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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5950

THE STATE,

RESPONDENT,

V.

DEVIN JAMEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2019-000938

RETURN TO PETITION FOR REHEARING

On November 9, 2022, this Court issued a published opinion reversing Appellant's conviction for murder. On November 28, 2022, the state petitioned this Court for rehearing. The following day, this Court requested Appellant respond to the petition for rehearing. Pursuant to Rule 221(a), SCACR, and this Court's request, Appellant now files this return. Appellant respectfully requests this Court deny the state's petition for rehearing because no matter was overlooked or misapprehended by this Court in arriving at its well-reasoned decision.

Respondent first complains that this "Court overlooked that while the prosecution's theory was that [Appellant] fired the fatal shot, the direct and circumstantial evidence presented

at trial supported the requested instruction on th[e] legal principle” of accomplice liability. Pet. at 2. In support of this position, the state cites to “text messages [Appellant] sent to Stevens ... [to] demonstrate his efforts to secure an accomplice to assist him in killing the victim.” Pet. at 2. However, the state omits that the state presented no evidence that Stevens actually agreed to be an accomplice, if that is indeed what the text messages sought, or that Stevens was an accomplice. In fact, according to the state’s own evidence, there was no one other than Appellant that could have been the shooter. As the petition for rehearing acknowledges, Appellant’s text messages did not even suggest the involvement of a second person as all text messages were in the first person singular – “I.” Even the penultimate text message, according to the state’s theory, was in the first person singular as Appellant allegedly indicated that he – and he *alone* – could not wait on Stevens as he had to handle his business. Pet. at 3. The only conclusion that can be drawn from these text messages is that if Appellant did act, then he did so *alone*. The state’s suggestion that this evidence supports the trial judge’s instruction on accomplice liability is simply incorrect.

Next, the state argued this Court “may have overlooked that a very reasonable inference that jurors could infer from the surveillance video and still photos is that he found a person to assist him and that they murder murdered the victim while acting together, aiding and abetting one another.” Pet. at 3. Thus, it is necessary to examine what the video actually showed. The video showed two people arrive at the apartment complex where the deceased lived at 10:15 p.m. in a car that was “consistent” with the car owned by Appellant’s girlfriend. The individuals got out of the car and walked toward the breezeway where shell casings were later found. Shortly thereafter, the video showed two individuals reenter the car in the same positions they exited. This – a video showing two people arriving in a car together and two people leaving in a car

together around the time of the shooting – is the state’s best argument that Appellant *and someone else* had joined together to accomplish the illegal purpose of murdering the deceased.

To this end, the state argued in its petition as it did at trial that Appellant “*might* have needed someone to provide him a gun because the murder weapon was never found; he *could* have needed someone to motivate or reassure him, since the defense elicited evidence that he was nonviolent, or he *might* not have wanted to murder ‘his sister’s boyfriend on the doorstep.’” Pet at 3 no.2 (emphasis added). Far from “beyond a reasonable doubt,” the best the state could argue was that its evidence “might” or “could” show a variety of things that “might” or “could” add up to accomplice liability. Appellant respectfully disagrees that these so-called “very reasonable” inferences could be drawn from the video in light of what the video actually showed. The state is, and was, merely speculating. Of course, in order for a judge to instruct the jury regarding an alternate theory of liability, such as accomplice liability, there must be “any evidence” to support the alternate theory. Nevertheless, the state’s speculation of what the evidence “might” show is a far cry from what the evidence actually showed.

Next, the state faults this Court for failing to follow the law by “focus[ing] heavily on the state’s theory of the case.” Pet. at 4. By describing this Court’s opinion as “focused heavily on the state’s theory of the case,” the state admits this Court did *not* focus *solely* on the state’s theory of the case, which would be erroneous. Instead, this Court focused on the entirety of the evidence presented, which included the lead detective’s testimony that it was a “close call” as to whether he could even charge the passenger of the car with murder. The lead detective – who was a member of the prosecutor’s office as a lawyer at the time of Appellant’s second trial – was hardly a neutral witness. In other words, the state’s own lead detective, who had every motive to

support the state's request for an accomplice liability instruction, could not be convinced that there was any evidence to charge the passenger with murder.

Demonstrating the leaps in logic the state is willing to make to maintain its conviction, the state claimed the police "affirmatively eliminated the 'Creep' to whom [Appellant] referred as a suspect" simply because the police located someone using the nickname "Creep" in Summerville and eliminated him "as a suspect because he did not have a tattoo and he had a different phone number from the 'Creep' in [Appellant]'s cell phone directory." Pet. at 5. If the "Creep" the police found did not have the tattoo described by Appellant or the phone number listed in Appellant's phone for "Creep," then all the police could do was eliminate the "Creep" the police found from being the person to whom Appellant referred in his statement to police. There is *absolutely no way* the police could "eliminate the 'Creep' to whom [Appellant] referred as a suspect" when the "Creep" the police found was not the one described by Appellant.

