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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. 2019-GS-42-02503, 02504

State of South Carolina, ... Respondent,

vs.

Robert T. Gentry ..... Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

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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?

The first question to be resolved is exactly what is the State required to prove to convict Robert Tyrell Gentry of being an accessory before the fact to murder? In the Statement of Facts the Respondent suggests that the State need only prove Mr. Gentry, "provided his co-defendant, Tremaine Johnson, with the handgun with which Johnson murdered his girlfriend, Brechue Wiles (victim) at a park in Spartanburg." Ret. of Resp. at 1. This simplistic statement is arguably in keeping with the definition generally used by this Court in defining accessory before the fact.

This Court has said, "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). This definition would permit a conviction of the defendant if he merely, "in some way aided them, to commit the offense." In this case, supplying the weapon to commit the crime would in some way aid in committing of the offense. The charge to the jury suggested this is all that is required. The trial judge told the jury, "In this particular case that would require that Robert Tyrell Gentry be proven to have in some manner provided aid or

assistance to Tremaine Pierre Johnson in his commission of the crime of murder." App. at 500, ll 20-23. As the State suggested in its Return, the mere supplying of the weapon with no knowledge it was to be used in a murder would be sufficient to sustain the conviction. As circumstantial evidence that Mr. Gentry supplied the weapon exists, the charge to the jury would permit a conviction simply because of that circumstantial evidence. That is not the law in South Carolina.

As noted in the Petition, the *mens rea* for accessory before the fact to murder is the same *mens rea* as for murder. As the act by Mr. Gentry would is required to have been committed wilfully, this would mean Mr. Gentry would have to know Mr. Johnson was going to commit a murder and not that he just wilfully gave Mr. Johnson the pistol. On the issue of knowledge by Mr. Gentry this record in this case falls short. The discussion here should be did the State present substantial circumstantial evidence to prove Mr. Gentry provide a weapon to Mr. Johnson knowing Mr. Johnson was going to commit a murder. This is what is alleged in the indictment. App. at 521.

Under "Reasons Why the Petition Should Be Denied," the State errs in several respects. True, the directed verdict standard has been, and continues to be in a circumstantial evidence case, whether the State has produced substantial circumstantial evidence. The State appears to argue that this Court has defined the phrase, "substantial circumstantial evidence." They say the definition is "if any rational factfinder could find guilt beyond a reasonable doubt." Ret. of Resp. at 2. This definition does not tell a rational fact finder what "substantial circumstantial evidence" means. A jury needs to be told what substantial circumstantial evidence means.

Second, the State argues that, as suggested by the Petitioner, the case has not been proven

if a not guilty verdict is possible misstates the position of the Respondent. At no time has Petitioner argued that any possible explanation of innocence is sufficient to acquit. The Petitioner has argued, "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." Pet. at 4. Petitioner has never argued that any fanciful possible explanation of innocence is sufficient for a directed verdict.

The merits of the directed verdict claim have been very clearly presented at trial. App. at 401, l 17 to 403, l 21. The attorney for Mr. Gentry clearly argued the lack of knowledge by Mr. Gentry that Mr. Johnson was going to commit a crime. App. at 402, ll 16-18. The argument by the State as to Mr. Gentry uses the fact that Mr. Gentry made searches for reporting a lost gun as the basis for substantial circumstantial evidence of accessory before the fact. App. at 410, l 20 to 411, l 21. The trial court simply said substantial circumstantial evidence existed without citing any of the substantial evidence. App. at 412, ll 14-25. Whether an argument is made that the State must prove any knowledge of a crime or the specific crime of murder is a distinction without a difference. The indictment said murder. Had the trial judge had an adequate definition of substantial circumstantial evidence, this case would not have survived a directed verdict.

This Court has said, and the State in its return has argued, "When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). No question exists as to whether the facts must be view in the light most favorable to the State. However, once the facts are viewed in the light most favorable to the State, a serious question

exists as to whether the inferences from those facts should be viewed in the light most favorable to the State. This Court, as noted in the Petition, has reversed a circumstantial evidence case because the inferences from the facts were not sufficient to convict. Under the standard of review set forth in *Cherry*, no circumstantial evidence case in this State would ever be reversed. In the cases cited in Petition, *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), all involved facts which if the inferences from those facts were viewed in the light most favorable to the State, would result in affirming the convictions and not reversing them.

