Supreme Court

No. 2010-61-C.A.
(P1/07-1310A)

State :

v. :

Julie Robat. :

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Dissenting Opinion begins
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v. :

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Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

O P I N I O N

Justice Robinson, for the Court. The defendant, Julie Robat, appeals from a judgment of conviction on one count of second-degree murder. The victim was the defendant's newborn daughter. On appeal, the defendant first contends that the trial justice erred in failing to grant her motion for a judgment of acquittal and her later motion for a new trial on the second-degree murder charge; the basis for that contention is the defendant's underlying assertion that the state failed to provide legally sufficient evidence for a jury to find that she acted with malice in connection with the death of her baby. The defendant additionally contends on appeal that the trial justice erred in failing to grant her motion for a new trial because of what she alleges were improper comments made by the prosecutor during her closing argument.

For the reasons set forth in this opinion, we affirm the judgment of conviction.

I

Facts and Travel

On the night of October 29 or in the early morning hours of October 30, 2006, defendant gave birth to a baby girl in the home of her parents; the baby was full-term (or nearly full-term) and healthy. It is the tragic death of the newborn daughter of defendant which resulted in the criminal prosecution of defendant and the instant appeal.

A

The Indictment and the Evidence Presented at Trial

On April 13, 2007, a Providence County grand jury indicted defendant for the murder of her child, in violation of G.L. 1956 §§ 11-23-1 and 11-23-2; she was also indicted for failure to report a death with the intent of concealing a crime, in violation of G.L. 1956 § 23-4-7, which charge was later dismissed by the state pursuant to Rule 48(a) of the Superior Court Rules of Criminal Procedure.

On April 2, 2009, defendant's trial began in the Superior Court for Providence County. The state presented the testimony of fourteen witnesses; in due course, defendant took the stand in her own defense and also presented the testimony of five additional witnesses. We summarize below the trial testimony pertinent to the issues on appeal.

1. The Testimony of Thomas Ellis

Thomas Ellis (defendant's former boyfriend) testified that, on a particular evening sometime between late February and early March of 2006,[1] defendant came to his apartment.

[1] The exact date of the meeting referenced in the text is unclear from the record. Mr. Ellis testified that it occurred sometime between late February and early March of 2006, while defendant testified that it occurred on April 2, 2006.

(At that point in time, defendant and Mr. Ellis had been dating for approximately four years; defendant was thirty years old and was living with her parents and her two younger sisters.)[2] Mr. Ellis testified that the purpose of defendant's visit was to discuss her suspicion that she was pregnant. Mr. Ellis stated that, while at his apartment, defendant took a home pregnancy test and learned that the result of that test was positive. Mr. Ellis further testified that he observed that, when she learned of the positive result, defendant was "petrified;" he added that she had "[a]lmost terror in her voice." He stated that she told him that, in view of her unmarried state, she was afraid of telling her parents that she was pregnant. Mr. Ellis testified that he and defendant discussed abortion, but he added that they reached no agreement on that evening as to how they were going to deal with the pregnancy.

Mr. Ellis then testified that, although he attempted to contact defendant in the interim, the next time that the two actually spoke was not until late August or early September of that year.[3] Mr. Ellis stated that, at that time, they began speaking more regularly, but without discussing the pregnancy; he testified that he had assumed that defendant had had an abortion.

2. The Testimony of Marie and Christine Robat[4]

Marie, the youngest sister of defendant, was nineteen years old at the time of the death of defendant's baby. She testified that, after being out during the night of October 29, 2006, she

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[2] The defendant is the oldest of the three girls who lived at the family home. Christine (with whom defendant shared a bedroom) is next to her in age, and Marie is the youngest.

[3] Mr. Ellis testified at trial that his romantic relationship with defendant ended after she left his apartment on the previously mentioned evening in what he said was late February or early March of 2006.

[4] For the sake of clarity, we shall hereinafter refer to defendant's sisters by their first names. We certainly intend no disrespect.

returned to her parents' home at approximately 12:50 a.m. on the morning of October 30.[5] Marie testified that, when she "got home," she went to her bedroom and then walked down the hallway to knock on the upstairs bathroom door, which was closed; she said that, when she knocked on the door, defendant responded that she would "be out in a minute." Christine, the middle sister, testified that she had knocked on the closed bathroom door approximately one hour earlier and had received a similar response; specifically, Christine testified that she had asked if she could use the bathroom, and defendant had responded: "No. I'm using it." Christine added that defendant might have said "[g]o downstairs," directing Christine to use the bathroom located downstairs.

Marie next testified that, at that time, she did not sense that anything was wrong; she said that, after taking a few minutes to get ready for bed, she returned to the bathroom. Marie testified that, when she walked through the open bathroom door and into the bathroom itself, she "saw [defendant] leaning over a counter," under which her family kept a laundry basket. Marie stated that she asked defendant "if she was okay" and that defendant responded that she was "fine;" however, Marie further stated that she observed that her sister was pale. Marie testified that she then proceeded to clean up a puddle of blood that she had noticed on the floor in front of the toilet; she said that the puddle of blood was approximately ten inches to one foot in size. Marie stated that, when she asked her sister what had happened, she responded that she "got [her] thing." Marie testified that she understood that statement to mean that her sister was menstruating. Marie stated that, when she inquired further, defendant said that she had fallen.

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[5] Both Marie and Christine were granted immunity with respect to their trial testimony. Due to the fact that Christine's testimony is, for the most part, substantially similar to Marie's, we shall summarize only Marie's testimony, except in instances where Christine's testimony materially differs from Marie's or is necessary to provide additional material information about the circumstances surrounding the death of defendant's baby.

Marie further testified that, after cleaning up the blood, she went to awaken her sister Christine, who was in bed "[h]alf asleep;" Marie said that she then told Christine: "There's something wrong with Julie." Marie testified that, just then, both she and Christine "heard a boom." She stated that they saw that defendant had fallen "face first" in the hallway; Marie added that "it looked like she had passed out." Marie testified that defendant then stood up and was "coherent" and that she and Christine helped their sister reach the bathroom. Marie further testified that, while accompanying defendant to the bathroom, she noticed "a spot of blood" on the hallway floor; she added that, once in the bathroom, defendant was bleeding from "[h]er vaginal area" and that there was blood "[a]ll over [her] legs." Marie testified that she and Christine then helped to clean their sister while she continued to tell them that she was menstruating. Marie stated that she and Christine discussed calling 911, but that defendant told them that she was fine and did not need an ambulance.

Marie testified that, after she and Christine helped defendant clean herself off, defendant said to them: "I have to wash some clothes for work tomorrow. I have to do laundry." Marie stated that she then followed defendant, who was carrying the laundry basket from the bathroom down to the laundry room. Marie testified that, on the basis of what she was able to see, there were "[j]ust towels" in the laundry basket. Marie stated that, even though she offered to help, defendant said that she wanted to do the laundry by herself. Marie further testified that she offered to stay with defendant while she did the laundry, but that defendant responded: "No. Get out of the room. I'm fine. I can do it myself."

Marie stated that she then left the laundry room and went to draw a bath for defendant. Christine testified that, at that point, she went downstairs into the laundry room and that defendant had "plopped herself on the cement ground floor" and commented that "the cement

felt good." Christine stated that she then left defendant "for a minute" and that, upon her return, defendant was still on the floor. Christine further stated, however, that the washing machine had been started and that she noticed that it was a "red, red load." Christine testified that she then helped defendant back upstairs to the bathroom; she said that defendant "was still bleeding" and that she and Marie put defendant into the bathtub.

Marie testified as follows about defendant's appearance: "She did not look good at all. She was very pale. She was a[s] white as a ghost. Her gums were white. Her tongue was white." Marie stated that defendant then had a seizure; she said that "[defendant's] head went back, her eyes rolled into the back of her head, and she started shaking."

Marie proceeded to testify that, at that point, Christine yelled to their father from the bathroom and that he came into the bathroom.[6] Marie stated that she then dialed 911, and Christine spoke to the 911 operator.[7] Marie testified that defendant did not want to go to the hospital and did not agree with their decision to call 911.[8] Marie further testified that, once the emergency medical technicians (EMTs) arrived, they had to persuade defendant to go to the hospital. Marie affirmed that, up to that point, defendant had not told anyone that there was a baby in the house. Marie testified that, once defendant left in the ambulance, she and Christine stayed at the house and cleaned up the bathroom and then eventually made their way to the

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[6] Marie and Christine both testified that they had previously awakened their father; he had asked defendant if she was "okay," and defendant had assured him that she was fine and had advised him to go back to bed.

[7] At a later point in Marie's testimony, it was confirmed that the call was made to 911 at approximately 2:30 a.m.

[8] Marie's testimony that defendant did not want to go to the hospital was corroborated by the tape recording of the 911 call, which was played during trial. Moreover, defendant acknowledged at trial that it was she who could be heard on the recording saying: "No, no, I don't want to go."

hospital where defendant had been taken. Marie testified that the first time that she learned about the birth of a baby was when defendant was in the hospital; she stated that she and Christine went into defendant's hospital room and that defendant "told [them] that she did have a baby." Marie added that defendant also told them that the baby had been born dead. Marie also testified that she asked defendant what color the baby was and that she had responded that "it was purple."[9]

3. The Testimony of the Responding Officers and the Treating Doctors

It was the testimony of the rescue lieutenant who responded to the 911 call as well as that of the doctors who treated defendant at the various hospitals[10] that defendant informed them that she was experiencing abdominal pain and cramping and that she attributed those symptoms to a "heavy menstrual cycle" or to a condition called "DUB" (dysfunctional uterine bleeding), from which condition defendant said she suffered. The first treating physician testified that, at all times, defendant stated that "she wasn't sexually active and [that] she wasn't pregnant" and denied that she had had a baby; she described defendant as being "very vehement." That doctor further testified that, despite defendant's "profuse" bleeding and deteriorating medical state, she remained "alert and oriented." The doctor testified that, although defendant resisted, she eventually was able to examine defendant unclothed; she stated that it became quite clear to her that defendant had been pregnant and had recently given birth. The doctor next testified that a

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[9] On cross-examination, Marie acknowledged that, in her testimony before the grand jury, she had not described the conversation with defendant at the hospital. In fact, she testified before the grand jury that defendant "couldn't remember anything" about the birth. Marie testified at trial that she recalled the conversation about two to three weeks prior to the trial because Christine had "remembered and told [her]." However, Christine testified at trial that she did not remember such a conversation and that she had not reminded Marie about it.

[10] The record indicates that defendant was treated at three different hospitals in the morning hours of October 30, 2006.

blood sample taken from defendant tested positive for pregnancy and revealed an elevated hormonal level, confirming the doctor's opinion that defendant had in fact been pregnant and had given birth. When defendant was confronted with those test results, she "absolutely denied" that she had been pregnant; the doctor said that defendant "kept on saying that she wanted to go home and didn't want to be treated" and that she was "very, very firm" that she did not want any information given to her family.

