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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI-COA
APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole

Appellant Case No 2025-000454
Lower Case Nos. 2019GS4202503, 2019GS4202504

The State,..... Respondent,

vs.

Robert Tyrell Gentry :..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Statement of Issues Presented

Question I: Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory before the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, that would tend to prove that Mr. Gentry knew of Tremaine Pierre Johnson's plan to kill Brechue Wiles and that he willfully aided Mr. Johnson in accomplishing the murder?

Question II: Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory after the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, that would tend to prove that Mr. Gentry knew Tremaine Pierre Johnson had killed Brechue Wiles and that he willfully aided Mr. Johnson in covering up the murder?

Statement of the Case

Procedural History

On February 12, 2019, Robert Tyrell Gentry was arrested on the charges of accessory before the fact to murder and accessory after the fact of murder. The grand jury indicted him on these two charges on May 3, 2019. He and his co-defendant, Tremaine Pierre Johnson, were tried before the Honorable J. Durham Cole and a jury on June 14 - 17, 2021. Mr. Gentry was convicted of both charges. On June 17, 2021 Judge Cole sentenced him to 30 years on the accessory before the fact to murder and 15 years on the accessory after the fact to murder. Both sentences were to run concurrently

Mr. Gentry filed his Notice of Appeal on June 25, 2021. On January 15, 2025, the South Carolina Court of Appeals affirmed the two convictions. A timely Petition for Rehearing was filed on January 28, 2025. The Petition for Rehearing was denied on February 10, 2025.

Factual History

Tremaine Pierre Johnson was involved in a relationship with Brechue Wiles. As a result, Ms. Wiles became pregnant with his child. The true father of the child was not known until over a year after her death. App. at 368, l 25 to 369, l 3.

On May 9, 2019, Ms. Wiles left the residence of her aunt to meet with a person. She did not disclose to her aunt the person with whom she was meeting. She did not return from this meeting. App. at 81, ll 21-23; 82, ll 1-7

On May 11, 2019, an early morning walker noticed a body, later identified as Ms. Wiles, in Duncan Park Lake. App. at 75, l 4 to 76, l 11. Also found at the scene were her shoes, keys and automobile. She died of a single gunshot wound to the head. App. at 385, ll 9-18.

Mr. Johnson was investigated because he had been involved with Mr. Wiles. He gave

permission for his cell phone to be searched. App. at 164, ll 11-15. In the cell phone were numerous messages between Mr. Johnson and Ms. Wiles. In addition, the investigators found messages between Mr. Johnson and Mr. Gentry. App. 524. Based upon these messages and the fact the two people knew each other, the police investigated Mr. Gentry as a suspect. After reviewing the text messages between Mr. Johnson and Mr. Gentry, and examining the searches Mr. Gentry made, Mr. Gentry was arrested on February 12, 2019.

Standard of Review

As this is a legal question as to the sufficiency of the evidence, the standard of review is *de novo*. "But when such a purported finding is appealed, whether it was grounded upon any competent, substantial evidence is a question of law for decision by the Court, and it will be reversed in the absence of such basis." *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841, 851 (1944)

Argument

Question I

Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory before the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial which would tend to prove that Mr. Gentry knew of Tremaine Pierre Johnson's plan to kill Brechue Wiles and that he willfully aided Mr. Johnson in accomplishing the murder?

Introduction

No appellate court in South Carolina has ever defined substantial circumstantial evidence. When determining whether the circumstantial evidence is substantial, the theory of guilt must be more than a possible conclusion from the circumstantial evidence. If a guilty conclusion is possible and a not guilty conclusion is possible, then clearly the evidence is not proof beyond a

reasonable doubt. If proof of guilt is sufficient to convict if it is a possible conclusion for the jury to draw, then virtually no circumstantial evidence case will ever be reversed on appeal. To be substantial circumstantial evidence, the evidence should be the conclusion of guilt the jury should draw and not a conclusion the jury could draw. Only then can the circumstantial evidence truly be substantial. The difference between "a" and "the" can be small, but important. At the very least, the theory of guilt should be substantially more likely than the theory of innocence. Even then, such a standard could easily fall short of proof beyond a reasonable doubt. A theory of guilt could simply be a modicum of evidence, which is prohibited in *Jackson v. Virginia*, 443 U.S. 307 (1979)

Discussion

"There are three elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that he was not present when the offense was committed; (3) that the principal committed the crime." *State v. Farne*, 190 S.C. 75, 1 S.E.2d 912, 915–16 (1939). While not specifically stated, the *mens rea* for the crime would be wilfully and with malice aforethought.[1] This is correct because this is the *mens rea* for murder in South Carolina. "Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless

[1] This point is made here because the trial court did not place any *mens rea* in his charge for accessory before the fact to murder. The trial judge simply stated that Mr. Gentry needed "to have in some way provided aid." App. at 500, ll 21 - 23. South Carolina Code § 16-1-40 contains no mens rea. The indictment refers to "knowing that Tremaine Pierre Johnson intended to commit a crime." App. at 521 (Indictment) No crime was stated. No objection was taken to this failure to charge a *mens rea*.

phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased." S.C. Code. § 17-19-30. As the accessory before the fact statute does not have a *mens rea*, the *mens rea* is what was applicable at the common law. The New York Court has stated the applicable *mens rea* for the common law crime of accessory before the fact. "Accordingly, to be an accomplice one must have the necessary intent or 'mens rea' in the same manner as would be required to convict one of being a principal." *People v. Beaudet*, 31 A.D.2d 705, 706, 295 N.Y.S.2d 697, 700 (1968), rev'd, on other grounds 32 N.Y.2d 371, 298 N.E.2d 647 (1973)

In this totally circumstantial evidence case, the State produced no substantial circumstantial evidence to support either that Mr. Gentry had knowledge Mr. Johnson would commit a crime or he substantially aided Mr. Johnson in committing the crime. The State needs proof of both to sustain the conviction for accessory before the fact.

As this is a pure circumstantial evidence case, there are no credibility issues for the jury or this Court to resolve. As a result, this Court is in as good a position to determine if the inferences support the conviction as was the jury.

Defining Substantial Circumstantial Evidence

The first question to be answered is, exactly what is substantial circumstantial evidence? This question has never been answered by our courts, perhaps because no litigant has ever asked the courts to define the term. "A conundrum exists in the criminal case law of South Carolina: the term 'substantial'- as it relates to the scope of review for directed verdict motions - has never been defined." *State v. Cherry*, 348 S.C. 281, 295, 559 S.E.2d 297, 304 (Ct. App. 2001), aff'd but criticized, 361 S.C. 588, 606 S.E.2d 475 (2004)(Anderson, concurring in part and dissenting

in part)[2]

Mr. Gentry now asks this court to define the term. Some evidence, whether the evidence be circumstantial or direct is not sufficient to convict. A probability that the facts are sufficient to convict is also not sufficient. If the theory of the state is simply plausible, the facts are not sufficient to convict. This principle was clearly established in *Jackson v. Virginia*, 443 U.S. 307 (1979). [3] In *Jackson,* the Court said, "But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. In the early days of reviewing the sufficiency of the evidence to sustain the conviction, this Court said, "This court has no jurisdiction to weigh the sufficiency of testimony in a law case, and can only consider whether the verdict is wholly without evidence. We cannot say there was a total failure of evidence to convict in this case." *State v. Havird*, 88 S.C. 227, 70 S.E. 721, 721 (1911). When the standard of review was a mere "modicum," the "no weighing" was in fact required. We have moved beyond that standard.

One writer has suggested that the jury in a criminal case should not weigh evidence, but simply to determine if the State has proven the case beyond a reasonable doubt. "In a criminal

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[2] The Courts of our state have defined "substantial" as it relates to a standard of review in appeals from administrative agencies. *See, Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 295, 299, 422 S.E.2d 118, 120 (1992)("We have defined 'substantial evidence' to mean " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Internal citations omitted). Evidence sufficient to sustain a civil verdict should not be judged by the same sufficiency standard as that to sustain a criminal verdict. If two inconsistent conclusions can be drawn, the proof is not beyond a reasonable doubt.

[3] The application of this case to South Carolina was first recognized by Justice Gregory in his dissent in *State v. Simpson*, 275 S.C. 426, 429, 272 S.E.2d 431, 432 (1980).

trial, where the standard for conviction is proof beyond a reasonable doubt, a weighing proposition would be detrimental to the defendant, as it, at best, implies the use of a preponderance of the evidence standard, which the Supreme Court emphatically rejected in *Winship*." Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 238 (2007). And if the jury "weighs" the evidence, how does a jury then exclude a reasonable hypothesis of guilt? What "weight" should the jury give to a reasonable hypothesis of guilt? Does a jury say the explanation of innocence is simply not as likely? And if they do, how much less likely is required for an acquittal? These questions simply establish that under a reasonable doubt standard, if a reasonable explanation of innocence exists, then the State has not met its burden of proving the case beyond a reasonable doubt. And this is true whether the conclusion is reached by the jury or an appellate court as an appellate court is not making a credibility conclusion in reviewing the evidence as to the sufficiency of the evidence to convict. Jurors should not be required to make a determination that the innocent explanation is highly likely, somewhat likely or probably likely. All these standards should fall short of proof beyond a reasonable doubt if the innocent explanation from the facts is reasonable.

