STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVIN JAMEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2019-000938

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err in removing the juror where (1) the juror's failure to disclose was unintentional and innocently made, as agreed upon by all parties and found by the trial judge and (2) the juror indicated he could remain fair and impartial, where his decision was based upon the solicitor's self-serving claim that she would have exercised a peremptory challenge to a juror who revealed mid-trial that he knew an inconsequential witness?

III. Violating Appellant's right to due process of law, did the trial judge err in instructing the jury concerning accomplice liability, specifically regarding the theory that "the hand of one is the hand of all," where the state failed to present any evidence that Appellant acted in concert with another?

STATEMENT OF THE CASE

On December 10, 2018, a Charleston County grand jury indicted Appellant for murder (2018-GS-10-6264) and possession of a weapon during the commission of a violent crime. R. 608 – R. 609; R. 612 – R. 613. The state, represented by Stephanie B. Linder and Price Sigal, called the case for trial before the Honorable R. Markley Dennis, Jr., and a jury on April 1-4, 2019. R. 1. John J. Kozelski, III, and Tola Familoni represented Appellant. R. 1. The jury found Appellant guilty of murder pursuant to an accomplice liability theory. R. 492, ll. 15-18. Accordingly, the jury found Appellant not guilty of possessing a weapon. R. 492, ll. 19-23. Judge Dennis sentenced Appellant to thirty-six years imprisonment. R. 493, l. 24 – R. 494, l. 1; R. 614.

On April 15, 2018, Appellant filed a motion for new trial. R. 600. On May 29, 2019, Judge Dennis presided over a hearing on the motion. R. 497. At the conclusion of the hearing, Judge Dennis denied the motion. R. 516, l. 11.

On May 29, 2019, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in admitting Appellant's statement to a police officer, which was given over the course of a five-hour interrogation, where the statement was not given knowingly, intelligently, and voluntarily in light of the totality of the circumstances, including (1) the officer's repeated refusal to permit Appellant an opportunity to smoke a cigarette, (2) the officer's statement that cigarettes were for cooperators, (3) the officer's statement that non-cooperators got prison, not cigarettes, and (4) the officer's threat that Appellant would never see his daughter again.

Relevant facts

Prior to trial, Appellant moved to suppress his video-recorded statement to law enforcement. R. 517. David Osborne, who previously worked for the City of Charleston Police Department, but was an Assistant Solicitor at the time of the trial, interrogated Appellant on June 10, 2011, two days after Smalls' death. R. 31, l. 13 – R. 32, l. 16; R. 34, ll. 13-15. The five-hour interrogation began with Osborne requesting a buccal swab from Appellant pursuant to a search warrant, which was provided to Appellant for review. State's Exhibit #80 at 21:03. Immediately before and after Osborne swabbed Appellant's mouth, Appellant asked Osborne if he could have a cigarette. Initially, Osborne responded that he *may* be able to work that out. State's Exhibit #80 at 21:05-21:06.

A different officer then read the arrest warrants and left Appellant with the paperwork. State's Exhibit #80 at 21:08-21:12. After Osborne demanded Appellant's clothing, Appellant asked for water and a cigarette. Although Osborne agreed, but provided neither. R. 47, ll. 10-12; R. 48, ll. 12-14; State's Exhibit #80 at 21:13-21:14. During the hearing, Osborne claimed that he did not recall ever offering Appellant anything to drink, but he knew that he would have. R. 35, ll. 20-22.

Shortly thereafter, Osborne advised Appellant of his rights pursuant to Miranda.[1] R. 37, l. 21 – R. 38, l. 10; State's Exhibit #80 at 21:19. Although Appellant indicated he understood his rights, there was no request by Osborne that Appellant waive those rights. State's Exhibit #80 at 21:19.

Initially, Appellant told Osborne that he was at home in Orangeburg on June 8, 2011. R. 40, ll. 8-15; State's Exhibit #80 at 21:21-21:44. Forty-five minutes into the interrogation, Osborne became exasperated and aggressive. R. 40, l. 22 – R. 41, l. 15; State's Exhibit #80 at 21:45. When Appellant requested a cigarette an hour into the interview, Osborne informed him that individuals who cooperate get cigarettes, and individuals who fail to cooperate go to prison. R. 41, ll. 21-23; State's Exhibit #80 at 22:12. Osborne elaborated on this notion by telling Appellant that if he cooperated, he would get a cigarette, but if he failed to cooperate, he would not. State's Exhibit #80 at 23:46. At another point when Appellant requested a cigarette, Osborne refused stating a cigarette would not change the trouble he was in. State's Exhibit #80 at 22:29-22:30. An hour later, Appellant begged for a cigarette, comparing his nicotine habit to a heroin addict. At this, Osborne responded that if Appellant told what happened, they would walk outside and have a cigarette. R. 48, ll. 20-24; State's Exhibit #80 at 23:20-23:21. Within minutes, Appellant asked for a cigarette again. Osborne responded, "We are not going to have a cigarette until we get a truthful story out of you." State's Exhibit #80 at 23:24. Three hours into the interrogation, Appellant remained steadfast that he was in Orangeburg and had requested a cigarette multiple times. State's Exhibit #80 at 22:05; 22:12; 22:29; 23:20; 23:24; 23:46.

When the show of aggression did not yield the results Osborne wanted, he switched gears and threatened Appellant with his ability to see his daughter. R. 42, ll. 21-23. Osborne told

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Appellant he would never see his daughter again because he was facing a murder charge. R. 43, ll. 1-3. Osborne decided to try a new interrogation strategy – allowing Appellant to contact his mother and girlfriend using Osborne's phone. R. 43, l. 22 – R. 44, l. 7; State's Exhibit #80 at 00:20. Thereafter, approximately four hours into the interrogation, Appellant stated he was at Georgetown Apartments, but denied he was involved in the shooting death of Smalls. R. 45, ll. 11-16.

During the hearing, Osborne admitted that Appellant asked him repeatedly for a cigarette. R. 36, ll. 3-8; R. 42, ll. 8-11. He further admitted that he had allowed individuals to smoke during interrogations. R. 36, ll. 13-15. Osborne explained his rationale:

> [W]ell, it depends on what they're arrested for, but if they're arrested for murder, you certainly need to think about safety. He has to be shackled. You need a belt harness or a security belt that you could loop the handcuffs through. I certainly wouldn't do it by myself regardless, but - - but either way, there certainly needs to be a level of comfortable where I'm comfortable with him that I'm going to walk outside and allow him to have a cigarette in his hand.

R. 36, l. 19 – R. 37, l. 2.

Osborne denied that he used the promise of a cigarette in an effort to get what he wanted. R. 51, ll. 9-14. Despite admitting he told Appellant that cigarettes were for cooperators, Osborne refused to categorize this statement as using the promise of a cigarette to get Appellant to provide him with more information about Smalls' death. R. 51, l.9 – R. 52, l. 1.

Osborne did not think "nicotine [was] that addictive." R. 47, ll. 22-23. While he admitted that heroin was "a very addictive substance," he was unwilling to even admit that nicotine was an "addictive substance." R. 47, l. 24 – R. 48, l. 5.