In *State v. Odems*, 395 S.C. 582, 590–91, 720 S.E.2d 48, 52–53 (2011) this Court said, "The State's key circumstantial evidence: (1) Petitioner's location in the getaway car a relatively short time after the robbery; (2) Petitioner's flight from law enforcement; and (3) Petitioner's attempt to enlist the assistance of an uninvolved individual, do not point to his guilt for the crimes charged to the exclusion of every other reasonable hypothesis-namely, the notion that he did in fact join Dawkins at a gas station following the crime." In that case, when discussing the standard of review as to the evidence, this Court said, "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." *Id.* at 586, 720 S.E.2d at 50. This Court did not say the inferences from those facts are to be viewed in the light most favorable to the State.

This court first used the concept of viewing inferences in the light most favorable to the State when it said, "But, viewing the evidence, and the inferences which may reasonably be drawn therefrom, in its most favorable light for the State, which is the accepted position on a motion to direct a verdict, we are of the opinion that it is of sufficient probative value to warrant

its submission to the jury." *State v. Brown*, 205 S.C. 514, ___, 32 S.E.2d 825, 827 (1945)(internal citations omitted). Viewing all inferences in the light most favorable to the State could cause a jury to convict when there is only a modicum of evidence in violation of *Jackson v. Virginia*, 443 U.S. 307 (1979). If this Court truly believes when there are equally conflicting inferences the jury is allowed to choose between equally compelling inferences, then this Court has greatly watered down the reasonable doubt standard. As on author has said:

> The "conflicting inferences" theory, as a purported application of the beyond a reasonable doubt standard in judicial review, is configured bApp.dly and will affirm a guilty verdict on mere evidence of guilt. Thus, it not only erroneously allows a jury to choose guilt over innocence when there is evidence supporting inferences of both, but it also allows a reviewing court to defer to and affirm this finding. Appellate courts will uphold too many erroneous convictions under this standard.
> Julie S. Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 247 (2007)

Granting the Petition in this case gives this Court the opportunity to clarify the law in this ever evolving standard of review as used in South Carolina.

Elements of Accessory Before the Fact to Murder

The State appears to be urging the law to go where it has not gone before. To contend, as the State does, that a conviction for accessory before the fact of murder can be obtained by proving the principal intended to commit any crime is not the law and should not be the law. Ret. of Resp. at 7. Under this theory, Mr. Gentry could lend Mr. Johnson a firearm to go hunting knowing Mr. Johnson is a convicted felon and cannot possess a firearm. If Mr. Johnson then uses the firearm to murder someone, then under that theory, Mr. Gentry would be guilty of accessory before the fact of murder. This Court should not adopt such a bApp.d holding.

South Carolina Code § 16-1-40 provides, "A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon." While this section contains no *mens rea*, as noted in the Petition, at common law one guilty of accessory before the facts must have the same *mens rea* as the crime actually committed.

The State, in attempt to water down the *mens rea* makes reference to *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977) and *State v. Foster*, 202 Conn. 520, 522 A.2d 277 (1987). In *Asfoor*, he was "charged with intentionally aiding and abetting the commission of the crime of injury by negligent use of a weapon." Id. at 427, 249 N.W.2d at 536. The case was decided on the law involving aiding and abetting and the liability of a defendant for the consequences of his actions. Being present at the scene aiding and abetting can make a person liable for a crime he had no intention to commit.

In *Foster*, which is a strange accessory before the fact case, the Court used language that is actually helpful to Mr. Gentry. The Court said, "[A]n accessory may be liable in aiding another if he acts intentionally, knowingly, recklessly or with criminal negligence toward the result, depending on the mental state required by the substantive crime." *Id.* at 531, 522 A.2d at 283. This case again confirms the *mens rea* of the person guilty of accessory before the fact, is the same as the person who commits the substantive crime.

The State then attempts to equate the act of Mr. Gentry giving a firearm and ammunition to Mr. Johnson to be equivalent of "a reckless disregard for human life." Ret. Resp. at 11. The State then attempts to equate this act to bringing a gun to a drug deal. Ret. Of Resp. at 12. The

analogy does not work.

In an attempt to show Mr. Gentry has criminal liability, the State notes that the jury could infer that Mr. Gentry gave Mr. Johnson the firearm. Shortly after the body was discovered, Mr. Gentry started a search for "gun" and how to report a stolen firearm. To infer from this that Mr. Gentry had a firearm does not seem logical. Also, based upon these searches the other logical inference is that he had no idea Mr. Johnson was going to use his firearm in a murder. If they had a plan to use the pistol in a murder, logic would dictate that they would have had a plan to dispose of the gun without calling attention to the fact.

