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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole

Appellant Case No 2021-000692
Lower Case Nos. 2019GS4202503, 2019GS4202504

State of South Carolina, ... Respondent,

vs.

Robert T. Gentry . . . . . Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Question I

Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory before the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, that would tend to prove that Mr. Gentry knew of Tremaine Pierre Johnson's plan to kill Brechue Wiles and that he willfully aided Mr. Johnson in accomplishing the murder?

If, as the State suggests, all reasonable inferences from the fact are to be decided in favor of the State, then virtually no circumstantial evidence case would ever be reversed. For example, in *State v. Hernandez*, 382 S.C. 620, 624–25, 677 S.E.2d 603, 605 (2009) the court noted these facts, "The undercover agent testified that Petitioners conversed with the driver of the Thunderbird before they caravanned down the rural dirt road. Additionally, the undercover agent testified that in his experience, drug transactions this large are typically handled within an 'inner circle' and all of the parties involved are aware of what transpires." The drugs were in rented tractor trailer from Texas. The rural dirt road was in Trenton, SC. Under these fact, a juror could conclude that Raphael Hernandez, Honorio Guerrero and Alfredo Avila–Arjona, the defendants, knew the truck from Texas contained drugs. The South Carolina Supreme Court said this inference was not enough. In reversing the conviction, the court acknowledged such an inference is possible, but stated, "We find, however, that while these testimonies may support such an inference, this evidence alone does not constitute substantial circumstantial evidence that Petitioners had knowledge." *Id.* at 625, 677 S.E.2d at 605.

In *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004), the South Carolina

Supreme Court, in reversing the conviction, said, "Viewing the evidence most favorably to the State, respondent's fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where respondent was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that respondent killed Dr. Cox." *Id.* Again, the fact that Mr. Arnold could have killed Dr. Cox is a rational inference. Thus, in South Carolina, something more than an inference supporting guilt is required to be substantial circumstantial evidence to sustain a conviction. Unfortunately, the courts have not told the bar how much more. At the very least, the evidence must show facts, not inferences, that make at least make the state's theory from the facts substantially more likely than the defendant's version. No such facts, not inference from facts, but facts, support the conviction in this case.

The State states, as did Mr. Gentry in his opening brief, that one of the elements is the defendant "either advised and agreed, urged, or in some way aided some other person to commit the offense." Br. of Resp. at 15. Not stated, but implied, is the fact the defendant has to know a crime is being committed. The indictment in this case alleged Mr. Gentry knew Mr. Johnson was going to commit a crime. Rec. on App. at (Indictment). The State must prove all three elements before a conviction can be secured.

In its brief, the State has offered virtually no evidence Mr. Gentry knew a murder or any other crime was about to be committed by Mr. Johnson. The State makes several statements in its brief that have no factual basis in the record. The State argues inferences from some facts, but no facts. For example, the State argues, "The evidence supports the inference that the day after the murder Johnson is urging Gentry to report the gun stolen while Gentry seems to be deciding

between alternative and incompatible courses of action of either (1) reporting his gun stolen or (2) selling his gun." Br. of Resp. at 15-16. Neither of these two facts support an inference of Mr. Johnson being guilty of accessory before the fact. While Mr. Gentry did searches for reporting a gun stolen, nothing in the record suggests he did so at the urging of Mr. Johnson. Nothing in the record suggests Mr. Gentry had the gun after the shooting and nothing suggest he intended to sell it. Both draw inferences from facts. The inferences are speculative at best.

With no facts to support its claim, the State urges upon this court the theory that "[C]ommunications between Gentry and Johnson neatly straddle before and after the murder as if the murder was the centerpiece of their communication." Br. of State at 16. The officer who examined the phone records testified the phone conversations made no reference to Brechue WIles, no reference to a female, no reference to Johnson being upset with his girlfriend, no reference to Johnson wanting to kill or harm anyone and no reference to a firearm of any type.. Rec. on App. at 292, l 2 to 293, l 25. With no facts to support such an inference, the state now says the conversations support an inference that they were planning a murder. That conclusion is an inference with no basis in fact to back it up. As such, it is mere speculation as to what the parties discussed with no substantial circumstantial evidence to support the conclusion. The State seems to argue that since we do not know what they said, we are entitled to speculate they discussed issues that support its version of the facts. No case law permits this type of inference seeking.

The State further argues that "they carefully avoid discussing the substance of their conversations in any text or messages." Br. of Resp. at 16. With no proof as to what the substance of the conversations were, the State is not entitled to speculate as to what was said nor

what was avoided being said. Such speculation is not proof. "By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act" *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). In this case the government is required to prove the parties discussed the murder and Mr. Gentry agree and aided in its participation.

The State further claims, "These careful, furtive communications in the day leading up to the murder and the immediate days afterwards suggest Gentry was aware he was providing a weapon for a violent crime." Br. of Resp. at 18. Again, as the State does not know what the conversations said, they elect to call them "furtive" and speculate as to what was said because they have no proof as to what was said. The State then concludes, "The jury could believe Gentry was aware of the probable use of the weapon for a violent crime." Br. of Resp. at 18. A jury is not entitled to base an conviction on absence of what the conversations actually said. This is pure speculation.

