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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 2023-UP-087 (S.C. Ct. App. Filed March 15, 2023)

Lower Court Case No. 2018-GS-10-05300

THE STATE,

RESPONDENT,

V.

SETH HASSAN SMITH,

PETITIONER

APPELLATE CASE NO. 2019-001418

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 18, 2023.

QUESTIONS PRESENTED

1. In this trial for accessory after the fact to murder, when the jury asked if the defendant and the unknown principal could be the same person, did the Court of Appeals err in finding harmless any error in the trial judge instructing the jury that, in theory, the defendant and the unknown principal could be the same person?

2. Did the Court of Appeals err in finding that the issue of the trial judge refusing to grant a new trial based on a supplemental jury instruction that deprived Petitioner of a fair trial was not preserved for appellate review?

STATEMENT OF THE CASE

In September of 2018, the Charleston County Grand Jury indicted Petitioner, Seth Hassan Smith, for accessory after the fact to a felony A, B, C or murder, indictment #2018-GS-10-05300.[1] (R. p. 581). On January 7, 2019, Petitioner proceeded to jury trial before the Honorable R. Markley Dennis. Michael Loignon and Stephen M. Bowden represented Petitioner at trial. David Osborne and Shannon Elliott prosecuted the case. The jury found Petitioner guilty and Judge Dennis sentenced Petitioner to fifteen (15) years. (R. p. 583). On July 31, 2019, Petitioner again appeared before Judge Dennis and moved for a new trial. Judge Dennis denied the motion in a written order filed August 14, 2019. (R. p. 598). A timely notice of intent to appeal was served on August 20, 2019, and the direct appeal perfected. On March 15, 2023, a three- judge panel of the South Carolina Court of Appeals affirmed Petitioner's conviction for accessory after the fact to murder. State v. Smith, 2023-UP-087 (S.C. Ct. App. filed March 15, 2023). A timely petition for rehearing was filed and denied on May 18, 2023. This petition for writ of certiorari follows.

[1] It is unclear who testified before the grand jury because the witness is listed as the Charleston City Police Department.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify the difference between a principal and an accessory after the fact.

FACTS

On April 18, 2015, at approximately 11:30 AM, George Bennett and Rashawn Rivers were shot as they sat in Rivers' car on Reid Street near East Bay Street in the "East Side" neighborhood of downtown Charleston. Bennett died as a result of the shooting. After viewing video from security cameras in the area of the shooting, police began to investigate two cars: the get-away vehicle, a black Cadillac Deville; and a silver Infinity. (R. pp. 375-377). A black Cadillac was registered to Petitioner and a silver Infinity was registered to Petitioner's brother, Bryant Smith. (R. p. 382, lines 6-19; p. 384, line 16 – p. 385, lines 1-2). A title search for the Cadillac showed a change of ownership with title transferred to Jibral Acevedo on April 20, 2015. (R. p. 390, line 15 – p. 391, lines 1-2). Acevedo is a cousin of both Petitioner and Petitioner's brother, Bryant Smith. (R. p. 232, line 12 – p. 233, 234, lines 1-13).

An investigator testified at trial that the motive for the shooting involved a drug deal gone bad between Petitioner's brother, Bryant Smith, and the deceased, George Bennett. (R. p. 424, lines 2-13). Phone records establish contact between Bryant Smith and the deceased the night before the shooting. (R. p. 393, lines 4-15). The investigator also testified that the murder and attempted murder charges originally brought against Bryant had been dismissed by the prosecutor. (R. p. 424, line 23 – p. 425, lines 1-4). The prosecutor admitted in his closing argument that he could not prove that Petitioner was in the Cadillac at the time of the shooting. (R. p. 545, lines 9-12).

Officers interviewed the cousin, Acevedo, who told them he bought the Cadillac from someone he met in the club named Tony James or TJ. (R. p. 397, line 24 – p. 398. lines 1-13). Acevedo told the police that the car had broken down and been towed. (R. p. 398, lines 7-8). Acevedo was charged with obstruction of justice for lying to the police. (R. p. 235, lines 21-23).

