

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

RECEIVED

Mar 17 2021

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SETH HASSAN SMITH,

APPELLANT

APPELLATE CASE NO 2019-001418

RECORD ON APPEAL

KATHRINE H. HUDGINS
Appellate Defender

ALAN WILSON
Attorney General

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

DAVID SPENCER
Senior Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JANUARY 7 TO 9, 2019.....	1
PRETRIAL MOTION TO QUASH THE INDICTMENT.....	13
RULING OF THE COURT	22
OPENING STATEMENT BY MR. OSBORNE.....	43
OPENING STATEMENT BY MR. LOIGNON	49
TESTIMONY	
MARCHENT FAUSTIN	
Direct Examination by Mr. Osborne.....	57
Cross Examination by Mr. Loignon.....	69
RANDALL UNTERBRINK	
Direct Examination by Mr. Osborne.....	71
Cross Examination by Mr. Bowden.....	80
Redirect Examination by Mr. Osborne	81
RAYSHAWN RIVERS	
Direct Examination by Mr. Osborne.....	82
Cross Examination by Mr. Bowden.....	93
JEREMY WRIGHT	
Direct Examination by Mr. Osborne.....	96
Cross Examination by Mr. Loignon.....	103
Redirect Examination by Mr. Osborne	109
Re-Cross Examination by Mr. Loignon.....	111
JERRY ROBERTS	
Direct Examination by Mr. Osborne.....	113
Cross Examination by Mr. Bowden.....	119
Redirect Examination by Mr. Osborne	121
RICHARD WIERSMA	
Direct Examination by Mr. Osborne.....	125
Cross Examination by Mr. Loignon.....	138
Redirect Examination by Mr. Osborne	141

ASHLEY WOJSLAWOWICZ	
Direct Examination by Mr. Osborne.....	142
Cross Examination by Mr. Loignon.....	150
Redirect Examination by Mr. Osborne	155
JEFF MILLER	
Direct Examination by Mr. Osborne.....	157
Cross Examination by Mr. Loignon.....	164
Redirect Examination by Mr. Osborne	165
NADA KERSTEIN	
Direct Examination by Mr. Osborne.....	166
Cross Examination by Mr. Loignon.....	179
Redirect Examination by Mr. Osborne	182
DEBRA TURNER	
Direct Examination by Ms. Elliott.....	184
Cross Examination by Mr. Bowden.....	192
SUSAN AMERMAN	
Direct Examination by Mr. Osborne.....	193
Cross Examination by Mr. Loignon.....	211
Redirect Examination by Mr. Osborne	212
NICHOLAS BATALIS	
Direct Examination by Mr. Osborne.....	220
JIBRAL ACEVEDO	
Direct Examination by Mr. Osborne.....	230
Cross Examination by Mr. Loignon.....	275
Redirect Examination by Mr. Osborne	300
Re-Cross Examination by Mr. Loignon.....	304
LORETTA MITCHUM	
Direct Examination by Mr. Osborne.....	304
CLAY SIMMONDS	
Direct Examination by Mr. Osborne.....	309
Cross Examination by Mr. Loignon.....	339
PAUL KRASOWSKI	
Direct Examination by Mr. Osborne.....	352
Cross Examination by Mr. Loignon.....	423
Redirect Examination by Mr. Osborne	439
Re-Cross Examination by Mr. Loignon.....	446

THE STATE RESTS	447
MOTION FOR DIRECTED VERDICT.....	453
RULING OF THE COURT	469
COLLOQUY WITH THE DEFENDANT REGARDING HIS RIGHT TO TESTIFY	470
CLOSING ARGUMENT BY MR. OSBORNE	488
CLOSING ARGUMENT BY MR. LOIGNON.....	509
CHARGE ON THE LAW	523
VERDICT	550
MOTION FOR A NEW TRIAL	553
SENTENCING	562
HEARING TRANSCRIPT DATED JULY 31, 2019.....	564
INDICTMENT AND SENTENCE SHEET	581
COURT’S EXHIBIT #2 (NOTE FROM JURY).....	584
MOTION FOR A NEW TRIAL	585
MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL	588
WRITTEN ORDER DENYING MOTION FOR A NEW TRIAL	598
STATE’S EXHIBIT #88 (PHOTOGRAPH).....	600
STATE’S EXHIBIT #89 (PHOTOGRAPH).....	601
CERTIFICATE OF COUNSEL	602

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

State’s Exhibit #23 (surveillance video footage); State’s Exhibits #104-114 (photographs); State’s Exhibit #115 (CD of call records); State’s Exhibit #116 (Simmons’ power point presentation); State’s Exhibit #119 (video clips, Dollar General store); State’s Exhibit #120 (photograph of car); State’s Exhibit #123 (photograph); State’s Exhibit #124 (CD of video footage); State’s Exhibits #125-

141 (photographs); State's Exhibits #142-144 (maps/aerial photos); State's Exhibits #145-146 (ALPR photos); State's Exhibit #147 (traffic citation); State's Exhibits #152-154 (Phone CDR, spreadsheets); State's Exhibits #155-156 (photographs); State's Exhibits #158 A-E; State's Exhibits #159 A-B; State's Exhibits #160 A-B (DMV records); State's Exhibit #161 (journal tap/receipt); and State's Exhibits #168-169 (photographs of car)

1 We are here for accessory after the fact.

2 Then he said that we want you -- the State wants you
3 to get into someone's head to try to figure out what they
4 knew. The law doesn't require that.

5 I would bet that you might hear the judge tell you
6 something about criminal intent. And that is really what
7 it is, it is criminal intent. The law does not require you
8 to dissect the person's head and get into their brain. And
9 I think that might have actually been the same language
10 that he used.

11 It does not require that. In fact, there is no way to
12 a mathematical certainty to know what someone was thinking.
13 You are not required to dissect their brain. You can use
14 your common sense to dissect their brain. You can use your
15 common sense. You can look at all of the circumstances
16 surrounding the case to infer what they meant. And that is
17 why we presented all of the evidence so that you can look
18 at everything to infer what they meant.

19 And lastly -- the last thing I heard that kind of
20 caught my ear was that the defense argued or at least said
21 in their opening that we have to prove that the defendant
22 knows the person that committed the murder. Not true.

23 In fact, I would bet that you will hear the judge say
24 something like an accessory may be convicted even if the
25 principal is unknown or not charged.

1 We don't have to prove that he knew him. We don't
2 have to prove that they had a relationship. It can be --
3 the principal can be undone. The key is not that he knew
4 the felon. The key is that he knew the felony had been
5 committed.

6 All right. And the last. So we have got to prove all
7 three. And the last, the accused must harbor or assist the
8 principal felon.

9 I can't prove to you -- we can't prove to you that the
10 defendant was in the Cadillac at the time of the murder.
11 We are not saying that we can do that. If we could I would
12 be asking you to convict him of murder. But we can't.

13 But he sure knew that his car was involved in the
14 murder. And you know that based on the extraordinary
15 efforts that he took to cover up his tracks, conceal and
16 destroy evidence just days after the murder.

17 When he participated in altering the appearance and
18 destroying the car, he assisted. And there may be -- this
19 is the last time that I am going to get a chance to talk to
20 you, so I have to try to predict to address some of the
21 issues I feel the defense might raise. I also have to try
22 to predict what kind of questions that you might have to
23 try to address those now.

24 There was some discussion about what evidence was sent
25 up and what evidence wasn't sent up. I think there are

CLOSING BY MR. OSBORNE

1 logical explanations that made perfect sense as to why
2 certain evidence was sent and certain wasn't.

3 But either way, you will not hear the -- the judge
4 instruct you to say that the accused efforts to impede the
5 investigation was successful. It doesn't matter that his
6 efforts ended up being successful. It matters what his
7 intent was when he did those efforts. And his intent was
8 to assist the person in getting away with it.

9 All right. I want to talk to you just a second --
10 well, talk to you about Acevedo. Now I did -- or we did
11 introduce some evidence of Acevedo's cell phone records.
12 And this is during the timeframe of the murder. And the
13 reason why we did that was to let you know that at the
14 timeframe of the murder Acevedo was in West Ashley in the
15 area in which he said he resided. You see phone calls at
16 9:30 and at 12 o'clock. The murder happened at 11:40.

17 All right. Now when you are dealing with witnesses,
18 you and jurors, you can decide what you are going to
19 believe and what you are not going to believe. You can
20 decide the credibility of a witness. And that credibility
21 is all for you to decide. You can believe all of what
22 someone tells you. You can believe none of what someone
23 tells you. Or you can believe just parts of it.

24 Look at what fits. Look at what doesn't. And this is
25 what I talk about in my opening, corroborations. It is

1 key. Not only when you are dealing with Acevedo. But
2 especially when you are dealing with a known liar.

3 Look at the evidence. Look at what corroborates. And
4 when it is different, ask yourself why. But most
5 importantly, use your common sense.

6 All right. First he tells you the defendant, his
7 cousin, called him Monday morning and they agreed to meet
8 in the area of Lowe's because he claims that he was going
9 to buy the Cadillac that he had expressed interest in
10 before.

11 Now if that were true you would expect to see some
12 sort of call log, communication between the defendant and
13 Acevedo on Monday morning. And you do.

14 Now Acevedo then says that after he is picked up he is
15 driven -- or they go to, in the white pickup truck, with a
16 guy he knows only as Bubba, to the Dollar General which is
17 right around the corner on 61 or Ashley River Road and
18 Magwood.

19 He says that once they get there it is the defendant
20 and Bubba who go inside and he waits outside in his car --
21 or in the truck.

22 There is the white truck (displaying). There is the
23 defendant and an unidentified individual going inside the
24 Dollar General (displaying).

25 Okay. Now the image isn't great. I understand. But

CLOSING BY MR. OSBORNE

1 you can just about make out that that appears to be two
2 cans of spray paint on the conveyor belt coming through
3 (displaying).

4 But you have more evidence that they did in fact buy
5 spray paint. The sales receipt. The sales receipt shows
6 that at 10:45 there were two cans of brown spray-paint that
7 was purchased which corresponds to the surveillance video
8 time at 10:45.

9 While Acevedo was waiting inside the car -- or inside
10 of the truck, this defendant was already taking measures to
11 get what he needed to alter and destroy that Cadillac.

12 All right. Now after that, he said that they --
13 Acevedo said that he and the defendant ended up going to
14 Mt. Pleasant to Jeremy Wright's house.

15 We do not have any communication from the defendant
16 using a cell phone, so we can't corroborate that. But we
17 can at least corroborate that Acevedo is where he says he
18 was.

19 Now after that, Acevedo says that he and the defendant
20 went to the DMV at Wappoo and 61. He says that while the
21 defendant is outside he goes inside of the DMV. The
22 defendant tells him that don't walk out without the title,
23 he needs the title that day.

24 You cannot sell the car without the title. And this
25 defendant wants to get rid of that car as quickly as he

1 can. So he is willing to pay whatever fees -- an extra 30
2 bucks; he pays the 30 bucks so that Acevedo can have the
3 title. He wants to make sure it is not him who is selling
4 the car, it is Acevedo.

5 And Acevedo says that once he is inside of the DMV
6 realizes the extra fee, he ends up communicating with the
7 defendant.

8 Now this one is going to be kind of hard to cover up.
9 If this is true then you would expect to see Acevedo
10 communicating with the defendant on the same cell tower.
11 And that's exactly what you see. Around 3:30, 3:45, the
12 defendant when Acevedo spoke to the defendant they both
13 pinged off of the same tower. And remember the transaction
14 occurred at 3:49.

15 You will have all of that DMV paperwork with you back
16 there. You can go through it yourself. Notice the date of
17 sale here. Again, 19 days earlier. A good 17 days prior
18 to the murder.

19 This again, common sense stuff. If they sold the car,
20 a \$300 car, if that is true that that car was sold on April
21 the 1st for \$300, why pay an expedited fee to have the
22 transfer title -- the title to the transfer -- the title
23 transferred 19 days later? Thirty percent of the value of
24 the car you are paying to get the title transferred on that
25 day.

1 It wasn't a hurry. It only became a hurry once the
2 murder occurred. And that is when the defendant knew I
3 have got to get it out of my name, got to get it out of my
4 name now. And that is where he found this fool.

5 But it wasn't enough to get the car out of his name.
6 He needs to get the car off of the streets. He knows the
7 police are looking for it. Got to get it off the streets.
8 And the easiest way to get it off the streets is to salvage
9 it. That way you get a little money. Spray painting the
10 wheels too to alter the appearance.

11 If you are going to wreck it and you are going to sell
12 it then why would you even bother spray painting the
13 wheels? You do that for one reason. And that is to avoid
14 detection.

15 And if you notice on the defendant's cell phone
16 records it is he who is communicating with the wrecker who
17 eventually takes the car to LKQ. And look who is caught in
18 the middle.

19 And one other thing about Acevedo. Now he said that
20 he believed the car might have been involved in a crime but
21 he wasn't sure. When he walked into that police station if
22 he thought that the car was involved in a crime then why
23 would he tell the police that I had possession of the car
24 two weeks earlier? He is going to increase the time in
25 which he had possession of the car, when in fact he never

1 had possession of the car. He did that for one reason
2 only, and that was to protect him (pointing) and that car.

3 Acevedo is going to have his day in court. I promise
4 you that. By the time this is all said and done, that day
5 in court is going to cost him a lot more than \$200.

6 All right. Lastly, proof beyond a reasonable doubt.
7 This is our burden. It means that it is proof that leaves
8 you firmly convinced of the defendant's guilt. The law
9 does not require proof that overcomes every possible doubt.
10 Few things in life that we know to an absolute certainty.

11 Firmly convinced. It -- this is not an impossible
12 burden. It doesn't mean all doubt. It means reasonable
13 doubt. But I would submit to you this: If you believe
14 that this defendant had no idea that his vehicle was used
15 in that murder, or if you believe he made no attempt to
16 destroy or cover up the vehicle having been used, the
17 evidence that ties into it, you should find him not guilty.
18 Just let him go.