The two other treating physicians testified that, after examining defendant, they also reached the conclusion that she had been pregnant and had recently, in the words of one of the physicians, "giv[en] birth to a baby that * * * was of sufficient gestational age that [it] could have * * * survived." One of the doctors testified that she also confronted defendant with her conclusions and that defendant responded with a denial of having seen a baby; she then informed defendant that the hospital would be notifying the police, at which point in time defendant "continued to appear calm, nodded her head, and really didn't say anything further." The police were subsequently notified that it was believed that defendant had given birth to an almost full-term baby that had not arrived at the hospital with her.

One of the officers who responded to the doctor's notification testified that several police and fire department personnel were dispatched to the Robat home in order to locate the newborn. That officer, a patrolman in the North Providence Police Department, testified that, upon searching the laundry room, he moved a laundry basket that was in front of the clothes dryer and he then found a bag that was located under a raised platform upon which the clothes dryer sat. The patrolman testified that he observed that the bag "appeared to have some blood" on the exterior and that he then notified his supervisor, Sergeant Kristian Calise.

Sergeant Calise testified that, upon "grabbing the bag," he immediately observed that "it was a baby inside" of the bag. He further testified that he could "tell there were liquids" inside the bag. Sergeant Calise further testified that, once he was able to open the bag, he saw that there was another bag inside the first bag and that the interior bag was "covered * * * in * * * blood and liquid." Upon opening the interior bag, Sergeant Calise testified that he "saw the baby lying inside;" specifically, he testified that he saw "the baby's face and chest portion area." Sergeant Calise then testified that he asked a firefighter to check to see if the baby was alive and that the firefighter determined that the baby was dead. Sergeant Calise testified that, at that point in time, "[e]verybody was taken outside of the house" and the crime scene was secured; he testified that he believed that he then notified the Medical Examiner's office.

4. The Testimony of the Experts

Three experts testified at trial: Thomas Gilson, M.D., on behalf of the prosecution and Jonathan Arden, M.D. and Dave E. David, M.D., on behalf of the defense.

a. The Testimony of Thomas Gilson, M.D.

Doctor Thomas Gilson testified as an expert in the field of forensic pathology. Doctor Gilson testified that, on October 30, 2006, he was the Chief Medical Examiner in Rhode Island and that, as part of his duties, he went to the Robat residence in order to investigate the fact that a baby had been found "wrapped in plastic bags in the basement of the residence." Doctor Gilson testified that, upon his arrival at the Robat home, he proceeded to the laundry room, where he saw two plastic bags, one inside the other; he stated that the inner bag contained a "female infant who looked about term." He further testified that the infant "had some fluid covering her head [as] would be seen in the birth process." Doctor Gilson stated that he also noticed that the

placenta had been placed in the outer bag and that the umbilical cord looked "like it had been torn, not sharply cut."

Doctor Gilson testified that he had the dead infant transported to his office, where an autopsy was performed the following morning by Peter Gillespie, M.D., an assistant medical examiner.[11] Doctor Gilson testified that he was "coming in and out of the room during the autopsy to monitor what was going on." Doctor Gilson further testified that he had read Dr. Gillespie's autopsy report, had recently spoken with Dr. Gillespie about the case, and had reviewed the laboratory testing that Dr. Gillespie performed as well as the x-rays and photographs that were taken.

Doctor Gilson stated that the baby weighed just under seven pounds and was twenty inches in length. Doctor Gilson further testified that, during the external examination, he did not observe any injuries to the baby and that there were not any "birth defects or abnormalities;" he stated: "She looked like a [full-]term baby, healthy, no signs of injury or disease."

Doctor Gilson further stated that the x-rays of the baby revealed that the lungs were dark, "which [was] consistent with aeration, air being in the lungs." In elaborating on the term "aeration," Dr. Gilson stated that that term meant that "air has been introduced into the lung tissue. Breathing." He further stated that "there was air also in the stomach of the infant."

Doctor Gilson further testified that, during the examination of the infant, "two small quarter-inch bruises" were observed "on the left side of her head." He stated that those bruises "could have been part of the birthing process." He added that the bruises were "not fatal injuries." Doctor Gilson indicated that the brain of the infant had been examined by a specialist in brain diseases and that "nothing abnormal was seen." He also indicated that all of the organs

[11] Doctor Gilson testified that Dr. Gillespie had since taken a job in Florida and was not available to testify.

of the infant were without abnormalities, defects, or diseases. Doctor Gilson testified that the infant's heart was "structurally normal" and that "she should have been able to live independent of her mother."

Doctor Gilson next testified that Dr. Gillespie had examined the lungs of the infant—an examination which was partially carried out in the presence of Dr. Gilson. Doctor Gilson testified that, after performing several tests and examinations of the lungs, the conclusion was that the baby "was breathing after birth;" he later stated that the baby "should have been able to continue [breathing]." However, he was not able to offer an opinion as to how many breaths were actually taken by the baby.

Doctor Gilson also testified regarding the results of the examination of the placenta. He stated that a microscopic examination of the fetal side of the placenta revealed "some staining;" he specified that the staining was a substance called meconium.[12] He elaborated that, when meconium is passed, it is "a marker for some sort of stress happening to the fetus while it's in the womb." With respect to the significance that Dr. Gilson drew from the meconium staining, he testified as follows:

> "I can only say that some stressor occurred to the child. It's not of a significant degree to make me think that the child was born dead, because those infants, you look at their placenta, you look at the infant at the time they're born, it's not subtle; they have lots of this material on top of them."

[12] A medical dictionary defines meconium as being "[t]he first intestinal discharges of the newborn infant, greenish in color * * * ." Stedman's Medical Dictionary 1167 (28th ed. 2006). Doctor Gilson described meconium as "the poop of the fetus." He added that it is "usually sort of a thick semi-liquid dark green material."

Doctor Gilson further testified that, when inhaled by an infant, meconium is "very irritating to the lungs" and can cause the death of the child when so inhaled. He stated, however, that there was no evidence that defendant's infant had inhaled meconium.

Doctor Gilson further testified that there was "a small focus of inflammation" in the placental membrane that "would have [been] wrapped around the [infant];" he stated that the likely cause of the inflammation was that it was "where the membrane tore and the body responded." He testified that the inflammation would not have caused the death of the infant and that it was a "normal part of the birthing process for the membrane to break."

With respect to the maternal side of the placenta, Dr. Gilson testified that there was a small amount of blood clot attached thereto—a phenomenon that he stated was "normal in the birthing process." He stated that there was nothing in the finding of the blood clot that "would explain why the baby died." He further testified that there was no evidence of placental abruption[13]—a condition which could be catastrophic to an infant; he specified that the blood clots on the placenta were not "much * * * beyond what would be normal for the baby being born vaginally normally."

In partial summary, Dr. Gilson testified that no defect, life-threatening injuries, or disease had been found in the infant and that, in his opinion, the baby was born alive and was viable; he explained the term "viable" as meaning "capable of living by [herself]." Doctor Gilson further testified that he agreed with the cause of death that Dr. Gillespie had recorded on the death certificate—viz., "asphyxiation due to exposure, and failure to provide or obtain basic neonatal resuscitation." With respect to the reference to "asphyxiation due to exposure," Dr. Gilson testified as follows:

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[13] A placental abruption (or "abruptio placentae") is defined as the "[p]remature detachment of a normally situated placenta." Stedman's Medical Dictionary 4.

> "[T]he baby was in some hostile environment. It could have been the plastic bags, or the baby could have been exposed to * * * [a] hostile environment just being cold. A baby cannot regulate its temperature itself after it[']s born, so it can get hypothermic, decreased body temperature, very rapidly."

With respect to the "failure to provide or obtain basic neonatal resuscitation" language in the death certificate, Dr. Gilson testified that that phrase refers to "things like calling 911, going to a hospital, wrapping the infant in blankets or something to keep it warm." Doctor Gilson summarized his explanation of the terms used in the death certificate by stating that "actions, either active or passive, resulted in the child not getting enough oxygen to her body." Later in his testimony, Doctor Gilson elaborated as follows:

> "Leaving a baby uncared for, even if nothing else had happened, puts that baby at risk to die because the baby is helpless. It needs somebody to provide warmth, make sure that it doesn't get into trouble or become hypothermic. And offering the baby that opportunity would increase its chances for survival tremendously."

Doctor Gilson testified that Dr. Gillespie's conclusion as to the manner of death, a conclusion with which Dr. Gilson agreed, was "homicide;" Dr. Gillespie explained that term as meaning that "the death was at the hands of another person." Doctor Gilson made the following statement as he concluded his testimony on direct examination:

> "This baby should have survived, but for being placed in the plastic bags, not being taken care of after she was born, or possibly having been suffocated from some other means, asphyxiated from some other means in a hostile environment."

b. The Testimony of Jonathan Arden, M.D.

Doctor Jonathan Arden testified on behalf of defendant as an expert in the field of forensic pathology. Doctor Arden testified that he became involved in the instant case in November of 2006 and that, at that time, he examined the remains of defendant's baby and the placenta; he stated that he also examined defendant's medical records, the final autopsy report,

the testimony of Dr. Gillespie before the grand jury, and various materials maintained by the Medical Examiner's office (microscopic slides, x-ray films, photographs, and the like).

Doctor Arden testified that he performed an independent examination of the baby's lungs and that on that basis he concluded as follows:

> "[T]here had been some breathing, but not enough breathing to expand them fully. In other words this is consistent with having taken a few breaths."

Doctor Arden also testified as to his examination of the placenta; he testified that he observed "areas of blood clot adhere[d] to the maternal surface of [the] placenta." He further stated as follows:

> "[The blood clots were] consistent with but not independently diagnostic of a premature separation of the placenta. That's a condition called abruption of the placenta."

In terms of the significance of that condition to the survival of the infant, Dr. Arden testified that, depending on the amount of the separation, it "could have no significant effect on the fetus whatsoever [or it could] very readily cause[] fetal death." Doctor Arden stated that, to him, it "look[ed] like a significant degree of blood clotting on the maternal surface [of the placenta], which is then consistent with a significant abruption of the placenta." Doctor Arden affirmed that, if the "degree of blood clot[s]" found on defendant's placenta was "found in the clinical setting of an abruption," that condition would be sufficient to cause fetal distress. With respect to the meconium found on the placenta, Dr. Arden testified that "finding meconium in a portion of the placenta is an indicator of some episode of fetal stress," but he added that the amount of meconium found in the instant case was "not sufficient in and of itself to be a cause or a mechanism of the death" of the infant.

Doctor Arden further testified that he had reviewed the autopsy report, including the conclusion regarding the manner of death, which was said to be homicide; Dr. Arden stated that, in his opinion, the "manner of death should have been certified as undetermined." He explained that he reached that conclusion because he thought that, in the instant case, one manner of death could not be said to have been a "far * * * more probable and supportable conclusion" than others.

Doctor Arden next testified that he would prefer to describe defendant's infant as having been "potentially viable," rather than "viable." Doctor Arden explained that an examination of the infant in isolation would support the conclusion that she was viable; he further testified, however, that "the viability of a newborn depends upon not only the inherent characteristics of that newborn, but also [upon] the circumstances of the fetal life in utero and the circumstances particularly of the birth." Doctor Arden proceeded to state that the presence of meconium on the placenta, defendant's severe vaginal bleeding, and the blood clots on the placenta "[gave him] reason to suspect and believe that there was an obstetric * * * complication [which injected] a different note into the question of viability." However, Dr. Arden did acknowledge on cross-examination that he was not diagnosing a placental abruption in this case. He also acknowledged that, when a baby is in severe distress, the placenta would "be obviously stained green," whereas in the instant case the meconium on the placenta was only observable through a microscopic analysis. He further acknowledged that "finding some blood clots in * * * association with the placenta" is typical in a normal delivery.

