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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Honorable Roger M. Young, Sr., Trial Judge
Honorable Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2025-000337

SAMUEL SMILEY

APPELLANT,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial court make an unconstitutional comment on the facts when it instructed the jury mere agreement with another's criminal plan makes one an accessory before the fact because it closely mirrored the State's theory of guilt and closing argument?

2. Did the trial court err by charging the jury an accessory before the fact includes one who "advised, agreed, [or] urged" the commission of a crime because that is an incorrect statement of law and improperly expands the conduct proscribed by statute?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Should this Court address the merits when Appellant did not object to this charge but in fact requested it himself?

2. Was the charge an unconstitutional comment on the facts when the court did not comment on the facts or elevate any fact in evidence, but rather charged the jury on the jury on the meaning of the offense of accessory before the fact—which it was constitutionally required to do—by listing seven verbs that could define the offense?

3. Was the language of the charge—which tracked South Carolina cases defining accessory before the fact—a proper statement of law?

4. Was any error in the court's use of the word "agreed" harmless beyond a reasonable doubt here where the State never argued the jury could convict based solely on Appellant's confession that he "agreed with the idea of a robbery," and phone records strongly corroborated Freeman's testimony that Appellant told her Brown would be waiting at the Bay?

STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In February 2013, the Charleston County Grand Jury indicted Appellant for accessory before the fact to armed robbery (2013-GS-10-0898). On November 17-19, 2014, Appellant proceeded to a jury trial before the Honorable Roger M. Young, Sr. Jason Bybee, Esquire, represented Appellant. The jury convicted Appellant as indicted, and Judge Young sentenced him to thirty years. Appellant filed a motion to reconsider, which was denied on June 25, 2021, following a hearing. Appellant did not appeal.

On December 3, 2021, Appellant filed a PCR application (2021-CP-10-5463) raising *inter alia* that counsel failed to file a notice of appeal. On March 14, 2024, an evidentiary hearing convened before the Honorable Walton J. McLeod, IV. Christopher L. Murphy, Esquire, represented Appellant. At the hearing, the State conceded Appellant was entitled to a belated direct appeal. Following a hearing, Judge McLeod issued an order granting Appellant a belated appeal pursuant to White but denying his remaining allegations.

STATEMENT OF FACTS

Appellant was indicted for accessory before the fact to armed robbery following the fatal shooting of Jarvon Dowling (Victim) in August 2012. At trial, Jane Freeman, testified she was dating Victim but was friends with Appellant and Jarvon Brown. (App. 132-33). She recalled Appellant and Brown asking her about Victim's background and how much money he carried about a month before the shooting. (App. 133-36). Freeman testified the three of them began discussing robbing Victim, and she understood "that we were going to rob him." (App. 134, 136-139). She elaborated, "Between the three of us, it wasn't really a planned thing. It was more of a freelance thing. They would ask questions. It was more of a serious thing. They would like, ask

questions, and I would tell them, and that's how we would go about it." (App. 138). Freeman stated she agreed with the plan because Victim was "sexually active with another co-acquaintance of mine." (App. 140). Freeman testified they had around "four to five different conversations" about robbing Victim. (App. 160).

On the day of the shooting, Freeman called Appellant several times to update him on what she and Victim were doing.[1] (App. 142-44). According to Freeman, they initially planned to rob Victim in Ladson, but she texted Appellant and told him not to come because Victim had picked up a friend who had a gun. (App. 142-45). She stated they dropped off the friend around 1:00 a.m. and headed downtown. (App. 146). Freeman testified Appellant called her and told her to take Victim to Bayside (also known as "the Bay"), where Brown would be waiting. (App. 146-48). She drove to Bayside, parked, and told Victim to stay in the car while she dropped off marijuana. (App. 148-49). Freeman saw Brown walking across the parking lot when she got out of the car; she did not engage him but continued to walk toward her friend's apartment. (App. 148-50). Once upstairs in the breezeway, she called Brown; he responded and asked where Victim was, and Freeman told him. (App. 151-52). Thereafter, she heard Brown approach Victim and speak to him:

> I then heard him say take off his shoes, and I heard [Victim] saying that's all he had, that's all he had. And after that, he told him to strip, and he just kept on saying that's all he had. And when he—as I heard that, I then heard three or four shots.