At the time of Petitioner's trial Acevedo had pled guilty to obstruction of justice but had not yet been sentenced. (R. p. 235, line 7 - p. 236, lines 1-18). At trial Acevedo testified that Petitioner went by the nickname TJ and it stood for Tony James. (R. p. 233, lines 3-8).

Acevedo testified that on Monday April 20, 2015, Petitioner called him and asked if he still wanted to buy the Cadillac. (R. p. 241, line 17 – p. 2142, lines 1-14). Acevedo testified that he had expressed interest in buying the car before. (R. p. 242, lines 15-17). According to Acevedo, Petitioner picked him up in a White truck driven by Bubba. (R. p. 243, line 23 – p. 244, lines 1-18). They first went to the Dollar General Store and Acevedo claimed he did not know what was purchased but learned later from investigators that they purchased spray paint. (R. p. 246, line 8 – p. 247, lines 1-14). Acevedo testified that when they left the Dollar General Store they went to "Face's" house in Mt. Pleasant where the Cadillac was parked. (R. p. 249, lines 9-22). "Face's" real name is Jeremy. (R. p. 249, lines 15-16).

Jeremy Wright testified at trial that between 1:00 and 2:00 PM on April 18, 2015, Petitioner and Bryant Smith parked a black Cadillac at his house. (R. p. 98, lines 2-11). Wright testified that Petitioner told him the car needed to be repaired and asked if he could give them a ride. (R. p. 98, lines 21-25). Wright testified that he dropped Bryant off at his gray car in downtown Charleston. (R. p. 99, line 2 – p. 100, lines 1-24). Wright testified he then took Petitioner to North Charleston. (R. p. 99, lines 5-12).

Acevedo testified that on April 20, 2015, after they left "Face's" house in Mt. Pleasant, he and Petitioner went to the DMV in West Ashley. (R. p. 251, lines 4-24). Acevedo admitted that the bill of sale was dated April 1, 2015, and the purchase price was listed as $300 even though the purchase did not take place on April 1st and he paid no money for the Cadillac. (R. p. 255, line 11 – p. 256, lines 1-17). Acevedo testified that Petitioner paid for an expedited transfer.

(R. p. 251, line 21 – p. 252, 253, lines 1-5). According to Acevedo, Petitioner told him he should just "junk" the Cadillac. (R. p. 265, lines 1-11). Acevedo testified that the next day he and Petitioner went back to "Face's" house and waited for the tow truck. (R. p. 267, lines 2 – 22). In an earlier statement to police Acevedo claimed that Petitioner spray painted the wheels but at the time of trial Acevedo could not remember. (R. p. 268, lines 3-23). Acevedo sold the Cadillac to a tow truck driver for about $200. (R. p. 268, line 24 – p. 269, lines 1-4). About a week after the shooting police found the Cadillac in a junkyard in North Charleston. (R. p. 398, line 14 – p. 399, lines 1-12).

ARGUMENTS

1. **In this trial for accessory after the fact to murder, when the jury asked if the defendant and the unknown principal could be the same person, the Court of Appeals erred in finding harmless any error in the trial judge instructing the jury that, in theory, the defendant and the unknown principal could be the same person.**

The indictment in the present case alleges "That in Charleston County, South Carolina, on or about the dates from April 18, 2015 to April 1, 2015, while knowing that the felony of murder and attempted murder, such being a Class A, B, C felony or murder, the Defendant, Seth Hassan Smith, did aid, harbor and assist an unidentified suspect with the intention of enabling him/her to escape detection, arrest, or to otherwise avoid punishment for the crime in violation of the Common Law of South Carolina and Section 16-1-55 of the South Carolina Code of Laws (1976) as amended." (R. p. 581). Petitioner was indicted solely as an accessory after the fact. The State was required to prove that Petitioner knew that another person, the principal, committed the murder and that Petitioner assisted that other person, the unidentified principal, from being detected.