As this court said over 100 years ago, "Where circumstantial evidence is relied on, the absence of reasonable doubt implies impossibility of explaining the evidence on any reasonable hypothesis of innocence. The effect of evidence not being sufficient to exclude every other reasonable hypothesis than guilt is to leave doubt of guilt more or less strong, according to the circumstances of the particular case." *State v. Jackson*, 68 S.C. 53, ___, 46 S.E. 538, 539 (1904). This standard should be used to define substantial circumstantial evidence to the jury

and to review the sufficiency of the evidence on appeal by an appellate court.

The late Judge Ralph King Anderson, in his concurring and dissenting opinion in *Cherry*, discusses the concept of "weighing" evidence.[4] In that discussion he states, "Proper application of this standard requires a determination of whether the state has presented evidence that reasonably supports every element of a charged crime." *Cherry*, at 298, 559 S.E.2d at 305(Anderson, concurring in part and dissenting in part). While this broad statement is an accurate statement, it does not address what the trial judge does when the evidence is undisputed and the evidence is circumstantial. A jury is well equipped to make the determinations of credibility. In the present case, the credibility of any witness is not an issue. When an appellate court reviews the evidence, all credibility issues should be resolved in favor of the State. This is the traditional standard of review. And with no credibility issues in the present case, this Court is not required to make any credibility determinations. Nor was the jury below required to make a credibility determination.

In a total circumstantial evidence case, should a trial court send the case to the jury if the trial court determines the circumstantial evidence could easily support either a conviction or acquittal? What if the trial court determines that the circumstantial evidence is only slightly in favor of the State on the issue of guilt? If under the traditional standard of review the jury is to determine the value of the evidence, then the jury gets to decide the 50-50 case or the 51-49 case. Under these circumstances, can any court truly say the State has proven the case "beyond a reasonable doubt"? Under these facts, is the circumstantial evidence substantial? "However, if

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[4] *Cherry* is a very unique case. While six of nine judges would have reversed the conviction for one reason or another, the conviction was affirmed due to the lack of consensus as to the basis for the reversal. Regardless, the reading of the various opinions is educational.

the evidence viewed in the light most favorable to the government supports an equal or nearly equal theory of guilt and of innocence, we must reverse the conviction because a reasonable jury, under these circumstances, necessarily entertains a reasonable doubt." *United States v. Rasco*, 123 F.3d 222, 228 (5th Cir. 1997). *See, also, People v. Rodriguez,* 63 A.D.2d 919, 920, 406 N.Y.S.2d 63 (1978)("The evidence in the present case is equally consistent with a conscious objective to cause serious physical injury or with a conscious objective to cause death. Such evidence thus equally consistent with the two intents may not form the basis for a finding against the defendant of the graver intent.") If the State has not eliminated a reasonable explanation of innocence, as a matter of law, the State has not proven the case beyond a reasonable doubt and the circumstantial evidence is not substantial. As a New York Court stated, "The danger, therefore, with the use of circumstantial evidence is that of logical gaps—that is, subjective inferential links based on probabilities of low grade or insufficient degree-which, if undetected, elevate coincidence and, therefore, suspicion into permissible inference." *People v. Cleague*, 22 N.Y.2d 363, 367, 239 N.E.2d 617, 619 (1968). The state is obligated to eliminate all reasonable explanations of innocence to keep from elevating mere suspicion to guilt beyond a reasonable doubt. To require anything less, is to permit a conviction on a standard of proof that is less than beyond a reasonable doubt.

This Court, unfortunately, has taken inconsistent positions as to circumstantial evidence cases. *Compare*, *State v. Bostick,* 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Arnold,* 361 S.C. 386, 605 S.E.2d 529 (2004) and *State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009) *with State v. Larmand*, 415 S.C. 23, 780 S.E.2d 892 (2015), *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016) and *State v. Pearson*, 415 S.C. 463, 783 S.E.2d 802 (2016). In *Bennett*,

Justice Hearn stated:

> Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. *Id.* at 237, 781 S.E.2d at354

The question not answered in Justice Hearn's statement is: If a reasonable theory of innocence exists, has the State proven the case beyond a reasonable doubt? If the State has not eliminated a reasonable hypothesis of innocence, has the State met its burden of proof? Would the language used by Justice Hearn permit a conviction to stand if both inferences are equal? The statement appears to answer the question in the affirmative.