(App. 152). Freeman "ran over to the banister and screamed, and I saw Brown running." (App. 152). Freeman testified she did not expect Victim to be shot. (App. 155, 157). She stated Brown later threw money at her and told her he shot Victim in the chest. (App.57). Freeman subsequently told police about setting Victim up to be robbed. (App. 159-60).

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[1] The State introduced records from the phones for Appellant, Freeman, and Brown that showed multiple calls and texts between Appellant and Brown that day. (App. 27, 166-69).

In addition to Freeman's testimony, the State introduced Appellant's recorded statement to police. In his statement, Appellant admitted he and Freeman discussed robbing Victim but claimed he did not take her seriously. (10:10). He stated:

> She called me that night a couple of times, she said she was with [the victim], smoking, getting high, chilling . . .
>
> It was around like one-something she called me back and said she was downtown, and I was like, I'm going to West Ashley, I ain't staying downtown. . . . I said you better call Head, cuz Head told me she was talking to him about that too, like she was calling me, asking me if I wanted to rob on some money cuz he got some money, but I was following up, I'd be like sure, but she ain't never put, like she ain't never put me and Head together saying, like we could rob him together, she was . . . calling me straight up asking me if I wanted to rob him, then I have Head holler at me one day and say, Oh she asking me the same thing.

Appellant readily admitted to discussing the robbery with both Freeman and Brown, although he claimed he and Brown were not planning it together. He also readily admitted to communicating with Freeman throughout the night of the shooting, but he maintained he thought she was joking about the robbery.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Lemire, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Id. (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. (quoting Clark, 339 S.C. at 389, 529 S.E.2d at 539).

ARGUMENT

1. Appellant did not object to this charge but in fact requested it himself; thus, this Court should not address the merits of this unpreserved argument.

At trial, Appellant did not raise any objection to the trial court's charge. In fact, the charge he now complains about was a charge he requested at trial. (App. 18). Appellant now argues—for the first time—that the trial court's charge on the offense of accessory before the fact to armed robbery was an unconstitutional comment on the facts and a misstatement of law. However, here where Appellant not only failed to object to this charge at trial but actually requested it, this Court should not consider this argument for the first time.

a. Appellant requested this charge and cannot now complain about it on appeal.

On the first day of trial, Appellant filed Proposed Charges with the court. (App. 17-18). Pertinently, Appellant requested the following charge:

> The elements that must concur to justify the conviction of one as an accessory before the fact are: (1) that the defendant *advised and agreed, or urged* the parties or in some way aided them, to commit the offense; (2) that the defendant was not present when the offense was committed; and (3) that the principal committed the crime.

(App. 18, emphasis added). Consistent with this language, the trial court charged:

> Now, the defendant is charged with accessory before the fact of armed robbery. In order to prove this crime, the State must prove beyond a reasonable doubt that the defendant either *advised, agreed, urged*, counselled, hired, or in some way aided or abetted another person to commit a crime and that the defendant was not present when the crime or the offense was committed.
>
> Aid means to help, to promote the course of accomplishment of, to give support to and to give assistance to. Abet means to encourage or appear to favor or support.

(App. 263, emphasis added).

In his brief, Appellant—for the first time—takes issue with the court's use of the verbs

agreed and urged; he does not complain about the court's use of the verbs advised, counseled, hired, aided, or abetted; or its definitions of aid and abet.[2] (App. Br. 9-12). However, Appellant himself requested the court charge the jury that accessory before the fact could occur if the defendant "advised and *agreed, or urged* the parties . . . to commit the offense." (App. 18, emphasis added). Because Appellant requested this charge, he has waived any objection to it on appeal.[3] See State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("Further, a party cannot complain of an error which his own conduct has induced."); Watson v. Sprott, 134 S.C. 367, 133 S.E. 27, 28 (1926) ("[A] party cannot on appeal complain of instructions to which he expressly or impliedly consented, or in the giving of which he acquiesced" (quoting 3 C. J. 845, § 751)).

b. As Appellant concedes, counsel did not object to the jury charge—leaving any issue related to the charge unpreserved.

Appellant argues for the first time on appeal that the charge was both an unconstitutional comment on the facts and a misstatement of the law. However, as Appellant himself concedes (App. Br. 12), he did not object to this charge at trial. Thus, this argument is not preserved, and this Court should not consider it for the first time on appeal.

"An issue may not be raised for the first time on appeal, but must have been raised to the

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[2] Throughout, Appellant complains that the trial court charged the jury it could find him guilty if he "merely 'agreed.'" The trial court, however, did not use the word "merely." Likewise, as discussed in the next section, the trial court did not elevate the verb "agree" over any other verb when defining the offense.

[3] Appellant did not raise this as an issue in his application for post-conviction relief and cannot do so now. Nonetheless, the requested charge was consistent with South Carolina law, and counsel thus was not ineffective for requesting it. See Strickland v. Washington, 466 U.S. 668, 690 (1984) ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."); Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501–02 (Ct. App. 2019) (providing a court considering an ineffective assistance of counsel claim "must consider the law as it existed at the time of trial").

trial judge to be preserved for appellate review." State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved." Id. at 142, 587 S.E.2d at 694.

Appellant did not object to this charge, leaving it patently unpreserved. (App. 242). Appellant now argues he was not required to object, citing a 1924 case that he admits "has not been utilized since." (App. Br. 12, citing State v. Orr, 128 S.C. 279, 122 S.E.2d 771 (1924) (excusing defendant's failure to object to court's misstatement to jury about facts of the case)). Not only is this not the law, but neither appellate court in our state has cited Orr for this proposition in the 100 years since Orr was decided. South Carolina law is clear: a contemporaneous objection is required to preserve a claim of error in a trial court's jury charge—even when the objection is on constitutional grounds. See State v. Daniels, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012) (holding claim that jury charge unconstitutionally shifted the burden of proof was not preserved because "[i]t is axiomatic that an objection to a jury charge may not be raised for the first time on appeal"); State v. Lemire, 406 S.C. 558, 573, 753 S.E.2d 247, 255 (Ct. App. 2013) ("As to Lemire's arguments that the charge was redundant, confusing, and tantamount to a charge on the facts, these concerns were neither raised to nor ruled upon by the trial court and are therefore not preserved for appeal."); Moses v. State, 442 S.C. 263, 268–69, 898 S.E.2d 174, 177 (Ct. App. 2024) ("South Carolina appellate courts do not follow the "plain error" standard when sitting in review of a trial court's decision."). Because this issue is patently unpreserved, this Court should not consider it.

2. In merely charging the jury on the jury on the meaning of the offense of accessory before the fact—which it was constitutionally required to do—by listing seven verbs that could define the offense, the court did not comment on the facts or elevate any fact in evidence, and the charge thus was not an unconstitutional comment on the facts.

Appellant argues the trial court's use of the words "agreed" and "urged" in its accessory charge constituted an unconstitutional comment on the facts because it mirrored one of the State's theories. (App. Br. 9-12). He contends the solicitor argued that Appellant could be convicted based only on his admission that "he told Freeman he agreed with the idea of a robbery," and thus the trial court's use of the word "agreed" as part of a list of seven verbs that defined accessory before the fact elevated this fact to the jury and constituted an unconstitutional comment on the facts. However, the State did *not* argue the jury could convict Appellant based solely on his admission that he told Freeman he agreed with the idea of a robbery.[4] Further—and critically—the trial court merely instructed the jury on the meaning of the offense of accessory—something it is constitutionally required to do. In doing so, the court did not provide any inferences the jury could draw from evidence or elevate any facts above others; rather, the judge included the verbs "agreed" and "urged" in a list of seven verbs that could constitute accessory. Thus, the charge was not an unconstitutional comment on the facts.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 26 (1895). Prior to the adoption of this constitutional amendment (and its predecessor in 1868[5]), "our circuit judges had the power to charge juries upon the evidence as well as upon the law." Norris v. Clinkscales, 47 S.C. 488, _, 25 S.E. 797, 804 (1896). The 1868

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[4] This will be addressed in section four.

[5] The 1868 version provided, "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." S.C. Const. art V, § 26 (1868).

Constitutional amendment removed from judges the right to advise or instruct the jury on facts, direct "the jury to the relevance and sufficiency of evidence," intimate the judge's opinion, aid the jury in forming its opinion of the facts, or "give the jury the aid of [the judge's] discrimination, experience, and judgment." Id. at _, 25 S.E. at 805. The 1868 amendment sought "to preserve the jury from being in any way influenced by the judge's opinion as to the facts." Id. at _, 25 S.E. at 805-06 (quoting State v. White, 15 S.C. 381, 393 (1881)). The Constitution was amended again in 1898 to (1) omit the provision that allowed judges to state the testimony and (2) mandate that judges *shall* declare the law. Id. at _, 25 S.E. at 804.