Perhaps the most telling sentence in the state's petition for rehearing is its concession that the state presented no evidence of accomplice liability when it admitted that the identity of "the other person present when the [deceased] was murdered is, like *his role in the murder*, still *unknown* to this day." Pet. at 5 (emphasis added). The fact that this is a concession of the lack of any evidence to support an accomplice liability instruction is the state's claim that it was "*impossible* for the prosecution, the defense, the trial judge, or this Court to *know* what precise role the unknown individual was recruited to play or played in the murder because there was neither an eyewitness nor a video of the shooting." Pet. at 5 (emphasis added). Despite recognizing this impossibility, the state argued, "All that is certain is that both men were present and, inferably, aiding and assisting one another in the commission of the murder." Pet. at 5. What the state claimed was an inference is actually pure speculation.

Repeatedly, the state complained about this Court's reliance on binding appellate precedent because the cases were "factually distinguishable." Pet. at 6 (claiming Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) is factually distinguishable); Pet. at 7 (claiming State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020) is factually distinguishable); Pet. at 8 (claiming State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021) is factually distinguishable). No two cases are ever exactly the same factually; thus, there will always be factual distinctions a party can make. What is important from those cases is the legal principles they embody, which this Court correctly articulated and then applied to the facts presented in the case sub judice.

At least the state acknowledged how the judge's erroneous instruction was prejudicial. As the state indicated, the jury's note regarding "the hand of one" and its subsequent acquittal of Appellant on the weapon charge showed the jury "convicted [Appellant] of murder even though it found that the unknown participant actually was the shooter." Pet. at 5-6. Yet, the state claimed "it was both legally and factually improper to rely on that acquittal to find prejudice." Pet. at 10. To support this claim, the state made the incongruous argument that this Court's use of the jury's verdict to determine if the erroneous jury instruction impacted the verdict was not preserved for appellate review because Appellant did not "alleged any supposed inconsistency in the verdicts in his Statement of Issues on Appeal" and that South Carolina abolished the rule against inconsistent verdicts in this state. Pet. at 10. Not only is the state's argument on this point bizarre in that the state's position is that Appellant failed to raise on appeal a legal doctrine that has been abolished, but the issue presented on appeal was *not* that the jury reached inconsistent verdicts. The issue raised on appeal was whether the trial judge erred by instructing the jury on the alternative theory of accomplice liability. This Court correctly looked to the

entire record to determine if the judge's error was prejudicial to Appellant, as this Court was required to do. This Court's examination of the jury's verdict concerned the "reversible" part of the reversible error analysis. In order to obtain relief, an appellant must show error and prejudice arising from that error in order for it to be deemed reversible error.

Likewise, the state's contention that Appellant's argument that the trial judge erred by submitting an alternative theory of liability to the jury is not properly before this Court on appeal because it was not raised at trial is misleading. Again, Appellant's issue on appeal is whether the trial judge erred by instructing the jury on accomplice liability. Trial counsel objected to the instruction, and this was the issue raised on appeal. Accomplice liability is an alternative theory of liability. While the state may not like that term, as is evident by its brief and petition for rehearing, that is the term that has been used by the South Carolina Supreme Court to describe accomplice liability. It is not a separate basis for relief on appeal as the state posits. Rather, it is the same basis for relief as that raised in Appellant's brief.

Appellant must note that in its brief of respondent filed in State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020), the state took no exception to the Supreme Court's categorization of accomplice liability as an alternate theory of liability as the state filed no petition for rehearing. In fact, the state quoted the exact language from Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011) that called accomplice liability an alternate theory of liability. See Brief of Respondent p. 34 in Washington. Likewise, the state did not complain when this Court cited to the Barber language in Wilds v. State, 431 S.C. 394, 848 S.E.2d 779 when it filed its petition for rehearing. Rather, the state quoted the exact language. See Pet. for Rehearing p. 1 in Wilds. Even in the state's recently filed briefs in State v. Campbell, Appellate Case No. 2022-000349, expressed no beef with this Court's citation and quotation of the language from Barber that is now deemed so

offensive and erroneous. See Brief of Petitioner in Campbell; Reply Brief of Petitioner in Campbell. Had the state any real reason to complain about the calling of accomplice liability an alternate theory of liability, surely the state would have done so in its first available opportunity.

Appellant respectfully requests this Court deny the state's petition for rehearing as this Court neither overlooked nor misapprehended anything in reaching its well-reasoned and thoroughly researched opinion that follows binding appellate court precedent.



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 9th day of December, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the return to petition for rehearing in the above-referenced case has been served upon William Edgar Salter, III, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Devin Jamel Johnson, #359432, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of December, 2022.



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

From: [Stock, Chris](#)
To: [SC - SALTER WILLIAM](#); [Angela Brown](#)
Cc: [Hackett, Susan](#)
Subject: Johnson, Devin - Return to Petition for Rehearing - 2019-000938
Date: Friday, December 9, 2022 4:56:00 PM
Attachments: [Johnson, Devin - Return to Petition for Rehearing - 2019-000938.pdf](#)
[Johnson, Devin - Return to Petition for Rehearing - 2019-000938 - AG Cover Letter.pdf](#)

Mr. Salter,

Please find attached for service the return to petition for rehearing for Devin Jamel Johnson's appeal which will be filed with the Court of Appeals today.

If you have any questions, please let me know.

Thank you,

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330