Properly understood, substantial circumstantial evidence has to mean, at the very least, that the theory for conviction is substantially more likely than the theory for acquittal. If beyond a reasonable doubt is to have true meaning, then a jury should be instructed that the state has to prove its theory of guilt is substantially more likely than a theory of innocence. As in this case, if a reasonable explanation of innocence exists, has the state met its burden of proof? Only then should the circumstantial evidence case be submitted to the jury. Under these circumstances, a trial court and an appellate court do, to some extent, "weigh" the evidence. But if the standard of proof of beyond a reasonable doubt is to have any real meaning, then this type of weighing by judges, trial and appellate, must be done. After all, a pure circumstantial evidence case is the only type of case tried in our country where all the witnesses can be truthful, and an innocent person convicted.

Circumstantial Evidence in this Case

Against these standards the evidence in this case must be viewed. The evidence, when credibility is resolved in favor of the State, shows there is no substantial evidence sufficient to convict. The State must prove each element of the crime beyond a reasonable doubt. So, before Mr. Gentry can be convicted, the State must prove beyond a reasonable doubt Mr. Johnson committed the act of murder.[5] Second, the State must prove Mr. Gentry knew Mr. Johnson was going to commit the murder. Thirdly, the State must prove Mr. Gentry willfully and with malice aforethought, aided Mr. Johnson in committing the murder of Ms. Wiles. The State offered no direct evidence that Mr. Gentry knew, or even should have known, that Mr. Johnson intended to murder his girlfriend. The State did produce evidence that Mr. Gentry and Mr. Johnson met shortly before Ms. Wiles was murdered. The State produced evidence that a few hours before the murder, Mr. Gentry and Mr. Johnson talked. App. at 528. Also, the former girlfriend of Mr. Gentry, testified that Mr. Johnson came by the house of Mr. Gentry on May 9, 2019. App. at 325, l 13 to 327, l 7. This was at about 4 or 5 on the afternoon of the murder. App. at 328, l 10 - 16. Mr. Gentry did not get in the car with Mr. Johnson. He simply talked to him for a period of less than 5 minutes. Ms. Alo did not see Mr. Gentry give anything to Mr. Johnson. App. at 329, ll 5 - 24. This evidence does not support the conclusion that anything about a murder was discussed. A meeting or a phone call with no testimony as to what was discussed cannot be substantial proof that a murder was discussed. This is what the State is arguing here. What the

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[5] This sufficiency of evidence to sustain the conviction of Mr. Johnson was fully addressed in his appeal. The Court of Appeals sustained his conviction. As the evidence in Mr. Gentry's case as to the second and third elements do not support a conviction, Mr. Gentry will only discuss the issue of his wilfully participating in the planned murder.

State is in essence saying is because a plan to murder the girl friend could have been discussed, the jury is free to infer that it was. This is a conclusion based upon speculation. The State offered several text messages and telephone calls between Mr. Gentry and Mr. Johnson. Both Mr. Johnson and Mr. Gentry gave permission for their phones to be searched. App. at 153, ll 11 - 12; App. at 164, ll 12 - 15. Mr. Gentry also gave permission for his home and automobile to be searched. App. at 183, ll 15 - 18.

The text messages between Mr. Gentry and Mr. Johnson do not prove or suggest any knowledge on the part of Mr. Gentry that Mr. Johnson intended to murder Ms. Wiles. William Reece, the investigating officer, testified that no text message or Facebook communication between Mr. Gentry and Mr. Johnson ever mentioned Ms. Wiles or her pregnancy. App. at 246, l 2 - 21. No communication between them ever referenced a firearm or returning a firearm. Rec. on App. at 248, ll 1 - 24. They only show communications between two people who knew each other. This does not support a conclusion that Mr. Gentry was involved in planning a murder or knowing of a murder. Granted a weapon could have been delivered to Mr. Johnson when the two people met as described by Ms. Alo. Such a conclusion, however, would be mere speculation, which is not sufficient to convict. It would be just as speculative to say a weapon was exchanged the previous day or a week before.