Doctor Arden offered as his final opinion on direct testimony that defendant's infant "did not demonstrate independent viability" in view of the "absence of * * * clear[-]cut indicators of prolonged independent survival." He further stated: "I think that tells us that this baby did not

live very long, did not maintain independent viable existence." Doctor Arden added that, given the evidence that the baby had taken only "but [a] few breaths," he could not "arrive at the opinion that providing neonatal care would have, to a reasonable medical certainty, altered the outcome." However, on cross-examination, Dr. Arden acknowledged that the infant manifested no signs of disease, no abnormalities, and did not have anything wrong with any of her organs; he added that, "by anatomical appearances," the infant appeared to have been a healthy baby.

c. The Testimony of Dave E. David, M.D.

Doctor Dave E. David was the second expert to testify on behalf of the defense. Doctor David was qualified at trial as an expert in the area of obstetrics and gynecology. He testified that he became involved in the instant case a few months prior to trial and that he had reviewed the records compiled by the EMTs and by the hospitals where defendant was treated, the minutes of the grand jury, the pathology report concerning the infant and the placenta, an expert report from Dr. Arden, and numerous photographs.

After testifying as to his observations based upon his review of the above-listed materials, Dr. David stated that it was his opinion that there had been a placental abruption during the course of the delivery of defendant's infant. He further testified that it was his opinion that the consequence of the placental abruption in the instant case was that it was "very likely that, um, that caused, um, [the] death of the baby." Doctor David also stated that, in his opinion, taking steps to provide neonatal care to the infant "couldn't ensure" the baby's survival. On cross-examination, however, Dr. David acknowledged that the infant had been born alive and had taken breaths. He further acknowledged on cross-examination that he had read the medical reports from the three doctors who had examined and treated defendant at the hospitals where

she was treated after the birth and that none of their diagnoses had indicated a placental abruption.

5. The Testimony of Defendant

At trial, defendant took the stand in her own defense. She testified that she had taken a pregnancy test on April 2, 2006[14] at the home of her then-boyfriend. She affirmed that the result of that pregnancy test was positive and that, after leaving her boyfriend's house that day, she never once saw a doctor about her pregnancy or took another pregnancy test. The defendant testified that the reason that she did not visit a doctor after learning of her pregnancy was because "a couple weeks later [she] got [her] period." The defendant further testified that she consistently menstruated over the next several months, but that she missed her period during the months of September and October.

With respect to the events of October 29, 2006, defendant testified in detail as to her activities on that day. She stated that the first sensation of pain that she experienced was at night at her parents' home. She testified that she felt a "sharp pain cramp" in her stomach and then went to the upstairs bathroom. She stated that she remembered "go[ing] to the bathroom" and "seeing blood," which she then flushed down the toilet. The defendant testified that the cramp was strong and that she then crouched over the toilet. She testified that the next thing that she remembered was that she fell down and hit her head.

The defendant next testified that, after that point in time, she did not remember much. She did testify, however, that she "remember[ed] the bathtub" and her sisters having put her into the bathtub. The defendant testified that she also remembered that, at some point, she was in the hallway, where she fell. She then recalled that "[s]omebody was slapping [her] face." The

[14] See footnote 1, supra.

defendant denied having any memory of going downstairs to the laundry room; she said that her next memory was of "water" and of being in the bathtub. She recalled that her sisters "were slapping [her] and screaming at [her]." She further testified that she also had a memory of being dressed and of sitting on the steps waiting for the ambulance. The defendant stated that she remembered "very little" about the ambulance ride and that the only thing that she remembered about being in the hospital was that she "had a lot of tubes" in her arm. She testified that she did not recall any questions that were asked of her at the hospital; she added that she did not remember talking to anyone there. She further testified that she had never used the term "DUB" and that she did not know what that term meant.

The defendant testified that her next memory about her hospitalization was that of seeing her father and her sisters. She stated, however, that she did not recall telling Marie that she had had a baby, that it was dead, and that it had looked purple. The defendant testified that she did not remember having a baby and that she did not kill her infant. She further testified that, if she were going to have a baby, she would not fear telling her parents about it. Ultimately, defendant denied ever seeing a baby; when asked if she had put the baby in the bags in which the baby was found, defendant replied: "I don't think so."

B

The Conclusion of the Trial, the Verdict, and the Subsequent Travel of the Case

On April 15, 2009, after the close of all of the evidence, the trial justice heard arguments on defendant's motion for a judgment of acquittal;[15] he subsequently granted defendant's motion

[15] The defendant moved for a judgment of acquittal pursuant to Rule 29 of the Superior Court Rules of Criminal Procedure. Rule 29(a)(1) reads in pertinent part as follows:

> "The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses

as to the charge of first-degree murder, but he permitted the charges of second-degree murder and involuntary manslaughter to be submitted to the jury. The jury began deliberations on April 16, 2009.

On April 17, 2009, the jury found defendant guilty of second-degree murder. On April 24, 2009, defendant filed a motion for a new trial, which motion was denied by the trial justice. The trial justice subsequently sentenced defendant to forty-five years imprisonment, with twenty-five years to serve and twenty years suspended with twenty years of probation. The judgment of conviction and commitment subsequently entered. Thereafter, defendant timely appealed.

II

Standards of Review

A

Motion for a New Trial

The analytical process that should be followed when a trial justice considers a motion for a new trial is well established in this jurisdiction. See State v. Cerda, 957 A.2d 382, 385 (R.I. 2008). In dealing with such a motion, "the trial justice acts as a thirteenth juror and exercises independent judgment on the credibility of witnesses and on the weight of the evidence." State v. Guerra, 12 A.3d 759, 765 (R.I. 2011) (internal quotation marks omitted); see also State v. Karngar, 29 A.3d 1232, 1235 (R.I. 2011); State v. Adefusika, 989 A.2d 467, 480 (R.I. 2010); Cerda, 957 A.2d at 385. It is the trial justice's responsibility to "(1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether he or she would have reached a result different

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> charged in the indictment, information, or complaint, after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses."

from that reached by the jury." State v. Staffier, 21 A.3d 287, 290 (R.I. 2011) (internal quotation marks omitted); see also State v. Pineda, 13 A.3d 623, 641 (R.I. 2011); State v. Guerrero, 996 A.2d 86, 89 (R.I. 2010).

If, after carrying out that three-step process, "the trial justice concludes that reasonable minds could differ as to the result or if the trial justice reaches the same conclusion as the jury did, the verdict should be affirmed and the motion for a new trial denied." State v. Texieira, 944 A.2d 132, 140 (R.I. 2008); see also State v. Cipriano, 21 A.3d 408, 429 (R.I. 2011); State v. Cardona, 969 A.2d 667, 672 (R.I. 2009); Cerda, 957 A.2d at 385.

However, if the trial justice "does not agree with the jury verdict or does not agree that reasonable minds could differ as to the proper disposition of the case," he or she must undertake a fourth analytical step. State v. DeOliveira, 972 A.2d 653, 665 (R.I. 2009); see also Guerra, 12 A.3d at 765; State v. DiCarlo, 987 A.2d 867, 870 (R.I. 2010); State v. Rivera, 839 A.2d 497, 503 (R.I. 2003). At that fourth step, the trial justice is required to determine "whether the verdict is against the fair preponderance of the evidence and fails to do substantial justice." DeOliveira, 972 A.2d at 665. Then, "[i]f the trial justice so determines, * * * a new trial should be ordered." Id. (citing State v. Luanglath, 749 A.2d 1, 4 (R.I. 2000)).

On appeal, this Court accords "great weight to a trial justice's ruling on a motion for a new trial if he or she has articulated sufficient reasoning in support of the ruling." State v. Navarro, 33 A.3d 147, 156 (R.I. 2011) (internal quotation marks omitted); see also Texieira, 944 A.2d at 140-41. Accordingly, the record "should reflect a few sentences of the justice's reasoning on each point." Guerra, 12 A.3d at 766 (internal quotation marks omitted); see also State v. Luanglath, 863 A.2d 631, 637 (R.I. 2005); State v. Salvatore, 763 A.2d 985, 991 (R.I. 2001). The trial justice "need not refer to all the evidence supporting the decision;" rather, he or

she "need only cite evidence sufficient to allow this [C]ourt to discern whether the justice has applied the appropriate standards." Guerra, 12 A.3d at 766 (emphasis and alteration in original) (internal quotation marks omitted); see also DiCarlo, 987 A.2d at 870; State v. Banach, 648 A.2d 1363, 1367 (R.I. 1994).

A trial justice's ruling on a motion for a new trial will not be overturned on appeal "unless we determine that the trial justice committed clear error or that he or she overlooked or misconceived material and relevant evidence [relating] to a critical issue in the case." Texieira, 944 A.2d at 141 (alteration in original) (internal quotation marks omitted); see also Pineda, 13 A.3d at 641; State v. Scanlon, 982 A.2d 1268, 1279 (R.I. 2009); DeOliveira, 972 A.2d at 665; State v. Bergevine, 942 A.2d 974, 981 (R.I. 2008). This Court is deferential to the trial court in this context "because a trial justice, being present during all phases of the trial, is in an especially good position to evaluate the facts and to judge the credibility of the witnesses." Guerra, 12 A.3d at 766 (internal quotation marks omitted); see also State v. Ferreira, 21 A.3d 355, 365 (R.I. 2011); Texieira, 944 A.2d at 141.

B

Motion for a Judgment of Acquittal

In undertaking a review of a trial justice's denial of a motion for a judgment of acquittal, "we employ the same standards as the trial court." DeOliveira, 972 A.2d at 663; see also Cipriano, 21 A.3d at 420; State v. Lynch, 19 A.3d 51, 56 (R.I. 2011); State v. Pitts, 990 A.2d 185, 189 (R.I. 2010). In accordance with those standards, we are required to "view the evidence in the light most favorable to the prosecution, giving full credibility to its witnesses, and drawing all reasonable inferences consistent with guilt." Pitts, 990 A.2d at 189 (internal quotation marks omitted); see also State v. Rodriguez, 10 A.3d 431, 433 (R.I. 2010); State v. Ros, 973 A.2d 1148,

1159 (R.I. 2009). Then, if that examination "reveals sufficient evidence to warrant a jury verdict of guilt beyond a reasonable doubt, the trial justice's denial of the motion should be upheld." Cipriano, 21 A.3d at 420 (internal quotation marks omitted); see also State v. Reyes, 984 A.2d 606, 616 (R.I. 2009); State v. Imbruglia, 913 A.2d 1022, 1027 (R.I. 2007).

III

Analysis

A

Sufficiency of the Evidence

On appeal, defendant challenges the legal sufficiency of the evidence in support of her conviction for second-degree murder; specifically, defendant contends that "the evidence did not give rise to an inference, beyond a reasonable doubt, that [she] acted with malice." The defendant asserts that, therefore, the trial justice erred in denying her motion for a judgment of acquittal and her motion for a new trial.

