defendant was the criminal agent is not a prerequisite to the admission of his statements or confession into evidence. *Id.* The substantive offense is sufficiently proven by independent evidence of circumstances that correspond and interrelate with the circumstances rendered in the statement or

confession. *Id.* In a homicide case, the *corpus delicti* is (1) a person's death, and (2) the criminal agency of another. *State v. Vincent*, 785 S.W.2d 805, 810 (Mo. App., S.D. 1990).

### ***Facts and analysis***

As more fully discussed in Point I, the facts brought forth by the State to try to prove Sharnique guilty of murder beyond a reasonable doubt were these.

Paramedics and police were called to Sharnique's home because Shaquir was not breathing (Tr. 290-291). Pine Lawn police chief found Shaquir lying on a twin bed just below the pillows (Tr. 293-295). A bassinet was in the room as well (Tr. 295). Collins gave the baby CPR until the paramedics arrived (Tr. 295). She was pronounced dead at Children's Hospital (Tr. 311, 379).

The pathologist who autopsied Shaquir found lividity on her back, which did not mean she was on her back when she died (Tr. 499). He found no malnutrition or brain injury (Tr. 501). There was a therapeutic level of phenobarbital in her bloodstream (Tr. 504). Dr. Ariel Goldschmidt ruled the cause of death as natural causes: seizure disorder, and Dr. Michael Graham signed the death certificate (Tr. 511, 517).

After almost eight hours of interrogation, her mother, Sharnique Jones, told the detective that she put the baby face down on a pillow on the bed when the baby would not stop crying (Tr. 796). This statement caused the medical examiner to change the death certificate to "homicide" and the State of Missouri to

charge Sharnique with murder in the second degree (Tr. 548, L.F. 8-9). As the Court of Appeals noted, Dr. Graham, who changed the death certificate, did not conduct any additional medical tests or discover any evidence outside of Sharnique's statement that caused him to change his opinion of the cause of death (Tr. 551-553). *State v. Jones*, 2012 WL 4497968 (Mo. App., E.D., Filed Oct. 2, 2012), slip op. at 7.

Sharnique made the following audiotaped statement to Clayborne:

I tried to get her to stop crying. I tried feeding her, changing her clothes, changing her pampers, giving her a bath, rocking her, putting her in her swing and I was getting frustrated.

[Frustrated] to the point where I felt like harming myself or her.

I laid her down on the bed on her stomach.

Her face was in the pillow.

I didn't think twice what would happen to me or her.

I ran downstairs to look for some pills because I was going to try to kill myself.

My godmother, her son and grandson came home.

I thought about Shaquir.

(Ex. 24 at page 3).

The *corpus delicti* of a homicide cannot be said to be established until it has been proved that the death was not self-inflicted, nor due to natural causes or accident. *State v. Applegate*, 668 S.W.2d 624, 628 (Mo. App., S.D. 1984). The

State must further prove, as an additional element, a criminal act of the defendant (his agency) as a cause of the victim's death. *Id.* Further, unless and until the *corpus delicti* is proven, appellant's statements cannot be used to establish the commission of a crime. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo. banc 2005); *State v. White*, 552 S.W.2d 33, 34 (Mo. App., St.L.D. 1977). Here, cause of death was originally pronounced to be natural causes. Without Sharnique's statement, there was no proof that the cause of death was homicide.

"Unless there is independent proof, either circumstantial or direct, of the essential elements of the corpus delicti, extrajudicial admissions, statements or confessions of the accused are not admissible in evidence, and where improperly admitted are insufficient to sustain a conviction." *Id.*, citing, *State v. Summers*, 362 S.W.2d 537, 542 (Mo. 1962). The *corpus delicti* was not established by the state's evidence, so Sharnique's statements were inadmissible to supply that element. "The corpus delicti cannot be presumed. The state has the burden to prove the corpus delicti by legal evidence sufficient to show that the crime charged has been committed by someone." *State v. Friesen*, 725 S.W.2d 638, 640 (Mo. App., W.D. 1987); *State v. Garrett*, 829 S.W.2d 622, 626 (Mo. App., S.D. 1992).

In *State v. Sardeson*, 220 S.W.3d 458 (Mo. App., S.D. 2007), the defendant was convicted of the murder of his infant son after he confessed that he pressed his elbow into the child's neck and back, pressing the child into the bedding until he suffocated. 220 S.W.3d at 463. The autopsy showed injuries consistent with the

statement. *Id.* At 462. The Southern District held that the corpus delicti had been established, allowing admission of the statement. The facts the Court relied included that “the medical examiner testified that Victim died from asphyxiation; Defendant was present when Victim died; there was a history of Victim suffering from physical abuse; there were three fresh bruises on Victim’s back; Victim suffered a rib fracture near the time of his death; and Victim had internal hemorrhaging beneath the connective tissue of his chest cavity.” *Id.* at 471.

Here, as the Court of Appeals found, there was no independent evidence in to corroborate Sharnique’s statement. The Court noted,

Had Dr. Graham initially found Shaquir’s cause of death to be suffocation, our inquiry would likely end. But he did not. Although Dr. Graham testified at trial that the cause of death was suffocation, the record is equally clear that Dr. Graham initially concluded that Shaquir died from a seizure disorder. Dr. Graham’s later revised opinion as to cause of death was directly attributed to Jones’s statement and, importantly, was not based on other medical evidence. The record does not point to any subsequently discovered medical evidence, or even Dr. Graham’s review of prior medical records, which could serve as adequate corroboration of criminal agency.

*State v. Jones*, 2012 WL 4497968 (Mo. App., E.D., Filed Oct. 2, 2012), slip op. at 8.

There is no proof here that Shaquir died from anyone’s criminal agency, and this Court cannot presume that Sharnique committed a murder. Plain error has

occurred. This case presents a manifest injustice. This Court should remand for a new trial without the improper evidence of Sharnique's statement.

**CONCLUSION**

For the reasons presented, appellant respectfully requests that this Court reverse her convictions and discharge her, or in the alternative, remand for a new and fair trial.

Respectfully submitted,

*/s/ Ellen H. Flottman*

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**Certificate of Compliance and Service**

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,076 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 6<sup>th</sup> day of June, 2013, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Jessica Meredith, Assistant Attorney General, at Jessica.Meredith@ago.mo.gov.

*/s/ Ellen H. Flottman*

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