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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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Seth Hassan Smith, Appellant.

Appellate Case No. 2019-001418

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2023-UP-087
Submitted January 1, 2023 – Filed March 15, 2023

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, both of Columbia, and Solicitor Scarlet A. Wilson, of Charleston, for Respondent.

PER CURIAM: Seth Hassan Smith appeals his conviction for accessory after the fact to murder and sentence of fifteen years' imprisonment. On appeal, he argues the trial court erred by (1) denying his motion for a directed verdict, (2) instructing

the jury, in response to a juror's question, the defendant and unknown principal could in theory be the same person, and (3) refusing to grant his motion for a new trial when the court's supplemental instruction deprived him of a fair trial. We affirm pursuant to Rule 220(b), SCACR.

1. We hold the trial court did not err in denying Smith's motion for a directed verdict because the State presented substantial circumstantial evidence that Smith knew the principal committed murder and assisted the principal in disposing of the car used in the shooting. *See State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When reviewing a denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate."); *State v. Fuller*, 346 S.C. 477, 480, 552 S.E.2d 282, 283 (2001) ("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."); *Weston*, 367 S.C. at 292, 625 S.E.2d at 648 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury.").

2. 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 appellant as a principal first").

3. 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 an issue may not be raised for the first time in a post-trial motion.").

AFFIRMED.[1]

WILLIAMS, C.J., THOMAS, J., and LOCKEMY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SETH HASSAN SMITH,

PETITIONER

APPELLATE CASE NO. 2019-001418

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 2023-UP-087

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Seth Hassan Smith, respectfully requests that this Court grant rehearing. On March 15, 2023, this Court 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). This Court found that the trial court properly denied Smith's motion for directed verdict, found that any potential error in the judge instructing the jury that in theory the defendant and the unknown principal could be the same person was harmless, and found that the challenge to the denial of the new trial motion was not preserved for appellate review. Counsel respectfully submits that this Court may have overlooked the fact that the instruction that the

defendant and the unknown principal could be the same person 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. Accessory after the fact requires the accused to harbor or assist a principal felon other than accused. If the accused only harbored or assisted himself as the principal felon, then the accused is only liable as a principal, not an accessory after the fact. The error in the instruction was not harmless.

The error was further compounded when the judge altered the supplemental instruction to omit the language, "that the defendant knew that **another person** called the principal committed a murder" given in the initial instruction. In finding the challenge to the denial of the new trial motion was not preserved for review, counsel respectfully submits that this Court may have overlooked the fact that the omission of the "another person" language in the supplemental instruction 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. The issue is preserved for appellate review. Counsel respectfully requests rehearing on these two issues.

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 trial judge committed an error of law in instructing the jury that, in theory, the defendant and the unknown principal could be the same person.**

The trial judge initially 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, emphasis added). 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, the judge omitted the "another person" language included in the initial instruction.

The jury then continued deliberating at 5:14 PM. (R. p. 542, line16). At 5:35 PM, only twenty minutes after the "re-charge," 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 "re-charge" 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 can be the same person. The judge did not tell the jury that in theory a principal could also be an accessory after the fact. (BOR, p. 22). Instead, the judge told the jury that the principal and the accessory

could be the same person. The "re-charge" constitutes an error of law. The accessory after the fact charge requires two different parties, a principal and an accessory. The charge requires the accessory assist another person, the principal. Accessory after the fact requires a principal who is not the accessory.

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 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 answering the question from the jury 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 "re-charge" 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 answer 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 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 the principal and the accessory cannot be the same person.

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. If the jury found that Petitioner was at the scene, there was no evidence presented that he was merely present. Under the facts of this case, if the jury found Petitioner was at the scene, he was acting as a principal as either the shooter or the get away

driver. Petitioner, however, was indicted as an accessory after the fact. The State was required to prove that he assisted someone other than himself. The judge's instruction removed that element.

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 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.

In affirming the conviction this Court 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).

Respectfully, 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 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.

Respectfully, Blakely, a case cited by this Court in the opinion, supports the proposition that the principal and the accessory cannot be the same person. This Court also cited Fuller for the holding that "defendant was not entitled to a charge of accessory after the fact because 'the evidence did not eliminate Petitioner as a principal first.'" The Court's reliance on this holding in Fuller is misplaced because Petitioner was only indicted as an accessory after the fact. The erroneous instruction requires reversal. Petitioner respectfully seeks rehearing.

2. The trial judge erred in refusing to grant a new trial when the supplemental instruction deprived Petitioner of a fair trial.

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 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). The judge answered the 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.
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> 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.
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> 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.
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> 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.
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> 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). 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 the fact that the judge omitted the "another person" language included in the initial charge. 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 this Court 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).

Respectfully, 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.

Counsel respectfully requests rehearing and a finding that the erroneous supplemental instruction requires reversal of the conviction and remand for a new trial.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 3rd day of May, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SETH HASSAN SMITH,

PETITIONER

APPELLATE CASE NO. 2019-001418

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 3rd day of May, 2023.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

The State, Respondent,

v.

Seth Hassan Smith, Appellant.

Appellate Case No. 2019-001418

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

A.J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
David A. Spencer, Esquire
Scarlett Anne Wilson, Esquire

FILED
May 18 2023