We once again note that this Court (like the trial court), in dealing with a motion for a judgment of acquittal, must view the evidence in the light most favorable to the state. In light of that requirement, "prevailing on an acquittal motion is a heavier burden for a defendant" than is prevailing on a motion for a new trial. See Pineda, 13 A.3d at 640; see also Navarro, 33 A.3d at 156. Accordingly, in view of the fact that a defendant's burden is less onerous in the context of a motion for a new trial, when a defendant challenges the rulings of a trial justice with respect to the denial of both such motions, this Court will first undertake a review of the motion for a new trial. See Cardona, 969 A.2d at 672; see also Navarro, 33 A.3d at 156; Pineda, 13 A.3d at 640. In other words, "unless a defendant can show that the presented evidence failed to support his or her conviction upon the motion-for-a-new-trial standard, a defendant necessarily will be unable

to establish [that] he or she was entitled to a judgment of acquittal." Pineda, 13 A.3d at 640; see also Navarro, 33 A.3d at 156; State v. Hesford, 900 A.2d 1194, 1200 (R.I. 2006). For that reason, we shall now proceed to review the trial justice's ruling on the motion for a new trial. See Pineda, 13 A.3d at 640; Cardona, 969 A.2d at 672.

1. Motion for a New Trial

The defendant contends that, in light of the evidence presented at trial, the only reasonable inferences that could be drawn beyond a reasonable doubt were that she "gave birth to a living child who then died of asphyxiation due to [defendant's] lack of care." (The defendant notes in her brief to this Court that the "lack of care" to which she makes reference would constitute involuntary manslaughter "if it amounted to criminal negligence.") The defendant argues, however, that the state did not present sufficient evidence to permit the jury to reach the conclusion that she either (1) maliciously failed to provide care to her child or (2) took affirmative action to smother her child. On the basis of those alleged insufficiencies of the evidence, defendant contends that her conviction for second-degree murder cannot stand.

a. Second-Degree Murder

The crime of murder existed at common law, but the delineation of murder into degrees was effectuated by the General Assembly in its codification of the crime. See State v. Gillespie, 960 A.2d 969, 975 (R.I. 2008); see also State v. Delestre, 35 A.3d 886, 900 & n.15 (R.I. 2012); State v. Mattatall, 603 A.2d 1098, 1105-06 (R.I. 1992); State v. Iovino, 554 A.2d 1037, 1039 (R.I. 1989). See generally § 11-23-1. Murder is defined in § 11-23-1 as "[t]he unlawful killing of a human being with malice aforethought * * * ." Pursuant to that section, first-degree murder is "[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing" or any murder committed during the commission of certain

enumerated felonies. Section 11-23-1; see also Delestre, 35 A.3d at 900; Texieira, 944 A.2d at 142 n.12.

The just-cited section of the General Laws goes on to define second-degree murder as any murder other than first-degree murder. See § 11-23-1. On the basis of that statutory definition, we have stated that second-degree murder is "any killing of a human being committed with malice aforethought that is not defined by the statute as first-degree murder." State v. Parkhurst, 706 A.2d 412, 421 (R.I. 1998); see also Delestre, 35 A.3d at 900; Gillespie, 960 A.2d at 975.

Malice aforethought has been defined as "an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life." Texieira, 944 A.2d at 142 (internal quotation marks omitted); see also Delestre, 35 A.3d at 900 n.16; Gillespie, 960 A.2d at 975; Mattatall, 603 A.2d at 1106. Malice aforethought arises from either "an express intent to kill or to inflict great bodily harm or from a hardness of the heart, cruelty, wickedness of disposition, recklessness of consequence, and a mind dispassionate of social duty." Texieira, 944 A.2d at 142 (internal quotation marks omitted); see also Delestre, 35 A.3d at 900 n.16; Gillespie, 960 A.2d at 975-76.

This Court has recognized three possible "theories of second-degree murder, each grounded in a different aspect of malice aforethought." Gillespie, 960 A.2d at 976; see also Delestre, 35 A.3d at 900 n.17; Parkhurst, 706 A.2d at 421; Iovino, 554 A.2d at 1039 ("Under the common law, Rhode Island has adopted three means by which the malice aforethought necessary to convict a defendant of second-degree murder can be established."). The first theory "involves those killings in which the defendant formed a momentary intent to kill contemporaneous with the homicide." Gillespie, 960 A.2d at 976; see also Delestre, 35 A.3d at 900 n.17. The second

theory "includes felony murder for inherently dangerous felonies that are not expressly listed within the statutory definition of first-degree murder." Gillespie, 960 A.2d at 976; see also Delestre, 35 A.3d at 900 n.17; Iovino, 554 A.2d at 1039. The third theory of second-degree murder involves "those killings in which the defendant killed with wanton recklessness or conscious disregard for the possibility of death or of great bodily harm." Delestre, 35 A.3d at 900 n.17 (internal quotation marks omitted); see also Gillespie, 960 A.2d at 976; Iovino, 554 A.2d at 1039.

Accordingly, for a conviction of second-degree murder to be upheld, the prosecution must prove, beyond a reasonable doubt, that the defendant acted with malice aforethought; and, in attempting to so prove, the prosecution may rely on any of the three above-listed theories. See Gillespie, 960 A.2d at 976; Parkhurst, 706 A.2d at 421. As defendant correctly states in her brief to this Court, "mere negligence or carelessness cannot support the malice that would be necessary to a finding of murder in the second degree." State v. Wilding, 638 A.2d 519, 522 (R.I. 1994). We do note, however, that malice may be inferred "from the circumstances surrounding a defendant's conduct and the events leading up to the death of the victim" and "from heedless indifference to the consequences of an act or recklessness." See id.

b. Inferences

The defendant first challenges the evidence presented at trial by directing our attention to the holdings in In re Derek, 448 A.2d 765 (R.I. 1982), and in State v. Dame, 560 A.2d 330 (R.I. 1989); on the basis of those cases, defendant argues that the jury's conclusion that she acted with malice was based upon an improper pyramiding of inferences.[16] The defendant contends that an

[16] The pyramiding of inferences concept relative to criminal cases has been discussed as follows in a treatise on the law of evidence:

"inference of malice * * * was not the only reasonable [inference] to be drawn from the established facts." (Internal quotation marks omitted.) Specifically, she maintains that it is no more reasonable to infer that she "intentionally killed" her child "than to infer that [she] was simply overcome by medical shock and distress, or fear, shame, embarrassment, had no idea what to do, and, without malice, failed to provide necessary care." (Emphasis in original.) The defendant further argues that, while it is reasonable to infer a general consciousness of guilt from her behavior, one cannot reasonably infer that she "had a guilty conscience about having intentionally and maliciously killed her baby."

It is well established in the jurisprudence of this Court that "we do not distinguish between the probative value of circumstantial and direct evidence." State v. Patel, 949 A.2d 401, 414 (R.I. 2008); see also State v. Vargas, 21 A.3d 347, 353 (R.I. 2011); State v. Hornoff, 760 A.2d 927, 931 (R.I. 2000); Mattatall, 603 A.2d at 1106. Indeed, the prosecution may rely entirely on circumstantial evidence "without disproving every possible speculation or inference of innocence as long as the totality of the circumstantial evidence offered constitutes proof of guilt beyond a reasonable doubt." State v. Caruolo, 524 A.2d 575, 581 (R.I. 1987); see United States v. Rodríguez-Durán, 507 F.3d 749, 758 (1st Cir. 2007) ("The government need not succeed in eliminating every possible theory consistent with the defendant's innocence and circumstantial evidence alone may be sufficient to provide a basis for conviction." (citations and

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> "If the inferences and underlying evidence are strong enough to permit a rational factfinder to find guilt beyond a reasonable doubt, a conviction may properly be based on 'pyramiding inferences.' If the inferences are too weak, or the conclusions the prosecutor seeks to have drawn from them are too speculative, a conviction based thereon must be set aside * * * ." Clifford S. Fishman, Jones on Evidence Civil and Criminal § 5:17 at 450-51 (7th ed. 1992).

internal quotation marks omitted)); see also State v. Lyons, 924 A.2d 756, 765 (R.I. 2007); Mattatall, 603 A.2d at 1106; Dame, 560 A.2d at 334; In re Derek, 448 A.2d at 768.

It is axiomatic that "[i]nferences and presumptions are a staple of our adversary system of factfinding." County Court of Ulster County, New York v. Allen, 442 U.S. 140, 156 (1979); see also State v. Stone, 924 A.2d 773, 783 (R.I. 2007); State v. Ventre, 910 A.2d 190, 198 n.5 (R.I. 2006). From that axiom, it follows that the state may prove the guilt of a defendant "by a process of logical deduction, reasoning from an established circumstantial fact through a series of inferences to the ultimate conclusion of guilt." Vargas, 21 A.3d at 353 (internal quotation marks omitted); see also Cipriano, 21 A.3d at 425; Stone, 924 A.2d at 783; Mattatall, 603 A.2d at 1107; Caruolo, 524 A.2d at 581-82. We remain mindful, however, that "[t]he pivotal question in determining whether circumstantial evidence is sufficient to prove guilt beyond a reasonable doubt is whether the evidence in its entirety constitutes proof beyond a reasonable doubt or is of such a nature that it merely raises a suspicion or conjecture of guilt." Lyons, 924 A.2d at 765 (alteration in original) (internal quotation marks omitted); see also Stone, 924 A.2d at 783; Caruolo, 524 A.2d at 581.

With respect to inferences, we have stated that, when "the initial inference in the pyramid [of inferences] rests upon an ambiguous fact that is equally capable of supporting other reasonable inferences clearly inconsistent with guilt, [the] pyramiding of inferences * * * becomes speculative * * * and thus insufficient to prove guilt beyond a reasonable doubt." Vargas, 21 A.3d at 353 (omissions in original) (emphasis added) (internal quotation marks omitted); see In re Derek, 448 A.2d at 768 ("[A]n inference resting on an inference drawn from established facts must be rejected as being without probative force where the facts from which it is drawn are susceptible of another reasonable inference." (internal

quotation marks omitted)); see also State v. Sivo, 925 A.2d 901, 910 (R.I. 2007); Mattatall, 603 A.2d at 1107; Dame, 560 A.2d at 334; Caruolo, 524 A.2d at 582.

The defendant in the case before us takes issue with the ultimate inference in this case—namely, that she acted with malice aforethought with respect to the death of her daughter. What defendant fails to identify, however, is any ambiguity in the factual foundation upon which that ultimate inference rests. See Mattatall, 603 A.2d at 1107 (explaining that the fact that the victim was found in the defendant's home "shot in the head by a .357 magnum" was "certainly * * * not an ambiguous fact that [was] capable of supporting other reasonable inferences clearly inconsistent with guilt"). To the contrary, defendant appears to admit, as the medical experts concluded, that her child was born alive and that it died while in her care; she focuses her attention on what she asserts is a lack of evidence of malice on her part. See id. at 1106 (stating that "[m]alice may consist of an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life").