The State also produced testimony that Mr. Gentry had on March 20, 2017, purchased a weapon capable of firing a bullet similar to the cartridge found at the scene. App. at 275, ll 11 - 14. The gun box was found at Mr. Gentry's residence under his bed, but the gun was not. App. at 188, l 3 - 23. Also, Tulammo 40 caliber ammunition, the same type of the cartridge found at the scene, was found in the glove box of his car. App. at 185, l 14 - 20. The absence of an

explanation by Mr. Gentry as to the location of the firearm cannot be considered by the jury or this Court. As this Court said, "Argument of counsel for the State that Schrock has no alibi is without merit. It is not incumbent upon an accused person to prove that he was somewhere else at the time and place of the crime. By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act." *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). By bringing this case, the State assumed the burden of proving Mr. Gentry supplied a weapon to Mr. Johnson with full knowledge that Mr. Johnson intended to murder Ms. Wiles. They failed in that burden. No such testimony exists in this case.

In the absence of any testimony that something was exchanged when Ms. Alo observed Mr. Gentry and Mr. Johnson meet, a conclusion a gun was exchanged is mere speculation and speculation is not sufficient to convict. And to conclude from the first speculative inference that Mr. Gentry knew, with no proof of the fact, Mr. Johnson intended to murder his girlfriend with the gun is to pile an inference upon an inference. Such a conclusion is legally not proper.

With no testimony that Mr. Johnson ever requested Mr. Gentry to give him a firearm, the mere fact the firearm purchased by Mr. Gentry a year before the shooting is missing is not proof Mr. Gentry gave a firearm to Mr. Johnson. "The motion [for directed verdict] should be granted where a jury would be speculating as to the accused's guilt, * * * or where the evidence is sufficient only to raise a strong suspicion of guilt." *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996)(internal citations omitted). Based upon the absence of a firearm, a jury is not entitled to infer that Mr. Gentry gave the firearm to Mr. Johnson and, again with no proof, to infer that Mr. Gentry knew Mr. Johnson was going to murder Ms. Wiles. This is building an

inference upon an inference. "[T]o establish the intent, the evidence of knowledge must be clear, not equivocal. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." *Direct Sales Co. v. United States*, 319 U.S. 703, 711, (1943)(internal citations omitted)[6]. A conviction for accessory before the fact to murder also cannot be made by piling an inference upon an inference. *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993).

This Court has said, "We have held that the mere fact that the circumstances are strongly suspicious and the defendant's guilt probable is not sufficient to sustain a conviction because the proof offered by the State must exclude every reasonable hypothesis except that of guilt and must satisfy the jury beyond a reasonable doubt." *State v. Hyder*, 242 S.C. 372, 379–80, 131 S.E.2d 96, 100–01 (1963). Under this holding, if an inference from the undisputed facts is probable as to guilt, the evidence is not sufficient. The inferences in this case discussed above do not even reach the level of a probability.

After rejecting the exclusion of the any other reasonable hypothesis standard of review, this court has twice reversed convictions using that standard of review on appeal. In *State v. Hernandez*, 382 S.C. 620, 626, 677 S.E.2d 603, 606 (2009), Chief Justice Toal in footnote 2 said, "Although in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) the Court abandoned this charge and held that it may confuse a jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, it nonetheless illustrates the lack of evidence against Petitioners." Again, in *State v. Odems*, 395 S.C. 582,

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[6] The evidence in this case arose out of drugs sold to a physician in the small community of Calhoun Falls, SC.

590, 720 S.E.2d 48, 52 (2011) Chief Justice Toal stated:

> The traditional circumstantial evidence definition illustrates the deficiency in the State's evidence against Petitioner. This definition provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:
>
> > Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

The logic of such a conclusion is compelling. If a reasonable explanation of innocence exists, the State simply has not proven its case beyond a reasonable doubt. The State should be required to negate any reasonable explanation of innocence. As discussed by one author, if the presumption of innocence is properly understood, a juror should be looking for proof of innocence and not proof of guilt. *See, Chauvin*, at 239("[F]or it would seem that if a juror is looking to find a defendant guilty, she is not presuming he is innocent."). To use a football analogy, if the call on the field is not guilty, the state must show irrefutable evidence that the call on the field is wrong. When the evidence is such that both guilt or innocence can be drawn, the state has not shown irrefutable evidence that the call on the field is wrong. Thus, the burden being on the government to exclude any reasonable hypophysis of innocence seems reasonable and logical.

Other courts have applied a similar standard. The Arkansas court has held, "Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture." *Morgan v. State*, 2009 Ark. 257, ___, 308 S.W.3d 147, 152 (2009). Georgia has enacted such a

standard of review by statute. Ga. Code § 24-14-6.[7] The evidence in this case certainly falls short of compelling the conclusion of guilt in which the government has eliminated every reasonable hypothesis of innocence.