Then, based upon telephone calls with no context given and evidence of messages back and forth with little context given, the State says the jury can assume Mr. Gentry knew Mr. Johnson was going to murder his girlfriend. What specific facts enable a jury to make this leap? The State seems to suggest the mere fact they were in touch with each other. With no context as to the phone calls and little context as to the messages, such a factual leap cannot be made. The inference of Mr. Gentry's gun being used in this crime is based upon specific facts that lead to such logical conclusion. Here, the absence of specific facts should not lead to a conclusion that has no factual basis. The jury should not be entitled to infer that which does not exist. As any discussion of an intent to murder the girlfriend of Mr. Johnson does not exist, there is no basis for the jury to infer it does.

The State further argues, "[T]he furtive conduct by both Gentry and Johnson to arrange the transfer of Gentry's 40 caliber Smith & Wesson to Johnson, with the requisite TulAmmo ammunition indicates knowledge and a reckless disregard for human life on Gentry's part because his conduct indicates knowledge he was providing the weapon to Johnson for some

illicit and dangerous purpose." Ret. of Resp. at 11. In the entire record, there is no time, place or manner given in which the firearm in question was exchanged. How in the total absence of evidence as to when, where or how the exchange occurred can the State argue the exchange was "furtive"? The absence of evidence is not evidence of what is not proven. If this theory is the State's theory, they bear the burden of proving that theory. They have not. Nor can a jury be permitted to infer that theory when no such evidence exists. To make such a claim is mere speculation. "Speculation and conjecture cannot take the place of reasonable inferences and evidence—whether direct or circumstantial—that Juan H.—through both guilty mind and guilty act—acted in consort with Merendon." *Juan H. v. Allen*, 408 F.3d 1262, 1279 (9th Cir. 2005)

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?

Mr. Gentry has no quarrel as to the elements for accessory after the fact as stated in the Return of the Respondent. In particular Mr. Gentry agrees, "An accessory after the fact is, by the common law, one who, knowing that a felony has been committed, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment." *State v. Nicholson*, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952). The State, however, appears to give little credence to the requirement that the person accused actually helped the perpetrator evade detection or arrest. If a defendant sits down and writes a three page note detailing the plans by

which he intends to help the perpetrator avoid or arrest or defection, that person while intending to help the person is not guilty of accessory after the fact. His note did nothing to help the perpetrator avoid detection or arrest.

The State has argued the fact that Mr. Gentry searched a website about guns titled "Cheaper than Dirt" is an indication Mr. Gentry had possession of the weapon and planned to sell it. It could also be an indication Mr. Gentry did not have the gun and was looking for a replacement. Why is one inference more likely than the other. Are equal inferences sufficient to convict? No evidence in this record remotely suggest that Mr. Gentry obtained the firearm from Mr. Johnson after the murder. The State then concludes, "There is sufficient evidence that Gentry disposed of the weapon or coordinated its disposition with Johnson, with the intent to aid Johnson." Ret. of Resp. at 15. The State however fails point to any such evidence other than the very ambiguous web searches.

How did searching for guns on "Cheaper than Dirt" aid Johnson in avoiding detection or arrest? The State has provided no answer. How did searching for how to report a gun lost or stolen aid Mr. Johnson? Again, the State has provided no answer.

The State has further argued that Mr. Gentry deleted nearly every contact with Johnson which is an action reasonably calculated to (1) assist Johnson in hiding the transfer of the weapon to Johnson and (2) conceal their communications after the murder." Ret. of Resp. at 15. Again, the State is arguing that the absence of evidence is evidence. As the messages were deleted, no one knows what was in the messages. With no knowledge as to what the messages said, the State can hardly argue a deleted message helped Mr. Johnson avoid detection. A message deleted on Mr. Gentry's phone can still appear on Mr. Johnson's phone. Simply put, the State

has not shown any action by Mr. Gentry that reasonably shows he aided or assisted Mr. Johnson in covering up this crime.

The State cites to several cases about a defendant assisting in destroying evidence as being evidence of accessory after the fact. *United States v. Elkins*, 732 F.2d 1280 (6th Cir. 1984) involved an attempt to destroy evidence so the evidence still existed. *United States v. Lepanto*, 817 F.2d 1463 (10th Cir. 1987) involved the defendant dumping a carpet which contained evidence of the crime in a dumpster. The carpet was recovered. Neither are applicable to this case except for the general well accepted proposition that destroying evidence of a crime makes on an accessory after the crime. The evidence destroyed has to be evidence of the crime. None existed in this case. The State failed to prove substantial circumstantial evidence existed as to this charge.

CONCLUSION

For the reasons given in the Petition for Writ of Certiorari and the forgoing reasons, this Court should grant the Petition and define substantial circumstantial evidence, find that the evidence in this case does not fit the definition and reverse the two convictions.

May 15, 2025

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