Defense counsel argued to suppress the statement based upon the totality of the circumstances. First, counsel noted the interrogation "went on for almost 5 hours." R. 54, l. 19. Second, the denial of nicotine to an addict affected Appellant's understanding and ability to voluntarily waive his rights. R. 54, l. 23 – R. 55, l. 4. Third, as Osborne mentioned during the

interrogation, Appellant was not familiar with the criminal justice system. R. 55, ll. 5-9. Fourth, the officers threatened Appellant with the loss of his daughter due to his arrest for murder in order to further manipulate and reduce his will. R. 55, ll. 10-15; R. 56, ll. 20-25. Finally, defense counsel explained how the police promised Appellant an opportunity to smoke a cigarette if he would simply give them the information they desired. R. 55, ll. 16-22.

To rebut Osborne's purported claim that he refused to allow Appellant to smoke based upon "potential physical harm," defense counsel noted the numerous times during the interrogation in which Appellant and Osborne were alone in the interrogation room together. R. 55, l. 23 – R. 56, l. 3. In fact, Osborne provided Appellant with his cell phone and allowed Appellant to remain in the room alone and unsupervised. R. 56, ll. 3-8. Osborne never displayed any fear of Appellant throughout the entire five-hour interrogation. R. 56, ll. 9-19.

Osborne and his fellow officer acted to "wear down the will" of Appellant over the five hour interrogation. R. 56, ll. 17-19. Looking at all of the facts as a whole, defense counsel moved to suppress the statement. R. 57, ll. 1-8.

The trial judge was unmoved by defense counsel's argument or the evidence presented. The judge determined that Appellant's cognitive skills and awareness were evident during his telephone calls with his girlfriend and mother. R. 59, ll. 1-7. Further, the judge found that Appellant changed his story because of his conversation with his mother, not because of any promise of cigarettes. R. 59, ll. 8-12; R. 60, ll. 3-7. According to the judge, "the only coercion was from whomever he was talking to on the phone." R. 61, ll. 13-14.

Following the judge's ruling, David Osborne took the stand. Osborne explained that "what [he] wanted to do was to first tell him or try to get him to admit that he was in Georgetown and then [go] rom there." R. 220, ll. 17-20. According to Osborne, "for several hours, [he] didn't get past

the first step because he said he was never in Georgetown. He said he was in Orangeburg the entire day." R. 220, ll. 20-22. Unable to dispute the evidence contained on the video, Osborne admitted that he was "a little bit more confrontational about some things" as the interrogation progressed. R. 223, ll. 9-11. He noted this was a strategy. He told the jury that there were certain things the police could do and certainly could not do. R. 223, ll. 14-16. According to Osborne, "You can't threaten them. You can't, you know, put your hands on somebody. You can't threaten them. You can't, you know, promise them things." R. 223, ll. 17-18. He even claimed that a detective could not falsify a document to make it look like he had evidence he did not have. R. 223, ll. 18-20. He then asserted he could "lie to them, … misrepresent evidence." R. 223, ll. 21-24.

In reference to a portion of the interrogation in which Osborne was "very sarcastic," he indicated it was "probably not a good technique" and blamed its use on his lack of sleep. R. 224, l. 22 – R. 225, l. 1. 2. When he admitted that he was "getting a little irritated" during the interrogation, he again blamed his "lack of sleep." R. 226, ll. 5-6. The prosecution played portions of the video of Appellant's interrogation. As clearly evidenced by the video, Osborne was confrontational and aggressive with Appellant when Osborne thought Appellant was untruthful. R. 227, ll. 14-17. Almost three hours into the interview, Osborne raised his voice because Appellant maintained he was in Orangeburg, not at the apartments. R. 227, ll. 14-17. Although Osborne allowed Appellant bathroom breaks and water, Osborne repeatedly refused to allow Appellant the opportunity to smoke. R. 227, l. 21 – R. 228, l. 3.

Regarding Appellant's requests for cigarettes, Osborne told the jurors that there was nothing that required him to give a cigarette to an individual. R. 228, ll. 10-12. He then repeated his testimony from the pre-trial hearing in which he painted the laborious scene of having to "put leg irons on them, … put a belt restraint on them so that their hands would be handcuffed close like

this." R. 228, ll. 17-23. He insisted that "a lot of planning" would be required for someone to smoke during an interrogation. R. 228, ll. 24-25. He was emphatic that he would never take someone to smoke by himself. R. 228, l. 25 – R. 229, l.1. He would "want maybe two or three guys." R. 229, l. 3. In order "to use manpower and resources" for a smoke break, he required " a certain comfort level with someone." R. 229, ll. 4-7. This included "feel[ing] like they're cooperating with the investigation, that they appreciate where they're at," especially for a murder case. R. 229, ll. 7-11. He "never reached that level to feel … comfortable walking outside" with Appellant, "especially with the charge that he had pending." R. 229, ll. 12-14. Contrary to what was contained on the video, Osborne claimed he told Appellant "no" when he requested a cigarette. R. 229, ll. 14-15. He caught himself, though, and admitted he told Appellant "cigarettes are for cooperators," which he claimed he did in one of his "more frustrated moments." R. 229, ll. 15-17.

He also admitted that he talked to Appellant about his daughter. R. 229, ll. 18-22. He did this because Appellant did not appreciate the situation he was in and he thought a reminder of what he had to lose would help him to appreciate that he was facing a murder charge. R. 229, l. 24 – R. 230, l. 4; R. 262, l. 14 – R. 263, l. 11. He wanted to impress upon Appellant the consequences he was facing when he told Appellant that "other men [were] going to raise her." R. 263, ll. 1-11.

Despite the alleged level of distrust Osborne had for Appellant, he left Appellant alone in the room to call his call his mother and girlfriend. R. 230, l. 14 – R. 233, l. 10. After this phone call, Osborne claimed Appellant "changed his story about being in Orangeburg." R. 233, ll. 12-14. Although Appellant told Osborne he was at Georgetown Apartments, he denied any involvement in the shooting. R. 264, ll. 16-23.

Relying upon the video and Osborne's testimony, during her closing argument, the solicitor told the jurors that part of Appellant's "cover up" of the shooting was his "four-hour" lie to the

police about being in Orangeburg. R. 449, ll. 18-21. The solicitor claimed Appellant showed "no emotion" regarding Smalls' death. R. 449, ll. 20-21. She reminded the jurors of Appellant's phone calls with his girlfriend and mother during the interrogation. R. 449, l. 22 – R. 450, l. 13. She described the interrogation as showing Appellant as "very calculated in all of this." R. 450, ll. 6-7. According to the solicitor, when Appellant "realized he was caught," he did not tell truth then, but he came "up with a new lie." R. 450, ll. 13-15. The interrogation was one of the "puzzle pieces" the solicitor claimed would result in Appellant's conviction. R. 450, l. 22 – R. 451, l. 9.

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect

made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted).

"A statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007) (quoting State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)).