The Minnesota Supreme Court did a lengthy discussion of the proper standard of review in a circumstantial evidence case. The Court adopted a position very similar to the position used by Chief Justice Toal. The Court said, "Having preserved the jury's credibility findings, the appellate court considers at the next step whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a reasonable inference inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole." *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). Again, in this case, a reasonable inference inconsistent with guilt can be drawn from the facts. Even assuming Mr. Gentry gave a firearm to Mr. Johnson, nothing in this record remotely establishes he did so with the required *mens rea* or knowledge of Mr. Johnson's intent.

Suppose the State at a trial proves the following facts and no others. Crack cocaine is found in a bag in a suitcase in the living room belonging to the Defendant and her husband. No other facts are proven. Under these facts, the State has proven that the drugs belong to the Defendant, the drugs belong to the Defendant and her husband or the drugs belong to the husband. Under these facts the jury will have two-third chance of convicting a guilty party if they convict the defendant. Is a two-thirds chance substantial circumstantial evidence to convict? Or should the trial court, or the appellate court on appeal, direct a verdict of not guilty because

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[7] The code section provides, "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused."

the State has not eliminated the one-third chance of the defendant being actually innocent?[8]

Here, the State has not eliminated the innocent explanation that Mr. Gentry had no knowledge of any plan of Mr. Johnson to murder his girl friend. Even assuming Mr. Gentry gave a firearm to Mr. Johnson, this fact does not eliminate the innocent explanation that Mr. Gentry did not know of Mr. Johnson's intent to kill his girlfriend. Before this conviction can be upheld, this Court is required to make the determination that the reasonable explanation of innocence has been eliminated by the proof presented by the State. Only then can this Court truly conclude the circumstantial evidence is in this case is substantial. To sustain a conviction, the State is required to eliminate the innocent explanation. If the State has not proven Mr. Gentry knew Mr. Johnson was going to kill his girlfriend, the proof fails. The State undertook the burden to prove Mr. Gentry had the knowledge that Mr. Johnson wanted to kill his girlfriend. In that proof, they failed.

Just as this Court is bound by the United States Supreme Court decision in *Jackson*, this Court is also bound by the Fourth Circuit Court of Appeals decisions as to the constitutional sufficiency of the evidence. In *Goldsmith v. Witkowski*, 981 F.2d 697 (4th Cir. 1992), the Fourth Circuit reversed a drug conviction that was based upon circumstantial evidence. The defendant was found in the house sitting at a table with illegal drugs being on the table. The testimony established that the apartment did not belong to Mr. Goldsmith. The Fourth Circuit, applying the *Jackson* standard of review, reversed the conviction. This Court, without referring to the substantial circumstantial evidence standard of review, had affirmed the conviction. The Fourth

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[8] An interesting discussion about the probability of guilt is contained in Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARVARD L. REV. 1187 (1979)

Circuit stated, "Essentially, the government only proved Goldsmith's presence in the apartment and his awareness of the drugs. Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs." *Id.* at 701. After recognizing that the openness of the drugs permitted an inference Mr. Goldsmith had knowledge of the presence of the drugs, the Court further said, "The state courts in this case, however, did not point to any evidence from which a jury could infer dominion or control. Nor do we find such requisite record evidence of that element of the state offense as would meet the *Jackson* standard." *Id.* The Fourth Circuit, thus, gave credence to the reasonable explanation of innocence that Mr. Goldsmith did not have dominion or control over the drugs that this Court had rejected. To the Fourth Circuit, failure to exclude the innocent explanation of lack of dominion and control was a lack of substantial circumstantial evidence. The Fourth Circuit rejected the right of a jury to infer dominion and control with no proof Mr. Goldsmith had that right.

The circumstantial evidence charge to the jury and the appellate review should put a heavy burden on the State to prove its case to the very high standard required in a criminal case. An argument can be made they should be the same. The Court of Appeals in the opinion below cited *Bennett,* in support of affirming the conviction. *Bennett,* in ruling against the directed verdict motion. stated, "However, when ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" *Id.* at 236-237, 781 S.E.2d at 354. If this Court had applied this same standard in *Bostick, Arnold,* and *Hernandez,* all three of those cases

would have been affirmed on appeal. In each case, the trial judge did look at the evidence, and inferences from that evidence, in the light most favorable to the State, and concluded that case should be submitted to the jury. Has this court now applied a different standard in *Bennett*? This Court made an interesting comment in footnote one of the opinion when it said, "We recognize in this area of ever-evolving jurisprudence our inquiry is necessarily fact-intensive; therefore, the holdings in those cases are limited to their peculiar facts." *Id.* 237, 781 S.E.2d at 354. When the standard of review in a circumstantial evidence case is "ever-evolving" how can any trial lawyer, trial judge, or any appellate court know what the rule is as to when a case should be submitted to the jury or reversed on appeal. The time has come for this Court to speak definitively as to the standard of review as to circumstantial evidence cases. When, as in this case, the facts are undisputed, the trial court and the appellate court are in as good a position as the jury to determine, not the facts, but the inferences from the facts. This Court needs to definitively say, a jury is not permitted to speculate as to the inferences. This case is speculation as to what the inferences mean.