A judge violates the constitutional prohibition on charging juries on facts when "he expresses in his charge his own opinion on the force and effect of the testimony, or of any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part." Id. at _, 25 S.E. at 806. Likewise, a judge violates the constitution when he repeats testimony to the jury "either by reading it in its proper or logical order, or by grouping it with reference to the several issues of facts arising and propositions of law involved," or when the judge "call[s] the jury's attention to the evidence applicable to the questions of law or fact." Id. at _, 25 S.E. at 807.

However, "statements used in illustration of some principal of law" do not violate the constitution. Id. at _, 25 S.E. at 808, emphasis added; see also State v. Young, 238 S.C. 115, 135, 119 S.E.2d 504, 514-515 (1961) ("[A] judge does not violate this provision of the Constitution by the use of hypothetical or supposed facts for the purpose of illustrating some principle of law."), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Quick, 141 S.C. 442, __, 140 S.E. 97, 99 (1927) ("Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations."); State v. Duncan, 86 S.C. 370, __, 68 S.E. 684, 686 (1910) ("It has been decided too often to require citation of cases that a

hypothetical statement of the facts with a statement of the legal result following thereupon, is not a charge upon the facts." (emphasis added)).

In certain circumstances, "it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven." State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." State v. Cheeks, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013).

Thus, the South Carolina Supreme Court has invalidated charges that elevate facts or provide inferences. See, e.g., Burdette, 427 S.C. at 502, 832 S.E.2d at 582 (holding courts can no longer charge malice may be inferred from the use of a deadly weapon regardless of evidence presented at trial); State v. Brown, 443 S.C. 196, 199, 904 S.E.2d 448, 449 (2024) ("We hold the trial court erred in giving the inferred malice instruction, for, in doing so, the trial court improperly elevated and commented to the jury upon a particular fact—the commission of a felony."); State v. Stewart, 433 S.C. 382, 858 S.E.2d 80 (2021) (holding courts shall no longer charge juries that "it may infer knowledge or possession [of drugs] when a substance is found on property under the defendant's control"; reasoning the inference is valid for juries to make and proper for attorneys to argue, but instructing the jury on the inference is improper); Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (finding improper a charge instructing juries that good character evidence of the defendant alone may create reasonable doubt); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (holding evidence of suicide-attempt may be admissible to prove

a guilty conscious, but trial courts shall not comment to the jury on such evidence); State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (holding courts shall not charge juries that the testimony of a CSC victim need not be corroborated because the charge "emphasizes the weight of that evidence in the eyes of the jury," "invites the jury to believe the victim," and "creates the inference the same is not true for the other[witnesses]"); Cheeks, 401 S.C. at 328–29, 737 S.E.2d at 484 ("[C]harging a jury that 'actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use' unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence. . . . [T]his charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.");. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721 728 (2000), overruled on other grounds by Rosemond v. Catoe, 383 S.C 320, 680 S.E2d 5 (2009) (finding trial court properly declined defendant's request to charge specific examples of legal provocation; reasoning, "the requested examples constitute a direct charge on the facts because Hughey alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. *The requested jury charge elevates the specific facts of the case*, such as spitting in a person's face, to an acceptable act of legal provocation." (emphasis added)); State v. Huckabee, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010) ("[T]he court also correctly declined defense counsel's subsequent request to charge the jury that the sale of crack cocaine in and of itself was not the fault which would eliminate the possibility of self-defense.").

Here, the judge did not restate any testimony in any manner, nor did he intimate to the jury his opinion on the evidence. Likewise, in providing a list of seven verbs to define the offense, the judge did not provide the jury with any inferences it could draw from the evidence or elevate any fact for the jury. Rather, the verbs "agree" and "urge" were used as part of a list of seven verbs

that defined the offense, including advised, counselled, hired, aided, and abetted. The court did not describe for the jury what facts in evidence could support agreeing or urging. Nothing about this charge elevated "agree" or "urge" over the other verbs; in fact, the court provided definitions of "aid" and "abet" but did not otherwise comment on the other verbs used to define the offense. The court was merely defining the law for the jury—as it is constitutionally required to do. Thus, the charge was not an unconstitutional comment on the facts.