In State v. Owens, 643 N.W.2d 735, 750-751 (S.D. 2002), the South Dakota Supreme Court found a statement given to police during custodial interrogation was voluntary in light of the totality of the circumstances. Those circumstances included the suspect's age of thirty-seven, his average intelligence, and the officer's advisement of rights. Id. at 750. Further, the court noted the suspect

had "broke[n] off the questioning on more than one occasion" showing his knowledge of his right to silence. The court recognized the interview was lengthy, but noted "it was not particularly adversarial or coercive" where there was "substantial give-and-take" between the officer and the suspect. Finally, the court explained there was "no evidence was of any physical punishment" where the suspect was not deprived of sleep, and he was supplied with soda and cigarettes." Id. at 750-751.

In State v. Cook, 847 A.2d 530, 547-548 (N.J. 2004), the New Jersey Supreme Court found a statement given to police was voluntary based on an examination of the totality of the circumstances. The Court noted that although the suspect, who was a high school graduate, was very emotional over the course of the nine-hour interrogation, he received intermittent breaks, drinks, cigarettes, and bathroom breaks. Id. at 547. The Court's concerns about the lengthy interrogation were assuaged by the fact that it occurred "all during the general work day, and there was no indication that he was sleep deprived, or that he was in any way physically or mentally abused." Id.

Appellant's statement was the product of coercive police practices and should have been excluded. The interrogation occurred over a five-hour period – lengthy by any measurement. The interrogation occurred during the evening hours, not beginning until 9 p.m. and not ending until after one in the morning on the following day. Appellant was exhausted physically and mentally as evidenced by his placing his head on the table. Appellant had limited involvement with law enforcement. Osborne was well aware of this fact and brought it to Appellant's attention repeatedly as he tried to "advise" Appellant on the best way to negotiate through the system. State's Exhibit #80 at 21:36; 21:44; 21:57; 22:02; 22:08; 22:38; 22:41; 22:46 ("You are ignorant to the system."); 22:54; 23:06; 23:16; 23:21; 23:36; 23:50. The detectives repeatedly used Appellant's six-year old

daughter as leverage to get Appellant to talk. For example, Kosarko told Appellant that if persisted in "lying," then he would never see his daughter again. State's Exhibit #80 at 22:01; see also State's Exhibit #80 at 21:35; 21:46; 22:06; 22:30; 00:09. See State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992) (holding a statement was involuntary where the police threatened a suspect that his wife could be arrested and their children could be taken away from them).

Perhaps the most coercive tactic used by the police during the interrogation was the denial of cigarettes to Appellant despite his repeated requests and his admission of nicotine addiction. Not only did Osborne refuse to allow Appellant to smoke, Osborne used the request for a cigarette break as a bargaining chip when he told Appellant that he would get to smoke only if he cooperated and that if he failed to cooperate, he would go to prison. This was Osborne's most obvious coercive technique regarding cigarettes, but he continued with more subtle methods, such as when he told Appellant that if Appellant changed his story, he would say that Appellant "told the truth" and then the two of them "went out and smoked a cigarette." State's Exhibit #80 at 23:21. Shortly thereafter, Appellant asked for a cigarette again, and Osborne continued to use the cigarette request and denial to coerce Appellant by stating Appellant would not get a cigarette until he gave "a truthful story." State's Exhibit #80 at 23:24.

Based on the totality of the circumstances, including the length of the interview, the time of the interview, Appellant's limited experience with criminal proceedings and Osborne's exploitation of this limited experience, Appellant's lack of sleep and obvious exhaustion, and Osborne's coercive behavior in response to Appellant's repeated requests for cigarettes, Appellant's statement was the product of police coercion and should have been suppressed by the trial judge.

II. Basing his decision upon the solicitor's self-serving claim that she would have exercised a peremptory challenge to a juror who revealed mid-trial that he knew an inconsequential witness, the judge erred in removing the juror where (1) the juror's failure to disclose was unintentional and innocently made, as agreed upon by all parties and found by the trial judge, and (2) the juror indicated he could remain fair and impartial.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only' and is 'bound by the trial court's factual findings unless they are clearly erroneous.'" State v. Coaxum, 410 S.C. 320, 326, 764 S.E.2d 242, 245 (2014) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)).

Relevant facts

During jury voir dire, the presiding judge asked if any of the potential jurors were "related by blood or marriage to any of these persons, ha[d] any business dealings with them, [were] socially or casually acquainted with them." R. 9, ll. 1-5. Among the list of persons was "Vanessa Morton." R. 9, l. 8. None of the potential jurors responded affirmatively to the question. R. 10, l. 7. When Timothy Backman was called as a potential jury, both sides agreed to seat him. R. 24, ll. 20-25.

Vanessa Bumcum Morton testified on behalf of the state. She described Aakeem Smalls as someone who was "like family" to her. R. 300, ll. 13-20. She corroborated the testimony given by her son, Diangelo Bumcum, regarding his phone call to her when Smalls died. R. 300, ll. 21-25. Further, she corroborated Diangelo's testimony that she instructed him to go home immediately, and he did. R. 301, ll. 7-15. When she learned the police wanted to question Diangelo about Smalls' death, she contacted the police. R. 301, l. 19 – R. 302, l. 6. She confirmed the testimony of law enforcement that the clothing Diangelo was wearing on the night of the shooting was seized. R.

303, ll. 2-16. Just as Diangelo and law enforcement testified, Morton told the jurors that Diangelo was arrested for Smalls' murder. R. 304, ll. 21-22. Although the police later dismissed the charge against Diangelo, Morton told the police to "[k]eep him in jail," which was exactly what the state's lead detective claimed she said. R. 305, ll. 15-16.

Later, the judge received a note from Juror Backman in which he revealed that he "kn[e]w Vanessa Buncom." R. 523. The parties agreed to allow the judge to speak to Juror Backman outside the jury room. R. 342, ll. 1-22. Thereafter, the judge revealed he had "two problems going simultaneously." R. 344, l. 13. First, he noted that he observed Juror Backman "nodding" and with his eyes closed. R. 344, ll. 20-22. He was unsure if the juror were sleeping. R. 344, ll. 22-23. However, based on his conversation with Juror Backman, he noted that "he's pretty alert to this." R. 344, ll. 23-25. The judge acknowledged that during his questioning of the jury panel, he "may have said Vanessa Morton," instead of Vanessa "Bumcum Morton." R. 345, ll. 1-3. Juror Backman told the judge that his knowledge of the witness would "absolutely not" influence his opinion. R. 345, ll. 4-5.

The solicitor indicated that had she known Juror Backman knew Vanessa Bumcum Morton, she would have exercised a peremptory challenge against him because of his knowledge of the witness. R. 347, ll. 5-15. The judge found there was "no basis for cause" to excuse the juror. R. 347, ll. 16-17. However, he concluded the state "would've had every reason to exercise" a peremptory strike. R. 347, ll. 16-18. He surmised, "You have to evaluate whether you want somebody to know them or not know them and, for whatever reason, I would find that I don't think that's an intent to remove a juror. I find that that would be an exercise." R. 347, ll. 18-22.