The defendant contends that the reasoning in In re Derek, 448 A.2d 765 (R.I. 1982), supports her argument. In our judgment, however, In re Derek is readily distinguishable from the case at hand. In In re Derek, 448 A.2d at 768, the Court concluded that neither of the inferences which were necessary in order to find the defendant guilty of the crime charged were "exclusive;" and, therefore, since the facts did not "inevitably" lead to those inferences, no further inferences could properly be drawn from those primary inferences. Ultimately, the Court held that, although the evidence "raise[d] a suspicion" that the defendant committed the crime, "[p]roof based on conjecture and speculation does not support a criminal conviction." Id. at 768-69; see also Dame, 560 A.2d at 335 (holding that, although testimony showed that the defendant

gave a false statement to the police regarding the description of the fire in question, that fact did not lead to the inevitable conclusion that the defendant intentionally set the fire).

To determine whether the facts of the instant case lead to the inevitable inference that defendant acted with malice (based upon a theory that defendant acted with wanton recklessness or conscious disregard for the possibility of death or of great bodily harm), we have turned to the record in order to scrutinize the trial justice's observations in passing upon defendant's motion for a new trial. See Navarro, 33 A.3d at 157-58. The trial justice began by reviewing the testimony of the expert witnesses. With respect to the testimony of Dr. Gilson concerning the independent viability of the infant, the trial justice noted that Dr. Gilson had opined that he "had every reason to believe that the baby should have continued to breathe." The trial justice added that Dr. Arden (one of defendant's expert witnesses) had "conceded and acknowledged that the child had been breathing * * * ."

The trial justice expressly rejected the testimony of Dr. David, defendant's other expert witness, stating that "[i]t is little wonder that these jurors plainly rejected Dr. David's opinions, and, from my vantage point as a front-row observer, they were entirely justified in doing so."

The trial justice concluded his review of the expert testimony by stating that he was "well-satisfied that the credible medical evidence demonstrated beyond any doubt that this child was born alive."

The trial justice next reviewed the evidence to determine whether defendant was "criminally responsible for the infant's death." The trial justice first observed that that determination "ineluctably turned on the credibility of the defendant."[17] He then proceeded to

[17] At the very beginning of his ruling on the motion for a new trial, the trial justice had remarked that this case "was very much a credibility contest."

review the testimony of defendant; and, after conducting that review, he expressly concluded that defendant's testimony was "simply implausible and, to any casual observer, scarcely worthy of belief." The trial justice then quoted from this Court's opinion in State v. Mattatall, 603 A.2d 1098 (R.I. 1992), which articulates the following principle:

> "[W]hen a defendant elects to testify, he [or she] runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his [or her] testimony is the truth. As long as there exists some other evidence of the defendant's guilt, disbelief of a defendant's sworn testimony is sufficient to sustain a finding of guilt." Id. at 1109 (citation omitted).

The trial justice then proceeded to review the evidence in the record which pointed to defendant's criminal responsibility for the infant's death. He first found that defendant gave birth to a healthy and fully developed infant, who at birth was breathing on her own. The trial justice also found that defendant had refused access to her sister[18] during the time that she was in the bathroom; he also found that defendant was later seen carrying a laundry basket downstairs to the laundry room—the room in which the body was eventually found "secreted in a trash bag." The trial justice further noted that defendant "protested vehemently" against seeking medical treatment and that, when she was later receiving such treatment, she had "adamantly denied" ever being pregnant or ever giving birth, despite being confronted with medical indications to the contrary. The trial justice then stated:

> "The defendant was alone with the newborn infant; the child did not die a natural death. The credible evidence leads clearly to the conclusion that the defendant caused that child to die."

[18] Although the trial justice stated in his review of the evidence that one of defendant's sisters was refused access to the bathroom, we note that the trial testimony revealed that both of her sisters were refused access to the bathroom by defendant that night. See Section I A 2, supra.

The trial justice then went on to review the evidence in the record that would support a finding of malice aforethought as would be required for a conviction of second-degree murder to be sustainable. He began by again referencing the testimony of defendant, and he found that "[t]he jury would have been well-justified in finding that the professed failure of memory at trial was a lie." He continued by reviewing the testimony of the treating doctors, and he made note of their statements that defendant was alert and oriented during her treatment. He also made reference to defendant's acts of concealment—including "[r]efusing her sister[s] access to the bathroom;" [19] carrying the laundry basket downstairs "with the infant hidden in the towels;" and the "final flourish" of hiding the infant in the black trash bag, which he stated was secreted in the laundry room and "shoved under the dryer" with a "large container * * * placed in front of it."

The trial justice concluded his assessment with the following statement:

> "This defendant was not some young teenager who was embarrassed or ashamed by what had occurred. * * * Julie Robat was a mature 30-year-old living in a household with two adult sisters and her parents, and, without question, she could have confided in them and explained her circumstances to them * * * . Considering the defendant's mendacious testimony that she suffered from a failure of recollection, together with obvious and, from the viewpoint of any fair-minded juror, her knowingly false and adamant denial to hospital doctors and staff that she had had a baby – couple that with the [secreting] of the baby in the plastic bags and hidden in the laundry room, together with all of the other evidence pointing to defendant's efforts to obfuscate what had occurred, including her demands that she did not want to go to the hospital or, for that matter, even remain there, a jury would not have been unjustified in concluding that with respect to this child's death, the defendant had acted with wanton disregard for the baby's life and with an extreme indifference to the sanctity of human life, i.e., with malice."

[19] See footnote 18, supra.

The trial justice determined that, "[a]t best, the defendant may be able to argue that reasonable minds could differ." The trial justice further stated as follows:

> "From my vantage point, as a front-row observer of this trial, and particularly taking into account the defendant's demeanor and her reaction while she testified, I cannot fault this jury at all for convicting her of second-degree murder, and I shall not set the verdict aside."

The trial justice thereafter denied defendant's motion for a new trial.

After examining the record, it is clear to us that, in addressing defendant's motion for a new trial, the trial justice properly weighed the evidence and assessed the credibility of the witnesses. Moreover, after scrutinizing the facts summarized above, it is our judgment that the trial justice did not overlook or misconceive material evidence relating to a critical issue, nor did he commit clear error. See Mattatall, 603 A.2d at 1109. Indeed, it is manifest from our review of the record that the trial justice conducted his analysis of the merits of the motion for a new trial in a laudably meticulous manner.

Therefore, in view of the trial justice's findings, the established circumstantial facts concerning the birth of defendant's child are as follows: that the infant was born alive and healthy and that the infant died while she was in the care of defendant. Those underlying facts lead to a single inference—that defendant's action or inaction resulted in the death of her infant. The question that remains is whether the state provided legally sufficient evidence to prove beyond a reasonable doubt that that action or inaction by defendant was carried out with an "unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life." See Texieira, 944 A.2d at 142.

One need only review the additional circumstantial evidence to conclude that such an inference was not only permissible in the instant case, but indeed was also inevitable. See In re

Derek, 448 A.2d at 766-68. The state's evidence, as found by the trial justice, established: (1) that defendant never sought medical attention for her baby; (2) that she expressly turned her sisters away while she was in the bathroom where she gave birth; (3) that she hid the body of her infant; (4) that she protested when her family sought medical attention for her; and (5) that she vehemently and mendaciously rebuffed the suspicions of her treating physicians to the effect that she had given birth or had seen a baby. In addition, defendant never once attempted to seek medical advice or treatment after she became aware that she was pregnant. The entirety of the evidence, which can properly be viewed as reflective of "purposeful and deliberate conduct in an attempt to conceal the true facts," Mattatall, 603 A.2d at 1108, leads ineluctably to the conclusion that defendant acted, with respect to the life of her child, with "an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life."[20] See id. (holding that the evidence presented at the trial in that case, including several acts of concealment, was "capable of demonstrating defendant's malice aforethought necessary to sustain a conviction of second-degree murder"); see also Wilding, 638 A.2d at 522 ("[M]alice may be inferred from the circumstances surrounding a defendant's conduct and the events leading up to the death of the victim."); State v. McGranahan, 415 A.2d 1298, 1302 (R.I. 1980). See generally Goldsmith v. State, 344 So.2d 793, 798 (Ala. Crim. App. 1977) (concluding that the evidence at the trial under review, which evidence showed that the defendant gave birth to a newborn child, never gave aid to the child and, at some point after the child's birth, placed the child in a paper bag which was then placed within a suitcase, was sufficient to enable the court to be able to sustain defendant's conviction for the first-degree murder of her newborn infant); Joshua Dressler, Understanding Criminal Law § 31.05[B] at 478

[20] State v. Texieira, 944 A.2d 132, 142 (R.I. 2008).

(2d ed. 1997).[21] Therefore, defendant's argument that there was an improper pyramiding of inferences is unavailing since, in our judgment, the circumstantial evidence leads, as the trial justice found, to the ineluctable inference that defendant acted with malice in causing the death of her child. See Vargas, 21 A.3d at 354 (holding that, "rather than deducing guilt from an ambiguous circumstantial fact, the state established a pattern of corroborating circumstances sufficient to justify a reasonable juror in finding defendant guilty beyond a reasonable doubt" (internal quotation marks omitted)).

It is important to draw a distinction between second-degree murder and involuntary manslaughter because defendant's argument that the evidence at trial was insufficient to warrant a conviction for second-degree murder necessarily invites the question as to whether the evidence warranted a conviction only for involuntary manslaughter, which is a lesser included offense.[22] The crime of involuntary manslaughter has been defined by this Court as "an

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[21] With respect to the distinction between murder and manslaughter, the treatise cited in the text reads as follows:

> "[A] person kills 'recklessly' if she consciously disregards a substantial and unjustifiable risk to human life. When such recklessness is extreme, i.e., when the risk of death is very great, and the justification for taking the risk is weak or non-existent, the actor is guilty of murder." Joshua Dressler, Understanding Criminal Law § 31.05[B] at 478 (2d ed. 1997).

[22] We note that the lesser included offense of involuntary manslaughter was submitted to the jury, along with the charge of second-degree murder. With respect to the offense of involuntary manslaughter, the trial justice instructed the jury in pertinent part as follows:

> "You should * * * consider whether or not [defendant] committed the lesser offense of manslaughter, which is the unlawful but unintentional killing of a human being, without malice or premeditation. In the context of this case, the level of manslaughter to be considered is involuntary manslaughter, which is based upon proof that the defendant's conduct amounted to

unintentional homicide without malice aforethought, committed either in performance of an unlawful act not amounting to a felony or in the performance of a lawful act with criminal negligence." State v. Hallenbeck, 878 A.2d 992, 1008 (R.I. 2005) (internal quotation marks omitted); see also Torres v. State, 19 A.3d 71, 75 n.7 (R.I. 2011); State v. Hockenhull, 525 A.2d 926, 929 (R.I. 1987). The just-quoted term "criminal negligence" means "conduct which is such a departure from what would be that of an ordinarily prudent or careful man [or woman] in the same circumstances as to be incompatible with a proper regard for human life, or an indifference to consequences." State v. Ortiz, 824 A.2d 473, 485 (R.I. 2003) (alteration in original) (internal quotation marks omitted); see also State v. Robbio, 526 A.2d 509, 514 (R.I. 1987). In sum, "involuntary manslaughter occurs when, without malice aforethought, an unintentional death results from a voluntary act, one that a reasonable person, acting in a similar manner, would not expect to cause death or serious injury." Ortiz, 824 A.2d at 486; see also Hockenhull, 525 A.2d

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> criminal negligence and that such negligence was a proximate cause of the child's death.
>
> "Let me speak to you about the term criminal negligence. * * * It is not criminal negligence unless the defendant's conduct was a gross deviation from the standard of care that a reasonable person would have followed under the circumstances. In other words, criminal negligence is evidenced by conduct that is such a departure from that of an ordinary prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life, or an indifference to the consequences.
>
> "Mention should be made of situations where criminal negligence may arise not because of an act of negligent conduct, but because of a negligent failure to act; that is to say, conduct of omission as opposed to an act of commission. * * *
>
> " * * *
>
> "There are * * * situations which do give rise to a legal duty to take remedial action based upon special relationships where the failure to act may, depending upon all the circumstances, constitute criminal negligence. * * * [A] parent has a legal obligation to protect a child and may be held criminally accountable for the failure to act affirmatively to seek assistance or attempt to prevent harm that results in the child's death."

at 929. We note that the trial justice instructed the jury with respect to the offense of involuntary manslaughter. See footnote 22, supra.