3. The language of the charge tracked the language of South Carolina cases defining accessory before the fact and was a proper statement of law.

Appellant contends, again for the first time on appeal, that the trial court erred in instructing the jury that an agreement can constitute accessory before the fact. (App. Br. 12-20). He avers this instruction lowered the standard required by the statute and common law. He further posits that South Carolina cases finding an agreement could constitute accessory are cases dealing with the directed verdict stage rather than the jury charge and thus should not be relied upon. Appellant's unpreserved arguments, however, ignore that the legislature added the word "otherwise" to the verb "procure," showing the legislature intended the statute to be more expansive than the common law. Further, although a directed verdict standard is not always consistent with a proper jury charge, cases addressing the directed verdict standard necessarily address what elements legally constitute an offense. Thus, language of the charge was legally correct.

"At common law an accessory before the fact is one who though not the chief actor in the offense, nor present at its performance, is in some way concerned therewith before the fact; one who, though absent at the time of the offense, yet procures, counsels, and commands another to commit it." State v. Farne, 190 S.C. 75, 1 S.E.2d 912, 915 (1939). Our legislature subsequently codified the offense of accessory to provide:

> 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.

S.C. Code Ann. § 16-1-40.

Since the enactment of this statute, multiple South Carolina appellate decisions have set forth the following elements for accessory before the fact: "The State must prove: (1) the accused advised and agreed, urged, or in some way aided some other person to commit the offense; (2) the accused was not present when the offense was committed; and (3) some principal committed the offense." State v. Claypoole, 371 S.C. 473, 478, 639 S.E.2d 466, 468 (Ct. App. 2006) (citing Farne, 190 S.C. at 84, 1 S.E.2d at 915–16); see also Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) ("To support a conviction of accessory before the fact of a felony, the prosecution must show that the accused advised, agreed, urged, or in some way aided some other person to commit the offense; the accused was not present when the offense was committed; and some principal committed the crime."); State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993) ("Accessory before the fact of murder requires a showing that the accused: (1) either advised and agreed, urged, or in some way aided some other person to commit the offense; (2) was not present when the offense was committed; and (3) that some principal committed the crime."); State v. Prince, 316 S.C. 56, 64, 447 S.E.2d 177, 181 (1993) (same); State v. Greuling, 257 S.C. 515, 523-24, 186 S.E.2d 706, 709-10 (1972) (same).

The jury charge here is consistent with the foregoing cases and is a correct statement of South Carolina law. Much of Appellant's argument that this was an incorrect statement of law is premised on the common law. However, when drafting the statute, the legislature added the word "otherwise" to procures—indicating an intent to make the statutory offense more expansive than

the common law. Because this is a statutory offense, common law cases—while instructive—are not dispositive to what constitutes the statutory offense of accessory before the fact.

The remainder of Appellant's argument focuses on whether the language itself should be charged—not whether it is a correct statement of law. (App. Br. 17-20). However, the issue of whether a court can *charge* a jury that an agreement constitutes accessory is different than the issue of whether, as a matter of law, an agreement constitutes accessory. Thus, although cases addressing the directed verdict stage are not always applicable to what can be *charged*, cases setting forth the elements that constitute accessory are absolutely applicable to the issue of whether the elements charged were *legally* correct. Appellant seemingly recognizes this in his petition by raising this as two separate issues, although he conflates these issues throughout his second argument. (App. Br. 12-20). The trial court's charge here was legally correct and consistent with South Carolina law, and Appellant has not set forth a compelling basis to change South Carolina precedent. Thus, as a matter of law, the charge was legally correct.

4. Here, where the State never argued the jury could convict based solely on Appellant's confession that he "agreed with the idea of a robbery," and phone records strongly corroborated Freeman's testimony that Appellant told her Brown would be waiting at the Bay, any error in the trial court's use of the word "agreed" was harmless beyond a reasonable doubt.