Defense counsel noted that during the bench conference, the solicitor said she would not have struck the juror based on his knowledge of the witness. R. 347, l. 24 – R. 348, l. 2. Further,

defense counsel explained the witness did not play "a very critical role." R. 348, ll. 3-4. Her role was simple – she confirmed that she told her son, Diangelo, to call the police. R. 348, ll. 4-6. Additionally, defense counsel did not believe the juror had been sleeping; rather, the juror had been paying attention. R. 348, ll. 8-10. In fact, his note stating that he knew a witness was evidence that he was paying attention. R. 348, ll. 10-12. While defense counsel admitted Juror Backman "close[d] his eyes from time to time," he was still listening, including "nodding his head to certain statements that were made by witnesses." R. 348, ll. 13-15. Defense counsel argued "his unintentional and certainly innocent knowledge of a very insignificant witness" was not a ground for him to be dismissed from the jury. R. 348, ll. 16-20.

The solicitor agreed that Juror Backman's failure to disclose his knowledge of the witness was "innocent." R. 348, ll. 22-25. Further, she admitted that during the bench conference, she stated she would not have struck the witness. R. 349, ll. 2-8. However, during her walk back to her table, she changed her position. R. 349, ll. 2-8. The solicitor elaborated:

> Well, I don't know if it would've affected things. I don't know if [it] would've affected him, whether or not he knew it, and for me I think you never know how a jury is going to be if they know somebody named on your witness list. And out of an abundance of caution, whether they know my investigator, whether they know a lay witness, whether they know whoever, I don't usually seat them. And I believe that it would've been the same situation in this and I would've used one of my given strikes.

R. 349, l. 9-16.

Despite defense counsel noting that the juror was emphatic that his knowledge of the witness would have no effect on his ability to be fair and impartial, the judge noted they were "now getting into peremptory challenges" and that "for whatever reason, the strategy can be a strategy." R. 349, ll. 19-23. Analogizing the present issue to Batson v. Kentucky, 476 U.S. 79 (1986), the judge noted that the state did not strike any potential juror who professed to knowing a witness. R.

350, ll. 8-18. Thus, he did not "think there's any pretextual issue there. [He thought] that's a legitimate strategy she's articulated." R. 350, ll. 18-20. Thereafter, the judge explained,

> Quite frankly, given the testimony of the witness and her - - some of her statements, I may have thought long and hard about that too. I mean you just - - you just don't know which way a - - what - - a witness is going to - - what image it's going to be and what somebody may have known or known this person.
>
> For instances, I don't know when. I didn't ask when he knew her or how he knew her. It may have been a different time in that lady's life. I don't know. I don't know anything about any of this. I just find that to be a legitimate reason that is not pretextual, not that I have to make that finding, but I think she's entitled to it.

R. 350, l. 21 – R. 351, l. 7.

Ultimately, the judge excused Juror Backman, stating that a "major motivating factor" was the solicitor's "reason stated that she would've exercised a peremptory challenge." R. 351, ll. 23-25.

Later, the judge returned to the matter of his removal of Juror Backman. He cited State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) as a decision regarding the removal a juror. R. 422, ll. 17-22. According to the judge, the appellate court "made a comment that it's not a material basis for a peremptory challenge that a witness knows somebody." R. 423, ll. 7-8. He found this "extremely odd" because when he was a lawyer, he "struck a lot of people that knew persons in there." R. 423, ll. 9-10. He opined that striking a juror who knew a witness was "indicative of a strategy and indicative of something that we as lawyers have to make a decision on." R. 423, ll. 16-18. Thereafter, and in response to his concerns about this language in Coaxum, the judge claimed Juror Backman was "sleeping at times," which contradicted the judge's earlier statement that he was unsure if the juror had been sleeping R. 423, ll. 19-22. He claimed the juror "caught himself," and that when the juror was "nodding his head," it was not in agreement, he was "dozing off." R. 424,

ll. 1-5. Further, he claimed Juror Backman drank some water because he "was trying to do something to stay awake." R. 424, ll. 7-9.

The judge then combined what he perceived as Juror Backman's alleged sleeping with his knowledge of a witness. The judge's concern was that if the juror missed some part of the trial by sleeping, he would "rel[y] on his knowledge of this witness" to fill in what he missed. R. 424, ll. 15-20. The judged noted the witness "was very straightforward, but she had an unusual personality," which "was noted by her responses coming up." R. 424, ll. 23-25. According to the judge, she made responses that were "not customary for a witness to do." R. 424, l. 25 – R. 425, l. 1. He also declared that "some of her expressions were not what would be customary." R. 425, ll. 1-2. The judge stated, "That could lead a juror to some determination and if this person knew that, it may affect it." R. 425, ll. 2-4.

Discussion

"The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant a fair trial by a panel of impartial and indifferent jurors." Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); see also S.C. Const. art. I, §§ 3 & 14. "The jury is a central foundation of our justice system and our democracy." Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 860 (2017). "The jury is a tangible implementation of the principle that the law comes from the people." Id. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

"The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Parker v. Gladden, 385 U.S. 363, 364 (1966) (internal citation and quotation omitted). "[T]he very heart of a 'fair trial' embodies a disciplined courtroom wherein an

accused's fate is determined solely through the exercise of calm and informed judgment." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 631 (1982). A jury must "render its verdict free from outside influences of whatever kind and nature" and make its decision based solely on the evidence admitted during the trial. State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993); see also State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999); State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010). "In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998); see also Cooper, 334 S.C. at 551, 514 S.E.2d at 590. Conduct that affects the jury's impartiality will affect the verdict. Kelly, 331 S.C. at 141, 502 S.E.2d at 104.

"To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to 'elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge.'" State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) (quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). "Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge." Id. "In the event of such juror misconduct, the trial court must inquire into whether the withheld information affects the jury's impartiality." Id.

When the court determines the juror intentionally concealed information, which would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges, a new trial is required. Id. at 328, 764 S.E.2d at 245. "Unintentional concealment" "occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's

failure to respond is reasonable under the circumstances." Woods, 345 S.C. at 588, 550 S.E.2d at 284; see also Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 155, 760 S.E.2d 111, 116 (Ct. App. 2014). "[W]here the failure to disclose is innocent, no inference of bias can be drawn." Woods, 345 S.C. at 589, 550 S.E.2d at 285. "[A] determination that a juror did not intentionally conceal the information *ends* the court's inquiry." State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) (emphasis added). "[T]he trial court in the unintentional concealment situation must determine whether the information concealed would have supported a challenge for cause or would have been a material factor in a party's exercise of its peremptory challenges." Coaxum. 410 S.C. at 329, 764 S.E.2d at 246. "Accordingly, the moving party has a heightened burden to show the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges." Id. "In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential – and material – source of bias." Id.

