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,

APPELLANT

APPELLATE CASE NO 2019-001418

FINAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENTS IN REPLY

1. **In this trial for accessory after the fact to murder, the trial judge erred in refusing to direct a verdict of acquittal when the State failed to prove Appellant had knowledge that the principal committed the murder.**

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).

Appellant was indicted solely as an accessory after the fact. The State, however, failed to prove that Appellant knew that the unknown principal committed the murder, an element of accessory after the fact. The trial judge erred in refusing to direct a verdict of acquittal. In closing argument the State admitted that they could not prove that Appellant was in the Cadillac at the time of the shooting stating, "I can't prove to you – we can't prove to you that the defendant was in the Cadillac at the time of the murder. We are not saying we can do that. If we could I would be asking you to convict him of murder. But we can't." (R. p. 502, lines 9-12). The actions Appellant took with regard to his Cadillac shortly after the shooting do not satisfy the element of accessory after the fact that Appellant knew that the principal committed the felony.

The State failed to prove knowledge of the murder, a necessary element of accessory after the fact. In State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004), the South Carolina Supreme Court wrote, "The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. Id. at 409, 535 S.E.2d at 127. 'Suspicion' implies a belief or opinion as to guilt based upon facts or

circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001)." The evidence presented by the State merely raises a suspicion that Appellant knew a murder had been committed. The trial judge erred in refusing to direct a verdict of acquittal.

2. **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.**

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 judge, over objection, told the jury:

> 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 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.

The indictment 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). Appellant was indicted solely as an accessory after the fact. The State was required to prove that Appellant knew that another person, the principal, committed the murder and that Appellant assisted that other person, the unidentified principal, from being detected.

In the "re-charge," 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 Appellant 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. Appellant 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 "re-charge" told the jury that Appellant 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 Appellant's actions with regard to his Cadillac were meant to prevent Appellant from being detected rather than the unidentified principal, the re-charge allowed the jury to find Appellant guilty without requiring the State to prove that Appellant assisted another person in avoiding detection. Because of the erroneous charge, the State was not required to prove that Appellant assisted another person, an element of accessory after the fact. This is an error of law.

Appellant objected to the trial judge telling the jury that the person accused of accessory after the fact can also be the unknown principal citing State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013). (R. p. 539, lines 14-17). In Blakely the Court of Appeals found that the State could try Blakely for accessory after the fact following an acquittal on the murder charge. Importantly, in the trial for accessory after the fact, the State was required to prove that Blakely assisted another person, the principal, Morris, after Morris murdered Fuller, Blakely's husband. Discussing the facts the Court of Appeals wrote, "Blakely pretended to call 911, told the teenagers to stay down, and further told the teenagers Morris' fight with Fuller involved the "Mexican Mafia." After checking Fuller and finding no pulse, Blakely helped Morris load Fuller's body into Fuller's truck. Morris drove Fuller's truck to a steep bank and rolled the truck with the body down the embankment. Morris got into the vehicle driven by Blakely and Blakely

dropped Morris off at a convenience store." Blakely, 402 S.C. at 654–55, 742 S.E.2d at 31. In the Blakely case the State proved that Blakely knew another person, Morris, murdered Fuller and that she assisted Morris from being detected. In the present case, because of the judge's "re-charge," the State was not required to prove that Appellant assisted another person.

Appellant cannot assist himself from being detected to satisfy the elements of accessory after the fact. The objection was not based on an argument that a defense to accessory after the fact is a claim that the alleged accessory is really a principal, as stated in the State's brief. (BOR p. 22). Appellant obviously never argued that he was a principal. The objection was based on the fact that the accessory after the fact and the principal cannot be the same person.

Appellant objected to judge's proposed answer and stated that he preferred the language included in the initial charge, (R. p. 539, lines 18-19), which included the **"another person"** language. While Appellant did not specifically raise the omission of the **"another person"** language until the motion for new trial, as discussed in issue three, 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. The judge's error in telling the jury that the defendant and the unknown principal could be the same person and omitting the **"another person"** language is preserved for appellate review. The trial judge should have simply re-charged the jury with the law on accessory after the fact as he did initially and as Appellant requested.

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

The State argues that, "Appellant failed to contemporaneously object to the supplemental instruction, so the issue is not preserved for review, and Appellant was not prejudiced by the purported error." (BOR, p. 29). The State places emphasis on the fact that Appellant did not object to the omission of "another person" language in the supplemental instruction. (BOR, p, 29). The motion for a new trial was not based solely on the omission of the "another person" language from the "re-charge" or supplemental instruction. Instead, 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. Appellant objected to the supplemental instruction. (R. p. 539, line 14 – p. 540, lines 1-7; p. 542, lines 19-21). As discussed above, while Appellant 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.

The State's reliance on Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005) and State v. King, 334 S.C. 504, 514 S.E.2d 581 (1999) is misplaced because, unlike in those cases, the supplemental charge was challenged at trial and not raised for the first time in the motion for new trial. The trial judge's error is not harmless. The supplemental instruction diluted the State's burden of proof and allowed the jury to convict Appellant without finding that he assisted the principal, another person, an element of accessory after the fact.

CONCLUSION

Based on the argument presented is issue one, this Court should reverse the conviction. Based on the arguments presented in issues two and three this Court should reverse the conviction and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

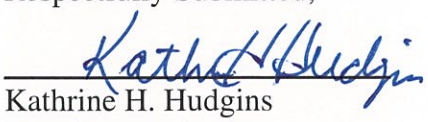
This 31st day of March, 2021.

RECEIVED
Mar 31 2021
SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Reply Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

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

ATTORNEY FOR APPELLANT

This 31st day of March, 2021.

RECEIVED
Mar 31 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

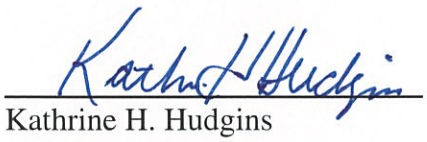
V.

SETH HASSAN SMITH,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Reply Brief of Appellant 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 31st day of March, 2021.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT