

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County

Steven H. John, Circuit Court Judge

RECEIVED
DEC 04 2013
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER MILLER,

APPELLANT

APPELLATE CASE NO. 2011-197146

FINAL BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
ARGUMENT	14
I. Appellant Christopher Miller is entitled to a directed verdict on the charge of criminal conspiracy where the State failed to prove any facts that would reasonably support an agreement between himself and co-defendant Keri Pope or anyone else to commit murder and where the evidence presented by the State merely raises a mere suspicion of Miller's alleged guilt.	
II. Where the Trial Court directed a verdict as to co-defendant Keri Pope on the criminal conspiracy charge and the State did not prove that Appellant Christopher Miller conspired with anyone else but Keri Pope to commit murder, Miller's conviction for criminal conspiracy must be set aside where the acquittal of the only other possible co-conspirator negates the possibility of an agreement which is an essential element of the crime of conspiracy.	
CONCLUSION	27

TABLE OF AUTHORITIES

Cases

<u>Direct Sales Co. v. U.S.</u> , 319 U.S. 703 (1943).....	15
<u>State v. Abraham</u> , 780 A.2d 2230 (Conn. App. Ct. 2001)	24,25
<u>State v. Ameker</u> , 73 S.C. 330, 53 S.E. 484 (1906).....	16,19
<u>State v. Buckmon</u> , 347 S.C. 316, 555 S.E.2d 402 (2011)	15
<u>State v. Crawford</u> , 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005)	15, 16, 23
<u>State v. Crocker</u> , 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005).....	15
<u>State v. Gunn</u> , 313 S.C. 124, 437 S.E.2d 75 (1993).....	15
<u>State v. Larmand</u> , 402 S.C. 184, 739 S.E.2d 898 (Ct. App. 2013)	17
<u>State v. Miller</u> , 223 S.C. 128, 74 S.E.2d 582 (1953).....	15
<u>State v. Odems</u> , 395 S.C. 582, 720 S.E.2d 48 (2011)	14
<u>State v. Pinckney</u> , 339 S.C. 346, 529 S.E.2d 526 (2000)	14
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984).....	14

Other Authorities

William Sheppard McAnich & W. Gaston Fairey, <i>The Criminal Law of South Carolina</i> , 476 (4 th ed. 2002).....	16
--	----

Statutes

S.C. Code Ann. § 16-17-410.....	15,27
---------------------------------	-------

STATEMENT OF ISSUES ON APPEAL

- I. Appellant Christopher Miller is entitled to a directed verdict on the charge of criminal conspiracy where the State failed to prove any facts that would reasonably support an agreement between himself and co-defendant Keri Pope or anyone else to commit murder and where the evidence presented by the State merely raises a mere suspicion of Miller's alleged guilt.
- II. Where the Trial Court directed a verdict as to co-defendant Keri Pope on the criminal conspiracy charge and the State did not prove that Appellant Christopher Miller conspired with anyone else but Keri Pope to commit murder, Miller's conviction for criminal conspiracy must be set aside where the acquittal of the only other possible co-conspirator negates the possibility of an agreement which is an essential element of the crime of conspiracy.

STATEMENT OF THE CASE

On August 12, 2009, Appellant Christopher Neal Miller was indicted by the Georgetown County Grand Jury on (1) one count of murder in the death of Joey Pope; and (2) one count of criminal conspiracy. R.935. His co-defendant, Keri Fore Pope, was also indicted on (1) one count of murder; and (2) one count of criminal conspiracy. R. 2, ll. 17-19.

A trial was held before the Honorable Steven H. John and a jury on July 21-22 and 25-29, 2011. R. 1; July 27, R. 285; July 28, R. 588; July 29 R. 837. Miller and his co-defendant, Keri Pope, were tried together. R. 2, ll. 17-19. Miller was represented by Wesley Locklair. R. 1. Keri Pope was represented by John H. Hilliard, III; Julia M. Bass; and Keita C. Sakata. Id. The State was represented by Assistant Solicitor Scott R. Hixson. Id.

On July 28, 2011, Judge John directed a verdict for Keri Pope for the crimes of murder and criminal conspiracy, ruling that despite her lies to the police department and inconsistencies in her statements, "submission to this jury as to the crimes of murder and criminal conspiracy would cause this jury to speculate, would cause this jury to engage in decision making where the evidence is sufficient only to raise a mere suspicion of guilt." July 28, R. 834, l. 5 – 835, l. 14.