The Supreme Court held a trial judge erred when he removed a juror during the sentencing phase of a capital trial. State v. Stone, 350 S.C. 442, 448-449, 567 S.E.2d 244, 247-248 (2002). When Stone's aunt took the witness stand, the juror indicated to the court that he knew the witness because the two were neighbors five or six years earlier. Id. at 448, 567 S.E.2d at 247. The juror did not respond affirmatively during voir dire because he did not know the aunt's name. Id. He juror described the relationship as "casual acquaintances only" and "indicated her acquaintance would not affect her ability to be fair and impartial." Id. The Court held the judge erred because the juror's failure to disclose was innocent and "her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges." Id. at 448, 567 S.E.2d at 247-248. See also State v. Tucker, 423 S.C. 403, 413, 815

S.E.2d 467, 472 (Ct. App. 2018) (holding a defendant failed to show how a relationship between a juror and a witness, which the witness described as co-workers and friends, "would have been material to his peremptory strike choices").

Yet, when confronted with this very issue a few years later, the Supreme Court concluded "if a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." Coaxum, 410 S.C. at 328, 764 S.E.2d at 246. The Court affirmed a trial judge's decision to remove a juror and replace her with an alternate during the middle of a trial where the failure to disclose was not intentional. Id. at 330, 764 S.E.2d at 247. The juror and a member of Coaxum's family were co-workers. Id. at 325, 764 S.E.2d at 244. According to the juror, Coaxum's family had previously claimed the juror was a distant cousin. Id. When the juror recognized the family member, the juror informed the judge of the relationship. Id. The judge

Ultimately, the Court held "the trial court likely would have been justified in refusing to excuse [the juror] from the jury," and that "its decision to remove her [was] not an abuse of discretion given the thorough inquiry it conducted into the solicitor's strategy in seating or striking prospective jurors." Id. "The solicitor detailed his strategy for exercising peremptory strikes, stating that he specifically looked for ties to the community, longstanding employment history, and ties to the defendant or a key witness." Id. at 326 n.5, 764 S.E.2d at 244 n.5. Finally, the Court held that "to receive a new trial, the defendant must show a prejudicial abuse of discretion." Id. at 331, 764 S.E.2d at 247. The Court held Coaxum failed to show prejudice because there was "no question" the jury was impartial after the removal of the juror. Id.

Respectfully, Appellant submits the Court erred in adding a requirement that a defendant show prejudice resulting from the improper removal of a juror as it did in Coaxum, supra. In

keeping with the precedent established in Stone, supra, the analysis need go no further than determining whether the trial court abused his discretion in determining whether the moving party met its "heightened burden" of showing "the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges." Put more simply, the reviewing court need ask whether the moving party showed it was prejudiced by the concealment because it was unable to strike a juror due to a material source of bias. Requiring a litigant to show the trial judge abused his discretion by improperly removing a juror where the state failed to meet its heightened burden in addition to showing the resulting jury was partial places an impossibly high burden upon a litigant. In what scenario could a litigant show a resulting impartial jury from the sitting of an alternate juror?

Here, Juror Backman's failure to disclose his knowledge of Vanessa Bumcum Mortan was innocent and unintentional. First, all parties agreed the failure to disclose was unintentional, and the judge so found. Second, the judge asked during voir dire if any potential juror were "related by blood or marriage … ha[d] any business dealing with … [were] socially or casually acquainted with" Vanessa Morton. The juror's note showed he knew the witness as "Vanessa Buncom [sic]." Thus, it was abundantly clear to all that the juror's failure to disclose that he knew the witness was unintentional and innocent. Therefore, the trial court's inquiry should have ended, as required by controlling case law. Nevertheless, the judge determined the juror should have been removed based upon the solicitor's self-serving indication, on second-thought, that she would have exercised a peremptory strike against the juror. Well aware of the case law in this state providing that "scant knowledge of a witness by a juror" was not a material reason to exercise a peremptory strike, the judge removed the juror because he had exercised peremptory strikes against potential jurors who knew witnesses when he was a lawyer. The state failed to provide a detailed strategy for its exercise

of peremptory strikes. Initially, the solicitor told the judge she would not have exercised a strike against Juror Backman. However, during her short walk from the bench to counsel's table, the solicitor changed her mind and told the judge she "usually" strikes jurors who know potential witnesses. This change of heart was oddly incongruous from her gut reaction that she would not have struck the witness based upon the revelation. Regardless, it was hardly a detailed strategy of how the solicitor exercised her peremptory strikes that would serve to show the juror was a material source of bias. In fact, the limited inquiry made by the judge showed simply that the juror knew the witness, and that the juror's knowledge of the witness would "absolutely not" impact the juror's ability to be fair and impartial. The solicitor requested no additional voir dire regarding the relationship to support her self-serving flip-flopping on whether she would have exercised a peremptory strike.

Surely, the relationship between Juror Backman and the witness was a "scant acquaintance," much like the one described in Stone, supra. Backman was not aware of the proper spelling of the witness's name nor of her married name. He told the judge simply that he knew her. He provided no additional details, and none were requested. This "scant" relationship could not support a challenge for cause, as the trial judge found, nor could it support a material factor in the exercise of the state's peremptory challenges, contrary to the trial judge's findings, which were based upon his own personal experiences as opposed to any information provided by the solicitor. Cf. Stone, supra.

Once the trial judge was made aware of the case law dictating that a mere acquaintance between a juror and a witness could not serve as a material factor in the exercise of a peremptory strike, the trial judge attempted to backpedal on his explanation for removing Juror Backman. The judge first noted how Bumcom was "odd" and that if he had been the solicitor he would have considered her oddness in deciding whether to strike potential jurors who were familiar with her.

The record failed to support the judge's report of Bumcom's peculiar personality or mannerisms during her testimony. Even when given an opportunity to explain why she would have exercised a peremptory challenge against Juror Backman, the solicitor made no reference to Bumcom as a witness. It was only the judge's post hoc rationalization for his prior decision to remove Juror Backman that any reference to Bumcom's disposition was made. Due to the solicitor's failure to even mention Bumcom's personality while testifying, it was clear this was no consideration by the solicitor in the exercise of its peremptory strikes. The trial judge's consideration of its view of Bumcom's character and any impact her character would have had on the judge as a lawyer was error.

Finally, the judge's attempt to explain his decision to remove Juror Backman because he was allegedly sleeping was improper. As the record showed, the judge initially indicated he was unsure whether Juror Backman was sleeping. It was only when the judge became aware of the case law indicating the juror's knowledge of a witness was not a material factor in the exercise of a peremptory challenge that the judge changed tracks and decided that Juror Backman was in fact sleeping during the trial. His earlier findings discredit his later post hoc rationalizations. At any rate, the fact that Juror Backman's eyes were closed at times did not require his removal from the juror. See State v. Hurd, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996); State v. Smith, 338 S.C. 66, 515 S.E.2d 263 (Ct. App. 1999).

III. Violating Appellant's right to due process of law, the trial judge erred in instructing the jury concerning accomplice liability, specifically regarding the theory that "the hand of one is the hand of all," where the state failed to present any evidence that Appellant acted in concert with another.

Standard of review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421-422 (2011) (internal quotation omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Berberich v. State, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (internal citation omitted). "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." Id.