Finally the State argues, "In the instant case, the furtive conduct by both Gentry and Johnson to arrange the transfer of Gentry's .40 caliber Smith & Wesson to Johnson, with requisite TulAmmo ammunition, indicates knowledge and a reckless disregard for human life on Gentry's part because his conduct indicates he understood he was providing the weapon to Johnson for some illicit and dangerous purpose." Br. of Resp. At 20. No facts exist to support this conclusion. With no facts to say what Mr. Gentry and Mr. Johnson discussed, the State argues, again, that the lack of any evidence enables them to speculate what was said, done and in the mind of both people based simply on the known fact they talked to each other. Again, this is mere speculation. This speculation is not substantial circumstantial evidence and is not sufficient

to sustain this conviction for accessory before the fact to murder.

Question II

Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory after the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, that would tend to prove that Mr. Gentry knew Tremaine Pierre Johnson had killed Brechue Wiles and that he willfully aided Mr. Johnson in covering up the murder?

The State fairs not better in it argument that the facts are sufficient to sustain the conviction of Robert Gentry for accessory after the fact to murder. The State again cites the three elements of accessory after the fact. One of the elements is Mr. Gentry helped Mr. Johnson cover up the crime.

In trying to sustain the conviction, the State argues, "Gentry undertook numerous searches regarding the murder. Further, the internet searches indicate Gentry knew he needed to dispose of the weapon quickly and Johnson's message seeking for Gentry to report the weapon stolen the day before the murder is further evidence of Gentry's knowledge.[1] The jury could infer that Gentry knew of the murder when he assisted Johnson in disposing of the weapon." Br. of Resp. at 22-23. Nothing in any in the record supports the conclusion that Mr. Gentry was trying to dispose of the weapon. No evidence establishes that Mr. Gentry assisted Mr. Johnson in

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[1] The record does not support the conclusion that Mr. Johnson asked Mr. Gentry to report the gun stolen. This conclusion by the State is apparently based upon Mr. Gentry conducting searches about reporting a gun as being stolen. It is just as logical to believe that Mr. Gentry figured out on his own that Mr. Johnson has used his weapon in a murder and Mr. Gentry on his own decided to report it stolen. Rec. on App. at 280, l 1 to 283, l 2. The murder, by the time of these searches, had been in the local news.

disposingof the weapon. Again, based upon the absence of facts, the State is asking this Court, and the jury below, to infer with no facts what they could not prove.

The State also argues, "Gentry's first internet search after the meeting was a search for selling a weapon on Cheaper then Dirt." Br. of Resp. at 23. The searches indicate that Mr. Gentry was trying to buy a firearm and not sell one.[2] Rec. on App. at 274, l 15 to 275, l 23. Nothing in the record establishes Mr. Gentry had the firearm used to commit the murder in his possession.

Whether Mr. Gentry conducted an internet search to buy or sale a weapon, neither happened. An internet search, even with knowledge that a murder had been committed does not make one guilty of accessory after the fact. As the Mississippi court said, "In order to commit the crime of accessory after the fact in this State, we are satisfied that there must be some indication that the effort to assist a fleeing felon actually aided or assisted him in some way. This is inherent in the statutory definition, which requires that the defendant have actually 'aided or assisted' the felon, as opposed to simply having attempted, but failed, to do so." *White v. State*, 851 So. 2d 400, 405 (Miss. Ct. App. 2003).

The State then argues, "There is sufficient evidence that Gentry disposed of the weapon or coordinated its disposition with Johnson." Br. of Resp. at 23. Nothing in this record supports this conclusion. Mr. Gentry agrees that if he had disposed of the weapon the evidence would support a conviction of accessory after the fact. No such evidence exist in this case. The State is using internet searches to conclude this happened. Such a conclusion is mere speculation.

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[2] The theory of the State at trial was Mr. Gentry was trying to buy a gun. Rec. on App. at 471, ll 11-14.

Speculation is not substantial circumstantial evidence. Again, the State is unable to prove Mr. Gentry even saw the murder weapon after the murder. Again, the State urges this court to sustain the conviction not based on facts but from speculation based upon the lack of facts.

Accessory after the facts requires that a defendant does an affirmative act to help cover up or conceal the crime. No such affirmative act has been shown in this case. No substantial circumstantial evidence support the conviction of Mr. Gentry for accessory after the fact.

CONCLUSION

For the reasons set forth in the opening brief and for the reasons above, this court should reverse the convictions of Robert Gentry on the grounds the facts were not sufficient to conviction and remand with an order to dismiss the two cases.

June 14, 2022

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CERTIFICATE OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 14, 2022, she did deposit a copy of the Initial Reply Brief in the above case addressed to David Spencer, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

June 14, 2022

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Re: State vs. Robert T. Gentry, Case No. 2021-000692

Dear Ms. Kitchings:

I am enclosing herewith for filing the Initial Reply Brief together with the Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt

cc David Spencer