Judge John denied Miller's directed verdict motion and allowed the case against him for murder and criminal conspiracy to proceed. July 28, R. 834, ll. 1-4.

On July 29, 2011, the jury returned a verdict of not guilty on the charge of murder against Miller. July 29, R. 927, ll. 19-23. As to the charge of criminal conspiracy, the jury found Miller guilty. July 29, R. 927, l. 24 – 928, l. 3.

Judge John sentenced Miller to five years imprisonment, the maximum penalty allowable by law for criminal conspiracy. July 29, R. 934, ll. 2-12.

Miller timely served and filed his Notice of Appeal on August 5, 2011.

STATEMENT OF FACTS

In the evening hours on May 27, 2003 around 11:45 p.m., members of the Georgetown, S.C. police department and Georgetown County E.M.S. responded to a call in regard to a shooting at a home on Highmarket Street. R. 3, l. 21 – 4, l. 16; 32, ll. 20-24; 42, ll. 8-11; 635, ll. 21-25; July 27, R. 392, l. 21 – 393, l. 2. The complainant that dialed 911 and stated that her husband had been shot was Keri Pope. R. 42, ll. 13-20; 59, ll. 17-20.

Joey Pope was found in his bed with gunshot wounds, and a deceased dog that also appeared to be shot was lying in the hallway. R. 12, ll. 1; 13, ll. 5-7, 17-18; 19, ll. 23-24. When EMS arrived on the scene, an officer and Joey Pope's wife, Keri Pope were performing C.P.R. on Joey Pope. R. 37, l. 25 – 38, l. 2.

Joey Pope was taken to the hospital where he later died of his gunshot wounds. R. 25, ll. 2-5; 26, ll. 18-21; 136, l. 17 – 137, l. 6; July 27, R. 393, ll. 3-5.

Statement of Keri Pope

On May 29, 2003, two days after Joey Pope's murder, Keri Pope described the events that transpired on the day of her husband's murder. July 27, R. 358, ll. 5-22.

Keri Pope said that she picked up Joey from his job at the Georgetown County Detention Center, where he had begun work approximately three weeks prior, a few minutes after 6:00 p.m. The two of them then went to Wal-Mart and walked around a little bit. They had arrived at the Wal-Mart around 6:15 to 6:30 p.m. They bought a ball for their thirteen month old daughter and went to the Blockbuster located inside the Wal-Mart. She spoke with a friend of her who worked there, Tiffany Cooper, and Joey rented a game. When they went into Wal-Mart, Keri asked Joey to put some money down on her layaway for a bathing suit, and he said no.

Keri and Joey left the store around 7:00 or 7:15 p.m., and she made Joey some sandwiches. He ate the sandwiches and he began playing his video game while she watched television in the kitchen.

Around 8:00 p.m., she stopped watching television. Shortly after 8:00, she heard a knock at the front door and there were two black males at the door, one named Germane who she recognized from school. They were interested in looking at a truck that Joey had out front for sale. Joey went outside to show the truck to the two men.

The two men left, and Joey and Keri went back inside the house. Joey told Keri he needed to park his car inside the fence because the two men had asked him if he wanted to buy a CD player, so he thought they might come back and steal the stereo out of the car.

At that point, Keri said Joey went to bed. Keri finished cleaning up, cooked pork chops, and fed herself and the baby.

Keri went into the bedroom to try to get Joey up, but he told her to get out of the room.

Keri said she then received a telephone call from Joey's cousin, Shane Prince, around 9:35 p.m. or 9:40 p.m. Keri told Joey that Shane was on the telephone, but Joey waved her on and said to tell Shane to call back in thirty minutes.

Shane called back around 10:20 p.m., and Joey talked to Shane for about a minute and rolled over and went back to sleep.

At 10:30 p.m., Keri put the baby down to sleep and about ten minutes later around 10:40 p.m., she went to take the trash out. She took the trash out the front door. When she walked out front, she saw Chris Miller and Nick Lambert riding by in a car. Chris yelled

something to her and she waved as they drove by. Keri walked back inside and sat down in the den and started playing the PlayStation.

Keri then heard a knock on the side door. She thought it was going to be Chris and Nick coming back to see her. Keri asked who was out at the door and no one answered. She opened the door and stuck her face out, and when she did, she saw a black male standing on the step. Keri said she was caught off guard because she thought it was going to be Chris.

There was another black male behind the first one. Keri said she had never seen these two guys before. The two men were not wearing a disguise of any sort.

Keri asked them what the two men what they wanted, and they said they wanted to talk about the truck.

Keri said the men asked about Joey, and she informed them that Joey was asleep. According to Keri, "the guy said good, and he then reached in, in the door, with his left hand and grabbed - - started pushing on the door." Keri tried to push back and said her pit bull was barking. Keri said she never yelled, but was concentrating on keeping the door closed.

Keri said the one of the men pushed his way inside and grabbed the necklace she had around her neck and pulled her back with that. He pushed her into the house with the necklace before it broke. Keri and the man went down the hallway. She was not sure if the man led her to Joey's bedroom or if she had led him to Joey.

As soon as Keri walks into the doorway of the bedroom, she flips on the light and yells, "Joey, get up." She is screaming for Joey to get up, and Joey at that point wakes up and kind of turns over with his hand up to block the light. Keri said the man then stepped beside her and fired a shot into Joey's stomach. The man fired a second shot into Joey's

stomach. The man then walked around the left side of the bed and shot Joey three more times in the head.

Keri also heard a gun go off in the hallway, and so she looked and saw the other guy shooting the dog out in the hallway.

When the men were done, they did not say a word to her and one man told the other one, "come on, we've got to go."

At that point, Keri is offering them what money she has, saying take what you want because they thought the men were going to look through the rest of the house. The two men, however, nonchalantly walked straight out the side door.

Keri said she was confused at first. She did not know if she ran to Joey first or to the telephone to dial 911. She started to dial 911, but then decided to go get a gun out of the kitchen closet. She looked at the door to see if she could see the two men but she never saw them.

She then dialed 911 and either hung up or got disconnected, ran back into the room where Joey was located, found a cordless phone and dialed 911. 911 called her back because she had hung up. Law enforcement arrived shortly after that. July 27, R. 361, l. 4 – 101, l. 17.

At subsequent questionings, Keri admitted that she and Chris Miller had previously had a physical relationship. July 28, R. 752, ll. 5-18.

Statement of Christopher Miller

Miller stated on the day Joey Pope's murder, he was at Chris Bonds' house with Nick Lambert on Duke Street. The three of them were there for a period of time. Officers

from the Georgetown Police Department came down there to interview them about an unrelated incident that had taken place.

Approximately thirty minutes after that interview, Chris and Nick left, traveled down Duke Street, went to Highmarket Street, and traveled past the Pope house. At that time, Chris observed Keri taking out the trash. Chris stuck his head out of the window and hollered at her and then they went from there to his house.

A short time later Chris received a telephone call from Tabitha Hanna saying that Joey had been shot, so Chris left to go to the hospital. Chris asserted that he did not go into the Pope home that night. July 28, R. 610, l. 3 – 611, l. 14.

Testimony of James Delton Goude, Jr.

James Goude testified that he knew Joey and Keri Pope, as well as Christopher Miller. R. 220, l. 20 – 221, l. 21. He also said that Joey Pope and Christopher Miller had a close relationship and that Chris was often at Joey's house. R. 221, l. 25 – 222, l. 6. James Goude said on the night of May 27, 2003, he ate at a restaurant with this wife, and after that, around 9:30 or 9:45 p.m., they were going to stop by Joey's house. Goude slowed down to turn into Joey's driveway, but they noticed that Chris' car was there and Goude's wife said, it's late, let's just go home. Goude claimed he saw Keri at the door with Chris and someone he thought was Nick Lambert walking behind Chris. R. 229, ll. 1-16. Goude maintained that Keri was at the side door with her left arm holding the door, with Chris and someone he assumed was Nick walking in the house even though he did not see Nick's face. R. 230, ll. 11-13; 252, l. 13 – 253, l. 3.

Goude, however, had also provided a statement to the police that he had only seen Chris' car with its headlights on at the Pope house and that he had not specifically seen Chris walking into the Pope house. R. 275, l. 7 – 277, l. 11.

Testimony of Angel Goude

Angel Goude, the wife of James Goude, and who also knew the Popes and Chris Miller, said that on the night of May 27, 2003 when she and James drove by the Pope house after eating dinner, she did not see Chris or anybody over at the Pope home, although her husband had told her that Chris' car was there. R. 279, l. 18 – 281, l. 8. She also claimed she overheard Chris at the hospital say something about how he was the one that found Joey and called 911. R. 283, ll. 9-21.

Testimony of Tabitha Hanna

Tabitha Hanna was a sixteen-year old friend of Joey and Keri Pope. On May 27, 2003, she claimed she stopped by the Pope house between 9:45 and 10:15 p.m., knocked on the door, but since no one answered, she left. She said that she did not hear the dog barking, even though when she had gone to the house before and knocked, the dog had always barked. July 27, R. 474, l. 6 – 475, l. 21. She initially insisted she found out at 10:30 p.m. that Joey had been shot but later changed her statement to the time she found as 11:30 p.m. after being refreshed with a statement she made to law enforcement on June 13, 2003. July 27, R. 476, ll. 8-15; 478, l. 11 – 479, l. 14.

Tabitha also said she did not see Chris Miller's car parked near the Pope's home at any point in time that night and testified that Chris' car was broken down in 2003. July 27, R. 493, ll. 6-19.

Tabitha said she called Chris with the news that Joey had been shot. July 27, R. 477, ll. 1-4.

Testimony of Tiffany Cooper

Tiffany Cooper confirmed that on May 27, 2003, Keri and Joey came into the Blockbuster where she was working. She said Joey and Keri seemed a little distant, like perhaps they had gotten into an argument. July 27, R. 500, ll. 8-24.

Tiffany testified that later in the evening, between 11:00 and 11:30 p.m., Keri telephoned her and said that she and Joey had been in an argument. Tiffany asserted that Keri said Chris and a few other people had been over at the house, but they had already left. July 27, R. 501, l. 8 – 502, l. 9. Keri also allegedly told Tiffany that “she didn’t think it was going to work any more.” July 27, R. 502, ll. 10-14.

Tiffany also said that Keri had told her that she and Chris Miller had had a physical relationship before. July 27, R. 500, ll. 5-7.

Tiffany also confirmed that she was aware that Keri and Joey Pope had an abusive relationship. July 27, R. 496, l. 23 – 499, l. 1.

Testimony of Roger Darrell Banks

Roger Banks was also knew Keri and Joey Pope, as well as Christopher Miller. July 27, R. 562, l. 10 – 563, l. 10. His testimony confirmed that Joey Pope was involved in various drug dealing activities. July 27, R. 568, l. 8 – 573, l. 8.

Testimony of Bruce Richardson

Bruce Richardson also testified at trial. He is currently serving an eighteen year sentence for first degree burglary. Richardson said he had the occasion to be in jail with Christopher Miller at some point in time, and that he was approached by Chris Miller at the

law library where Chris allegedly asked Richardson to help him with some legal research. Chris allegedly said that he needed to research murder cases because he only shot and killed a dog, and that he could not be guilty of murder.

Chris purportedly told Richardson that he was driven over to Joey Pope's house by a guy named Nick Lambert and that he was supposed to go in and shoot Joey Pope. When Chris allegedly saw Joey lying in bed asleep, Chris could not shoot him. Chris purportedly backed down, shots were fired, and as a result the dog charged him from the bed and so Chris shot and killed the dog. July 27, R. 533, l. 18 – 536, l. 25.

For his testimony against Chris, Richardson admitted he had asked to be transferred to an institution closer to his home and was hopeful for a reduction in his sentence. July 27, R. 535, ll. 11-14; 539, ll. 5-25.

Testimony of Bruce Taylor

Bruce Taylor, also currently incarcerated, said he had spoken with Chris Miller about the charges pending against Miller, and that Miller apparently said the State did not have any evidence and that no evidence was left behind. July 28, R. 731, l. 8 – 733, l. 10.

ARGUMENT

Appellant Christopher Miller is entitled to a directed verdict on the charge of criminal conspiracy for two separate reasons. First, the State failed to prove any facts that would reasonably support an agreement between himself and Keri Pope or anyone else to murder Joey Pope. The State's evidence against Miller only raised a mere suspicion of his guilt. Second, where the Trial Court directed a verdict as to Keri Pope on the criminal conspiracy charge and the State did not prove that Miller conspired with anyone else to commit murder, Miller's conviction for criminal conspiracy must be set aside where the acquittal of the only other possible co-conspirator negates the possibility of an agreement. Accordingly, the criminal conspiracy conviction against Miller must be reversed.

- I. Appellant Christopher Miller is entitled to a directed verdict on the charge of criminal conspiracy where the State failed to prove any facts that would reasonably support an agreement between himself and co-defendant Keri Pope or anyone else to commit murder and where the evidence presented by the State merely raises a mere suspicion of Miller's alleged guilt.**

On appeal from the denial of a directed verdict, the Court must view the evidence in the light most favorable to the State. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). The defendant is entitled to a directed verdict when the State fails to provide evidence of the offense charged. Id. However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). A circuit judge should grant a directed verdict motion when the evidence raises merely a suspicion the accused is guilty. State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984).

S.C. Code Ann. § 16-17-410 defines a conspiracy as “a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means.” Proof of a conspiracy is often necessarily by circumstantial evidence alone. State v. Miller, 223 S.C. 128, 133, 74 S.E.2d 582, 585 (1953). Nevertheless, “the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy.” State v. Crocker, 366 S.C. 394, 406, 621 S.E.2d 890, 897 (Ct. App. 2005). The appellate courts, in viewing the sufficiency of the evidence to support a charge of conspiracy, “must exercise caution to ensure the proof is not obtained ‘by piling inference upon inference.’” State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 81 (1993) (quoting Direct Sales Co. v. U.S., 319 U.S. 703, 711 (1943)).

“The gravamen of the offense of conspiracy is the agreement, or combination.” State v. Crawford, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005). The very essence of a conspiracy is the agreement. State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2011).

For criminal conspiracy, it is not necessary to prove an overt act. The gist of the crime is the unlawful combination, and the crime is then complete even if nothing further is done. Crawford, 362 S.C. at 637, 608 S.E.2d at 891.

A formal or express agreement is not required to prove criminal conspiracy. “A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end.” Id. (internal citations omitted).

Professor McAnich has explained: “The mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a

conspiracy.” William Shepard McAnich & W. Gaston Fairey, *The Criminal Law of South Carolina*, 476 (4th ed. 2002).

This State’s Supreme Court approved the following explanation of conspiracy given by the trial judge:

[S]uppose, Mr. Foreman, that you and the gentleman on your left would go out in the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it. It is an *agreement* to do an unlawful act that is the gist of the whole matter.

State v. Ameker, 73 S.C. 330, 339, 53 S.E. 484, 487 (1906).

The guilty act of the conspiracy is the agreement, and that is what the State’s evidence must prove. Crawford, 362 S.C. at 641, 608 S.E.2d at 893.

In this case, the State presented no direct or substantial circumstantial evidence that Miller had any agreement between himself and Keri Pope or any other person to commit the murder of Joey Pope.

Viewing the evidence in the light most favorable to the State, the only evidence offered at trial against Miller was the following:

1. That at some point in time he had a physical relationship with Keri Pope, although the State presented no evidence as to how long this relationship may have lasted, when it occurred, and whether it was still occurring at the time of Joey Pope’s death;
2. James Goude claimed he saw Miller walking into the Pope home with Keri around 9:45 p.m. on May 27, 2003;
3. Tiffany Cooper testified she had a telephone conversation with Keri around 11:00 p.m. on the evening of May 27, 2003 in which Keri allegedly said Miller had left her house;
4. Angel Goude thought she overheard Miller at the hospital saying that he found Joey Pope and called 911;
5. The evidence indicated that two guns were used on May 27, 2003 – one to kill Joey Pope and one to kill the dog;

6. Bruce Taylor claimed Miller told him the State had no evidence against him for the murder of Joey Pope and no evidence was left behind; and
7. Bruce Richardson contended that Miller told him that on the day in question, he was driven over to Joey Pope's house by Nick Lambert and that Miller was supposed to go in and shoot Joey Pope, but that he backed out and when shots were fired and the dog charged him from the bed, Miller allegedly shot and killed the dog.

The above was the entirety of the evidence in the record as to Miller, and none of this evidence establishes that Miller had any agreement with anyone to do an unlawful act. The State is improperly trying to pile inference upon inference to obtain a guilty verdict against Miller on criminal conspiracy.

That Miller once had a physical relationship with Keri Pope shows absolutely nothing with respect to whether they had an agreement to commit murder. That Miller may have been at the Pope home on the night of May 27, 2003 also shows nothing, especially where the evidence at trial established that he was good friends with the Popes and often at their house. R. 221, l. 25 – 222, l. 6. That he and Keri Pope were together at the same place does not establish an agreement to commit murder. See State v. Larmand, 402 S.C. 184, 739 S.E.2d 898, 903 (Ct. App. 2013) (holding that evidence that the defendant and another man arrived at the same place together did not constitute evidence from which the jury could infer the defendant and the other man had a common agreement and understanding to injure the victim or point a firearm at the victim; therefore, the trial court erred in denying the defendant's motion for directed verdict).

Angel Goude's belief that she may have overheard Miller at the hospital saying that he found Joey Pope and called 911 is not evidence of any agreement between Miller and anyone to commit murder. At most, this evidence perhaps points to whether Miller

murdered Joey Pope, but the jury has already rejected such a contention by finding Miller not guilty of murder.

Whether two separate guns were used to kill Joey Pope and the dog also does not point to any agreement between Chris Miller and anyone when there is no evidence linking Miller to the guns used and where it is also completely speculative that it was necessarily two people that used the two guns. One person could have shot both Joey Pope and the dog with different guns.

Bruce Taylor's testimony that Miller said the State had no evidence against him and that no evidence was left behind is also not evidence of some unlawful combination between Miller and another person. In fact, the jury found Miller not guilty of murder, supporting Miller's assertion that the State did not have any evidence against him. Even if Miller claimed no evidence was left behind and a jury thought he meant he made sure no evidence was left behind, such a statement still does not indicate that he conspired with someone else to commit murder.

Bruce Richardson's testimony likewise does not establish an unlawful combination between Miller and anyone else to commit murder in order to sustain a guilty verdict against Miller on the criminal conspiracy charge. Even if Bruce's testimony were believable, it only shows that Nick Lambert drove Miller over to the Pope home. That Nick Lambert allegedly drove Miller over to the Pope home does not indicate that Nick and Miller had any sort of agreement to commit the murder of Joey Pope. Richardson's testimony does not disclose that Nick ever got out of the car or ever knew why Miller was going over to the Pope home. Richardson's testimony does not show that Miller and Nick had any sort of agreement for purposes of criminal conspiracy.

Richardson contends that Miller said he was supposed to go in and shoot Joey Pope. Again, this statement does not show that Miller had any agreement with anyone to murder Joey Pope. Perhaps the statement shows that Miller had some intent to go kill Pope on his own, but again that, if true, is only evidence of the murder charge of which the jury found Miller not guilty.

Richardson then testified that Miller backed out of shooting Joey Pope and shot the dog when it charged from the bed after shots were fired. Richardson's testimony, again if believable, may indicate that someone else must have fired shots at Joey Pope, but that is, however, not evidence that Miller had any agreement with anyone to commit the murder of Joey Pope. Richardson's testimony does not reveal who shot Joey Pope, whether that person arrived with Miller, whether Miller knew someone else was going to be arriving to shoot Joey Pope, or whether Miller even knew who was shooting Joey Pope. Richardson's statement provides no information about this other shooter.

Richardson's testimony provides nothing more than rank speculation that this other shooter and Miller had some agreement to kill Joey Pope. Someone that wanted Joey Pope dead, perhaps because of Joey's drug dealing activities or his stint as a confidential informant, could have walked in and shot Joey Pope even if Miller was allegedly there at the same time. It was not disputed that Joey Pope was involved in drug dealing activities and there were persons out there that may have wanted to seek retaliation against Joey Pope. July 28, R. 663, l. 7 – 664, l. 1; 667, l. 10 – 678, l. 9. As our State's Supreme Court in Ameker observed, if two people assault another person at the same time, that is an unlawful act but not a conspiracy where there is no agreement between the two assailants to do the act prior to doing it. 73 S.C. at 339, 53 S.E. at 487.

Having no direct or substantial circumstantial evidence against Miller, the State in its closing argument to the jury heavily relied upon the alleged acts of Keri Pope and her inconsistent statements in the State's attempt to persuade the jury that Miller was guilty of criminal conspiracy. The State stressed Keri's abusive relationship with Joey Pope, that he had threatened to kill her. The State highlighted the fact that Keri thought she would receive Joey's \$75,000.00 in life insurance benefits upon his death. The State relied upon Keri's statements that Miller was not at her house the night of the murder. July 29, R. 845-896.

The State pointed out inconsistencies in Keri's story to law enforcement about what happened on the night her husband was killed. The State brought up Keri's statement to law enforcement that she felt like gunshot residue was all over her, but a gunshot residue test came back negative. The State submitted to the jury that Keri made that statement to law enforcement because she knew she had fired the weapon that killed her husband and she did not know what the results of the gunshot residue tests would be so she wanted to have a reason why the tests might come back positive. July 29, R. 869.

The State emphasized that Joey Pope was not shot in the stomach as Keri told law enforcement. The State pointed out that even though Keri said no pillow was placed over her husband's head before he was shot, the evidence established that someone put a pillow over Joey Pope's head before that person shot Joey because during his autopsy pillow stuffing was pulled from his gunshot wound to the head. July 29, R. 880-893.

The State pointed out evidence that a law enforcement officer who specialized in tracking could not find any tracks of anyone going the direction that Keri said the attackers left. July 29, R. 874-876.

The State argued to the jury that Keri lied to law enforcement when she said she saw her husband's killers at Wal-Mart in the sock department in the days after the murder when law enforcement could not find any evidence after viewing the Wal-Mart surveillance tapes that Keri was at Wal-Mart on the day she said she was there. July 29, R. 878.

The State focused on Keri's state of mind, including her diary entry from February 27, 2002, written more than a year before Joey Pope was killed. Keri apparently wrote: "I can't leave him, he'll kill me. I'm really scared, he's gotten out of control, I'm afraid he'll lose his temper and hurt her. I ruined my life and my daughter's, I ruined everything, I really want to leave all the pain. . . . I fear for her [Keri's daughter] life now and really a lot after she's born. She's going to have enough problems, God bless, or God, I wish someone would help me." July 29, R. 894-895.

The entirety of the State's closing argument to the jury focused on Keri Pope and what she did or did not do and what motive she had to murder her husband, Joey Pope. July 29, R. 845-896. The Trial Court, however, found that none of this evidence was sufficient to submit the charges of murder and criminal conspiracy against Keri Pope to the jury:

As to the defendant Keri Fore Pope and the charges of murder and criminal conspiracy, I find in this particular case in looking at the evidence in the light most favorable to the State, that there's certainly evidence that Ms. Pope either misled or lied to the police department. That's certainly a reasonable inference that can be garnered from the testimony. I'm not saying whether it is or isn't, but it's certainly a reasonable inference from the testimony that she misled or lied to the police. I don't think there's any question about that.

There's inconsistencies in her statement. I don't think there's any question about that. It's even acknowledged. But be that as it may, I don't think there's any question she made inconsistent statements over a period of time. The police believed that they eliminated other people that could have committed the crime.

Looking at the evidence, the Court finds that a submission to this jury as to the crimes of murder and criminal conspiracy would cause this jury to speculate, would cause this jury to engage in decision making where the evidence is sufficient only to raise a mere suspicion of guilt. That's not enough. She's not on trial for lying to the police. She's not on trial for misleading the police in this investigation, but she is charged with the crimes of murder and criminal conspiracy.

From the Court's examination of the evidence, I find the State has absolutely failed in its responsibility to produce evidence that a jury could use to find her guilty of the crimes of murder and criminal conspiracy. They would be engaging in pure speculation to do so. That is not proper. Therefore, the motion of the defendant Keri Fore Pope for directed verdict as to the crimes of murder and criminal conspiracy is hereby granted.

July 28, R. 834, l. 5 – 835, l. 14.

The evidence the State had against Keri Pope only raised a mere suspicion of her guilt and was insufficient for a jury to decide whether she was guilty of murder or criminal conspiracy, but the State nevertheless focused almost exclusively on this purely speculative evidence against Keri to obtain a conviction against Miller for criminal conspiracy. The evidence that is purely speculative against Keri is just as speculative against Miller.

The scant evidence the State has presented against Miller as to whether he combined with another person to commit the murder of Joey Pope barely even raises a suspicion that Miller was guilty of criminal conspiracy. The Trial Court should have granted Miller a directed verdict on the criminal conspiracy charge, just as it did for co-defendant Keri Pope, where the evidence only raises a mere suspicion that Miller is guilty.

II. Where the Trial Court directed a verdict as to co-defendant Keri Pope on the criminal conspiracy charge and the State did not prove that Appellant Christopher Miller conspired with anyone else but Keri Pope to commit murder, Miller's conviction for criminal conspiracy must be set aside where the acquittal of the only other possible co-conspirator negates the possibility of an agreement which is an essential element of the crime of conspiracy.

There must be at least two members of a conspiracy because it takes at least two persons to enter into an agreement. State v. Crawford, 362 S.C. 627, 638, 608 S.E.2d 886, 892 (Ct. App. 2005). In this case, the State alleged that Miller conspired with co-defendant Keri Pope, and only co-defendant Keri Pope, to commit the murder of Joey Pope. The State argued to the jury in its closing argument that "Christopher Miller [is] guilty for conspiring with Keri Pope to kill her husband." July 29, R. 896, ll. 12-14.