In State v. Fuller, 346 S.C. 477, 480, 552 S.E.2d 282, 283 (2001), the South Carolina Supreme Court wrote:

> The elements of accessory after the fact to a crime are 1) the felony has been completed, 2) the accused must have knowledge that the principal committed the felony, and 3) the accused must harbor or assist the principal felon. State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) (Collins II). A defendant may not be found guilty as an accessory when indicted solely as a principal. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) (Collins I).

The trial judge initially correctly instructed the jury on the law of accessory after the fact to murder as follows:

> The defendant is charged, as I mentioned, with the criminal offense of accessory after the fact of a felony murder. And in order to obtain a conviction the State

must prove beyond a reasonable doubt the following: First, that the defendant knew that another person called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection.

While the State must prove that the principal did commit the murder, it is not necessary that the State prove the identity of the principal or that the principal has been prosecuted for you to return a verdict of guilty of the crime of accessory after the fact of committing the murder.

Intentionally means willful in attaining the results which actually occurred. Not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

Although the actions of the defendant may have in fact helped the principal to escape detection or arrest, this would not be enough to be found guilty of accessory after the fact. The State must also prove that the defendant acted with the intention or the purpose of helping the principal to escape detection or arrest.

So if a person charged with being accessory after the fact did not intend that his act should help the principal escape detention -- detection or arrest then he is not an accessory after the fact even though his acts in fact have resulted in helping or aiding the principal to escape arrest or detection. There must be some affirmative act tending towards the concealment of the commission of a crime and assisting the principal. Silence alone is not sufficient to make a person an accessory after the fact to a felony for murder.

(R. p. 532, line 24 – p. 533, 534, lines 1-10). There was no objection to the charge as given. (R. p. 539, lines 3-5). The jury began deliberations at 3:53 PM. (R. p. 539, lines 8-9).

During deliberations the jury sent a note to the judge asking, "Are the accused, (defendant) and "unknown" principal mutually exclusive in the eyes of the law? Can they be the same person?" (R. p. 541, lines 3-6). The note was marked as Court's Exhibit #2. (R. p. 584). Prior to answering the question from the jury, the judge asked defense counsel, "You object to my saying that the principal can – he can – the person accused of accessory after the fact can also be the principal, the unknown principal, because of the Blakely case?" (R. p. 539, lines 14-17). Defense counsel answered, "Yes, sir. And I actually like the way you stated it before as opposed

to that direct language." (R. p. 539, lines 18-19). The trial judge asked, "That they have to – that they don't have to be mutually exclusive?" (R. p. 539, lines 20-21). Defense counsel answered, "Yes, sir, I do object to that. I would argue that if a person is a party to the crime then they are a principal and they cannot then be an accessory after the fact to that crime." (R. p. 539, lines 22-25). Defense counsel cited State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013), for the proposition that a person cannot be both a party to the crime and accessory after the fact. (R. p. 540, lines 2-7).

The judge overruled the objection and stated:

> All right. Thank you. And in reading that case I think it is distinguishable because Blakely was a case involving a question of whether it was vindictive and double jeopardy to try – to try a person who has been acquitted of a crime itself. And the case that they cite is a Georgia case. And it really deals with more being an accomplice. And an accessory after the fact is not an accomplice. That is a separate crime altogether.
>
> I think we use the term – rather, Georgia uses accomplice apparently. We use they are involved, because they are – the hand of one is the hand of all, which says they assisted in some fashion. So that is not what he is facing. It is totally separate., truly. So I mean it is a different situation.

(R. p. 540, lines 8-22).

The judge then answered the jury's question stating:

> I am going to answer that by recharging a portion of my charge where I define the elements of -- for the crime of accessory after the fact of committing a felony of murder.
>
> And, as you will recall, there are basically three: The felony must have been completed. The accused must have knowledge of the principal that the principal committed the felony. And the accused must harbor or assist the principal felon from being detected. And harboring must have the intention to protect the principal.
>
> As I further charge you that accessory -- a person may be convicted even if the principal is unknown or has not been charged or has not yet been prosecuted.

> And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal -- had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested.
>
> If those elements are present it doesn't matter what -- who the principal was, because you are not dealing with the principal. You are dealing with the person accused of basically in this case being an accessory after the fact of the crime that was committed by the principal. So the identity, as I have stated, is really not significant in so far as your determination. The key is whether those elements pertaining to the person accused of the accessory are present. Okay.