Relevant facts

Despite the state's attempts to pepper its opening statement and closing argument with references to accomplice liability, the *actual* evidence presented failed to support any theory of accomplice liability. The state's consistent story was that Appellant shot Smalls. In her opening statement, the solicitor told the jurors that Smalls was "approached by two individuals," one of whom was Appellant. R. 64, ll. 1-6. Further, the solicitor told the jurors that one of the men pulled out a 9 millimeter handgun and began firing. R. 64, ll. 7-13. According to the solicitor, Appellant had a reason to kill Smalls – "the age-old reason for so much conflict in this world. Money." R. 66, ll. 13-15. The solicitor explained that Smalls disrespected Appellant by failing to pay a debt, and Appellant "could have Aakeem Smalls walking around town owing him a debt without repercussions." R. 66, ll. 22-24.

Robert Holmes sold marijuana with his best friend, Smalls. R. 77, ll. 9-24. Appellant, who was the brother of Smalls' girlfriend, provided them with the marijuana to sell. R. 77, l. 25 – R. 78,

l. 18. Business was good for the partnership. R. 91, ll. 3-4. Smalls was selling out of product quickly. R. 92, ll. 3-4.

At the trial, Holmes alleged that Smalls stole approximately $1000 worth of marijuana from Appellant; however, Holmes did not witness the actual theft. R. 79, ll. 5-18; R. 91, ll. 10-11. Although Holmes initially denied telling the police, Smalls stole only about $500 worth of marijuana, he was forced to admit the discrepancy between his testimony and his statement to police when confronted with his actual words to the investigators. R. 91, l. 22 – R. 94, l. 7. Additionally, Holmes begrudgingly admitted that Smalls gave Appellant some money for the missing marijuana, and Smalls "thought everything was fine." R. 94, ll. 8-12.

Further, Holmes claimed that he talked to Appellant approximately one week before Smalls' death on the phone, that Appellant was looking for Smalls, and that Appellant was not happy. R. 79, l. 19 – R. 80, l. 11. Holmes never told anyone about this phone call – he waited until Appellant's trial to reveal its alleged existence. R. 85, l. 11 – R. 86, l. 2.

On June 8, 2011, Appellant took his girlfriend, Tenika Elmore, from their home in Orangeburg to work at Verizon in North Charleston. R. 100, l. 22 – R. 101, l. 5. Appellant was driving her blue Toyota Camry. R. 101, ll. 6

Later, Appellant went to the apartment shared by Appellant's sister and Smalls. State's Exhibit #80. Appellant was accompanied by his acquaintance, "Creep." State's Exhibit #80. Appellant was not aware of Creep's given name. State's Exhibit #80. Appellant would later tell the police that he was going to the apartment to get some clothing, but he was going there to assess his supply of drugs maintained by Smalls. State's Exhibit #80. While walking to his sister's apartment, Appellant saw a dark-skinned black male in the area. Appellant heard gunshots. Scared, he and

Creep ran back to the car and left. State's Exhibit #80. Appellant dropped off Creep, and then went to pick up Elmore from work. State's Exhibit #80.

Shortly after 11 p.m., Appellant picked up Elmore. R. 103, ll. 11-14. The two then drove to the home of Appellant's mother in Summerville to pick up Appellant's daughter. R. 104, ll. 6-11. On their way home to Orangeburg, they stopped at a gas station near Appellant's mother's house. R. 104, ll. 12-19.

The lead detective pinpointed the time of the shooting to 10:18 p.m. R. 198, ll. 11-12. Around 10:15 p.m. the video from the apartment complex showed a small car park in the lot. R. 203, l. 15 – R. 204, l. 9. Osborne opined that the small car was "consistent" with the car owned by Elmore and driven by Appellant. R. 204, l. 14 – R. 205, l. 15. Just one minute before the shooting, the video showed two individuals walk toward the breezeway where the shell casings were later found. R. 205, l. 20 – R. 206, l. 7. Shortly thereafter, the video showed two individuals reenter the car in the same position they exited. R. 207, ll. 4-11.

Defense counsel asked Osborne if he would charge the passenger with murder if he were able to locate him. R. 273, ll. 5-6. Osborne responded that it was "a little bit trickier with the passenger." R. 273, l. 7. Oddly, he then said, "The driver took the shooter there, the driver took the shooter from there." R. 273, ll. 7-9. Osborne explained he "would have to show that the passenger, whoever it was, Creep, whoever, was actively involved in the murder." R. 273, ll. 9-11. He described it as "a close call." R. 273, ll. 11-12.

While interrogating Appellant, the police showed him a photograph of Diangelo Bumcum. State's Exhibit #80. Appellant told the police that Diangelo was the person he saw outside of Smalls' apartment shortly before the shooting. R. 267, ll. 1-15; State's Exhibit #80. In fact, the police had arrested Diangelo already and charged him with Smalls' murder based upon what their

investigation had uncovered so far. R. 236, ll. 12-17. Osborne interrogated Diangelo and informed him repeatedly that his story was impossible. R. 267, ll. 18-25; R. 320, ll. 4-8.

However, Osborne told the jurors that Diangelo was not guilty of shooting Smalls because the video from the apartments showed Diangelo, or someone who looked like Diangelo in Osborne's opinion, walking away from Smalls' apartment shortly before the shooting, just as Diangelo told Osborne repeatedly during the interrogation. R. 238, l. 3 – R. 239, l. 12. When Osborne determined he needed to dismiss the charge against Diangelo, he did not immediately release him. R. 268, ll. 13-14. Instead, he contacted Diangelo's mother who told Osborne to let Diangelo stay in jail. R. 268, ll. 15-22; R. 305, ll. 15-16. Osborne said the police agreed to keep Diangelo in jail for what may have been a week or two after the police determined he was not their suspect. R. 268, l. 25 – R. 269, l. 3. Diangelo explained that he was not released until "a few months" after his arrest. R. 325, ll. 1-7.

After the police released Diangelo, they received a report from SLED that Diangelo's shirt tested positive for a lead particle, which is a component of gunshot residue. R. 269, l. 14 – R. 270, l. 17. Osborne reasoned the particle was present because Diangelo worked at Jiffy Lube at the time. R. 270, ll. 3-12.

At the shooting scene, the police found four shell casings. R. 138, ll. 11-21. They were all FC Luger .9-millimeter shell casings. R. 140, l. 18 – R. 141, l. 4. About a week after the shooting, the police collected an unfired bullet from the nightstand of a bedroom in the apartment Smalls shared with Appellant's sister. R. 172, l. 2 – R. 174, ll. 6. The bullet was an FC .9-millimeter. R. 174, ll. 2-12. The police identified a print on this unfired cartridge as belonging to Appellant. R. 294, l. 11 – R. 295, l. 9.