Appellant argues the erroneous charge was not harmless because the jury could have disbelieved Freeman but convicted Appellant based only on his "agreement." In support, Appellant asserts that the State argued in closing "that regardless of Freeman's testimony, by Appellant's own admission he "agreed" with the idea of the robbery and was therefore guilty." (App. Br. 20). He avers that because the State made this argument, the jury could have "disbelieved Freeman and convicted Appellant based on his mere agreement." However, Appellant's argument—as framed—is a misstatement of what the State actually argued. Further, this argument ignores phone

records that strongly corroborated Freeman's testimony that Appellant told her Brown would be waiting at the Bay. Thus, the court's use of the verb "agree" is harmless beyond a reasonable doubt.

"An erroneous instruction alone is insufficient to warrant this Court's reversal. Errors, including erroneous jury instructions, are subject to harmless error analysis." Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (internal quotation marks omitted). "When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." Id. (internal quotation marks omitted). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id.

Appellant's argument that the State argued the jury could convict him based solely on his admission that he agreed with the idea of a robbery is a misstatement of what the State actually argued. The State *never* argued to the jury that it could convict Appellant based solely on his confession that he "agreed with the idea of a robbery." Rather, in setting forth the evidence that supported accessory, the State—after recounting Freeman's testimony—argued:

> At the very least you heard Mr. Smiley himself made calls, to call ahead. He told officers, I knew she was trying to plan a robbery. She was trying to plan it with me. I know she was trying to plan it with Javon Brown. She called me, wanted me to help her out.
>
> I told her I'm in West Ashley. You need to call Head. You need to call Javon Brown. At the very least, he told officers he was trying to put her in contact with somebody who could help her carry it out; can't help you commit this crime. I'm going to put you in contact with someone who can. Here is somebody who can help you out. I'm going to make sure that you can get this done; at the very least, in some way aiding someone to commit the offense. At the very least, Mr. Smiley told officers that's what he did, but we've got a whole lot more here, a whole lot more.

> *Mr. Smiley said in his own interview with the police, 15 different times he referenced conversations with Ms. Freeman about robbing Mr. Dowling. He referenced agreeing with her to carry out the armed robbery. He referenced communicating with her and telling her to contact Head, call Javon Brown, 15 different times.*
>
> *He told Sergeant Kosarko about several different conversations that happened on different days, at different times, where Ms. Freeman mentioned to him, Let's rob Jarvon Dowling, and he said, Aill right. Sure. Yeah, let's do it.*
>
> *He told officers on numerous occasions he agreed to help her do this. He appeared to favor and support her plan. Nine different times in his interview with Sergeant Kosarko the defendant stated that when Ms. Freeman specifically said, Let's rob the victim, he said All right, nine different times. He said, All right. Let's do it.*
>
> *Now,* ***counselling constitutes being an accessory, and it means assisting and advising another on the commission with the intent to further the act without actually participating in the act itself.***

(App. 247-48, emphasis added[6]). Here, the State merely recounted the evidence that supported accessory; the State did not argue the jury could convict Appellant based solely on Appellant's confession that he agreed with the idea of a robbery. Likewise, although the State argued that Appellant "referenced agreeing with her to carry out the armed robbery," it did not even use the word agreement in its statement on the meaning of accessory. In context, the closing argument does not support Appellant's contention that the solicitor misled the jury to convict Appellant based solely on an admission of a "mere agreement." Thus, the State's closing argument does not support Appellant's contention that he suffered prejudice from the trial court's use of the word "agree" in defining the offense of accessory.

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[6] The italicized portion is the portion Appellant relies on in asserting the State argued "that even if the jury did not believe Freeman's testimony, it should still find Appellant guilty because he admitted in the interrogation that he agreed with Freeman's idea." (App. Br. 6-7).

Likewise, Appellant's prejudice argument ignores the phone records that corroborated Freeman's testimony about numerous phone calls and texts between her and Appellant on the night of the shooting. Critically, the records showed Freeman called Appellant at 1:14 a.m., and that call lasted just over two minutes; Appellant called Brown at 1:17 a.m. and that call lasted one minute and thirteen seconds; and then Appellant called Freeman back at 1:22 a.m.[7] (App. 228-30). This is compelling circumstantial evidence that corroborated Freeman's testimony that Appellant told her Brown would be at the Bay. Based on the foregoing, the trial court's use of the word "agree" did not contribute to the verdict, and any error is harmless beyond a reasonable doubt.

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[7] The call to police about the shooting occurred at 1:38 a.m. (App. 190, 249).

CONCLUSION

Based on the foregoing, this Court should affirm.

Respectfully Submitted,

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