(R. p. 541, line 7 – p. 542, lines 1-13). The judge then noted Petitioner's "Blakely" exception. (R. p. 542, lines 19-21). Importantly, and as will be discussed further below in issue two, in the "re-charge" the judge omitted the "another person" language included in the initial instruction. In the initial instruction the judge told the jury:

> The defendant is charged, as I mentioned, with the criminal offense of accessory after the fact of a felony murder. And in order to obtain a conviction the State must prove beyond a reasonable doubt the following: First, that the defendant knew that **another person** called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection.

(R. p. 532, line 24 – p. 533, lines 1-8) (emphasis added). The jury then continued deliberating at 5:14 PM. (R. p. 542, line16). At 5:35 PM, twenty minutes after the re-charge/supplemental instruciton, the jury reached a verdict. (R. p. 542, line 25. The verdict of guilty was announced at 5:48 PM. (R. p. 550, line 13).

Prior to the announcement of the verdict Petitioner renewed the objection to the supplemental instruction citing State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998), and arguing that, based on the facts presented, if Petitioner was at the scene, he could only be acting as a principal as either the shooter or the get away driver. (R. p. 544, line 3 – p. 545 – 548, lines 1-3).

Petitioner also cited State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976), for the proposition that the State has to prove the guilt of the principal in the trial of the accessory. (R. p. 546, lines 15-17). The judge overruled the objection. (R. p. 545, line 9 – p. 546 -550, lines 1-10). The trial judge erred in instructing the jury that the principal and the accessory after the fact could be the same person.

In Blakely the South Carolina Court of Appeals found no error in the State seeking an indictment for accessory after the fact to a felony following an acquittal for murder. The State originally indicted Teresa Blakely for murder based on a theory that she aided and abetted the principal, Paul Morris, in the murder of Blakely's husband, Houston Fuller. The jury acquitted Blakely and found Fuller guilty of voluntary manslaughter. After Blakely's acquittal, the State indicted her for accessory after the fact to a felony. In Blakely the Court of Appeals wrote:

> An exception to these modern notions of criminal liability applies to an accessory after the fact. While an accessory before the fact may be treated like a principal upon proper proof, an accessory after the fact is not generally treated like a principal of the crime. *See* S.C.Code Ann. § 16–1–55 (2003) (outlining lower classifications of punishment for persons convicted of the offense of accessory after the fact to a felony as compared to punishment for the principal felon); State v. Good, 315 S.C. 135, 139, 432 S.E.2d 463, 466 (1993) (holding there was no error in refusing to charge accessory after the fact because "there is no exclusionary situation which eliminates one [defendant] or the other from having participated in the murder as a principal."); State v. Fuller, 346 S.C. 477, 481, 552 S.E.2d 282, 284 (2001) (finding the defendant was not entitled to a jury instruction on accessory after the fact to murder, as the evidence did not eliminate the defendant as a principal first); Vergara v. State, 287 Ga. 194, 695 S.E.2d 215, 218 (2010) ("A person cannot be both a party to a crime and an accessory after the fact." (internal quotation marks omitted)). Moreover, accessory after the fact to a felony is not a lesser- included offense of murder. Fuller, 346 S.C. at 481, 552 S.E.2d at 284; *see* Good, 315 S.C. at 138–39, 432 S.E.2d at 465–66 (noting accessory after the fact is not a lesser-included offense of any of the offenses with which the defendant was charged, including murder, armed robbery, grand larceny of a motor vehicle, and criminal conspiracy). Accordingly, double jeopardy does not attach under these facts. *See* State v. Parker, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) ("Under the law of double jeopardy, a defendant may not be prosecuted for the *same* offense after an acquittal, a conviction, or an improvidently granted mistrial." (emphasis added) (internal quotation marks

omitted)).

402 S.C. at 657, 742 S.E.2d at 32–33 (n. #3 omitted). Blakely supports the proposition that a defendant who is indicted solely for accessory after the fact to murder cannot also be the principal.