Additionally, the police obtained Appellant's phone records. Prior to noon on June 8, 2011, Appellant sent a text message to Terry Stevens, in which he said, "I need that bread today, at least half." R. 357, l. 10 – R. 358, l. 8. Later, Appellant asked, "When that go because I'm almost on E and my girl got to get to work the rest of the week." R. 358, ll. 10-12. The detective opined that Appellant was "essentially asking Terry to help him out with something at this point," but Appellant "didn't really explain why." R. 358, ll. 15-20. Appellant asked what time Terry got off from work. R. 358, ll. 23-24. The penultimate text message, according to the state, was one sent by Appellant at 4:37 p.m., in which he stated, "hey, I got - - I go wet dude ass up tonight." R. 359, ll. 3-4. The detective claimed this meant to shoot somebody. R. 359, ll. 14-15. Then, at 9:34 p.m., Appellant sent a message that he could not wait on Terry and he had to handle his business. R. 360, ll. 7-10.

In its closing argument, the state conceded it was relying entirely on circumstantial evidence against Appellant. R. 431, ll. 8-9. The state also told the jury about the "concept" of "the hand of one is the hand of all." This "legal concept" provided that "one person is responsible - - criminally responsible for the acts of everything done by the other person." R. 431, ll. 23-25. The state told the jurors of the "classic example," which it claimed its case was, "if there are two people but only one gun and one bullet, if those two people are acting together, they are together, they are assisting each other, aiding each other, abetting each other, planning with one another, all of that, it means the act of one is the act of all." R. 432, ll. 1-6.

The state theorized that Appellant "tried to recruit backup" in his text messages to Terry Stevens. R. 439, ll. 21-22. Yet, the state admitted Stevens was not involved. R. 440, ll. 22-23. Further, the state argued that Appellant's fingerprint on the unfired ammunition that was of the same brand and caliber as the shell casings found at the scene meant that Appellant had access to the same ammunition. R. 445, ll. 19-25. However, the state argued that it did not matter whether

Appellant pulled the trigger or merely supplied everything to his passenger because under the hand of one theory, Appellant was guilty. R. 445, l. 25 – R. 446, l. 5.

The judge charged the jury as follows regarding accomplice liability:

> Now, in conjunction with the crime of murder, I would charge you of this principle of law. It's called the hand of one is the hand of all.
>
> If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts or act done in carrying out the common plan or purpose. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all.
>
> Now, prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of the crime. Mere knowledge or merely being present by another person and the crime is committed, that's not sufficient to convict a person of the crime.
>
> In order to convict the defendant - - even if the defendant was present when it is committed, is not sufficient to convict. You must - - guilt is - - to convict the defendant as a principal, a principal is proven by showing an actual or construction presence at the scene as a result of a prior arrangement. Therefore, finding a prior arrangement, plan or common scheme is necessary for a finding of guilt as a principal.
>
> The state must prove beyond a reasonable doubt by competent evidence that the theory of the hand of one is the hand of all. A principal in a crime is one who either actually commits the crime or who is present aiding, abetting or assisting in committing the crime.
>
> When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more are acting with a common plan or scheme or intent are present at the commission of the crime, it does not matter who actually commits the crime. All are guilty.
>
> And of course, as with any other aspect, the state has to prove each of those facts that we just discussed beyond a reasonable doubt. That means you are firmly convinced.

R. 479, l. l. 8 – R. 480, l. 20.[2]

Further, the trial judge instructed the jurors that they could consider the second indictment – possession of a weapon during the commission of a violent crime – only if the jurors determined Appellant "fired the shot, not just assisting and aiding." R. 484, ll. 6-10. The judge told the jurors that if they found Appellant "was not the person that was the shooter," then the jurors could not return a verdict of guilty on the weapon charge. R. 484, ll. 21-25. On this point, the jury asked if "'the hand of one' appl[ied] to the possession of a weapon during the commission of a violent crime" charge. R. 489, l. 22 – R. 490, l. 2; R. 524. The judge again instructed the jurors as follows:

> If the state has proved beyond a reasonable doubt that the murder has been committed, then in order to have a conviction for the hand of one/hand of all, the state would also have to prove beyond a reasonable doubt that Mr. - - Mr. Johnson had possession of a firearm at the time that that murder was committed.
>
> In other words, hand of - - you can't - - assuming just for the sake that there were two people and three people, whatever, the person - - in order to be convicted, the hand of one doesn't apply to anything but the murder. It doesn't apply to the - - to the firearm possession. You have to prove actual possession of that in order to return a verdict of guilty.

R. 490, ll. 3-15.

After the instructions were given, Appellant objected to the instruction on accomplice liability because the state failed to present any evidence that the person with Appellant was the shooter. R. 486, l. 21 – R. 487, l. 1. "[T]he evidence … presented exclusively in this case was the fact that [Appellant] was the shooter." R. 487, ll. 1-3. Defense counsel noted that when he questioned whether Osborne could arrest the passenger, Osborne indicated it was "tricky" because the person was the passenger, not the driver of the car. R. 487, ll. 3-8. Osborne indicated he would "want to find out his involvement in this case before" he arrested the person for murder. R. 487, ll. 3-8. As defense counsel explained, the lead detective, and now an assistant solicitor, did not believe

[2] Appellant objected to the instruction during the brief charge conference. R. 429, ll. 2-11.

there was sufficient evidence of the passenger's involvement to satisfy the probable cause requirement for an arrest warrant. R. 487, ll. 3-12.

The judge reasoned that the state's evidence showed Appellant was going to shoot Smalls based upon the text message regarding "wet up." R. 488, ll. 3-8. Further relying upon the text messages, the judge rationalized his decision based upon his belief that Appellant was "getting somebody to assist him," and that "maybe he didn't want to do it himself. Maybe he wanted somebody else to be the shooter, but he was going to assist." R. 488, ll. 9-12. The judge "believe[d] all of that really [fell] into that accomplice part of being participating." R. 488, ll. 12-15.

Based on the jury's verdict, the judge remarked that "the verdict clearly states this time that it was a hand of one/a hand of all." R. 493, ll. 12-15.

Appellant moved for a new trial based upon the judge's erroneous instruction to the jury regarding accomplice liability. R. 601. During the hearing on the motion, defense counsel noted the state theorized that Appellant was the actual shooter. R. 501, l. 21 – R. 502, l. 1. He noted that "it came to a climax in their closing statement when they put forth the little puzzle pieces that they said they had proven to the jury throughout the trial that came to - - came together to fit [Appellant]'s booking photo." R. 502, l. 2-6. At no time did the state "put forth that anybody else was the shooter." R. 502, ll. 7-8. Defense counsel noted that the jury did not believe Appellant was the shooter, which was clear based on the verdict. R. 504, l. 1-7. However, the jury used the process of elimination to determine the passenger was the shooter, despite the lack of evidence "to suggest that this person was a co-conspirator." R. 504, ll. 8-13.

After noting Osborne's testimony that he did not have probable cause to charge the passenger and the state's failure to present any evidence other than Appellant was the shooter,

defense counsel argued the state failed to present any evidence to suggest Appellant was conspiring or in some sort of agreement with another person. R. 504, l. 14 – R. 505, l. 24. In fact, the state's evidence against the passenger was that he was "merely present." R. 509, ll. 13-25. Thus, defense counsel explained the jury instruction was erroneous. R. 505, ll. 19-24.