In the instant case, it is clear that the evidence produced at trial established that defendant's actions were far more egregious than those that have been held sufficient to warrant a conviction for involuntary manslaughter. The defendant, at the time of her pregnancy and the birth of her newborn infant, was thirty years old. It appears self-evident to us that a reasonable thirty-year-old person would understand and expect that the deliberate failure to obtain medical attention for a newborn infant would lead to that newborn's death or serious injury. Furthermore, defendant owed a duty of care to her newborn infant because a special relationship exists between a parent and his or her child such that a duty to care for the child on the part of the parent is manifest, and the jury was so instructed (see footnote 22, supra). See State v. McLaughlin, 621 A.2d 170, 175 (R.I. 1993) (expressly recognizing the parent-child relationship as constituting an exception to the rule that there is "no general duty of care imposed on a person to protect, render assistance, or to otherwise be responsible for another's safety and welfare" and stating that a "parent may be guilty of criminal homicide for failure to call a doctor for his [or her] sick child" (internal quotation marks omitted)). If the failure to act in the face of such a duty results in the death of the child and is accompanied by malice aforethought, then the parent may properly be found guilty of murder. See Dressler, Understanding Criminal Law § 31.05[A][2] at 477 ("Malice may also be evidenced by an omission, such as when a parent, out of indifference, fails to feed her infant for two weeks."); see also 2 Wayne R. LaFave, Substantive Criminal Law § 14.4(a) at 440, 441 (2d ed. 2003) (stating that, with respect to the type of risks that will be adequate to show the "high degree of unjustifiable homicidal danger" required for certain

second-degree murder convictions, "[a] very risky omission will suffice where there is a duty to act").

In the case at bar, as noted above, the state proved that defendant acted with malice aforethought (an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life).[23] The state so proved by presenting evidence that defendant took affirmative steps to prevent the discovery of the birth of her child—by refusing access to her sisters while she was in the bathroom where the birth occurred and by not seeking medical attention for her child, thereby willfully allowing her daughter, to whom she owed a legal duty to protect,[24] to be exposed to conditions which resulted in her death. See, e.g., Goldsmith, 344 So.2d at 798 ("Willfully allowing one to be exposed to conditions which will probably result in death, where there is a duty to protect such person, constitutes murder." (internal quotation marks omitted)); Simpkins v. State, 596 A.2d 655, 660 (Md. Ct. Spec. App. 1991) (stating, with respect to parents depriving their child of care, that "[m]ost courts * * * look more to whether the deprivation was knowing and willful, tacitly, perhaps, inferring an intent [to kill] from the inevitable consequence of the deprivation but not requiring proof of an express intent to kill"); State v. Collins, 986 S.W.2d 13, 19 (Tenn. Crim. App. 1998) (holding that the evidence supported a conviction for second-degree murder where the state had offered proof that "the defendant hid her condition from her parents, her roommates and her friends, and caused the drowning death of the victim by cutting her own umbilical cord as she sat on her private commode" and also pointing out that the defendant had "failed to inform either her roommates or

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[23] See Texieira, 944 A.2d at 142.

[24] See State v. McLaughlin, 621 A.2d 170, 175 (R.I. 1993).

paramedics that she had delivered a full-term child" while seated on the toilet); see also 40 C.J.S. Homicide § 37 at 407-08 (2006).

The defendant further contends that, in reviewing her testimony at trial, the trial justice mistakenly relied upon certain language in this Court's opinion in Mattatall. Specifically, defendant argues that the trial justice incorrectly reasoned that, because defendant's testimony was not credible, the jury could reasonably infer that the state had proven its case. As previously noted, the trial justice in the instant case quoted certain language from the Mattatall opinion as articulating the principle that, by testifying, defendant ran the risk that, if her testimony were disbelieved, the finder of fact could conclude that the opposite of her testimony was actually the truth—provided that there existed some other evidence to support a finding of guilt. See Mattatall, 603 A.2d at 1109.[25] However, what defendant notably ignores is that the trial justice explicitly proceeded to fully review the independent evidence presented by the state that supported a conviction for second-degree murder.[26] Therefore, the trial justice did not err in

[25] We deem it helpful to quote the complete language from State v. Mattatall, 603 A.2d 1098 (R.I. 1992), which lies at the center of one of defendant's arguments:

> "We agree with the trial justice that when a defendant elects to testify, he runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth. As long as there exists some other evidence of the defendant's guilt, disbelief of a defendant's sworn testimony is sufficient to sustain a finding of guilt. As was stated by the United States Court of Appeals for the Ninth Circuit: 'A trier of fact is not compelled to accept and believe the self serving stories of vitally interested defendants. Their evidence may not only be disbelieved, but from the totality of the circumstances, including the manner in which they testify, a contrary conclusion may be properly drawn.'" Id. at 1109 (citations omitted) (quoting United States v. Cisneros, 448 F.2d 298, 305 (9th Cir. 1971)).

[26] It should also be noted that this Court has very recently had occasion to revisit the Mattatall language with which defendant takes issue; and, in doing so, we steadfastly reaffirmed

reasoning that, as long as there was evidence of defendant's guilt, certain damning conclusions could properly be drawn from his finding that defendant had provided "implausible" testimony. See id. (reviewing the evidence, which included the concealment of the weapon and the fact that the defendant "failed to call for help or report the shooting," and holding that "when the independent evidence is considered in light of [the defendant's] patently incredible testimony—testimony full of inconsistencies and contradictions—neither the trial justice nor any rational juror could have entertained any reasonable doubt about [the defendant's] guilt").

Lastly, defendant primarily relies upon Vaughan v. Commonwealth, 376 S.E.2d 801 (Va. Ct. App. 1989), to contend that, "[b]ased upon factual scenarios that were very similar to this case, other courts have held that the evidence was not sufficient to support a conviction for intentional malicious murder."[27] Although it is true that the factual scenario in Vaughan bears some similarity to the lamentable facts of the instant case, what is fatal to defendant's argument is that the Court of Appeals of Virginia, in reversing the defendant's first-degree murder conviction for insufficient evidence, relied upon the principle that the evidence presented in a criminal case must be "inconsistent with innocence" and must "exclude every reasonable hypothesis except guilt." Id. at 808 (internal quotation marks omitted). In this jurisdiction, however, a similar rule of law (known as the Montella or "reasonable hypothesis" rule) was abandoned by this Court over twenty-five years ago. See State v. Roddy, 401 A.2d 23, 35 (R.I. 1979) ("[W]e think the time has come when we abandon 'Montella.'"); see also Caruolo, 524

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said language. See State v. Smith, 39 A.3d 669, 674 (R.I. 2012) (citing Mattatall and concluding that "[i]t is apparent * * * that defendant's testimony—laden with cryptic one-word responses—did not assist his cause"); see also State v. Karngar, 29 A.3d 1232, 1236 (R.I. 2011).

[27] The defendant also relies upon two other cases (viz., United States v. Nelson, 52 M.J. 516 (U.S. Navy-Marine Corps Ct. Crim. App. 1999) and People v. Chavez, 176 P.2d 92 (Cal. Dist. Ct. App. 1947)) to support her argument; however, we perceive those cases as having no bearing on the instant case.

A.2d at 581; State v. Romano, 456 A.2d 746, 763 (R.I. 1983) (recognizing that the Court's intention in Roddy was to reject the Montella rule "in its entirety"). We also note that the defendant in Vaughan (sixteen years old) was significantly younger than the defendant in the instant case (thirty years old) at the time of the death of her newborn child, and the Court of Appeals of Virginia considered the defendant's age to be a relevant factor in concluding that the Commonwealth had failed to prove that the defendant had "acted with malice and a deliberate intention to bring about the baby's death." Vaughan, 376 S.E.2d at 807, 808. For these reasons, the Vaughan case cited by defendant does not persuade us to hold that the evidence in the instant case was insufficient to convict defendant of second-degree murder.

Accordingly, "we are satisfied that the evidence and testimony were sufficient to support a jury finding that defendant possessed the legal malice necessary to sustain [her] conviction of second-degree murder." Mattatall, 603 A.2d at 1109. The trial justice pointed to "ample evidence" in denying defendant's motion for a new trial. See id. We hold that the trial justice did not err in denying defendant's motion for a new trial; and, in fact, we agree with his decision. For these reasons, we will not disturb that decision. See Scanlon, 982 A.2d at 1279.

2. Motion for a Judgment of Acquittal

Due to our conclusion that the evidence presented in this case was sufficient to enable us to sustain the denial of defendant's motion for a new trial, it follows a fortiori that "the evidence was also sufficient to withstand a motion for a judgment of acquittal." See State v. Otero, 788 A.2d 469, 475 (R.I. 2002) ("[T]he standard applied to a motion for judgment of acquittal requires less in the way of evidence than the standard applicable to a motion for a new trial." (internal quotation marks omitted)); see also Navarro, 33 A.3d at 158; Cardona, 969 A.2d at 674; Hesford, 900 A.2d at 1200. Thus, the trial justice correctly denied defendant's motion for a judgment of

acquittal on the second-degree murder count. See Navarro, 33 A.3d at 158; see also Pineda, 13 A.3d at 642.

B

The Prosecutor's Statements During Closing Argument

The defendant next contends that the trial justice erred in overruling defense counsel's objections to comments made by the prosecutor during her closing argument. The defendant further maintains that the trial justice should have granted a new trial, "in the interests of justice," because of what she characterizes as the "improper comments" made by the prosecutor.

As specified by defendant, the comments to which, in defendant's view, counsel's objections should have been sustained are as follows:

> "In the end, [Dr. Arden] had to say that this death was undetermined, because, if he had said it was a homicide, he wouldn't have been presented to you."
> "* * *
> "[Dr. David is] a polished pitchman. * * * He's paid to convince people that the position he's putting forward is the right one. In this case, his client's product is her lack of responsibility for her child's death."
> "* * *
> "These witnesses were hired to endorse the defendant's product. They were not the treating physicians. They were not the investigators on scene. When they were reviewing the materials that were provided to them by the defendant, they were looking for things consistent with her defense, things that were consistent with what she wanted them to say. And when * * * they found it, they were satisfied."