In Collins the Court removed the element of absence from the scene of the crime for accessory after the fact writing:

> We concur with the law espoused by these authorities. It is untenable to suggest that a defendant who is "merely present" at the scene of a crime may not be convicted as an accessory if he thereafter aids the perpetrator to cover it up or escape from the crime. The mere fact of one's "presence" at the time of commission of the substantive offense is insufficient to relieve him of liability as an accessory. Accordingly, we modify existing case law to recognize that **absence** is not an essential element of the offense of accessory after the fact and that "mere presence" at the scene will not preclude an accessory verdict where the defendant becomes involved **after** commission of the substantive offense.

329 S.C. at 27–28, 495 S.E.2d at 205. While the jury could have found that Petitioner was merely present at the scene of the shooting, the State was still required to prove that Petitioner harbored or assisted the principal felon, another person who is not Petitioner. In the supplemental instruction, however, the judge instructed the jury that, in theory, the defendant and the unknown principal could be the same person. The instruction diluted the State's burden of proof by not requiring the State to prove that Petitioner knew **another person** committed the murder and assisted that **other person**, the unidentified principal, from being detected. The error was compounded by the fact that in the supplemental instruction the judge omitted the **"another person"** language included in the initial instruction.

The issue is not whether the State can charge a defendant for being a principal as well as an accessory after the fact. Petitioner was charged solely as an accessory after the fact. The issue in this case is that in telling the jury that the defendant and the unknown principal could be

the same person the judge deleted an element of accessory after the fact. The judge's supplemental instruction told the jury that Petitioner taking actions to prevent himself from being detected, rather than an unknown principal, is sufficient for a finding of guilt for accessory after the fact. If the jury believed that Petitioner's actions with regard to his Cadillac were meant to prevent Petitioner from being detected rather than the unidentified principal, the re-charge allowed the jury to find Petitioner guilty without requiring the State to prove that Petitioner assisted another person in avoiding detection. Because of the erroneous charge, the State was not required to prove that Petitioner assisted another person, an element of accessory after the fact. This is an error of law.

In Massey the Court found that the State should not be barred from prosecuting someone as an accessory after the fact simply because the principal was acquitted. The Court affirmed Massey's conviction for accessory after the fact although the principal was acquitted in an earlier separate trial. The Court, however, specifically noted that, "That the jury in the trial of the accessory must find as a fact that the principal did actually commit the crime involved is a rule that remains as valid and unchanged as before. Burbage, supra; Hess, supra. This rule affords the accused accessory the necessary degree of protection. Unless the State can prove at the trial of the accessory that the principal is guilty, the accessory cannot be convicted." 267 S.C. at 446, 229 S.E.2d at 339. The language from Massey further supports the fact that the principal and the accessory cannot be the same person. The accessory must assist the principal, a person other than the accessory.

The judge erred in instructing the jury that, in theory, the defendant and the unknown principal could be the same person. In response to the question from the jury the judge should have simply recharged the original instruction he gave the jury on the law of accessory after the

fact to murder. The answer to the question and supplemental instruction given diluted the State's burden of proof by removing the third element of accessory after the fact, that the accused harbored or assisted a principal felon, someone other than the accused. The instruction constituted an error of law as well as an improper comment on the facts. The error was not harmless.

The present case is distinguished from Nalls v. State, 815 S.E.2d 38 (Ga. 2018), where the Supreme Court of Georgia found that " . . . a person who was a party to the primary crime may also be guilty of the separately charged crime of hindering, where the evidence shows that the person has hindered the apprehension of punishment of **another** person who is also a party to that crime." 815 S.E.2d at 47-48 (emphasis added). The Nalls case did not involve an erroneous jury charge as in this case. As Nalls was charged as both a principal and with the crime of hindering, the State was required to prove all of the elements of the principal offense in addition to proving that Nalls hindered the apprehension of **another** person. Petitioner in the present case was only charged as accessory after the fact. The State was required to prove that Petitioner harbored or assisted **another** person. In instructing the jury that the principal and the accessory after the fact could be the same person, the trial judge eliminated the **another** person element of the offense of accessory after the fact.