19 And I -- but I will end it with this. And I am going
20 to piggyback off of something Mr. Loignon said in his
21 opening. Because I think it deserves repeating and it is
22 important. When you go back there and you start
23 deliberating, when you are dealing with a trial where you
24 are talking about murder, I think it is only human for you
25 to want to hold someone responsible for that murder. And I

1 think that in doing so you may start to think about the
2 victim's family, and you may think that -- in sympathetic
3 -- in sympathy for them. And that is normal too. And you
4 may want to bring them some sort of justice. That wouldn't
5 be doing them justice.

6 When you leave out of this courtroom I am asking you
7 to check your sympathy at the door. When you go in there
8 in this deliberation rooms -- or that deliberation room, I
9 do not, I am not, asking you to convict this man because
10 you think he might have had something to do with that
11 murder. Do not do that.

12 I am also asking you do not convict this man because
13 you want some sort of justice for the murder. That's not
14 justice. I am asking you to convict this man for the crime
15 that we can prove that he did. And that is accessory after
16 the fact to murder. Thank you.

17 THE COURT: Thank you, Mr. Osborne.

18 Mr. Loignon.

19 MR. LOIGNON: Thank you, Your Honor. May it please
20 the Court.

21 THE COURT: Yes, sir.

22 **CLOSING BY MR. LOIGNON:**

23 Good afternoon, everyone. I told you all at the
24 beginning of this trial that looks can be deceiving. Seth
25 Smith somehow got wrapped up in this thing. But he had no

1 knowledge that a murder occurred. And he didn't intend to
2 help someone else avoid detection for that murder either.

3 And I hope you have seen throughout the course of this
4 trial that the State has failed to present any evidence to
5 show that Seth Smith knew beyond a reasonable doubt that
6 the unknown principal committed a murder. And they have
7 not presented evidence beyond a reasonable doubt that he
8 intended to help any unknown principal to avoid detection.

9 The burden is important. It is not to be taken
10 lightly. Beyond a reasonable doubt. And the only thing
11 they have presented is suspicion and assumptions.

12 And hopefully you didn't jump to conclusions. And
13 hopefully you are not going to jump to conclusions like the
14 State is asking you to do.

15 Because Mr. Osborne said it, I am asking -- I am
16 telling you what you are going to have to do is go into
17 someone's head; that is what you have to do to really know
18 beyond a reasonable doubt that Seth Smith knew that someone
19 committed that murder.

20 That's what you have to do, because they haven't
21 presented the evidence. They haven't met their burden. I
22 wish -- I wish it weren't that way. But that is the
23 situation they have put us in. Because they don't have any
24 evidence to prove that he knew that a murder happened and
25 that whatever acts Jibral Acevedo said he was a part of

1 were in furtherance of letting this principal escape. They
2 have to make those connections. They can't just ask you to
3 assume those things. And they haven't done it.

4 There was no testimony to link Seth to this crime
5 scene. And the cell phone map that you saw doesn't show
6 Seth anywhere near the area of that crime scene when the
7 crime happened.

8 There is no forensic evidence linking him to the crime
9 scene, no shell casings, no DNA, no fingerprints. So that
10 is that direct evidence Mr. Osborne was talking about. And
11 they can't prove that Seth was anywhere near there or had
12 any direct knowledge to that murder.

13 So what about circumstantial evidence? You heard a
14 little bit about that. There is no circumstantial evidence
15 to show that Seth had knowledge of the crime. And I am
16 going to explain that in a minute. Because Mr. Osborne and
17 I obviously have a difference of opinion.

18 They did present some circumstantial evidence, a few
19 pieces. But that doesn't -- that evidence it doesn't go
20 towards the knowledge element, the second element. It goes
21 towards the third element which is circumstantial evidence
22 that he was helping someone escape detection. But if
23 you -- if you are helping someone escape detection but you
24 don't know for what, he is not guilty.

25 The State must prove beyond a reasonable doubt that a

1 murder occurred. They must prove beyond a reasonable doubt
2 that Seth Smith knew the murder occurred and knew the
3 principal committed the murder.

4 If I misstated that in my opening, I apologize. I
5 didn't intend to. And I don't think I did. But I believe
6 what I just stated is correct. The State must prove beyond
7 a reasonable doubt that Seth Smith knew the murder occurred
8 and knew the principal committed the murder. And then they
9 must also prove that Seth harbored or assisted that
10 principal with the intent - this is the important part - to
11 allow that person to escape detection.

12 So as I just mentioned, the State has presented some
13 circumstantial evidence. Seth -- Jeremy Wright testified
14 that Seth and Bryant were at his house an hour and a half
15 to two hours after the shooting. And there's a black
16 Cadillac in the driveway.

17 Jibral Acevedo said that Seth was involved in dating
18 the title -- backdating the title to the Cadillac. And
19 Jibral Acevedo also said that Seth was involved in altering
20 the appearance of the vehicle.

21 But that stuff only goes to the third element. That's
22 circumstantial evidence that Seth may have been assisting
23 to escape detection. It doesn't show knowledge in any way.
24 Think about it. Because this is where the State wants you
25 to make that leap that the law will not allow you to make,

1 from suspicion to assumption to conviction. It doesn't go
2 that way.

3 The State wants you to think why else would Seth
4 appear to assist someone if he had no knowledge of a
5 murder. That is the question. But where is the answer?

6 They want you to assume, but they haven't given you
7 the evidence. They haven't given you the answer. And I
8 would like to go back to those ifs that I talked about in
9 the opening. If it is the same Cadillac, right, Rayshawn
10 Rivers testified the shooter's vehicle was brown. He
11 doesn't have any allegiance to Seth. He doesn't know him
12 at all. Why would he make up the color of the car?

13 Jeremy Wright and Jibral Acevedo both testified that
14 Seth's Cadillac always had a bright red pinstripe down the
15 side. Now Detective Krasowski said the pinstripe make him
16 raise an eyebrow; it caused him to question whether it was
17 the same car.

18 He didn't see the pinstripe on the video of the car
19 that was circling, so he checked the license plate reader
20 picture. And he couldn't see the pinstripe there either,
21 so he assumed it is just you can't see the pinstriped on
22 video, on any of the video.

23 Well, let's look at these pictures. Because that
24 doesn't really make sense to me. Here is one of the
25 pictures (displaying). You have over here this black

1 Cadillac. Here is another one (displaying). You can't see
2 a pinstripe. Here is another one (displaying). And here
3 is probably the best one; no pin stripe (displaying).

4 Okay.

5 So and you are telling me that in every camera angle,
6 every view, every glare, you still can't see the pinstripe;
7 it is just invisible in video?

8 And let's look at the one from the license plate
9 reader so that we can see the difference between that
10 picture and this one (displaying) which is way high up,
11 zoomed out further, blurry, and from the back. No wonder
12 you can't see pinstripe. It is a much worse image. It is
13 not from the side of the vehicle. And it is from way far
14 away.

15 What can you see though on that license plate reader
16 picture? And you might not be able to see it here. But
17 you will have it back there in your jury room. You might
18 need a magnifying glass. But, no, I think you can see it.
19 I think you can see it with the naked eye that that
20 driver's side window is down. Right there (pointing).
21 Permanently stuck down. Just the way Jibral Acevedo said
22 it was. Permanently stuck down. Just like the search
23 warrant pictures show when they took these pictures of the
24 car, all of these windows are up except for the driver's
25 window, which was permanently stuck down.

CLOSING BY MR. LOIGNON

1 Someone would have seen that driver. Someone would
2 have at least noticed the driver's window was down and
3 would have told police. They wouldn't have said that
4 Cadillac was completely tinted out, you couldn't see
5 anybody. No, because the driver's window was permanently
6 stuck down.

7 And those license plate readers they captured Seth's
8 Cadillac on East Bay several times before. You heard they
9 didn't capture it on the day of this shooting. There are
10 tons of those cameras downtown. If he is anywhere near
11 downtown they are going to get a hit. You heard Krasowski
12 say they are everywhere. They are all over the state.

13 Acevedo also testified that Seth's car never had a
14 blue and white South Carolina flag license plate on the
15 bumper. No one testified that that was ever on Seth's car
16 previously. And there was testimony that the shooter's car
17 had these dark tinted windows.

18 Like I said, you don't have any tint when there is not
19 a window rolled up. If a window is permanently stuck down
20 there is no tint. No tint to be seen.

21 And I am going to show you one other picture real
22 quick if I can find it.

23 (WHEREUPON, pause for counsel.)

24 Well, maybe I will just tell you about it. And then
25 y'all can find it when y'all are looking through all of

1 these back in the jury room.

2 So the State showed you a picture of the Cadillac up
3 on a truck. And that was when it was being towed from LKQ
4 from the junkyard. And it is the only picture -- well, no,
5 I won't say that. I can't be sure.

6 But I can't really remember -- there aren't a whole
7 lot of pictures of the full Cadillac. The one that we --
8 the one that was once Seth Smith's Cadillac, outside being
9 photographed in the light of day. So when you look at that
10 picture of that Cadillac up on the truck, just you tell me
11 if you see any tint on those windows. And that's what
12 those witnesses would have seen in the middle of the day at
13 11:30 in the morning. Okay.

14 For argument sake, if it is the same Cadillac, okay,
15 if it is, then the State has argued that Seth must have
16 known that the person who went and used it went and
17 committed a murder. That is our first assumption. Because
18 there's no way for us to ever know that.

19 Anyone could have borrowed that car, subsequently let
20 another person use it. Jibral Acevedo testified he had
21 driven the car before on multiple occasions. So we can't
22 just make an assumption that Seth must have known who used
23 the car. But if we do make that assumption and it is the
24 same Cadillac and Seth knew the person that used it, he
25 must have known that that person committed the murder. And

1 as I said in my opening, that is too many if's. That is
2 reasonable doubt.

3 So let's talk about some things that don't make sense
4 with the State's case. The car that was used was simply a
5 method of transportation to take -- transport this unknown
6 shooter from Point A to Point B, right?

7 The car was not used in the crime to run someone over.
8 The shooting didn't actually happen in the car. It
9 happened in the white Grand Marquis. But it was just used
10 to transport the shooter, whatever car that was. There's
11 no shell casing or blood or evidence of the crime in the
12 shooter's vehicle. No way for anyone to know afterwards,
13 is what I'm getting at, that a crime happened in that car.
14 Okay.

15 Obviously if it were George Bennett's car, there's a
16 lot of evidence of the crime -- or excuse me, Rayshawn
17 River's car. There's a lot of evidence in the crime -- of
18 the crime in that car. That is the distinction I am
19 making.

20 There is no way for someone to know after the fact
21 that a crime happened in this car that this shooter used to
22 be transported from Point A to Point B.

23 I mean it is -- I know it seems silly, but it is
24 almost as if the shooter could have gone around -- run
25 around the corner and taken a bus or an Uber, and that bus

1 driver is not going to have or that Uber driver they are
2 not going to have any idea of what the shooter just came
3 from doing; right?

4 Why transfer a car to your cousin, your family, if you
5 are trying to conceal your brother's identity? You are
6 keeping it in the family. It doesn't make sense.

7 The State has alleged that Seth was setting up his own
8 cousin by telling him to transfer the title into his name
9 to protect his brother. If you believe that Seth would do
10 that to his own family I still don't understand how that
11 would help anyone very much. Right?

12 How are we -- any of us supposed to know if Seth had
13 knowledge that someone committed a murder? The State has
14 told you they don't need to prove the identity of the
15 shooter. They told you that he could convict someone for
16 accessory after the fact even if the identity of the
17 shooter is unknown.

18 And that may be true. But this case is much different
19 than that. In this case we don't have any evidence that
20 Seth had any knowledge of who the principal was or that
21 that principal committed the murder.

22 Remember, Bryant Smith's charges were dropped. So not
23 only does the State not have a principal, they don't --
24 they haven't proven that Seth knew it either. And that is
25 why it doesn't make sense.

1 Let's talk about the cell phone stuff briefly. And
2 first off, the only reason the State has given us to know
3 that the number they showed up here as Seth's number was
4 actually Seth's number, is Jibral Acevedo. He said this is
5 -- that is the number. We didn't have anyone from the
6 phone company here showing you that that number was
7 registered to Seth Smith. Because it wasn't.

8 We had Jibral Acevedo. And you are supposed to take
9 his word that that was Seth's number. And even if we do
10 believe that that was Seth's number, what do the records
11 show us? The general area where a phone was at a
12 particular time.

13 And in this case they showed the phone that the State
14 associated with Seth Smith was nowhere near West Ashley
15 when this alleged drug deal was going on and it was nowhere
16 near the crime scene when the crime scene happened. So
17 they can't prove knowledge that way.

18 Henry Wolf, the tow truck driver, he didn't testify.
19 I wonder why not. He is the one who Jibral called and sold
20 the Cadillac to on April 21st. He came out on Kent Street
21 and met with Jibral. He was interviewed by Detective
22 Krasowski. He could have come in here and testified as to
23 who he saw at that house in Mt. Pleasant and who he didn't
24 identify as being there. But the State chose not to call
25 him as a witness. That was their choice. I wonder why?

1 My job is to challenge all of the State's evidence.
2 And that is what I have done here this week. It may have
3 seemed nitpicking at some points. But it is my job.

4 Even if you believe all of the State's evidence, Seth
5 Smith is still not guilty. Because they are required to
6 prove each element beyond a reasonable doubt. And there is
7 no way that they can prove that he had knowledge of that
8 murder. Ever.

9 So even if he did backdate a title or alter a car, he
10 didn't know that an unknown principal committed murder.
11 And the State has not come even close to proving that.

12 But Seth didn't actually intentionally backdate that
13 title or alter the vehicle. Because the only person saying
14 he did was Jibral Acevedo. Jibral Acevedo, the State's
15 star witness, the State called him. Not me. I didn't call
16 him to try to lie for Seth. The State did.

17 I don't think I need to say much about his
18 credibility. But he is looking for leniency. And if he
19 says the right things, he will probably get it. But if he
20 admits to backdating that title on his own, spray painting
21 those wheels on his own, altering that vehicle on his own,
22 he would be in the same position as Seth is right now.

23 We don't know how involved Jibral Acevedo really was.
24 He could have played a much bigger role than the State
25 wanted to present to us. He is convicted of obstructing

1 justice.