As two authors have stated as to the exclusion of an innocent explanation of innocence charge and appellate review:

> To assure jury compliance with this instruction, the standard for appellate review of sufficiency of the evidence claims should focus on whether there is any reasonable possibility of innocence, and the reviewing court should assess the rationality of inferences from circumstantial evidence to assure that guilt has been established beyond a reasonable doubt. Although such a charge and standard for review impinge to some extent on the jury's fact finding role, they do not intrude on the jury's authority to assess credibility, because only the rationality of the jury's inferences from circumstantial evidence and their sufficiency are being tested.
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> Irene Merker Rosenberga andYale L. Rosenberg *"Perhaps What Ye Say is Based Only on Conjecture"--Circumstantial Evidence, Then and Now* 31 Hous. L. Rev. 1371, 1424 (1995)

The standard of review from the denial of a direct verdict is *de novo.* Thus, an appellate court uses the same standard of review in a circumstantial evidence case, such as this, as the trial court. No credibility findings need to be made. On undisputed facts, the appellate court is in exactly the same position as the trial judge in reviewing the evidence. A *de novo* review can have no other meaning.

When the standard of proof before a jury or the standard of review by an appellate court is lessened, it, of course, makes it much easier for the State to convict the guilty. But, especially in circumstantial evidence cases, it also makes it much easier for the State to convict the innocent. As one court has said, "[P]ermitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent." *Commonwealth v. Bujanowski*, 418 Pa.Super. 163, 172, 613 A.2d 1227, 1232 (1992).

Question II

Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory after the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, which would tend to prove that Mr. Gentry knew Tremaine Pierre Johnson had killed Brechue Wiles and that he willfully aided Mr. Johnson in covering up the murder?

For a person to be guilty of accessory after the fact, this Court has said three factors must be present.

> An accessary after the fact is one who, knowing a felony to have been committed receives, relieves, comforts, or assists the felon. * * *. Three conditions must unite to render one an

> accessary after the fact: (1) The felony must be complete. (2) The accessary must have knowledge that the principal committed the felony. (3) The accessary must harbor or assist the principal felon.
> *State v. Nicholson*, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952)

In addition, the refusal of a person to give information does not make one guilty of accessory after the fact even if the refusal, in some manner, aids in the cover up of the crime. "Where, however, the speaker reasonably believes that the information concealed could be used against her in a criminal prosecution as an accessory or principal in the underlying felony, then the privilege bars a misprision prosecution." *State v. Smith*, 357 S.C. 182, 186, 592 S.E.2d 302, 304(2004). While *Smith* involved a misprision of a felony, the statement also applies to accessory after the fact. Based upon the facts, Mr. Gentry had a reasonable basis for believing if he told of any of his innocent involvement, he could have been prosecuted. This is especially true considering that without giving a statement to the police, he was arrested for accessory before and after the fact to murder. The investigators would not be required to believe an innocent explanation.

As to accessory after the fact, neither the indictment nor the charge to the jury contains a *mens rea*. The accessory after the fact indictment and jury charge does contain a requirement that Mr. Gentry had knowledge that a murder by Mr. Johnson had been committed, but contains no *mens rea* as to wilfully aiding Mr. Johnson in covering up the murder. As stated in Question I, the *mens rea* for an accessory is the same as the underlying crime. Thus, the *mens rea* for accessory after the fact to murder is willfully.

The principles discussed in Question I as to the proper standard of review in circumstantial evidence cases also applies to this question. As with accessory before the fact, the

evidence as to accessory after the fact is also circumstantial. The evidence should be viewed by the same standard of review.

The evidence as to accessory after the fact is also devoid of any evidence that Mr. Gentry took any action to harbor or assist Mr. Johnson in concealing the crime. The record contains little, if any, evidence he knew a murder had been committed. The indictment as to accessory after the fact alleges no facts to constitute the crime. App. at 525. In his closing argument, Solicitor Barnette only makes references to the searches found on his phone.[9] He does not explain how these searches made Mr Gentry guilty of accessory after the fact. The facts do not show, and Mr. Barnette did not argue, that any of the searches hindered the investigation or aided Mr. Johnson in any manner.

The main pieces of evidence against Mr. Gentry as to accessory after the fact are internet searches listed in Exhibit 22. App. at 524. These searches are for a gun on a website called "Cheaper Than Dirt." In addition, there are searches about stolen pistols. Assuming these searches prove what the State contends — that Mr. Gentry knew at the time of the search his firearm had been used in a murder, the searches did nothing to cover up the crime or harbor or assist Mr. Johnson. Nothing in the record even suggests the searches were done at the request of Mr. Johnson. If Mr. Gentry had carried through on the searches and actually reported the pistol as being stolen or bought one to replace the one the State believed he gave Mr. Johnson, then

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[9] In his closing argument, Solicitor Barnette makes references to statements by Mr. Gentry in which Mr. Gentry claimed he knew where the missing pistol is located. App. at 426, ll 8 - 18. Officer William Reece, who conducted the search of Mr. Gentry's car and house, never testified as to statements made by Mr. Gentry. At a pre-trial hearing, the State stated they were not going to introduce statements by Mr. Gentry. App. at 41, ll 16 - 21; 43, ll 21 - 25; 44, ll 7 - 17.

perhaps, the State could argue Mr. Gentry might be guilty of accessory after the fact if he had the required intent. Mr. Gentry did not even get rid of the box the gun came in nor the ammunition that was of the same type used in the shooting. He did nothing to aid or assist Mr. Johnson in covering up the crime.[10]

The State also showed that after the murder, Mr. Gentry did not produce the firearm he purchased over a year earlier. This fact does not support a claim he was guilty of accessory after the fact to the murder. To conclude from this fact that Mr. Gentry knew a murder had been committed with his weapon is speculation and certainly not substantial circumstantial evidence to sustain a conviction. As noted above, Mr. Gentry was under no obligation to aid the police in their investigation of the murder. The indictment does not allege the failure to turn over the gun as a basis for making him an accessory. Nor did the State argue this theory. As noted in Issue I, the State has the burden of proving Mr. Gentry knew of the crime and covered it up. The State cannot rely upon inaction on the part of Mr. Gentry to prove the crime. He was only under an obligation not to lie to them if they asked him questions. The State has failed in its effort to prove Robert Gentry was guilty of accessory after the fact.

The State has not proven any action of Mr. Gentry aided Mr. Johnson. The Court of Appeals makes reference to the numerous searches Mr. Gentry made after the murder occurred. *State v. Gentry*, Op. № 2025-UP-016 (S.C.Ct.App. filed January 15, 2025) at 3-4. The Court of Appeals never explained how these searches ever aided Mr. Johnson in covering up the crime.

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[10] These internet searches at best are some evidence that Mr. Gentry learned of the murder after it occurred. Logic would dictate that if Mr. Gentry knew of the plan to use his weapon in a murder before hand, a plan to dispose of the weapon would have been made before the searches. This would be circumstantial evidence he is not guilty of accessory before the fact.

The Court of Appeals makes reference to the fact that Mr. Gentry asked Mr. Johnson to contact him when he was done. No other statement or evidence remotely suggests that this was in reference to a murder. Asking someone to contact them when they are done, does not remotely provide evidence as to accessory after the fact. Ironically, the Court of Appeals used the same statement as proof of accessory before the fact. *Id.* at 2.

In the opinion of the case against Mr. Johnson, the court of appeals stated, "Further, the State provided evidence that in the days following the murder, Johnson worked with his co-defendant to dispose of the murder weapon." *State v. Johnson,* Op. № 2025-UP-018 (S.C.Ct.App. filed Jan. 23, 2025) at 3. The record in this case contains no evidence to suggest that Mr. Gentry and Mr. Johnson disposed of any weapon. The facts do not support this claim.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari, establish a standard of review where the appellate courts should also review the evidence to decide, considering the undisputed facts, whether the State has eliminated all reasonable hypotheses of innocence and reverse the two convictions in this case as the facts were not sufficient to convict.

April 1, 2025

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI-COA
APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole

Appellant Case No 2025-000454
Lower Case Nos. 2019-GS-42-02503, 02504

State of South Carolina, ... Respondent,
vs.

Robert T. Gentry . . . . . Petitioner.

CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for Attorney for the Appellant in the above entitled case. That on April 1, 2025, I did send via US Mail and e-mail, a copy of the Petition for Writ of Certiorari and Appendix to:

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April 1, 2025

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