In Ramos v. State, 696 So.2d 461 (Fla. Dist.Ct. 1997), the defendant was charged only as an accessory after the fact. The Florida District Court found that the trial judge properly refused a proposed jury instruction that if the defendant was guilty as the principal, she could not be convicted as an accessory. The jury instruction requested in Ramos was not requested in the present case. The issue in the present case is not whether the State can charge a defendant for being a principal as well as an accessory after the fact. The issue in this case is that in telling the

jury that the defendant and the unknown principal could be the same person the judge deleted an element of accessory after the fact.

In Morman v. State, 458 So. 2d 88, 88–89 (Fla. Dist. Ct. App. 1984) a double jeopardy violation to be convicted of both robbery and accessory after the fact to the same robbery. The Florida District Court wrote:

> However, we do not think double jeopardy is involved in this context. An accessory after the fact contains a completely different bundle of elements than the crime of robbery. Section 777.03, Florida Statutes (1983), provides:
>
> Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he had committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> To commit such a crime it must be proved that the defendant aided or assisted *another person* to commit a crime, or to escape detection, arrest, trial or punishment. Clearly a person cannot aid and abet himself to commit a crime. Conviction for such a fact situation would be a violation of due process because it would be a non-existent crime. *State v. Sykes,* 434 So.2d 325 (Fla.1983).

458 So.2d at 89. The Florida District Court noted that if there were two robbers and Morman later aided his co-robber, he could be convicted of both robbery and accessory after the fact. The instruction in the present case, however, omitted the requirement of aiding another person.

In State v. Mitchell, 337 So. 2d 1189 (La. 1976), the defendant was charged only as an accessory after the fact. On appeal the defendant argued that the trial judge erred in finding her guilty as an accessory after the fact to the crime of simple robbery, urging that the facts clearly established that she was guilty of the robbery as a principal. Defendant argued that an individual

cannot be both an accessory and a principal to the same crime. The Supreme Court of Louisiana found that because there was evidence presented that there were two principals, Mitchell and her co-defendant Diane Butler, the judge properly found Mitchell guilty of accessory after the fact for assisting her co-defendant, **another** person. The court noted, "The bill of information as finally amended charged Martha Mitchell with aiding and abetting Diane Butler, knowingly and with reasonable grounds to believe that Ms. Butler had committed a felony. The State did not charge Martha Mitchell as an accessory for aiding and abetting herself, after the commission of the crime." 337 So. 2d at 1190. Again, the issue in the present case is not whether the State can charge a defendant for being a principal as well as an accessory after the fact. The issue in this case is that in telling the jury that the defendant and the unknown principal could be the same person the judge deleted the **another** person element of accessory after the fact. The language in Mitchell supports the proposition that accessory after the fact requires aiding **another** person.

In affirming the conviction the Court of Appeals wrote:

> We hold any potential error in the trial court's jury instruction was harmless. See State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."(quoting State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), overruled on other grounds by Burdette, 427 S.C. at 503, 832 S.E.2d at 582-83)); State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("In making a harmless error analysis, [the appellate court's] inquiry is . . . whether the erroneous charge contributed to the verdict rendered."); State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) ("In reviewing jury charges for error, [an appellate c]ourt considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial."); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[I]f as a whole [the jury instructions] are free from error, any isolated portions which may be misleading do not constitute reversible error."); State v. Blakely, 402 S.C. 650, 657, 742 S.E.2d 29, 32-33 (Ct. App. 2013) (stating "an accessory after the fact is not generally treated like a principal of the crime" and citing case law suggesting a principal could not also be an accessory after the fact); Fuller, 346 S.C. at 480-81, 552 S.E.2d at 283-84 (holding a defendant was not entitled to a charge of accessory after the fact because "the evidence did not eliminate Petitioner as a principal first").

State v. Smith, 2023-UP-087 (S.C. Ct. App. filed March 15, 2023).