2 If the State wants you to assume that Seth was the
3 ringleader stringing Jibral along then what is stopping us
4 from assuming that it was the other way around, Jibral was
5 the ring leader stringing Seth along?

6 Jeremy Wright testified he had no knowledge of a
7 murder. The car sat in his driveway in front of his house
8 for four days while he and Seth were at work together at
9 the Holiday Inn. He was just unfortunate to get wrapped up
10 in this. He didn't know what was going on.

11 Jibral Acevedo says he had no knowledge of anything
12 either. Started to get suspicious. But he had no
13 knowledge of a murder. They believed him. He got wrapped
14 up in this though.

15 And the State wants you to believe that there's no way
16 that Seth Smith can get wrapped up in this without knowing
17 that a murder happened.

18 So here we are back where we started, with suspicion.
19 The State is raising suspicion. I am not denying that.
20 The State has made it look darn suspicious. What Jibral
21 Acevedo says Seth did on the 20th and the 21st looked
22 suspicious, if you believe Jibral Acevedo.

23 But suspicion is never enough in a court of law in the
24 United States of America. Because suspicion leads to
25 assumptions. And in assumptions we are not allowed to

1 convict someone on. We are not allowed to convict someone
2 based on suspicion and assumptions.

3 Not one witness to say that Seth had knowledge of a
4 murder. Not one person currently a suspect in that murder.
5 Not one fingerprint or shred of DNA linking Seth to the
6 crime scene. Seth Smith did not have knowledge of murder.
7 And Seth Smith is not guilty.

8 Thank you.

9 THE COURT: Mr. Loignon, if you could if you could
10 pull that back just ---

11 MR. LOIGNON: Yes, sir.

12 THE COURT: Thank you.

13 MR. LOIGNON: My pleasure.

14 (WHEREUPON, podium moved.)

15 THE COURT: Very much appreciated. Thank you so much.

16 MR. LOIGNON: Sure.

17 THE COURT: All right. Ladies and gentlemen, thank
18 you. If I could have your attention now. It becomes my
19 responsibility to give you the law which you of course will
20 ultimately apply fairly and impartially to the facts that
21 you will determine in just short order when you begin your
22 deliberations in this case.

23 And as you know, it is your duty to accept the law and
24
25 apply it fairly and impartially. And it is your exclusive

1 duty to determine the value, the weight, and the truth of
2 the evidence.

3 Both the State and Mr. Smith have a right to expect
4 that you will conscientiously consider and evaluate the
5 evidence and then apply the law and report your decision.
6 And when that is accomplished you will have fulfilled your
7 responsibility that you undertook when you raised your hand
8 and swore to become a judge with me. And I appreciate your
9 attention thus far and ask you to give me just a little bit
10 more.

11 During this instruction when I use the word defendant
12 I am referring to Mr. Smith. That term defendant is a term
13 of art in our legal profession. It is simply a way to
14 designate a party. And generally the defendant means the
15 party against whom some claim is made. And that it is the
16 sole significance of it. It is just another way of
17 identifying Mr. Smith. But don't infer anything from it
18 other than that.

19 As I mentioned to you, Mr. Smith was accused by this,
20 this document that I am holding in my hand. It is called
21 an indictment. It accuses him of the crime of accessory
22 after the fact to a felony murder. And that will not
23 accompany you to your jury room because it is not evidence.
24 It merely contains the accusations. Frames the issues, so
25 to speak, of what we have been trying for the last couple

1 of days.

2 To this indictment Mr. Smith has rendered a plea of
3 not guilty which, as I told you when we start, places the
4 burden solely upon the State of South Carolina to prove his
5 guilt beyond a reasonable doubt.

6 In this country persons accused of committing criminal
7 offenses are never required to prove or disprove anything
8 at all. They have no obligation whatsoever. Because as I
9 stated to you when we were qualifying you, the law says in
10 this country that persons so accused are to be presumed
11 innocent.

12 And those aren't just words. That is an active
13 presumption that you as a judge, as a juror, are required
14 to maintain. And that can only be removed when through
15 your -- through the deliberative process you are convinced
16 beyond a reasonable doubt that the State has met each of
17 the elements required of it before returning a verdict of
18 guilty. And it is at that time when you become so
19 convinced and firmly convinced and only then may you set
20 aside that presumption.

21 So obviously, ladies and gentlemen, the fact that the
22 defendant in a case doesn't take -- doesn't testify or
23 doesn't offer any evidence, that should not be considered
24 by you, again, because the defendant has no responsibility
25 to do that.

1 So the fact that the defendant in this case did not
2 testify may not be considered against him at all. He has
3 the absolute right to remain silent. And that may not be
4 considered against him in any way whatsoever.

5 If in your deliberations any of you should make
6 reference to that, you would have violated your oath.
7 Because he has an absolute right not to do that at all.
8 And you draw no conclusion from it.

9 Because as I have stated to you, the burden is solely
10 upon the State to prove his guilt beyond a reasonable
11 doubt. What is a reasonable doubt? A reasonable doubt is
12 a doubt that would make an honest, sincere, conscientious
13 juror who is searching for the truth in a case to hesitate
14 or take some action.

15 Proof beyond a reasonable doubt is proof that leaves
16 you firmly convinced of the defendant's guilt. Now I would
17 tell you that there are very few things in this world that
18 we know with absolute certainty. And in criminal disputes
19 such as this the law does not require proof that overcomes
20 every possible doubt.

21 If based on your consideration of the evidence you are
22 firmly convinced the defendant is guilty of the crime
23 charged, then you must return a verdict of guilty.

24 If on the other hand you think there is a real
25 possibility that he is not guilty you must give him the

1 benefit of that doubt and return a verdict of not guilty.

2 A reasonable doubt, ladies and gentlemen, may arise
3 from the evidence which is in a case or the lack of -- or
4 absence of evidence in the case. And it is up to you to
5 determine whether or not a reasonable doubt exists as to
6 the guilt of this defendant.

7 And I charge you in that respect that he is entitled
8 to every reasonable doubt arising in the whole case. What
9 do I mean by that? Simply this: If upon any issue of fact
10 which would be essential for you to return a verdict of
11 guilty - that is a conviction - you should have a
12 reasonable doubt as to how that particular issue is to be
13 resolved, I would instruct you you must resolve it in his
14 favor.

15 Now, ladies and gentlemen, cases such as this are
16 presented obviously through presentation of evidence. And
17 there are two types of evidence. One is direct and the
18 other indirect. But the more common name for indirect
19 evidence is circumstantial evidence.

20 Direct evidence is when someone comes in and
21 testifies, generally to a sensually perception - I saw
22 something; I heard something; I felt something or the thing
23 like - and you are firmly convinced as to the reliability
24 and credibility of that testimony it would establish that
25 particular fact or circumstance.

1 Circumstantial evidence is when a person comes in and
2 testifies through a number of factors and you are firmly
3 convinced as to each of those factors and when you link
4 them, when you consider them either through inductive or
5 deductive reasoning, it leads you to a conclusion which
6 you -- about which you are firmly convinced it would
7 establish that particular fact through that reasoning
8 process, through circumstantial evidence.

9 I would tell you that both methods are used in
10 presenting cases. And our law makes absolutely no
11 distinction between the weight or the value to be given to
12 either direct or circumstantial evidence. Nor is there any
13 greater degree of certainty required of circumstantial
14 evidence than direct evidence. You should weigh all of the
15 evidence.

16 And the law says, to the extent, however, that the
17 State is relying on circumstantial evidence to meet -- to
18 prove its case, it has to meet certain tests.

19 First, the facts and circumstances upon which the
20 State is relying must point conclusively to the guilt of
21 Mr. Smith. And they must be wholly perfectly consistent
22 with each other in every particular respect.

23 I would further instruct you in that regard that the
24 mere fact that the circumstances brought out in a case are
25 strongly suspicion of guilt or that the guilt -- or that

1 the circumstances are such that the defendant's guilt is
2 probable that that would not be sufficient to sustain a
3 conviction.

4 Why? Because the State -- it has to be more than
5 someone being suspected of committing a crime or that they
6 probably committed a crime. It has to be proof that
7 satisfies you beyond a reasonable doubt.

8 Now the evidence in this case which you are to
9 consider obviously consists -- comes from the testimony of
10 the witnesses and the exhibits that have been offered
11 through their testimony. You will have a chance to review
12 all of those and access that when you retire and begin your
13 deliberations.

14 During the trial the attorneys have made comments. I
15 have made comments. Those may not be considered as
16 evidence whatsoever.

17 In fact, but during the trial there have been
18 occasions and a couple of times you were excused while we
19 argued -- we placed certain things on the record. And as I
20 have told you, that was perfectly proper; and you may not
21 consider the fact that an objection was made or my ruling.

22 Now most of the time you heard it. I overruled or I
23 sustained the objection. That was for me. That is my job
24 to rule on what is proper, consistent with the rules of
25 evidence typically. The fact that an objection is made

1 shouldn't even be considered by you. And in fact, my
2 ruling shouldn't be considered.

3 And what do I mean by that? Probably I guess that is
4 the greatest example I can give a jury of how we work
5 together. If I overruled the objection I simply said under
6 the rules of evidence I was going to permit the witness to
7 answer that question and give you that for your
8 consideration. That shouldn't be considered by you that to
9 say that okay now you have to accept that. Because if you
10 allow that, then you have allowed me to step over into your
11 area of responsibility. Just like if I excluded it you
12 shouldn't say, well, I wonder why the judge did that.
13 Because if you think that way, then you have kind of
14 stepped into my area of responsibility.

15 Frankly, that -- the -- the first one where I allowed
16 it, I said as a matter of law it was a proper question.
17 Now it shifts to you. You decide whether you believe it or
18 not and if so how strongly you believe it. And that is how
19 we work together. You decide the issues of fact and I
20 decided the issues of law.

21 I would also tell you that while it is very proper for
22 the attorneys to discuss legal principles with you, you are
23 instructed that if any of the discussions of the law the
24 attorneys gave you during either opening or closings
25 differs from what I give you as the law, you are instructed

1 to disregard that. Because for the purposes of this
2 proceeding today I am the sole judge of the law.

3 Likewise if in reciting certain facts of what they
4 believe the facts showed, what a witness said or didn't
5 say, if that differs from your collective recollection then
6 you are instructed to disregard those remarks. Because
7 why? Because you are the sole judge of the facts in this
8 dispute.

9 How do you decide this case? Well, it really is
10 something that we do every day. It is a common sense
11 exercise. You have to assess and evaluate the evidence and
12 decide what you believe to be credible and believable.

13 And there are many many factors that we consider in
14 assisting us in making those types of decisions. And you
15 have probably made them probably more subconsciously than
16 consciously in your life I can't -- I can't even guess how
17 many times. But the methods that you have employed and
18 have been -- you have been -- found reliable, please use
19 them when you begin your deliberations.

20 I am going to discuss some of the factors that you may
21 want to consider. That is not all-inclusive. Again, if
22 you -- if I don't mention something that you have found
23 helpful, please employ it.

24 But some of the factors that you would, would be the
25 appearance of the witness. How did they appear to you,

1 straight forward or hesitant in answering the questions.
2 Was the testimony of a witness consistent or inconsistent.
3 Was it strengthened or weakened by other evidence in the
4 case. How did that witness come to know the facts that he
5 or she testified to and what was the ability of that
6 witness to know those particular facts or circumstances.
7 Is there a reason for a witness to give testimony which may
8 be helpful to one side or the other, or conversely,
9 detrimental for one side or the other; in other words, was
10 a witness biased or prejudiced in any fashion.

11 In making the determination of credibility and
12 believability you are given very wide latitude, broad
13 discretions. You have the right to believe one witness
14 against many, many witnesses against one. You have a right
15 to believe all of a witness's testimony, parts of a
16 witness's testimony, or none of a witness's testimony.

17 Now you don't make these decisions of what you find to
18 be credible and believable arbitrarily. But if there is a
19 reason in the record, that is the evidence in this case,
20 for taking a certain position about credibility and
21 believability, you are entitled to do that because you --
22 your oath has said that you are going to evaluate the
23 evidence and determine what you find to be credible and
24 believable.

25 And once you decide that, then you have further said I

1 am going to take the law as the judge gives it to me, apply
2 it to those facts, and report my decision. And that is
3 what you have been about from the start. Nothing more.

4 Now as I have said over and over, you have to take the
5 law as I give it to you. And sometimes -- and this --
6 today -- and it is great people have knowledge of laws and
7 we have it at our disposal, so to speak, if we chose to
8 to look it up. And you might have done that on occasions
9 in your life. I am going to tell you now that what you
10 promised when you started is if I tell you something that
11 differs from what you thought it was or what you have read
12 it before, I respect your right to differ with me, but you
13 have to set that aside. Because that was your promise, you
14 are going to take it as I give it to you and apply it
15 fairly and impartially to facts. And I am confident each
16 one of you will do that.

17 Please remember that you have to consider the charge
18 as a whole. Don't put any greater weight on one part or
19 the other. The order of my instruction means nothing. I
20 have to put it in some order. And please remember that
21 nothing in my instruction should be considered by you as a
22 suggestion of how you are to resolve a factual issue.
23 Because I have nothing to do with that whatsoever.

24 The defendant is charged, as I mentioned, with the
25 criminal offense of accessory after the fact of a felony

1 murder. And in order to obtain a conviction the State must
2 prove beyond a reasonable doubt the following:

3 First, that the defendant knew that another person
4 called the principal committed a murder, which was
5 completed; and after the crime, the defendant with
6 knowledge that the principal committed that felony; and
7 then intentionally helped the principal to escape from
8 arrest, conviction, or punishment or detection.

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

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

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

1 So if a person charged with being accessory after the
2 fact did not intend that his act should help the principal
3 escape detention -- detection or arrest then he is not an
4 accessory after the fact even though his acts in fact have
5 resulted in helping or aiding the principal to escape
6 arrest or detection.

7 There must be some affirmative act tending towards the
8 concealment of the commission of a crime and assisting the
9 principal. Silence alone is not sufficient to make a
10 person an accessory after the fact to a felony for murder.

11 As I mentioned to you, criminal intent is an element
12 of this crime. And I would define criminal intent is --
13 and that has to be of course established by the -- beyond a
14 reasonable doubt. And it is determined -- our law says it
15 is determined by you by considering the circumstances
16 surrounding the situation. So that criminal intent may be
17 inferred from the circumstances which have shown to have
18 existed.

19 The State is not required to prove motive, although
20 presence or absence of this evidence of motive may be
21 considered in your consideration.

22 Criminal intent is simply a state of mind that
23 operates jointly with an act in the commission of a crime.
24 Intent would include those consequences which represent the
25 very purpose for which an act is done or are known to be

1 substantially certain to result regardless of one's desire.

2 Criminal intent is a mental state, a conscious wrong
3 doing. So it is up to you to determine when considering
4 all of the facts and circumstantial as presented by the
5 State what the defendant intended to do and what has been
6 shown to have existed.

7 I tell you that your conclusion must be that the
8 criminal intent has been established beyond a reasonable
9 doubt before you can return a verdict of guilty.

10 Now, ladies and gentlemen, you -- neither you nor I
11 are partisans or advocates for either side. We don't have
12 any friends to reward nor do we have enemies to punish.

13 One of the things about being a judge -- and I can --
14 I have probably had a little more experience in it than you
15 have. But I will tell you it doesn't matter how much
16 experience, we are human beings and we all come with
17 varying degrees of human emotion. But one thing we have to
18 do -- and I will tell you this. I try to do it every time
19 I sit where I am sitting right now. I consciously remind
20 myself I cannot be influenced by any human emotion in any
21 decisions. Because if I do then I have violated the oath
22 that I took. Because that is not what we are about. We
23 can't make a decision based on human emotion. We have to
24 make a decision on our -- the use of our mind, our
25 knowledge, our experience in life, applying that fairly and

1 impartially, methodically, and then making that decision.

2 And I am confident that each one of you will do that.
3 Very shortly you will analyze the evidence and decide what
4 you find to be credible. You will take the facts and apply
5 it and report your decision. And when you have done that
6 you will have honored the commitment you made.

7 Mr. Green, to assist you in reporting that decision I
8 have prepared a verdict form which I will be sending back
9 to you. You will note that it is captioned. The caption
10 is for purposes of filing. Make sure it goes in the right
11 place. It means nothing. And you shouldn't even consider
12 that.

13 There are two choices. The order in which they appear
14 means absolutely nothing. I had to put them in some order.
15 And it reads thusly: We the jury by unanimous consent.
16 What does that mean? That means twelve to zero. Eleven to
17 one won't work. It has to be twelve to zero for there to
18 be a verdict in this case.

19 By unanimous consent find the defendant Seth Hussan
20 Smith on the charge of accessory after the fact of murder
21 guilty or not guilty.

22 Whichever your choice, you will see that there is a
23 line that precedes the choice. If you will place a check
24 or a cross mark there and circle it we will know that is
25 your decision.

1 Once you have done that, if you will sign it where it
2 says presiding juror. Knock on the door and we will return
3 you to the courtroom to receive your verdict.

4 Now what will you be saying if it is guilty? You will
5 be saying that you have considered the elements that I
6 defined and that you -- each juror are firmly convinced the
7 State has met its burden of proof as to each of those
8 elements. And as instructed, because of that, you must
9 check the block not -- of -- of guilty.

10 What will you be saying if it is not guilty? You will
11 be saying that in analyzing the evidence you are not firmly
12 convinced of one or more. But one is sufficient. If they
13 failed on one you must return a verdict of not guilty.
14 Why? Because the State has to prove each element beyond a
15 reasonable doubt.

16 Again, I know you are anxious to get started. You
17 have some exhibits that you will -- play on a TV. If it
18 doesn't play we can return you to the courtroom. Just let
19 us know. But we will hopefully have the instrument to do
20 that.

21 I know you are ready to get started. And you are
22 almost there. But I have to discuss my charge with the
23 attorneys. It might be necessary to return you to the
24 courtroom, so when you retire do not begin your
25 deliberations yet. You wait until I give you the

1 instruction and really until we send the exhibits. When
2 you receive the exhibits then you may commence your
3 deliberations.

4 The only deliberation -- I mean the only restriction
5 that I place on the deliberations is simply this: If at
6 any point any juror has to leave the table for any reason,
7 you must stop deliberating until all 12 of you are
8 together. Other than that you proceed as you deem fit and
9 proper.

10 Let me ask you now whether the first 12 feel that they
11 will be able to continue. If so -- if anyone believes they
12 can't, raise your hand.

13 (WHEREUPON, no one raised hand.)

14 Mr. Presiding Juror -- excuse me, Mr. Alternate Juror,
15 at this point the first 12 have indicated they are able to
16 continue. So when the jury retires I am going to ask that
17 you not return to the jury room with them. They will show
18 you to another room. If we need to bring you -- all the
19 jury back, we will return you to the courtroom. If not we
20 will be in shortly to let you know how much longer you need
21 to remain with us.

22 Thank you so much, ladies and gentlemen. You may
23 retire to your jury room. But await the exhibits before
24 commencing your deliberations.

25 (WHEREUPON, jury exits courtroom 1/9/19, 3:40 p.m.)

1 THE COURT: Exceptions or additions from the State?

2 MR. OSBORNE: None, Your Honor.

3 THE COURT: Exceptions or additions from the
4 defendant?

5 MR. LOIGNON: None, Your Honor.

6 THE COURT: Thank you all very much.

7 (WHEREUPON, break 1/9/19, 3:40 p.m.)

8 (WHEREUPON, 1/9/19, 3:53 p.m., exhibits and verdict form
9 delivered to the jury for deliberation.)

10 (WHEREUPON, Court presented with note from jury. Court's
11 Exhibit Number 2, jury note, was marked for
12 identification.)

13 (WHEREUPON, pause until the Court is ready to resume.)

14 THE COURT: You object to my saying that the principal
15 can -- he can -- the person accused of accessory after the
16 fact can also be the principal, the unknown principal,
17 because of the Blakely case?

18 MR. LOIGNON: Yes, sir. And I actually like the way
19 you stated it before as opposed to that direct language.

20 THE COURT: That they have to -- that they don't have
21 to be mutually exclusive?

22 MR. LOIGNON: Yes, sir, I do object to that. I would
23 argue that if a person is a party to the crime then they
24 are a principal and they cannot then be an accessory after
25 the fact to that crime.

1 THE COURT: Okay.

2 MR. LOIGNON: And I believe that -- I cited State v.
3 Blakely to support my position on that.

4 THE COURT: Okay.

5 MR. LOIGNON: Which cite -- which states that a person
6 cannot be both a party to the crime and accessory after the
7 fact.

8 THE COURT: All right. Thank you. And in reading
9 that case I think it is distinguishable because Blakely was
10 a case involving a question of whether it was vindictive
11 and double jeopardy to try -- to try a person who has been
12 acquitted of a crime itself. And the case that they cite
13 is a Georgia case. And it really deals with more being an
14 accomplice. And an accessory after the fact is not an
15 accomplice. That is a separate crime altogether.

16 I think we use the term -- rather, Georgia uses
17 accomplice apparently. We use they are involved, because
18 they are -- the hand of one, of hand of all, which says
19 they assisted in some fashion. So that is not what he is
20 facing. It is a totally separate. And the elements are
21 totally separate, truly. So I mean it is a different
22 situation.

23 All right. Ask the jury to come in.

24 (WHEREUPON, break awaiting jury, 1/9/2019, 5:11 p.m.)

25 (WHEREUPON, jury enters 1/9/2019, 5:13 p.m.)

1 THE COURT: Thank you very much, ladies and gentlemen
2 and presiding juror. What I have now is Court's Exhibit 2.
3 And it is a question. And I will read: Are the accused,
4 the defendant, in parens, and unknown principal mutually
5 exclusive in the eyes of the law? Can they be the same
6 person?

7 THE COURT: I am going to answer that by recharging a
8 portion of my charge where I define the elements of -- for
9 the crime of accessory after the fact of committing a
10 felony of murder.

11 And, as you will recall, there are basically three:
12 The felony must have been completed. The accused must have
13 knowledge of the principal that the principal committed the
14 felony. And the accused must harbor or assist the
15 principal felon from being detected. And harboring must
16 have the intention to protect the principal.

17 As I further charge you that accessory -- a person may
18 be convicted even if the principal is unknown or has not
19 been charged or has not yet been prosecuted.

20 And so to answer your question, the name of the
21 principal really doesn't really have any bearing in your
22 decision. Can it be one in the same person? It is in
23 theory it could be. The key is whether or not the person,
24 the acts taken by the person, were after having knowledge
25 that the crime had been committed and completed; two, that

1 they knew that the principal -- had reason to know the
2 principal committed that crime; and three, the acts taken
3 by the person were to protect the principal from being then
4 detected or arrested.

5 If those elements are present it doesn't matter
6 what -- who the principal was, because you are not dealing
7 with the principal. You are dealing with the person
8 accused of basically in this case being an accessory after
9 the fact of the crime that was committed by the principal.
10 So the identity, as I have stated, is really not
11 significant in so far as your determination. The key is
12 whether those elements pertaining to the person accused of
13 the accessory are present. Okay.

14 With that instruction please retire and resume your
15 deliberations.

16 (WHEREUPON, jury exits courtroom 1/9/19, 5:14 p.m.)

17 THE COURT: Exceptions from the State?

18 MR. OSBORNE: No, Your Honor.

19 THE COURT: Other than the Blakely exception, anything
20 else?

21 MR. LOIGNON: No, Your Honor.

22 THE COURT: Okay. Thank you very much. Thank you.

23 We will be at ease.

24 (WHEREUPON, at ease 1/9/19, 5:16 p.m.)

25 (WHEREUPON, resume 1/9/19, 5:35 p.m.)

1 THE COURT: Let me state this. I am advised that the
2 jury has reached a verdict. And I don't know what it is.
3 Neither do y'all.

4 One of the things -- and I want to thank all of the
5 persons who have been attending for your observing decorum.
6 And I know that at times it has not been easy, some of
7 things. And I have watched some of you have to leave. And
8 my heart goes out to you for having to deal with that.

9 But I would expect that we will maintain -- continue
10 to maintain the same decorum and not have any outbursts,
11 any reaction to the jury verdict.

12 And I appreciated -- appreciate in advance your
13 complying. If you don't -- or if you can't, I would urge
14 you to leave now. Because if there is any outburst I will
15 have to consider that contempt of the court and deal with
16 it accordingly.

17 So thank you very much. And again I thank you for
18 your tolerance of the Court and the manner in which you
19 have all conducted yourself throughout the trial. Thank
20 you.

21 All right. Is the defendant ready to receive the
22 verdict?

23 MR. LOIGNON: Judge, I think we might need to put a
24 little something else on the record. Mr. Bowden has just
25 been doing some research on the charge that we gave the

1 jury.

2 THE COURT: All right.

3 MR. BOWDEN: It said, State v. Collins case ---

4 THE COURT: Do you have a copy of it?

5 MR. BOWDEN: I do. I am trying to find -- I just
6 found this. So bear with me for a second.

7 So the State v Collins case ---

8 THE COURT: What is your cite? I have got -- what is
9 the cite?

10 MR. BOWDEN: It is 329 SC 23.

11 THE COURT: Let me -- I don't have that one. All
12 right. Let me see it. Do you have a copy of it?

13 MR. BOWDEN: Here is the case, and here is
14 specifically where I am looking.

15 (WHEREUPON, document presented to the Court.)

16 THE COURT: Just a second. I am going to give this
17 back to you, if I can find this. There it is. Okay. Just
18 one second. I will return it to you. I will give you the
19 cite too. It is 329 SC 23.

20 Okay. Tommy Cooper's case. Accessory after the fact
21 of murder. Okay.

22 MR. BOWDEN: This case is the one that changed the
23 requirement that a principal ---

24 THE COURT: This is dealing with absence not being an
25 essential element.

1 MR. BOWDEN: Right.

2 THE COURT: Okay.

3 MR. BOWDEN: Right. Right. And this is -- this
4 created basically a seachange in the law on this topic.
5 And they say -- the Supreme Court says that the mere fact
6 of ones presence at the time of commission of the
7 substantive offense is insufficient to relieve him of
8 liability as an accessory. So the ---

9 THE COURT: Talking about merely being present and you
10 would charge mere presence doesn't make him guilty of the
11 crime but it could make him guilty of the accessory.

12 MR. BOWDEN: Right, but the converse of that statement
13 is if he is more than merely present, that he participates
14 in the crime, that he can -- then he is relieved of
15 liability as an accessory.

16 THE COURT: You are back to Blake. But, no, it
17 doesn't do that. I'm sorry, I disagree with you for this
18 reason: When you read Blakely -- and if you read the
19 Georgia case, which I did after y'all left, that case
20 really talks about -- because what -- and it makes perfect
21 sense with what we are saying.

22 In that case -- and they pulled it. That is why it is
23 very important just not just to read the little note
24 somebody puts in a thing in a case. It is important to
25 read the case.

1 But in this particular situation the case that they
2 are relying on out of Georgia the issue was did the defense
3 counsel fail - it was a PCR issue - fail to request being
4 basically an accessory.

5 And the court said, no, because he was being tried for
6 being a principal. And you can't be an accessory and a
7 principal. Why? Because it is a separate crime.

8 But he is being tried for an accessory. Can he be
9 actually the principal? Because as I told the jury, it
10 doesn't matter who the principal was. We are not there to
11 try the principal. We are there to try did he -- was he an
12 accessory.

13 If he is the principal, yeah, he has knowledge of
14 being the principal. That is all that's necessary.

15 MR. BOWDEN: But the Massey case still -- still
16 reaffirms the rule that the State has to prove the guilt of
17 the principal at this trial.

18 THE COURT: No, he doesn't. And you have argued that.
19 I disagree with you. The Massey case says they don't
20 have to prove it. Because in the Massey case he was
21 acquitted ---

22 MR. BOWDEN: Right, the -- that ---

23 THE COURT: --- of the principal -- as a principal.

24 MR. BOWDEN: In the principal's trial. They are not
25 suggesting reputting him on trial.

1 THE COURT: The principal was acquitted. He -- the
2 question was, well, does that protect him since the
3 principal didn't commit a crime. No, it didn't. Because
4 the principal doesn't have anything to do with it.

5 The question is not whether he is guilty or not. Has
6 nothing to do with it. It's do you know him. That is the
7 whole princi- -- that is the whole purpose of this issue.
8 Did he know him? Well, he knows himself.

9 There is no case that I have found that says you
10 can't. And, frankly, it may be a loop hole. Maybe we will
11 close it. I don't know what the jury verdict. Maybe we
12 won't close it. But if we do, great. Y'all can argue that
13 in Columbia.

14 I don't think -- I appreciate the Collins case. And I
15 don't disagree with your argument. The Collins case talks
16 about basically eliminate -- because you used to have they
17 had the charge that he was absent from the scene. And the
18 Collins case basically said, no, no, no, no, that is not
19 so, you can be an accessory and still be present.

20 Why? Because he can know -- he is there. He knows
21 what is going on. He knows who is doing it. Well, that is
22 exactly what we have here. Precisely. In theory.

23 MR. BOWDEN: But on the facts of this case if he was
24 there he could have only been a principal because he would
25 have been ---

1 THE COURT: No, he can be an accessory; he ---

2 MR. BOWDEN: Unless he was either the getaway driver
3 or the shooter.

4 THE COURT: Mr. Bowden, I will -- I will agree with
5 you 100 percent, if he was there the State could have made
6 an election, I can charge -- I can try you as a principal
7 or I can try you as an accessory. They make the call.
8 Because they are two separate crimes. They both were
9 committed at the same time. Well, accessory wasn't.
10 Accessory doesn't have a thing to do with the principal.
11 And therein goes the other. Because that deals with the
12 commission of that crime.

13 The accessory we know - because I charged them - takes
14 affirmative acts. If he had walked away, didn't report,
15 didn't do anything, not done really anything at all,
16 couldn't have convicted him. Why? Because there was no
17 affirmative act done to protect himself. Okay.

18 If he hadn't participated -- allege- -- we will find
19 out whether he did or didn't. If he hadn't participated in
20 getting rid of the car, he hasn't done anything; he is the
21 principal. And that would have protected him.

22 But when he took those affirmative acts to hide
23 something to protect the principal, which happened -- if
24 the jury concludes that. And I don't know what they are
25 going to conclude. But it doesn't prevent them from

1 concluding that it protected himself.

2 I don't find -- I don't -- I appreciate it. You and I
3 just agree to disagree. Thank you, sir.

4 But Collins is a further supportive reason why I
5 shouldn't -- why I shouldn't charge and allow -- in answer
6 to the question that they can't be the same. Okay.

7 MR. BOWDEN: Thank you, Your Honor.

8 THE COURT: And I acknowledge that. And we'll -- for
9 the purposes of review please answer the question, Court of
10 Appeals or Supreme Court. We would love that if that
11 becomes necessary. Because it is a fascinating theory.
12 And it is a fascinating issue.

13 And, Mr. Smith, let me say this to you: I know that
14 word is not -- and it is not meant to make light of what
15 you are facing right now, sir. Because I appreciate that
16 as well. I am speaking solely from the standpoint of what
17 I have done for 47 years now. It is a legal theory.

18 And that is why I like what I do. It is fascinating.
19 And that is why I like working with people like your
20 lawyers and the State's lawyers.

21 So anyway, thank you very much, Mr. Bowden. I
22 appreciate your thoroughness and going and getting some
23 more. I like that. And I like the exchange too.

24 As I have told Mr. Osborne, we have had a few of those
25 over the period of time too.

1 MR. OSBORNE: Yes, we have.

2 THE COURT: And one thing I understand because it was
3 that way when I started practicing, I pray to God I hold on
4 to this, man, lawyer, we can but heads with each other and
5 then walk out and buy each other a beer if we drank beer.

6 So I respect your -- the beauty of the law is -- that
7 is why I love it. It can be who knows. Unfortunately - or
8 fortunately - it is my call today. It might not be
9 tomorrow. But it is my call today, and I call it that way.
10 But thank you.

11 All right. Let's bring in our jury.

12 (WHEREUPON, recess 1/9/19, 5:46 p.m., awaiting jury.)

13 (WHEREUPON, jury enters 1/9/19, 5:48 p.m., for verdict.)

14 THE COURT: Ms. Green, as I understand the jury has
15 reached a verdict?

16 THE FOREPERSON: Yes, sir.

17 THE COURT: If you would pass the form to Mr. Major,
18 please.

19 (WHEREUPON, foreperson complied.)

20 THE COURT: Thank you, sir. The verdict form has
21 been properly completed.

22 Madam Clerk, If you could assist me in publishing
23 that. I would ask Mr. Smith if you would please rise, sir.

24 THE CLERK: In the State of South Carolina versus Seth
25 Hassan Smith, Case Number 2018-GS-10-05300 we the jury by

1 unanimous consent find the defendant Seth Hassan Smith on
2 the charge of accessory after the fact to murder, guilty.
3 By presiding juror, January 9th, 2019.

4 THE COURT: Ladies and gentlemen, if the clerk has
5 accurately published your verdict please indicate that by
6 raising your right hand.

7 (WHEREUPON, all complied.)

8 THE COURT: Let the record reflect that each jury
9 member has raised his or her right hand in response to the
10 question.

11 Anything further from the jury, Mr. Loignon?

12 MR. LOIGNON: No, Your Honor.

13 THE COURT: Ladies and gentlemen, at this point I want
14 to thank you for your assistance and participating in this
15 matter. As I stated to you, I know -- and you can be
16 seated, Mr. Smith. I'm sorry, sir. Forgive me, sir.

17 (WHEREUPON, Mr. Smith was seated.)

18 THE COURT: It is not something that you would have
19 chosen to do, but you accepted it as a responsibility that
20 we each have in living in this great country. And I thank
21 you for that. And I thank you for your participation and
22 the manner in which you have participated.

23 I am not commenting on your verdict. I don't need to.
24 Just like you don't need to comment on my decisions on the
25 law. You were tasked with the job and you have honored

1 that by returning this verdict.

2 And you are now free from any further participation.
3 This concludes -- will conclude your services this week.
4 You don't need to call the number tonight. You are done.
5 And you have earned an exception for the next three years
6 if you choose to take it.

7 If you happen to be selected, I won't be an active
8 judge but if I happen to be holding court as a retired
9 judge and you want to be excused and I am qualifying you I
10 will be privileged to do so. But if you choose to serve it
11 will be an honor and a privilege to serve with each one of
12 you as well.

13 If any of you should have any questions or concerns
14 about anything if you will just remain in the jury room. I
15 will be in in just a few moments. I will be happy to
16 address it. If not, you are free to leave.

17 Ms. Green, the clerk is going to meet you outside.
18 The indictment that I showed you all is a document the
19 clerk retains in the file. There is a place for the
20 verdict to be written and needs you to just -- we will fill
21 that -- and need you to sign that. Okay. You are free to
22 leave. Thank you very very much.

23 (WHEREUPON, jury exits 1/9/19, 5:48 p.m.)

24 THE COURT: All right. Anything from the State at
25 this point?

1 MR. OSBORNE: No, Your Honor.

2 THE COURT: Mr. King, ---

3 MR. OSBORNE: I ---

4 THE COURT: --- any motions from the defendant other
5 than of course renewing the directed verdict which we have
6 fully placed on the record?

7 MR. LOIGNON: Just the renewal of those prior motions.

8 THE COURT: And a motion for a new trial, the
9 evidence?

10 MR. LOIGNON: We -- yes, Your Honor, we would move for
11 a new trial based on that the jury verdict doesn't support
12 the evidence that was presented.

13 THE COURT: And of course and again the charge -- the
14 part that was raised recently that is there that certainly
15 would -- you don't know whether that influenced or didn't
16 influence the ultimate decision given the question, but
17 that is also is an additional basis I would assume?

18 MR. LOIGNON: Yes, Your Honor.

19 THE COURT: Okay. Thank you. Are we ready for
20 sentencing tonight?

21 MR. OSBORNE: We are, Your Honor. Embarrassingly I am
22 just not firing on all cylinders. I forgot to print out
23 the sentencing sheet.

24 THE COURT: That is fine.

25 MR. OSBORNE: She is bringing that right now.

1 THE COURT: No problem.

2 MR. OSBORNE: But other than that we are ready to
3 roll.

4 THE COURT: We will be at ease.

5 MR. OSBORNE: Okay.

6 THE COURT: Are you all ready for sentencing tonight?

7 MR. LOIGNON: Yes, Your Honor.

8 THE COURT: Thank you. We will be at ease.

9 (WHEREUPON, recess 1/9/19, 5:53 p.m.)

10 (WHEREUPON, resume 1/9/19, 5:57 p.m.)

11 THE COURT: While we are waiting on the sentencing
12 sheets let me also -- your motions are noted. I think I
13 did address them on the record. But I think based on my
14 view of the evidence, while I concur as I believe I
15 indicated, that I wrestled with whether or not the directed
16 verdict was appropriate I think there is certainly an
17 abundance of evidence to support the jury's decision, while
18 I agree with Mr. Loignon's argument that it was a
19 circumstantial case for sure.

20 But some of the issues that to me indicate knowledge
21 of everything is why would -- I mean we are not talking
22 about before -- we are talking about doing things before
23 anybody disclosed anything about a black car that we went
24 and got rid of the car and got -- painted the wheels. And
25 that was done by the defendant and the defendants involved,

1 indicating no question that he had knowledge of a crime, no
2 question that he was aware of it, no question that it was
3 protecting whomever.

4 And if it wasn't himself it was he knew the person.
5 Because again why else would you have done it if you didn't
6 know that the crime had been committed and your car was
7 involved, because he had to be aware that they were using
8 his car or could be, that a jury could have concluded. So
9 those are just some of the facts that really support it.

10 And then the Facebook shows that we are not talking
11 about a novice here. That that is the one bad thing about
12 publishing on Facebook, it shows you what your knowledge is
13 and what your mindset is sometimes.

14 And it goes to say that this man -- I am not
15 suggesting it makes him guilty of anything; it just makes
16 him being aware of things and being with groups of people
17 who are. So those things give you -- give further
18 knowledge of why it was necessary to take the action, the
19 actions taken. Because it just doesn't make any sense
20 otherwise that somebody would take that immediate action to
21 do something with a vehicle that prior to that date -- I
22 mean there may have been some discussion, assuming Mr.
23 Acevedo was accurate about prior discussions, but why you
24 are suddenly calling people to junk it just **doesn't** make
25 any sense except for the connection.

1 So I think that -- while I understand there may be
2 another one, but that is consistent with guilt. And there
3 is no other reasonable hypothesis that I can come up -- but
4 the Supreme Court will review it for sure. So thank you.

5 All right. Do you have it?

6 MR. OSBORNE: Yes, sir. I am sorry for the delay.

7 THE COURT: That is not a problem. Is there anything
8 else from the State's at this point?

9 MR. OSBORNE: I can give you his criminal history if
10 you would like, Your Honor.

11 THE COURT: Yes, it would be helpful to me.

12 MR. OSBORNE: All right. In 1997 we have a conviction
13 for possession of a stolen vehicle. Another conviction in
14 '97 for simple assault. 1998 possession of cocaine first.
15 Another conviction in 1998 for possession of stolen
16 property. In 2000 conviction of pointing and presenting of
17 a firearm. 2001 resisting arrest, driving under suspension
18 third -- third offense, possession of marijuana. 2004
19 contempt of court, PWID, a close proximity, failure to stop
20 for blue lights, trafficking cocaine first, and another
21 PWID first all in 2004. 2006 driving under suspension.
22 2012 PWID second. And 2014 possession of a gun by a
23 convicted felon.

24 And I have talked to the victim's family in this case
25 and I told them in essence the State is the victim. They

1 did have a brief -- if you would like to hear from them,
2 the mother and the father only.

3 THE COURT: I will be happy to hear from them. And I
4 couldn't agree more with your assessment. It really is --
5 this is all about what we are supposed to do as citizens
6 when we have knowledge of crimes. But it has really --
7 other than the crime itself and the horrific nature of it
8 this doesn't address that or -- and the punishment doesn't
9 address that either so.

10 MR. OSBORNE: Yes, sir.

11 THE COURT: Okay. But I would be happy to hear from
12 anyone who wants to speak. If they will just give me their
13 full name, please.

14 MS. TODD: My name is Paula Todd, and I am the mother
15 of George Bennett. My son was defenseless. He was killed
16 execution style. This has caused a heavy impact on me and
17 my family. I am mentally disturbed, emotionally disturbed.
18 This is a scar I have to carry for the rest of my life.
19 And because of that I am asking for the court to give the
20 max.

21 THE COURT: Yes, sir. Thank you, ma'am.

22 Okay. Mr. Loignon, I will be happy to hear from you
23 and/or Mr. Bowden, and Mr. Smith if he wishes to speak.

24 MR. LOIGNON: Thank you, Your Honor. May it please
25 the court.

1 Mr. Smith is 37 years old. He has lived in Charleston
2 his entire life. He has a GED. He has been employed at
3 the Greenery as a landscaper for the last two years. He
4 has a ten-year-old daughter named Kaliah. She lives with
5 her mom during the week and with Seth on the weekend
6 sometimes.

7 He does have a bit of a prior record, most of it drug
8 stuff from when he was younger. He has served 586 days in
9 jail ---

10 THE COURT: Okay.

11 MR. LOIGNON: --- prior to bonding out. And he has
12 been out of jail for over two years now; twenty-five months
13 to be exact. When he was in jail no write-ups, no
14 additional charges, no trouble. And he has been out of
15 jail now, as I said, for about 25 months with no trouble on
16 the street.

17 He has essentially complied with the self-imposed
18 period of probation, so to speak, for two years waiting for
19 this trial. His last sentence that he received was 22
20 months with probation to follow.

21 And we understand obviously this is something totally
22 different. I think that this has all taught Seth a really
23 valuable lesson about where his loyalty should lie and who
24 he should distance himself with.

25 He has no contact with his brother Bryant anymore.

1 Hasn't for a long time. His parents are deceased. His
2 other -- his other brothers are in the Merchant Seaman. So
3 Seth has kind of the last couple of years started a new
4 life for himself, and hopefully when he does get out he
5 will continue on that path.

6 We would ask the court to consider an eight-year
7 sentence for Mr. Smith based on the charge that we are here
8 with today and the fact that most of his prior record is
9 from years past.

10 Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Loignon. I appreciate it.
12 I appreciate also the manner in which you and Mr. Bowden
13 represented your client as well. Thank you for that and
14 your professionalism and your thoroughness as well.

15 Mr. Bowden, anything you wish to add, sir?

16 MR. LOIGNON: No, Your Honor.

17 THE COURT: Mr. Smith, is there anything you wish to
18 add, sir?

19 (WHEREUPON, confers with counsel.)

20 THE COURT: Sir?

21 DEFENDANT SMITH: No, sir.

22 THE COURT: All right. I would ask you to please
23 rise, Mr. Smith. While I appreciate and it is important --
24 Mr. Loignon, I appreciate you sharing the fact of his
25 conduct since he has been released. It is supportive and

1 indicative of the fact that he can lead a law-abiding life.

2 And as we know, first of all for the families, no
3 sentence that I impose -- that is why we have two separate
4 branches of circuit court. One deals with common pleas
5 which deals with damages.

6 And about 90 percent of what you said really -- if not
7 99 percent are damages. No criminal sentence ever is meant
8 to serve as damages or to compensate someone for their
9 loss. Because there is no amount of time that somebody can
10 serve to replace what you have lost and what you have
11 experienced and the heartache in your life. That is where
12 juries have to set a figure and they set a monetary figure
13 which is also some -- I did it for 21 years and represented
14 persons who were damaged and asked for injuries in
15 compensation. And I then used to say really what is the
16 value of that.

17 The more I have done this job the more I have realized
18 that is also virtually impossible to put a figure on that.
19 But clearly any sentence I impose has nothing to do with
20 that. It shouldn't be equated to that.

21 The sentence of course deals with punishment, to some
22 extent the deterrence for you. And really a deterrence for
23 others. And I don't quarrel with necessarily with how the
24 legislature chooses to grade this one. I don't know why
25 you wouldn't put a felony murder making it violent, but

1 they chose to make it nonviolent. Which means -- and we
2 know what that means. That is the least amount of time
3 that you will serve before you will be eligible.

4 I am going to take into consideration your conduct for
5 two years and not give you a split sentence. But the only
6 way to make a statement -- and it really goes back to when
7 I first started this job, we didn't have truth in
8 sentencing in the sense of having an 85 percent. I wish we
9 had. Because all -- in order to meet out the proper
10 punishment we had to max everybody out to get the
11 appropriate amount of time served.

12 This case -- and I mentioned the Facebook for this
13 reason: I see some faces that need to understand -- and I
14 don't know whether this is something that is talked about
15 or what, but we as a society can't continue to condone
16 people hiding and not reporting and not getting involved
17 when they know something. And that is what we have got to
18 make a statement. And we have got to deter people from
19 doing that.

20 Until we do that we are going to be a victim of just
21 what we have seen a lot of times. And you have seen it
22 probably a lot more than I have of communities and what
23 happens to people who do assist law enforcement. That has
24 got to stop. And do you know who is going to stop it? Us.
25 Not law enforcement, but us.

1 So that being said -- and you have done a good portion
2 of it. The sentence is 15 years. And I give you credit
3 for 586 days. Good luck, sir.
4 (WHEREUPON, trial concludes 1/9/19, 6:07 p.m.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on January 7-9, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: September 16, 2019

Certified Transcript Provided For: SCCID

Certification Reference #2019-0916 /copy

INDEX TO PROCEEDINGS

	PAGE
PROCEEDINGS	3
MOTION FOR NEW TRIAL	3
CERTIFICATE OF THE COURT REPORTER	17

INDEX TO EXHIBITS

No exhibits were introduced

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

THE COURT: Thank you. Please be seated. Sorry to keep y'all waiting. What is this?

CLERK OF COURT: The defense motion for ---

MR. BOWDEN: --- a new trial.

THE COURT: For a new trial? Your motion?

MR. BOWDEN: Yes, Your Honor.

THE COURT: He's not here?

MR. BOWDEN: He is here.

THE COURT: Oh, he's here?

MR. BOWDEN: Yes, he's here.

THE COURT: Okay, good.

[Whereupon, Mr. Smith enters the courtroom]

THE COURT: You're Seth Smith?

MR. SMITH: Yes, sir.

THE COURT: Good morning, sir.

MR. SMITH: Good morning.

THE COURT: Let the record reflect Mr. Smith is present. It is a motion by Mr. Smith. I'll be happy to hear from you Mr. Bowden.

MR. BOWDEN: Thank you, Your Honor. This was a trial that happened in January. It was an accessory after the fact trial. If you recall there was a jury instruction that was you know in the normal course of business after a charging conference and we each

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 submitted things. You read some and turned down other
2 instructions. And we've reviewed those objections in the
3 motion; I don't want to belabor any of those points.

4 THE COURT: Okay.

5 MR. BOWDEN: The summary -- not the summary
6 judgment; excuse me. The directed verdict motion that we
7 argued I'd like to focus on the supplemental jury
8 instruction that came after the closings.

9 THE COURT: Okay.

10 MR. BOWDEN: And my argument is that that jury
11 instruction rendered the trial fundamentally unfair
12 because when it was given -- because it wasn't supported
13 by the evidence and because it was not a correct point of
14 law.

15 The jury sent a question asking, and I included the
16 specific language in the memo that we sent, but it was
17 they were asking essentially whether an accessory after
18 the fact and a principal were mutually exclusive meaning
19 whether a person, the arrest of another person whether
20 they could find Mr. Smith guilty of being an accessory
21 after the fact if they thought that he was at the scene.

22 In some cases that would be, the answer to that
23 would be yes. In this case it would be no because and
24 the distinction is if somebody is merely present then
25 they can still be convicted of being an accessory after

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 the fact because they had no participation in the crime;
2 their participation still started after the crime was
3 completed.

4 Whereas if somebody actively participates in the
5 crime such that they could be considered a principal then
6 they are not, they are relieved of any liability as an
7 accessory after the fact because they are not covering up
8 for somebody else's completed crime; they would be
9 covering up for their own. It's evidence that they
10 committed the crime.

11 And that's exactly what we confront here. And that
12 was my third argument but I'll just go ahead and deal
13 with it now. This issue was dealt with in State v
14 Collins. In that case -- the 1998 case; I know there are
15 a few State v Collins.

16 But that's the real landmark decision in our law an
17 accessory after the fact. In it it was clear that people
18 who were merely present at the scene of a crime can still
19 be convicted of accessory after the fact. That changed
20 the law from what it was previously with three other
21 cases.

22 The Court was very careful to distinguish this from
23 cases when somebody actually participates in a crime.
24 The Court says that there was the element of absence from
25 the scene for many years in South Carolina if convicted

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 but it was also clear that those cases had always dealt
2 with cases where there was clear evidence the Defendant
3 had actually participated in the crime. So there was no
4 reason to give an instruction for mere presence.

5 It was almost a misinterpretation over time of what
6 the 1st court had said and the other courts incorporated
7 absence as an element when really it's just a question of
8 what jury instruction should be given based on the
9 evidence that is presented at trial.

10 And it's use of bold text in the opinion I think is
11 particularly instructive because it makes that
12 distinction so clearly between mere presence and
13 participation such that its -- and they cite to other
14 state law with the same principles that somebody who
15 actively participates in a crime cannot be called an
16 accessory after the fact.

17 And that really fits with the common law going as
18 far back as the development of accessories in general.
19 And there are cases that interpret the federal statute
20 which has substantially similar elements the same way to
21 make that distinction between participation and mere
22 presence.

23 So in this case the evidence that was presented and
24 this goes to whether the supplemental charge was
25 supported by the evidence that was presented at trial.

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 But the evidence that was presented was that there were
2 two people in the car. Nobody suggested there was a
3 third. Nobody necessarily said that there were two but
4 there was -- the evidence that was presented was that
5 there was a passenger who got out of the car and did the
6 shooting and there was a getaway driver. And we know
7 that because the car backed down towards East Bay Street
8 after the shooter got back in the passenger seat.

9 Nobody knows who either of those people are and no
10 evidence was presented. And the State specifically said
11 multiple times that they were not going to try to prove
12 that person or who that person was. And they don't know.
13 And really I don't think they wanted the jury to
14 speculate about that.

15 So it's actually Maddock [phonetic] that the charge
16 has to be supported by the evidence that is presented.
17 So when the jury asks whether they can still convict if
18 they thought that Mr. Smith was in the car being a
19 principal that question shouldn't have been answered
20 because there was no evidence to suggest that he was in
21 the car.

22 The State specifically said in its opening that this
23 would be a murder trial if they could prove that he was
24 in the car. They didn't intend to present any evidence
25 that he was in the car. And so it introduced some

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 confusion to the jury essentially. We believe they made
2 a determination on evidence that specifically hadn't been
3 presented and that the State did not intend to present
4 it.

5 But the most important reason that we're asking for
6 a new trial on this case is based on the timing of the
7 instruction. During the charging conference we had
8 discussed what the charge was going to be on accessory
9 after the fact. And we discussed verbatim the definition
10 from the South Carolina bench book, which defined the
11 principal as another person. So, I mean it doesn't say
12 this but another person meaning separate and apart from
13 the person who is on trial for accessory after the fact.

14 That suited us perfectly because that fit in with
15 our theme which was suspicion and assumption. The State
16 was -- we had many discussions about this during trial.
17 But our whole theory was that the State could not ask a
18 jury to convict somebody of intending to cover up this
19 other person's crime because nobody can say who that
20 person is. That's asking the jury to make this extreme
21 logical leap that the State itself has admitted that it
22 can't prove.

23 And so our whole theory again was that we just build
24 up this cloud of suspicion and you build it and build it
25 and build it and eventually the jury would have no other

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 conclusion but that something happened. He wasn't doing
2 this for no reason. We don't really know what happened.
3 The State doesn't know what happened. We're going to
4 convict.

5 And so we acted in reliance on the jury charge that
6 the principal had to be another person. And essentially
7 the supplemental charge after the closing gave the State
8 almost a new theory of liability. It prevented us from
9 -- it really undercut what our theory of the case was
10 because it put in the jury's mind this idea that maybe he
11 was there. And that support just wasn't in the evidence.

12 We could have adjusted our closing certainly had we
13 known that this other charge was going to be given. But
14 unfortunately, we just weren't given that opportunity and
15 this I think dovetails with State v Devin Johnson, and
16 State v Jones, both which we've elaborated on in our
17 memo. And I do just want to take a second to acknowledge
18 the work of my law clerk Luke O'Brian.

19 THE COURT: That's fine. Your memorandum, of
20 course, is incorporated for purposes of review. So you
21 can rely on your position stated there. Thank you.

22 MR. BOWDEN: Yes, sir.

23 THE COURT: Okay.

24 MR. BOWDEN: Thank you, Your Honor.

25 THE COURT: Mr. Osborne?

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 MR. OSBORNE: It is a little bit peculiar to say
2 that they were kind of caught off guard by the jury
3 charge because we did talk about it. And in your jury
4 charge you did say that we don't have to prove the
5 identity of the shooter. He doesn't have to be
6 prosecuted or convicted.

7 And that's good law. I mean that's Massey and
8 that's really what this case revolves around; it revolves
9 around Massey. And in Massey it overturned the old
10 common law principle that the principal had to be
11 convicted prior to going forward with accessory after the
12 fact. And Massey says the State doesn't even need to
13 know who the principal was. And I said that during my
14 opening and I said that during my closing.

15 Collins is -- we're not -- Collins is kind of a
16 different issue. Collins, the holding in Collins is
17 simply you can be present and be convicted of accessory
18 after the fact. That's the holding in Collins.

19 Now to get there the court goes back and looks at
20 the three prior cases. And in those three prior cases
21 those courts were dealing with -- well, they were dealing
22 with that old common law. And the defense in each of
23 those cases asks for the accessory after the fact charge
24 and the court in each one of those cases says you weren't
25 entitled to it because under the old common law if you

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 were present you don't get that accessory after the fact
2 charge. And in doing so they distinguished in those
3 cases the individual was a principal; he acted. That's
4 why it wasn't appropriate to give the accessory after the
5 fact charge. Not because they were just simply there;
6 that's the distinguishing fact.

7 Now I mean I will say the defense in their opening
8 did say that the State has to prove that the Defendant
9 knew the person. Well, I said in my closing that's
10 incorrect law.

11 THE COURT: Yes.

12 MR. OSBORNE: I mean I think the record is pretty
13 clear. And you know to the Appellate Court I would ask
14 them if they don't want you to answer a question then
15 give us standard jury charges. One said you can go back
16 and you can read to them. Otherwise I mean I don't see
17 any error in stating what the correct law is in answering
18 their question.

19 THE COURT: Right. Any response?

20 MR. BOWDEN: I absolutely agree that we are talking
21 about different issues. I'm not talking about a Massey
22 issue ---

23 THE COURT: --- let me just -- you mentioned
24 something that first of all we don't charge -- we can't
25 charge on the facts.

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 MR. BOWDEN: Right.

2 THE COURT: So how the jury viewed it I don't
3 really know even with that. But they asked a specific
4 question which you have just acknowledged. Can you be
5 present and not be a principal? You can be. And I'll
6 give you the scenario.

7 If he didn't know anything was going to happen he
8 was in that car and the person leaves and he's not
9 involved in any of that other than he hears a shot and he
10 takes off he's not a principal. He's not the hand of one
11 is the hand of all; he's none of those things. He's
12 present. And when did the crime of accessory after the
13 fact when did it commence assuming those facts? It
14 commenced driving away didn't it?

15 MR. BOWDEN: I would disagree with that. I ---

16 THE COURT: --- well, I appreciate that. We can
17 disagree but that's what -- that's precisely not my
18 decision. My decision is to give the jury the law and
19 the law was yes, you can be present and not be a
20 principal. That is the law. You agree with that. It is
21 the law.

22 MR. BOWDEN: Not in this case.

23 THE COURT: You're now getting to the facts of this
24 case. I don't make that call. They asked me a principle
25 of law which I defined for them at their request. Not --

1 I agree you didn't ask for it and neither did the State.
2 They asked for it. And if the court wants to say -- if
3 the Appellate Court wants to say no Judge, you can't
4 answer those questions then say it. But I don't think
5 that's what we do.

6 I agree with you if the law was that you cannot be
7 present, merely present, and be an accessory after the
8 fact I would agree with you. And that was the law
9 previously. But when they changed that they changed it
10 and I think it makes sense to me at least because the
11 hand of one or the hand of all charge really incorporates
12 exactly what we're saying because it has the principal
13 but it has merely being present doesn't make you a
14 principal. And that's all -- that's all we said.

15 So I appreciate your position. I decline the motion
16 and let's see what the court wants to do.

17 MR. OSBORNE: And the one last thing I would say
18 and I think it kind of brings it home. You can't be
19 convicted of both ---

20 THE COURT: --- no, I agree with you ---

21 MR. OSBORNE: --- but you can be both.

22 THE COURT: I don't know -- well, you may be
23 technically, and I don't have a problem because you
24 weren't trying him as a principal.

25 MR. OSBORNE: That's right. We didn't know who the

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 principal was ---

2 THE COURT: --- you were trying him as an accessory
3 and the evidence pointed to that as merely an accessory.

4 MR. OSBORNE: Right. And you did a good job I
5 thought when you answered the question ---

6 THE COURT: --- well, I appreciate that ---

7 MR. OSBORNE: --- and you told them don't -- well,
8 I'm winning that's why ---

9 THE COURT: --- the Appellate Court may say no, you
10 didn't do a good job but you know that's okay ---

11 MR. OSBORNE: --- you told them you're focusing on
12 the wrong thing.

13 THE COURT: Well, the bottom line, the bottom line
14 is why we were late Judge Young and I were talking about
15 some decisions that have come down. One is going to be
16 interesting to see how the bifurcation issue expands.
17 I've been crying -- I've been railing about that since
18 I've been on the bench. And I don't fault you.

19 And I understand this one deals with CSC and that's
20 fine. And I don't quarrel with the logic of the court.
21 I just don't know how that doesn't apply to a burglary
22 charge as well because you're telling me that you try
23 somebody for burglary and you get to prove that he's
24 committed prior burglaries. Excuse me? Yeah, he
25 probably did commit the burglary. I mean it's the same,

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

1 to me it's the same thing. Yet, we know and there is
2 case law that says they'll have to overturn it that
3 that's an element of the crime. The statute says prior
4 burglaries. And you can't make the State stipulate to
5 that. Yet we know we have stipulations every day in
6 trials just to shorten trials.

7 So don't tell me we can't stipulate; we can. But
8 you choose not to. And I don't fault you. You're an
9 advocate. I'd take advantage of that too. But the
10 bottom line is we'll see.

11 All of that to say Mr. Bowden if they want to go
12 back and say you know what if there is any evidence, any
13 inference that he's a principal then yes, you can't have
14 that. And that's fine. I'll be happy -- but I don't
15 read it that way. And so I think I've articulated and I
16 think I did before as to why. But if I'm wrong they will
17 tell me so. Thank you.

18 MR. BOWDEN: And if I may I think we got a little
19 wrapped up in the Collins issue. And each one of the
20 things I've argued is a separate basis that a new trial
21 could be granted on ---

22 THE COURT: --- your brief sets forth and I'm
23 comfortable with the decision and let's let them decide.
24 If they want to kick it back so be it.

25 MR. BOWDEN: Thank you, Your Honor.

State v Seth Hassan Smith
Motion for New Trial
July 31, 2019

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MR. OSBORNE: Thank you, Judge.

THE COURT: Thank you.

*****END OF TRANSCRIPT OF RECORD*****

State v Seth Hassan Smith
Certificate of the Court Reporter
July 31, 2019

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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Charleston County, South Carolina on the 31st day of July, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 2, 2019



Joyce C. Rueger, CVR-M

Court Reporter

DLO/0305163
WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

2015-06223

ARREST WARRANT NUMBER

2018-GS-10-05300

DATE OF ARREST

05/06/2015

ACTION OF GRAND JURY

TRUE BILL

Hope L. Vadio
Foreperson of Grand Jury SEP 10 2018 Date:

VERDICT

Foreperson of Petit Jury Date:

DOCKET NO. 2018-GS-10-05300

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2018

THE STATE

VS.

SETH HASSAN SMITH

B/M DOB: [REDACTED]

Indictment for

ACCESSORY AFTER THE FACT TO
FELONY A, B, C OR MURDER

SC Code: § 16-01-0055

CDR Code: 2413

FILED

9/27/2018 11:35:47 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

INDICTMENT

At a Court of General Sessions, convened September 2018, the Grand Jurors of Charleston County present upon their oath:

ACCESSORY AFTER THE FACT TO FELONY A, B, C OR MURDER

That in Charleston County, South Carolina, on or about the dates from April 18, 2015 to April 21, 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.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



DAVID L. OSBORNE
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON

STATE VS.

SETH HASSAN SMITH

AKA:

Race: Black/African American Sex: M

DOB: [REDACTED] SS#: [REDACTED]

Address: 98 Spring Street

City, State, Zip: Charleston, SC 29403

DL# [REDACTED] SID# SC01014527

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

CONVICTED OF or PLEADS

TO: Accessory after the fact to Felony A, B, C or Murder

In violation of § 16-01-0055 of the S.C. Code of Laws, bearing CDR Code # 2413

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45 (CSC w/minor 1st or CSC w/minor 3rd)

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, _____ (def.'s initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

[Signature] 101325
David L. Osborne, Assistant Solicitor SC Bar #

[Signature] 101291
Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center, for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: _____

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 586 days

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____ days/hours Public Service Employment

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

Recipient: _____

*Fine:		\$	_____
§14-1-206 (Assessments 107.5%)		\$	_____
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$	<u>100.00</u>
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$	_____
§56-5-2995 (DUI Assessment)	\$12	\$	_____
§56-1-286 (DUI Breath Test)	\$25	\$	_____
Proviso (Public Def/Probation)	\$500	\$	_____
§14-1-212 (Law Enforce. Funding)	\$25	\$	<u>25.00</u>
§14-1-213 (Drug Court Surcharge)	\$150	\$	_____
§50-21-114 (BUI Breath Test Fee)	\$50	\$	_____
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	_____
3% to County (if paid in installments)	\$	\$	<u>3.75</u>
TOTAL		\$	<u>128.75</u>

Obtain GED
Attend Voc. Rehab. Or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal consecutive weekly/monthly pmts. of \$ _____ Beginning _____
\$ _____ Paid to Public Defender Fund
Other: _____

Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Clerk of Court/Deputy Clerk: [Signature]
Court Reporter: [Signature]

Presiding Judge: [Signature]
Judge Code: 206A
Sentence Date: 1/9/19

Are the accused (defendant) and
"unknown" principal mutually
exclusive in the eyes of the law.

↳ can they be the same
person

Juror ask a question

Noquite Mn 130



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

FILED
) **IN THE COURT OF GENERAL SESSIONS**
) **FOR THE NINTH JUDICIAL CIRCUIT**
2019 JAN 18 AM 11:08

) Indictment No.: 2018-GS-10-05300
) Charge: Accessory After the Fact to Murder

STATE OF SOUTH CAROLINA
vs.
SETH HASSAN SMITH,
Defendant

Handwritten signature

MOTION FOR A NEW TRIAL

The Defendant, indicted for Accessory after the Fact to Murder, proceeded to trial before the Honorable R. Markley Dennis, Jr. on January 7, 2019. The jury returned a verdict on Wednesday, January 9, 2019, finding the Defendant guilty of Accessory After the Fact to Murder. The Court sentenced him on January 9, 2019 to fifteen years in prison.

The Defendant hereby moves for a new trial on the following grounds:

1. Based on the lack of evidence to support an essential element of the offense, namely the lack of evidence to show the Defendant had knowledge that the principal committed a murder, the Defendant was entitled to a directed verdict.
2. The evidence did not support a supplemental jury instruction, given after the jury had begun deliberating, that the identity of the principal is immaterial and, therefore, the jury could find that the Defendant charged with Accessory After the Fact could also have been the principal in the murder.
3. The timing of the supplemental jury instruction violated the Defendant's right to due process of the law because it prevented Defense counsel from making specific arguments in closing to address the theory that the Defendant was both the principal in the murder and the accessory after the fact.
4. All other Defense motions made, but denied; and
5. All Defense objections made, but overruled.

Defense counsel submits the following in support of this motion:

1. At the close of the State's case, the Defense moved for a directed verdict based on the lack of substantial circumstantial evidence to prove each element of the offense. The

Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Odems*, 395 S.C. 582 (2011). The elements of Accessory After the Fact to Murder 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 for the purpose of enabling the principal felon to escape detection. *State v. Legette*, 285 S.C. 465 (1985). The trial judge should not refuse to grant the directed verdict if the evidence merely raises a suspicion the accused is guilty. *State v. Cherry*, 361 S.C. 588 (2004). The State presented circumstantial evidence that the Defendant assisted an unknown principal by disposing of a vehicle that was allegedly used to transport the shooter, which is the third element. The State argued that the alleged involvement of the Defendant's brother and cell phone call records show the Defendant must have known who he was assisting and what felony they committed; the second element. However, even taken in the light most favorable to the State, the State did not come close to meeting its burden of substantial circumstantial evidence to prove the second element of knowledge. Based on the evidence presented, the State failed to prove beyond a reasonable doubt that the Defendant had knowledge that the principal committed a murder. Therefore, the Court should have directed a verdict for the Defendant in this case.

2. Prior to closing arguments, the State and the Defense submitted requested jury charges to the Court. A charging conference was held on January 9, 2019 to discuss the standard jury charges as well as the requested charges from counsel. The Court informed counsel of the specific law that would be charged regarding the elements of accessory after the fact. There was no discussion of charging the jury on the theory that the Defendant charged with Accessory After the Fact could also have been the principal in the murder. The judge charged the jury and the jury then began deliberations. The jury then sent a note asking the question whether the principal and the accessory after the fact are mutually exclusive. There was a discussion off the record between counsel and the Court about how to handle the note. Initially the Court indicated that he would recharge the jury in a similar fashion to his original charge. The Court then decided that he would inform the jury that the identity of the principal does not matter and so they could in fact find that the Defendant was both the principal and the accessory after the fact to murder. Defense counsel objected to this supplemental instruction that was vastly different from the original charge. "The law to be charged must be determined from the evidence presented at trial." *State v. Ward*, 374, S.C. 606, 614 (Ct. App. 2007) (quoting *State v. Knoten*, 347 S.C. 296, 302 (2001)). There must be some evidence in the record to support the charge to the jury. *Id.* The State actually conceded during its opening and closing statements that there was no evidence to prove the Defendant was the principal, and in fact the State presented no evidence during the trial that the Defendant was the principal. This instruction was not supported by the evidence and violated the Defendant's right to due process of the law.
3. The Court should not have instructed the jury that the accessory after the fact could also be the principal because the State presented no evidence during the trial that the Defendant was the principal, and the timing of the supplemental charge prevented

Defense counsel from addressing this new theory during closing argument. This supplemental instruction was not supported by the evidence. The State actually conceded during its opening and closing statements that they could not prove the Defendant was the principal. Recharging the jury that the Defendant could be both the principal and the accessory after the fact to murder had the effect of submitting a new theory of the case to the jury after the presentation of evidence and closing arguments were complete. In *State v. Day*, the South Carolina Supreme Court found that “[p]roviding an ‘after the fact’ instruction was inadequate because the prejudice to Day was incurable” where “Day was unable to adequately assert a complete defense during the trial, and the jury was left with the impression that the trial judge did not think the law of self-defense was applicable to the case.” *State v. Day*, 341 S.C. 410, 419 (2000). Preventing Defense counsel from addressing a new theory of guilt in closing argument violated the Defendant’s right to due process of the law and rendered this trial fundamentally unfair.

- 4. The Defense made a pretrial motion to quash the indictment for accessory after the fact to murder. The grounds for this motion were that the State failed to list all elements of the offense with specificity, and the State failed to both identify the principal and allege that the Defendant had knowledge that the principal committed the offense. This motion was denied.
- 5. The Defense renews all other objections and motions made that were denied and overruled.

For all the foregoing reasons, the prejudice to the Defendant was not harmless error and the Defendant should be granted a new trial.

Respectfully submitted,



Michael R. Loignon
Charleston County Public Defender
101 Meeting Street, 5th Floor
Charleston, SC 29401

Attorney for Defendant

2019 JAN 18 AM 11:08
 JULES & AN...
 CLERK OF COURT
 BY: [Handwritten initials]

FILED

Charleston, South Carolina
January 17, 2019

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
 COUNTY OF CHARLESTON)
) FOR THE NINTH JUDICIAL CIRCUIT
)
) Warrant No(s):
) Indictment No(s): 2018-GS-10-05300
) Charge(s): Accessory After the Fact to Murder

STATE OF SOUTH CAROLINA)
)
 vs.)
) MOTION FOR NEW TRIAL
 SETH HASSAN SMITH,)
)
 Defendant)
)
 _____)

NOW COMES the Defendant, Seth Hassan Smith, by and through undersigned counsel of record, and moves the Court for an Order granting Defendant a new trial on indictment 2018-GS-10-05300, which charges the Defendant with Accessory After the Fact to Felony A,B, C, or Murder. This Court should grant Defendant’s motion for a new trial because the Court’s Supplemental Jury Instruction in response to the jury’s question deprived Defendant of a fair trial.

ALLEGED FACTS

On April 18, 2015, at approximately 11:41 a.m., police officers with the Charleston Police Department responded to a shooting at 2-C Reid Street in Downtown Charleston. This address is located in a neighborhood commonly known as the “East Side.” Responding officers observed a large crowd of approximately 75 individuals on scene, Rashawn Rivers (“Rivers”) exiting a vehicle while holding his leg and shouting for medical assistance, and an unresponsive victim, George Bennett (“Bennett”), lying face-down across the front seats of his vehicle.

Police began interviewing witnesses who described seeing a black male in his thirties with a slim build get into a black Cadillac Deville, which backed away from the crime scene and fled northbound on East Bay Street after the shots were fired. Police obtained still photographs of a

black Cadillac Deville from a city surveillance camera in the area of the shooting, and a witness at the scene, Suzanne Simkovich, identified it as the same vehicle she saw the shooter get into. The vehicle had distinctive features that allowed Police to determine the Cadillac Deville belonged to Smith.

Upon receiving an obstruction of justice charge from lying to investigators, Smith's cousin, Jibral Acevedo ("Acevedo"), informed police after the shooting that Smith contacted him and told him to complete a fraudulent sale of the car. Although the date of sale allegedly occurred on April 20, 2018, Acevedo wrote it as April 1, 2015. Acevedo further claimed he helped Smith disguise the appearance of the car by spray painting the rims, removing parts, and removing the tag. Acevedo, at Smith's direction, arranged to sell the vehicle to a tow truck driver, Henry Woolfe, who picked the vehicle up in Mount Pleasant and took it to a scrap yard in North Charleston, where police ultimately located the vehicle.

Police alleged that on the night before the shooting, April 17, 2018, Bennett planned to buy a quantity of marijuana from Smith's brother, Bryant Smith, but that Bennett had paid for the marijuana using counterfeit bills. Following this incident, witnesses told police Bennett told them he did a "lick on the West" – slang for committing a robbery in West Ashley. Police presented this incident as the motive for the shooting in multiple affidavits in support of search warrants and arrest warrants.

The State initially charged Smith with murder, but indicted him in September, 2018 for "accessory after the fact to felony A, B, C or murder." The indictment read:

[t]hat in Charleston County, South Carolina, on or about the dates from April 18, 2015 to April 21, 2015, while knowing that the felony of murder and attempted murder, such being a Class A, B, C felony or murder [sic], 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 a 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.

Smith was tried for accessory after the fact. In opening statements, the State conceded there would be no evidence to prove the identity of the driver or the shooter.

Prior to closing arguments, the trial judge, (Judge Dennis), the Assistant Solicitor, (“Mr. Osborne”), and defense counsel, (“Mr. Loignon” and “Mr. Bowden”) held a charging conference. In that charging conference, Judge Dennis informed the parties he would charge the jury on the South Carolina bench-book definition, which provides “another person” (the principal) committed a felony. See transcript, 4-5.

Defense counsel relied heavily on this in closing arguments, stating, “[s]uspicion is never enough in a court of law in the United States of America. Because suspicion leads to assumptions. And in assumptions we are not allowed to convict someone ... based on suspicion and assumptions.” The State even conceded there was no evidence to prove the identity of the murderer.

In his original charge to the jury, Judge Dennis stated, “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.” [Emphasis added].

However, while deliberating, the jury asked, “[a]re the accused, the defendant, in parens, and unknown principal mutually exclusive in the eyes of the law? Can they be the same person?” In response, Judge Dennis stated, in part, “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."

Defense counsel argued prior to the supplemental instruction that it was an incorrect point of law. After the Court gave the supplemental jury instruction, counsel further argued *State v. Collins* clearly established a person cannot be both an accessory after the fact and a principal.

The Court disagreed, and Smith was convicted of accessory after the fact and sentenced to 15 years in prison.

ARGUMENT

I. The post-closing supplemental jury instruction denied Smith due process of law.

"[T]he law to be charged must be determined from the evidence presented at trial". *State v. Ward*, 374 S.C. 606, 614 (Ct. App. 2007) (quoting *State v. Knoten*, 373 S.C. 296, 302 (2001)). More specifically, *Collins* established one is not an accessory after the fact if he or she participated in the crime as opposed to being "merely present." *State v. Collins*, 329 S.C. 23, 26-27 (1998). However, when attorneys craft closing arguments in reliance on the trial judge's representation of an intended charge, yet the trial judge alters that intended charge, the supplemental jury instructions are fundamentally unfair. *State v. Jones*, 343 S.C. 562 (2001); *State v. Johnson*, 418 S.C. 587 (Ct. App. 2016).

This Court should grant this motion for a new trial because (1) the timing of the supplemental jury charge deprived Smith any chance to respond, (2) the charge was not supported by the evidence, and (3) the charge stated an incorrect point of law.

The timing of the supplemental jury charge deprived Smith any chance to respond.

Supplemental jury instructions are not automatically reversible error when the defendant

was given a chance to respond in closing argument, that charge is supported by the evidence, and that charge states a correct point of law; however, supplemental jury instructions are fundamentally unfair¹ when attorneys rely on the trial judge's intended charge to craft a closing argument. *State v. Jones*, 343 S.C. 562 (2001); *State v. Johnson*, 418 S.C. 587 (Ct. App. 2016). The fundamental unfairness is so pervasive that rearguing closing after a supplemental jury charge cannot cure the error, as it would harm an attorney's credibility with the jury. *State v. Johnson*, 418 S.C. 587 (Ct. App. 2016).

The Court of Appeals addressed a closely related scenario in *State v. Devin Johnson* when it held supplemental jury instructions that are contrary to the trial judge's representation of an intended charge are fundamentally unfair. *State v. Johnson*, 418 S.C. 587 (Ct. App. 2016). In that case, the trial judge informed defense counsel in the charging conference that no jury instruction on "the hand of one is the hand of all" would be given. *Id.* With the trial judge's assurance he would not give "the hand of one is the hand of all" instruction, defense counsel presented its theory to the jury in closing argument. *Id.* at 590. After the parties argued closing, the trial judge decided to charge "hand of one is the hand of all." *Id.* As a result of the unanticipated supplemental jury charge, the court offered to allow the parties to reargue closing and the defense refused, arguing it would affect his credibility with the jury if he was forced to reargue based on a new theory. *Id.* at 594. On appeal, the Court of Appeals held a supplemental jury instruction rendered the trial fundamentally unfair because it deprived the defendant of the opportunity to respond. *Id.* at 587. The court emphasized "there's not any evidence to support that charge at all", and the timing of the charge violated the defendant's right to due process as the charge resulted

¹ "Appellant reasonably relied upon the court's representation that it intended to give that charge to the jury. The decision to alter the charges after the argument, was fundamentally unfair." *State v.*

in an all but pre-determined conviction. *Id.* at 591.

Similarly, in *Jones*, the trial court erred by not charging the jury with specific language agreed to in the charging conference. *Jones*, 343 S.C. 562 (2001). More specifically, the trial court agreed in the charging conference to incorporate the language “hesitate to act” in the definition of reasonable doubt. *Id.* Due to the trial court’s representation the phrase “hesitate to act” would be given in the jury charge, defense counsel “reasonably relied” on this by stating in closing arguments “when you go through the testimony and the evidence in this case, you`re gonna hesitate.” *Id.* at 577. However, the trial judge never gave the “hesitate to act” language in the charge. Thus, “[t]he decision to alter the charge, after the argument, was fundamentally unfair”. *Id.* at 578.

Just as when defense counsel in both *Johnson* and *Jones* relied on the trial judge’s intended charge to craft closing arguments. here, defense counsel reasonably relied on this Court’s intended charge in closing arguments as well. More specifically, although Mr. Loignon conceded the State presented some evidence Smith may have been trying to conceal something by altering the vehicle’s appearance, the State failed to present any evidence Smith either knew a murder occurred or that Smith knew the principal who committed it and intended to aid that person to escape detection.

Additionally, defense counsel’s entire theme was presented to the jury as “suspicion and assumption” because the State was never able to present any evidence about the individuals involved in the shooting. The State asked the jury to make the leap that Smith knew who the person was despite the State repeatedly conceding the State could not identify the shooter or the driver. Mr. Osborne even stated this would have been a murder trial if there was any evidence

Jones, 343 S.C. 562, 578 (2001).

that Smith was the driver. If this were the case, defense counsel could have addressed this and requested the court to explain to the jury they would have had to find Smith was merely present in order to convict for accessory after the fact. Thus, because the timing of the supplemental jury charge deprived Smith any chance to respond, Smith's trial was tainted by fundamental unfairness.

The supplemental jury charge was not supported by the evidence.

"[T]he law to be charged must be determined from the evidence presented at trial". *State v. Ward*, 374 S.C. 606, 614 (Ct. App. 2007) (quoting *State v. Knoten*, 373 S.C. 296, 302 (2001)). An alternate theory of liability, however, may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. *State v. Washington*, 424 S.C. 374, 417 (Ct. App. 2018).

In *Ward*, the court held evidence must support all jury charges. *Ward*, 374 S.C. 606 at 614. Although *Ward* argued "the hand of one is the hand of all" was an improper jury charge because there was no evidence to support it, the court held "[t]he evidence at trial supported the theory that *Ward* and his co-defendant joined together to accomplish an illegal purpose, and therefore it was appropriate". *Id.* However, the court emphasized a jury charge is improper when there is no evidentiary support for that charge. *Id.*

Here, the State failed to present a single witness who could identify either the shooter or the driver. The only evidence the State could present was there was a shooter in the passenger seat and a driver who sped away from the scene. Although the evidence showed there were two people in the car, the State even conceded in opening statements the identity of these two people was a mystery. The State could not present eyewitnesses, videos, or forensics to put Smith near

the crime scene. In short, there was no evidence to support this Court's supplemental charge because the State intentionally did not present evidence that Smith was either the shooter or get-away driver. Thus, the supplemental jury charge was not supported by the evidence.

The supplemental jury charge stated an incorrect point of law.

Jurors are presumed to follow the law as instructed to them. *Washington*, 424 S.C. 374 at 376. It is axiomatic that jury instructions must comply with the law. *State v. Logan*, 405 S.C. 83, 91 (2013); *State v. Miles*, 421 S.C. 154, 159 (Ct. App. 2018). The supplemental jury instruction stated an incorrect point of law because one cannot be convicted of accessory after the fact if he or she were a principal in the underlying crime. *State v. Collins*, 329 S.C. 23, 26-27 (1998).

The landmark *Collins* decision clearly established one cannot be an accessory after the fact if he or she participates in the crime as opposed to being merely present. *Id.* at 26-28. The court held absence from the scene of the crime is no longer an essential element of accessory after the fact to a felony. *Id.* Prior to the landmark *Collins* decision, *Plath*², *Whitted*³, and *Hudgins*⁴ established that absence from the scene of a crime is an essential element of accessory after the fact. *Id.* at 27. The *Collins* decision made clear the courts in those cases only added absence as an element because they confronted cases where there was evidence each defendant had participated in the crime, as those convictions were “based on the fact that there was evidence adduced at trial which demonstrated participation [emphasis added] in the actual commission of the substantive offense of murder”. *Id.* at 26.

However, the *Collins* opinion stresses the determinative distinction in language used; “[t]here is, however, a distinction between being present and **participating** in the crime, and

² *State v. Plath*, 277 S.C. 126 (1981).

³ *State v. Whitted*, 279 S.C. 260 (1983).

being **merely present** during commission of the crime”. *Id.* at 26-27; [Emphasis original]. Moreover, the court references other jurisdictions who have also taken the approach that one cannot be both a principal and an accessory after the fact. More specifically, Mississippi highlighted the crucial difference between the principal and the accessory by emphasizing the help furnished “must be given after the felony is completed”. *Buckley v. State*, 511 So.2d 1354, 1358 (1987). Similarly, Maryland also classifies the identity of a principal as separate from the identity of an accessory. *State v. Hawkins*, 326 Md. 270, 280 (Ct. App. 1992). Moreover, the accessory after the fact federal statute⁵ provides similar meaning to accessory after the fact as does our state law.⁶ In short, one is simply not an accessory after the fact if he or she participates in the crime as opposed to being “merely present”. *State v. Collins*, 329 S.C. 23 (1998).

In our case, the evidence suggests it was impossible for Smith to be at the scene and not be the principal. Consequently, for the trial judge to instruct the jury that a principal and accessory are not mutually exclusive is an incorrect point of law. Thus, because the supplemental jury charge stated an incorrect point of law, Smith was denied due process of law.

CONCLUSION

For all these reasons, this Court should grant this motion for a new trial.

⁴ *State v. Hudgins*, 319 S.C. 233 (1995).

⁵ 18 U.S.C. § 3 provides “[W]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact”.

Respectfully submitted,

Stephen M. Bowden
Charleston County Public Defender
101 Meeting Street, 5th Floor
Charleston, SC 29401

Attorney for Defendant

Charleston, South Carolina
July _____, 2019

⁶ *State v. Collins*, 329 S.C. 23 (1998).

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
) Case No(s): 2018GS1005300
Warrant No(s): 2018GS1005300DI; ~~K740344;~~
~~2015A1010900354~~ (13)
Charge(s): Accessory / Accessory after the fact to
Felony A, B, C or Murder; Murder / Murder;
Assault / Attempted Murder

STATE OF SOUTH CAROLINA)
)
 vs.)
)
 SETH HASSAN SMITH,)
)
 Defendant)
 _____)

ORDER

BY JR
JULIE J. ARMSTRONG
CLERK OF COURT

2019 AUG 14 PM 1:54

FILED

This matter comes before the Court on Defendant's Motion for a New Trial. The Court held a hearing on Defendant's Motion on July 31, 2019. After considering the arguments of both parties, including Defendant's Memorandum in Support of his Motion for a New Trial, which was fully incorporated at the hearing, Defendant's motion is denied.

IT IS SO ORDERED

[Signature]
JUDGE, NINTH JUDICIAL CIRCUIT

Charleston, South Carolina

Dated: 8/14/2019

PENGAD 800-631-6889

STATE'S EXHIBIT

88

PN





CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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,

RECEIVED

Mar 17 2021

SC Court of Appeals



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 17th day of March, 2021.