We begin by noting that defense counsel's objections to these statements were overruled; and, in our judgment, given the facts of this case, the challenged statements did not constitute improper comments.

We would further comment that, although defense counsel did timely object to the above-quoted statements, he failed either to move to pass the case[28] or to request a cautionary instruction. It is well settled in our jurisprudence that, "in order to preserve for appellate review the issue of prejudicial impropriety in a closing argument, a defendant must not only make an objection at the time when the allegedly improper comment is made, but he or she must also make a request for a cautionary instruction or move for a mistrial." State v. Fortes, 922 A.2d 143, 149 (R.I. 2007); see also State v. Monteiro, 924 A.2d 784, 792 (R.I. 2007); State v. Portes, 840 A.2d 1131, 1141 (R.I. 2004). If that procedure is not followed, then "the issue is not properly preserved for appeal." State v. Horton, 871 A.2d 959, 964 (R.I. 2005) (internal quotation marks omitted); see also Portes, 840 A.2d at 1141.

This Court will look beyond a failure to comply with that procedural requirement and will deem there to be present an exception to the raise or waive rule "if such a request would [have been] futile, or [if] any attempt to cure the prejudice would have been ineffective * * * ." Monteiro, 924 A.2d at 792; see also Horton, 871 A.2d at 964. Similarly, despite a party's failure to do more than voice an objection, this Court has stated as follows with respect to when we will reach such an argument:

> "[A]n exception to the rule * * * exists when a constitutional right is implicated and each of the following three criteria is satisfied: (a) the alleged error consists of more than harmless error; (b) the record permits a determination of the issue; and (c) counsel's failure to raise the issue at trial stemmed from ignorance of a novel rule of law about which he or she could not reasonably have known at the time of trial." State v. Remy, 910 A.2d 793, 800 (R.I. 2006); see also Horton, 871 A.2d at 964-65.

[28] "In Rhode Island, the terms 'motion to pass the case' and 'motion for a mistrial' are synonymous." State v. Rosario, 14 A.3d 206, 212 n.4 (R.I. 2011) (internal quotation marks omitted); see also State v. Grant, 946 A.2d 818, 824 n.2 (R.I. 2008); State v. Disla, 874 A.2d 190, 198 (R.I. 2005).

The defendant does not argue that a request for a cautionary instruction would have been futile,[29] nor are the criteria set forth in Remy before us. Accordingly, we maintain our long-standing rule that the above-referenced procedural steps must be adhered to in order to properly preserve the issue of inappropriate prosecutorial comments.

IV

Conclusion

For the reasons set forth in this opinion, we affirm the judgment of conviction. The record in this case may be returned to the Superior Court.

Justice Flaherty, dissenting. I respectfully dissent from the holding of the majority in this case. I do agree, however, with the majority's cogent framing of the question before us: Whether the state produced legally sufficient evidence from which the jury could conclude beyond a reasonable doubt that the action or inaction of Julie Robat that caused her child's death was perpetrated with malice aforethought? The facts of this case are beyond tragic; they are the stuff of nightmares. Nevertheless, after a searching review of the record and the applicable law, I have concluded that there is but one, unequivocal answer to that question under the law of this state: No.

In my opinion, the trial justice erred when he denied defendant's motion for a new trial because he misconceived both the evidence and our state's law with respect to the critical issue

[29] It appears from the record that such a request would not have been futile, since the trial justice had previously sustained defense counsel's objection to a statement made by the prosecutor and had also later admonished the prosecutor to "stay within the bounds of the argument." See State v. Fortes, 922 A.2d 143, 150 (R.I. 2007); State v. Horton, 871 A.2d 959, 965 (R.I. 2005).

of whether defendant acted with malice aforethought. It is also my opinion that the trial justice erred when he denied defendant's motion for judgment of acquittal based on substantially the same errors of law; those errors subsequently tainted his ruling on defendant's motion for a new trial. For these reasons, it is my opinion that the defendant's conviction for second-degree murder should be vacated, and the matter should be remanded to the Superior Court for an entry of conviction for involuntary manslaughter and concomitant resentencing.

I

The Law of Inferences

The majority lashes its holding to what it describes as the "ineluctable inference" that defendant acted with malice. In my opinion, the majority's interpretation and application of our law on the probative value of "pyramiding inferences" is a flawed contortion of this Court's precedent. It is wholly accepted that the state may rely solely on circumstantial evidence of guilt to sustain its burden of proof, so long as the totality of the circumstantial evidence constitutes proof beyond a reasonable doubt. In re Derek, 448 A.2d 765, 768 (R.I. 1982) (citing State v. Proulx, 419 A.2d 835, 841 (R.I. 1980); State v. Roddy, 401 A.2d 23, 35 (R.I. 1979)); see also State v. Dame, 560 A.2d 330, 334 (R.I. 1989). It is equally true that "the state may prove guilt from an established circumstantial fact through a series of inferences" in "a process of logical deduction." Dame, 560 A.2d at 334 (citing State v. Caruolo, 524 A.2d 575, 581-82 (R.I. 1987)). "If this pyramiding of inferences becomes speculative, however, proof of guilt beyond a reasonable doubt will not be found." Id. (citing Caruolo, 524 A.2d at 581; State v. Alexander, 471 A.2d 216, 218 (R.I. 1984); In re Derek, 448 A.2d at 768).

This Court firmly has delineated when a "pyramid of inferences" stretches so far beyond its factual foundation that it becomes legally, and logically, unsupportable. As Chief Justice Bevilacqua wrote in State v. von Bulow, 475 A.2d 995 (R.I. 1984):

> "It is well settled that if an inference is the only reasonable one to be drawn from the established facts, then a secondary inference may be drawn from the primary inference. However, when the facts from which it is drawn are susceptible of another reasonable inference, it must be rejected as lacking probative force." Id. at 1023 (citing In re Derek, 448 A.2d at 768; Waldman v. Shipyard Marina, Inc., 102 R.I. 366, 373-74, 230 A.2d 841, 845 (1967)) (Bevilacqua, C.J., concurring in part and dissenting in part).

"In this way the ultimate inference rests upon a foundation that logically has the probative force of established fact; were it otherwise, the ultimate conclusion * * * would rest on no more than conjecture and surmise." von Bulow, 475 A.2d at 1023 (quoting Carnevale v. Smith, 122 R.I. 218, 225, 404 A.2d 836, 841 (1979)). Put another way, if a chain or pyramid of inferences begins with an ambiguous fact—that is, an established fact that is "capable of supporting other reasonable inferences clearly inconsistent with guilt"—then the probative force of the chain is broken, and the state has failed to demonstrate proof beyond a reasonable doubt. Caruolo, 524 A.2d at 582; see also State v. Vargas, 21 A.3d 347, 353 (R.I. 2011); Alexander, 471 A.2d at 218; In re Derek, 448 A.2d at 768.

In my opinion, a review of the record shows that the pyramid of inferences built by the state, and relied upon by the majority, strains credulity and transgresses these salutary restraints. At trial, the state presented no direct evidence of malice; instead, it relied on circumstantial facts and a series of inferences surrounding the established fact that defendant's child was born alive

and died while in her care.[30] To conclude that defendant acted with malice, however, a fact-finder must deduce the following from that single fact: (1) defendant knew that the baby was born alive; (2) defendant knew that the baby needed care; (3) defendant chose not to provide care, or acted in a hostile manner; and (4) she did so knowingly, or with wanton or consciousness disregard for the fact that her failure to provide care likely would cause the baby's death. Under In re Derek and its progeny, the first inference may be resolved safely in favor of the state: a reasonable fact-finder may, but need not, infer that defendant knew the baby was born alive. However, even if a fact-finder grants the state some latitude and further infers defendant knew the baby needed immediate care, it is my opinion that under the law of this jurisdiction, without more, nothing more can be deduced.

The In re Derek line of cases militates against the stacking of further inferences because the established fact—that defendant's baby was born alive—is susceptible to another reasonable inference inconsistent with guilt. See Vargas, 21 A.3d at 353; Caruolo, 524 A.2d at 582; In re Derek, 448 A.2d at 768. This is so because the same fact-finder reasonably could infer from the evidence that defendant was incapacitated to the extent that she (1) did not appreciate the condition of the baby at the time of delivery; (2) that she did not know that the baby needed to be cared for and warmed immediately; or (3) that she knew the baby needed care but was unable to render any aid. Because these reasonable-alternative inferences exist, any inference drawn in favor of the state beyond the primary inference that "the defendant knew the baby was born alive" lacks "a foundation that logically has the probative force of established fact" and necessarily is reduced to mere "conjecture and surmise." Carnevale, 122 R.I. at 225, 404 A.2d at

[30] There was disagreement among the testifying medical experts about how many breaths the baby may have taken, and the length of time that it may have lived. However, based on my reading of record, the evidence presented at trial established that defendant's baby was born alive.

841. As this Court reaffirmed in Dame, 560 A.2d at 334, that kind of speculation cannot constitute proof beyond a reasonable doubt; to hold otherwise would eviscerate that standard.

The majority's attempt to distinguish In re Derek is, in my opinion, a hollow exercise. The test for determining whether a fact is "ambiguous" is whether it is susceptible to more than one reasonable inference inconsistent with guilt. See Vargas, 21 A.3d at 353; Caruolo, 524 A.2d at 581; In re Derek, 448 A.2d at 768. Our law does not require that the alternative inference be more likely or more probable; it requires only that it be "reasonable." The majority opines that because the trial justice concluded that "a jury would not have be unjustified" in finding malice, that not only does the law permit such an inference, but that it necessarily must be so. I respectfully disagree. There was ample evidence from which a juror reasonably could infer that defendant was incapacitated after she gave birth, and therefore she did not know the baby was born alive or was incapable of rendering aid. As the majority relates, there was little question that this was a traumatic delivery: The medical testimony reflected that this was a "precipitous birth" and an inordinately fast labor for a first-time mother. The record is replete with evidence of her copious blood loss: her sisters described that she was "white as a ghost" and that even her gums and tongue were white; defendant passed out, fell face-first onto the floor, and began to seize when her sisters put her in the bath tub; Dr. Kurl testified that defendant arrived at the hospital "soaked in blood" and that blood was pouring out of both sides of the gurney; she estimated the blood loss at two to three liters, which is nearly half of the human body's total blood volume.[31] From these facts, a juror reasonably could infer that defendant was suffering

[31] I cannot help but note the brow-raising testimony by defendant's sisters that despite finding her in such a state, defendant engaged in a host of physical activities alone. These included cleaning up the bathroom after the delivery of the baby, traversing down the staircase to the basement with a full laundry basket, putting the load into the washing machine, and climbing the stairs back to the second floor. They testified that only then did she collapse to the floor.

from hemorrhagic shock after the birth of her child. Therefore, like the observations of the young man in a blue T-shirt in In re Derek, the established fact that "defendant's baby was born alive" is ambiguous and consequently incapable of supporting further inferences.[32]

II

The Majority's Other Evidence of Malice

The majority bolsters its untenable chain of inferences by reviewing evidence of the "surrounding circumstances" considered by the trial justice when he ruled on defendant's motion for a new trial. In my opinion, that evidence bears no rational relationship to the issue of malice. The majority improperly relies on evidence of "consciousness of guilt" that is only properly probative of the fact that defendant committed a "guilty deed." Furthermore, the majority emphasizes that the trial justice did not find defendant to be a credible witness, and was able to consider that conclusion as evidence of malice. In my opinion, the majority's conclusion results from a misapplication of our law on that issue.

A. Consciousness of Guilt Evidence

The majority's reliance on the consciousness of guilt evidence introduced by the state is misplaced and vastly at odds with the weight of authority. The defendant's refusal to admit her sisters into the bathroom, her secreting of the baby's body, and the lies she told hospital staff about not being pregnant or giving birth give rise only to an inference that defendant knew she

[32] In In re Derek, 448 A.2d 765, 766 (R.I. 1982), the bookkeeper of a Newport company left her office for a short period, only to return and discover that about $6,000 had gone missing during her absence. She testified that she recalled seeing two young men in the hallway as she left, one of whom was wearing a blue T-shirt. Id. A police officer testified that he had seen the defendant earlier that same day in a public building wearing a blue T-shirt. Id. A different witness testified that he had seen a young man wearing a blue T-shirt in the vicinity of that same building with a large sum of money. Id. This Court held that this evidence could not sustain a conviction for larceny because the inference that the defendant was the youth seen by the bookkeeper earlier in the day did "not inevitably follow" from the evidence presented, and therefore that fact was ambiguous and could not serve as the foundation for multiple inferences Id. at 768.

had done something that was illegal or shamefully immoral; it says nothing about whether she acted with malice. Our Court has not squarely considered whether so-called "consciousness of guilt" evidence has any bearing on a defendant's specific mental state. However, this issue has been addressed by numerous other authorities. See, e.g., Stafford v. People, 388 P.2d 774, 778 (Colo. 1964); Commonwealth v. Lowe, 461 N.E.2d 192, 199 n.6 (Mass. 1984); State v. Steele, 130 S.E. 308, 312 (N.C. 1925); 1A Wigmore, Evidence §§ 32, 173, 267, 276-78 (Tiller rev. ed. 1983). These authorities, among others, unanimously conclude that inferences of malice, premeditation, or deliberation cannot be gleaned from evidence of subsequent concealment of evidence, lying, or other guilty conduct.

The Supreme Court of North Carolina's holding in Steele, 130 S.E. at 312, is representative: "Subsequent acts, including flight or hiding the body, or burning the bloody clothes and otherwise destroying traces of the crime are competent on the question of guilt." The North Carolina court, however, had no trouble also concluding that "[f]light is not evidence of premeditation and deliberation." Id. Similarly, the Massachusetts Supreme Judicial Court stated that evidence of the defendant's consciousness of guilt—that he did not call for help, that he fled and disposed of the death weapon, and that he made incriminating statements to police officers—"while relevant to the issue whether a criminal homicide was committed, is not evidence of malice aforethought." Lowe, 461 N.E.2d at 199 n.6; accord Stafford, 388 P.2d at 778 ("The fact that the defendant buried the body, repeatedly lied concerning the disappearance of Blanche, went under an assumed name and, while awaiting trial, escaped from jail, was properly submitted to the jury as evidence of guilt * * * but the same does not serve to supply the missing element of malice."). The facts relied upon here by the trial justice in his review of the evidence, and necessarily by the majority in sustaining his ruling, are indistinguishable from the

facts that confronted the courts in these other jurisdictions. I am more than persuaded by the reasoning of those rulings that defendant's subsequent conduct—while evidence of a guilty deed—has no rational relationship to the issue of whether defendant acted with malice, recklessness, or negligence.

The majority also suggests that defendant's age and the fact the she did not prepare for the baby's birth are probative of malice. In my opinion, defendant's age, with no additional evidence of her specific knowledge or education about childbirth or her mental well-being, says nothing about her mental state. The gap between unreasonableness and malice is wide, and defendant's age cannot span it. I similarly believe that the majority's consideration of the civil duties of care imposed on parents and their children is not germane to this matter. Those duties serve to underscore the aberrant nature of defendant's actions, which I do not contest. However, they are irrelevant to the question presented.[33]

Furthermore, if defendant's failure to prepare for the birth of her child constitutes malice, then the majority puts this Court in the precarious position of judging the sufficiency of every expectant mother's decisions about prenatal care. I see no intrinsic relationship between a mother's failure to prepare for the birth of her child and a murderous intent.[34] See Vaughan v. Commonwealth, 376 S.E.2d 801, 807 (Va. Ct. App. 1989). The majority dismisses Vaughan primarily because that decision reversed a conviction for first-degree murder rather than second-degree murder; I believe that assertion is a distinction without a difference. The Virginia Court

[33] In the recent case of Commonwealth v. Pugh, 2012 WL 2146788 (Mass. June 15, 2012), the Supreme Judicial Court of Massachusetts declined to impose a duty on a mother to summon assistance during an in-home childbirth.

[34] I find it noteworthy on this point that the trial justice granted defendant's motion for judgment of acquittal on the charge of first-degree murder. Obviously, the trial justice found that these same facts could not support an inference that defendant acted from premeditation or deliberation.

vacated the conviction because "the evidence was inadequate to prove beyond a reasonable doubt that [the defendant] acted with malice, willfulness, deliberation, or premeditation." Id. (emphasis added). The court wrote:

> "[T]he evidence that [the defendant] kept her pregnancy, the labor, and the birth of the baby a secret does not support, beyond a reasonable doubt, an inference of intent to kill the baby. Although this evidence may be consistent with the behavior of a person who intends to kill a baby at birth, it is also consistent with the behavior of an unwed young girl who is frightened, enveloped in shame, and embarrassed about her pregnancy and labor. Disposing of the baby's body is behavior that is as consistent with shame, an attempt to avoid embarrassment, and fear of incurring the anger of one's parents as it is consistent with an attempt to conceal a murder." Id.

I fully concur in this analysis, which is based on facts that are closely analogous to the circumstances of this case. The fact that Ms. Robat is older than the defendant in Vaughan does not mean that she may not have felt the same shame, embarrassment, and fear as a result of her pregnancy, particularly when it was undisputed that she lived with her parents and she admitted that they espoused rather traditional, conservative values. Surely, the failure to prepare for the birth of a child is highly irresponsible, but it does not indicate malice. See id.; see also United States v. Nelson, 52 M.J. 516, 518, 524 (1999) (upholding a conviction for involuntary manslaughter when a naval technician failed to seek medical assistance during the birth of her daughter, secreted the baby in her bunk, and did not bring the newborn to a hospital for twelve hours).

I have been unable to find a similar case with so few established facts in which an appellate court has affirmed a conviction for a crime requiring malice aforethought. After reviewing the majority's comparators, I find them to be quite incongruous. For instance, in State v. Collins, 986 S.W.2d 13, 18 (Tenn. Crim. App. 1998), the Court of Criminal Appeals of Tennessee affirmed a conviction for second-degree murder, which that state defines as the

"knowing killing of another." Additionally, Tennessee law provides that "[a] parent who elects not to seek medical assistance for his infant child may be convicted of second degree murder where there is proof that the victim's 'deterioration [is] evident and the need for medical attention [ ] apparent." Id. In that case, there was significant additional evidence of the defendant's "knowing" action that is absent here: the prosecution introduced evidence showing that her labor lasted several hours, during which she asked her roommates for towels as well as for a pair of scissors. See id. at 15. Additionally, the cause of death of the baby was drowning, not exposure, which drowning occurred in the bathroom's commode; the commode was found draped with a towel. See id. at 15-16. These circumstances, unlike those in this case, provided a factual platform for the primary inference that the defendant was not only consciously aware of everything that was going on, but arguably an active participant in the death of her child.

Goldsmith v. State, 344 So.2d 793 (Ala. Crim. App. 1977), and State v. Wilding, 638 A.2d 519 (R.I. 1994), are even more dissimilar. In Goldsmith, 344 So.2d at 794, the defendant admitted giving birth to a baby in a motel during the early morning hours. She then left the baby, which was born alive, on the motel room's bed until 1 P.M. the following day. Id. In her statement to police, she admitted that around that time she placed the baby in a paper bag, and then inside of a suitcase, and that she and her brother then drove to her mother's house. Id. There was testimony from the defendant's aunt that she could hear "something moving" and "whin[ing]" inside of the suitcase when they arrived at the house. Id. The suitcase was opened around 2 p.m., and the baby was discovered; several witnesses testified that the baby appeared to be alive, but was having difficulty breathing. Id. The baby subsequently died. Id. In Wilding, 638 A.2d at 519-20, an otherwise healthy infant was left in his father's care and subsequently discovered by his mother "hardly breathing and covered with black-and-blue marks." Id. at 520.

The baby died "of severe external and internal traumatic injur[ies] to the head." Id. I cannot conceive of how cases like Goldsmith and Wilding support a similar outcome in this case; they are simply factually inapposite.

B. The Effect of Defendant's Credibility

I also find fault with the majority's application of our law concerning the effect of the defendant's lack of credibility as a witness. I agree that State v. Mattatall, 603 A.2d 1098, 1109 (R.I. 1992), stands for the proposition that if a defendant chooses to testify, then "he runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth." However, in my opinion, the key to understanding this rule is found in the sentence that follows it: "As long as there exists some other evidence of the defendant's guilt, disbelief of a defendant's sworn testimony is sufficient to sustain a finding of guilt." Id. I would not disturb the experienced trial justice's finding that Ms. Robat's testimony lacked the hallmarks of truthfulness. However, the entirety of his analysis with respect to the "other evidence" of guilt required under Mattatall consists of generic evidence of the defendant's consciousness of guilt. As discussed above, that evidence bears no relationship to whether the defendant acted out of malice. The defendant testified consistently, if not credibly, that she did not remember with any clarity the events that occurred in the bathroom or at the hospital. If she is not believed, then the jury is permitted to infer that she in fact did remember what happened in the bathroom and at the hospital. Because the state introduced no other evidence of malice, but rather relied on an impermissible pyramid of inferences, the jury cannot attribute malice to the defendant's actions based upon her lack of credibility. See id.

IV

Conclusion

For the foregoing reasons, I cannot join in the majority's holding in this case with respect to the sufficiency of the evidence on the issue of malice.[35] The defendant's conviction necessarily was predicated upon a chain of inferences that inherently was flawed. The conclusion that flowed from those inferences was then bolstered by unrelated evidence. In my opinion, the defendant's conviction for second-degree murder should be vacated, and the matter should be remanded to the Superior Court for an entry of conviction for involuntary manslaughter and re-sentencing on that charge. Therefore, I respectfully dissent.

[35] I concur in the portion of the majority opinion related to the prosecutor's statements during closing argument.

RHODE ISLAND SUPREME COURT CLERK'S OFFICE

Clerk's Office Order/Opinion Cover Sheet

TITLE OF CASE: State v. Julie Robat.

CASE NO: No. 2010-61-C.A.
(P1/07-1310A)

COURT: Supreme Court

DATE OPINION FILED: July 12, 2012

JUSTICES: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia JJ.

WRITTEN BY: Associate Justice William P. Robinson III

SOURCE OF APPEAL: Providence County Superior Court

JUDGE FROM LOWER COURT:

Associate Justice Robert D. Krause

ATTORNEYS ON APPEAL:

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