The error is not harmless because the supplemental instruction diluted the State's burden of proof by omitting an element of accessory after the fact, that the accused harbored or assisted a principal felon, other than the accused. The erroneous instruction contributed to the verdict rendered as it only took the jury twenty minutes to reach a verdict following the erroneous instruction. "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)). "A jury charge which is substantially correct and covers the law does not require reversal." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (citing State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)). The erroneous instruction does not simply contain an isolated misleading portion. Instead, the instruction as a whole is incorrect and fails to cover the law because the instruction omits an element of accessory after the fact, diluting the State's burden of proof.

2. The Court of Appeals erred in finding that the issue of the trial judge refusing to grant a new trial based on a supplemental jury instruction that deprived Petitioner of a fair trial was not preserved for appellate review.

On January 18, 2019, following conviction and sentencing Petitioner filed a motion for a new trial. (R. p. 585). In July a trial brief was prepared and on July 31, 2019, Judge Dennis heard the motion for a new trial. (R. p. 588). After hearing argument from both sides Judge Dennis denied the motion for new trial. (R. p. 576, lines 15-16). The motion was denied by written order dated August 14, 2019. (R. p. 598).

Prior to instructing the jury the judge advised the attorneys about the charge on accessory after the fact stating:

> Yeah, this is what it says: The defendant knew that another person, the principal, committed a felony and after the crime intentionally helped – knew the – committed a felony and the felony was complete basically. I put that – that is consistent with Massey. Which that's – has been committed a felony. Has committed the crime of murder. So I mean that is all it says. It doesn't say that he has to be guilty of it. Massey doesn't say that. Because Massey specifically stands for the principle he doesn't have to prove that. Because in Massey the principal was acquitted.

(R. p. 481, lines 5-11).

The trial judge initially correctly instructed the jury on the law of accessory after the fact to murder as follows:

> The defendant is charged, as I mentioned, with the criminal offense of accessory after the fact of a felony murder. And in order to obtain a conviction the State must prove beyond a reasonable doubt the following: First, that the defendant knew that **another person** called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection.
>
> While the State must prove that the principal did commit the murder, it is not necessary that the State prove the identity of the principal or that the principal has been prosecuted for you to return a verdict of guilty of the crime of accessory after the fact of committing the murder.

(R. p. 532, line 24 – p. 533, lines 1-14, emphasis added).

As discussed above, during deliberations the jury sent a note to the judge asking, "Are the accused, (defendant) and "unknown" principal mutually exclusive in the eyes of the law? Can they be the same person?" (R. p. 541, lines 3-6). The note was marked as Court's Exhibit #2. (R. p. 584). During the objection prior to the supplemental instruction the judge did not notify the parties that he planned to alter the initial instruction. The judge answered the question in the supplemental instruction stating:

> I am going to answer that by recharging a portion of my charge where I define the elements of -- for the crime of accessory after the fact of committing a felony of murder.
>
> And, as you will recall, there are basically three: The felony must have been completed. The accused must have knowledge of the principal that the principal committed the felony. And the accused must harbor or assist the principal felon from being detected. And harboring must have the intention to protect the principal.
>
> As I further charge you that accessory -- a person may be convicted even if the principal is unknown or has not been charged or has not yet been prosecuted.
>
> And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal -- had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested.
>
> If those elements are present it doesn't matter what -- who the principal was, because you are not dealing with the principal. You are dealing with the person accused of basically in this case being an accessory after the fact of the crime that was committed by the principal. So the identity, as I have stated, is really not significant in so far as your determination. The key is whether those elements pertaining to the person accused of the accessory are present. Okay.

(R. p. 541, line 7 – p. 542, lines 1-13). The supplemental instruction was not a "re-charge as it was slightly different from the initial instruction. The supplemental instruction omitted the "another person" language included in the initial instruction. Petitioner objected to the judge instructing the jury that the principal and the accessory can be the same person. The basis for the motion for a new trial was based on both the fact that the trial judge erroneously told the jury during the supplemental instruction that the principal and the accessory after the fact could be the same person and, in relation to that erroneous answer, the fact that the judge omitted the "another person" language included in the initial instruction. The erroneous answer and the omission of the "another person" language in the supplemental instruction were closely connected. Petitioner

objected to the supplemental instruction. (R. p. 539, line 14 – p. 540, lines 1-7; p. 542, lines 19-21).

During the hearing on the motion for new trial counsel argued:

> And so we acted in reliance on the jury charge that the principal had to be another person. And essentially the supplemental charge after the closing gave the State almost a new theory of liability. It prevented us from -- it really undercut what our theory of the case was because it put in the jury's mind this idea that maybe he was there. And that support just wasn't in the evidence. We could have adjusted our closing certainly had we known that this other charge was going to be given. But unfortunately, we just weren't given that opportunity and this I think dovetails with State v Devin Johnson, and State v Jones, both which we've elaborated on in our memo.

(R. p. 572, lines 5-17).

The judge then stated, "Let me just – you mentioned something that first of all we don't charge – we can't charge on the facts." (R. p. 574, lines 23-25). Trial counsel agreed and then the Judge said, "So how the jury viewed it I don't really know even with that. But they asked a specific question which you have just acknowledged. Can you be present and not be a principal? You can be. And I'll give you an example." (R. p. 575, lines 2-6). The jury's question, however, was, "Are the accused, (defendant) and "unknown" principal mutually exclusive in the eyes of the law? Can they be the same person?" (R. p. 584, lines 3-6). The judge erred in denying the motion for new trial when the supplemental instruction deprived Petitioner a fair trial by altering the original instruction with the "another person" language that trial counsel reasonably relied upon.

In State v. Johnson, 418 S.C. 587, 795 S.E.2d 171, (Ct. App. 2016), the South Carolina Court of Appeals found that the trial judge's supplemental jury instruction on the "hand of one is the hand of all" after the judge assured defense counsel he would not instruct the "hand of one is the hand of all" and trial counsel relied upon the judge's assurance in crafting his closing

argument rendered the trial fundamentally unfair. In the present case the judge told defense counsel that he would instruct the jury that the elements of accessory after the fact to murder are that the defendant knew that **another person** called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection. (R. p. 481, lines 5-11) (emphasis added). Trial counsel relied on the discussion in crafting the closing argument. The judge then instructed the jury as discussed. In response to the jury's question of whether the defendant and the "unknown principal" could be the same person, however, the trial judge omitted the **another person** language and instructed the jury that, "And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal -- had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested." (R. p. 541, line 20- p. 542, lines 1-4). As in Johnson, the altered supplemental instruction in the present case rendered the trial fundamentally unfair.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), The trial judge stated during a charge conference that he would instruct the jury that reasonable doubt meant a doubt that would cause a reasonable person to hesitate to act. Defense counsel specifically incorporated the "hesitate to act" language in his closing argument. The trial judge then, based on a request from the prosecution, removed the "hesitate to act" language from the reasonable doubt charge. The South Carolina Supreme Court found that the decision to alter the charge after closing argument

was fundamentally unfair. As in Jones, the altered supplemental instruction given after closing argument in the present case rendered the trial fundamentally unfair.

In affirming the conviction the Court of Appeals wrote:

> We hold Smith's argument regarding the denial of his new trial motion is not preserved for appellate review because he did not object at the time of the supplemental jury instruction; rather, he raised the issue for the first time in his post-trial motion for a new trial. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); S.C. Dep't of Transp. v. First Carolina Corp.of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that anissue may not be raised for the first time in a post-trial motion.").

State v. Smith, 2023-UP-087 (S.C. Ct. App. filed March 15, 2023).

While Petitioner did not specifically raise the omission of the "another person" language at trial, the omission is so connected to the objection to the judge telling the jury that the defendant and the unknown principal could be the same person that the omission is encompassed in the objection. Once the omission was discovered, it was brought to the trial judge's attention as an additional ground for a new trial and the trial judge had an opportunity to correct his error. The issue is preserved for appellate review. As discussed above, the error is not harmless because the instruction diluted the State's burden of proof by omitting an element of accessory after the fact, that the accused harbored or assisted **another** person.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of June, 2023.