The state conceded that Appellant "had the motive, the access, he set up, he drove there; he was involved with everything." R. 506, ll. 12-15. The state hung its hat on its claim that Appellant was "recruiting for assistance." R. 506, ll. 16-18. The solicitor claimed that his text messages were "pretty darned specific as far as what the plans were." R. 506, ll. 20-22. Failing to include the fact that the person to whom Appellant was sending the messages was not the person who went with him to the apartments, the state made the illogical argument that "ultimately, he was - - he came with another person." R. 506, ll. 20-23.

The state did not "know why he wanted another person there." The state theorized that "maybe he - - that person provided the gun, because the gun was not found." R. 506, l. 25 – R. 507, l. 2. Next, the state offered that "[p]erhaps, he needed a cheerleader." R. 507, ll. 3-6. Offering another hypothetical, the state suggested that "[p]erhaps he didn't want to, you know, kill his sister's boyfriend on the doorstep." R. 507, ll. 7-11.

The judge found that he did not know whether the passenger was the shooter or that Appellant was the shooter. R. 513, ll. 2-7. However, he noted the jury found Appellant was not the shooter, but convicted him as an accomplice. R. 513, ll. 8-15. The judge found there was "no evidence of actually beyond a reasonable doubt evidence that who - - which one was the shooter." R. 513, ll. 14-20. The judge thought it "was a pretty fair verdict" and noted that if the passenger were tried, the same verdict "should" be reached. R. 513, ll. 21-23. After recalling his involvement

in a death penalty case, the judge asserted there was "an abundance of evidence" "of a shooter and this man being a shooter and being involved in a plan to go kill somebody." R. 516, ll. 2-4.

Discussion

"'The law to be charged must be determined from the evidence presented at trial.'" State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (quoting State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). There must be some evidence in the record to support the charge to the jury. Id. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999)). According to the South Carolina Supreme Court, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Langley, 334 S.C. at 648, 515 S.E.2d at 101.

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" Id. at 648-649, 515 S.E.2d at 1010 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). Mere association with admitted members of a conspiracy or an admitted perpetrator of a crime is insufficient to constitute the guilt of the defendant on trial. See State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Mouzon, 326 S.C. 191, 485 S.E.2d 918 (1997). Further, "[p]rior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime." Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995); see also

State v. Thompson, 347 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) Rather, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal." State v. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977).

In Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011), the Supreme Court examined the propriety of an accomplice liability charge. The Court explained that "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Id. Resolving the issue of whether the "hand of one" charge was correct, the Court asked whether there was any evidence that another co-conspirator was the shooter and the defendant was acting with him when the robbery took place. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 295-296, 534 S.E.2d 268, 269 (2000); see also State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). The evidence showed the robbers were clothed in black and wrapped shirts around their heads, that the defendant was involved in the planning and execution of the robbery, and that one of the robbers other than the defendant may have been the shooter. Id.[3]

This Court concluded the trial judge correctly charged the jury concerning "the hand of one is the hand of all" where the evidence revealed the defendant and his co-defendant were with a large

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[3] Relying upon Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011), this Court affirmed a judge's instruction on the hand of one theory of accomplice liability where the defendant argued there was no evidence to support the alternate theory of liability – that he was an accomplice to the shooter. State v. Washington, 424 S.C. 374, 419-420, 818 S.E.2d 459, 483 (Ct. App. 2018). This Court found there was evidence to support an accomplice liability charge. Id. at 420, 818 S.E.2d at 483. On February 1, 2019, the Supreme Court granted the petition for writ of certiorari filed by Washington. The Court heard argument on March 11, 2020.

group of people during a confrontation, the co-defendant used language indicating the two were acting together, the defendant and co-defendant got into a truck that chased after an individual in a car, and witnesses claimed the defendant shot his gun toward the car. State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007). This evidence supported the theory that the defendant and his co-defendant joined together to accomplish an illegal purpose. Id.

This Court affirmed a grant of post-conviction relief where appellate counsel failed to raise on appeal the trial judge's error in instructing the jury on accomplice liability and mere presence where the evidence failed to support the charge. Wilds v. State, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (Ct. App. 2014).[4] On the afternoon of March 29, 1999, Wilds was walking down the street with two companions when they saw Rumph approaching them. Wilds commented to the others that he thought Rumph had some money. Id. Wilds stopped to talk to Rumph while his companions continued walking. Id. at 436, 756 S.E.2d at 388. Wilds unexpectedly pulled out a pistol. Rumph handed over his wallet. Id. at 436, 756 S.E.2d at 389. Wilds ordered his companions to hit Rumph and they complied. Wilds' companions took items from Rumph, including a cigarette lighter and change. Wilds then shot Rumph. Id. After the shooting, Wilds and his companions ran. When the stopped, Wilds gave the companions money from Rumph's wallet and told them to stay quiet. Id. One of the companions told Wilds to get rid of the gun. Id.

Wilds was charged with armed robbery and murder of Rumph. During the deliberations, the jury sent a note asking if the jury found Wilds guilty of murder, would that be a finding that Wilds alone pulled the trigger. Id. at 437, 756 S.E.2d at 389. Over Wilds' objection, the judge instructed the jury on accomplice liability, but refused to instruct the jury concerning mere presence. Id.

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[4] The South Carolina Supreme Court granted the petition for certiorari on November 20, 2014. After hearing argument on October 7, 2015, the Court dismissed the writ as improvidently granted.

This Court explained that "no evidence … indicated anyone other than Wilds was the shooter." Id. at 439, 756 S.E.2d at 390. "The only evidence presented was that Wilds was the shooter, and [his companions] joined in the robbery after Wilds pulled the gun on Rumph." Id. This Court recognized that the jury may have had doubts about the companions' testimony; however, those doubts failed to support a charge on the alternate theory of liability, such as accomplice liability. An alternative theory "'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236, 712 S.E.2d at 438). This Court found prejudice to Wilds "[b]ecause the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction." Id. at 439, 756 S.E.2d at 390-391.

In the present case, the prosecution presented no evidence to support an instruction to the jury concerning accomplice liability or "the hand of one is the hand of all." The only evidence presented by the state was that Appellant was the shooter. There was no evidence that the passenger in the car was the shooter or that Appellant and the passenger agreed upon some criminal enterprise prior to the shooting. The evidence was not equivocal on some integral fact as would be required in order to instruct the jury on accomplice liability. In fact, the evidence presented by the state was that Appellant and an unknown passenger arrived at the apartment complex, walked in the direction where the shooting occurred, Appellant shot Smalls due to a debt, then Appellant and the passenger ran back to Appellant's car. There was no indication that Appellant and the passenger had planned to engage in any action upon arrival at the apartment or that the shooting was the natural and probable consequence of any agreed upon action.

CONCLUSION

Regarding Issues I and II, Appellant respectfully requests this Court reverse his conviction and grant him a new trial. Regarding Issue III, Appellant respectfully requests this Court reverse his conviction for murder pursuant to an accomplice liability theory and hold he may not be retried for murder as a principal because the jury rejected the state's claim that Appellant was the triggerman.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of October, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 12, 2020

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