The State's entire closing argument to the jury focused on Miller's conspiracy with Keri Pope to murder her husband Joey Pope. The State begins its closing by telling the jury that Keri was afraid of Joey Pope, that Joey had told Keri he "was going to cut her up and do what Johnny Edwards did to those boys." July 29, R. 845, ll. 13-15. Keri, according to the State, was looking for a way out and "she found one in Christopher Miller." July 29, R. 845, ll. 15-22.

The State argued that Miller willingly participated in Keri's plan to "take care of a problem" on May 27, 2003. July 29, R. 845, l. 24-18, l. 3.

The State insisted that "[Keri] and Chris were together, they were acting together and they were assisting each other in the commission of the crime" July 29, R. 851, ll. 20-23.

The State told the jury they had to decide whether or not "Christopher Miller in conjunction with Keri Pope committed this act." July 29, R. 852, ll. 15-16.

The State claimed that Keri was the person who fired the weapon that killed her husband. July 29, R. 869, ll. 7-13.

The State emphasized to the jury that a page from February 27, 2002 in Keri's diary noted Keri's fear of Joey and she begged in that diary: "God, I wish someone would help me." July 29, R. 894, l. 5 – 895, l. 1. The State then asserted to the jury that Keri Pope got help, "she got help in the form of Chris Miller She found help, she conspired with Mr. Miller, decided enough was enough, her frustrations prompted her toward an intentional plan as Mr. Miller drove by, saw her, he stopped, came in the house, we see him go in the house, discuss it, the time table is very vague." July 29, R. 895, ll. 2-10.

The State has never contended that Miller acted or combined with anyone other than Keri Pope to commit murder.

The Trial Court, however, found that the State "absolutely failed in its responsibility to produce evidence that a jury could use to find [Keri Pope] guilty of the crimes of murder and criminal conspiracy," observing that the jury "would be engaging in pure speculation to do so." July 28, R. 835, ll. 7-14. The Trial Court directed a verdict in favor of Keri Pope as to the crimes of murder and criminal conspiracy. *Id.* Keri Pope was the only alleged coconspirator of Miller. The State never pointed to or presented evidence of any other coconspirator.

"[T]he acquittal of a co-defendant negates the possibility of an agreement, which is an essential element of the conspiracy charge." State v. Abraham, 780 A.2d 223, 230 (Conn. App. Ct. 2001).

The Connecticut Appellate Court discussed the factual scenario where the State alleges and presents evidence of only one coconspirator, but that coconspirator is acquitted of the conspiracy in the same proceeding:

[I]t has traditionally been held that a single conspirator may not be convicted in the same proceeding or prosecution in which all of the alleged coconspirators are acquitted The apparent basis for the traditional rule is the notion that the acquittal of all but one potential conspirator negates the possibility of an agreement between the sole remaining defendant and one of those acquitted of the conspiracy and thereby denies, by definition, the existence of any conspiracy at all.

The gravamen of the crime of conspiracy is the *unlawful combination* Because the essence of the conspiracy is the mental confederation of two or more persons, the crime is in every sense indivisible

. . . .

Further, this court and our Supreme Court have on several occasions stated that the conviction of one defendant and the acquittal of the other in a joint trial of two alleged coconspirators constitutes a legal impossibility and cannot stand.

Id. at 231-32 (emphasis in original).

In the instant matter, the State prosecuted the case against both Miller and his co-defendant, Keri Pope, jointly, as co-defendants and coconspirators of the murder of Joey Pope. The State only charged one person as a coconspirator, Keri Pope, and did not allege nor introduce evidence to establish that another person had engaged in a conspiracy to commit the murder of Joey Pope with Miller on May 27, 2003.

During closing arguments, the solicitor detailed the evidence allegedly proving that Miller and Keri Pope had conspired to murder and had murdered Joey Pope on May 27, 2003. The State repeatedly emphasized during its closing that Keri Pope and Miller had conspired together to murder her husband.

Here, for Miller to have been legally convicted of conspiracy, there must be another person who was a party to the conspiracy. Because the Trial Court directed a verdict and acquitted Keri Pope of the offense of criminal conspiracy, she may not be considered as a coconspirator. The State failed to present any evidence to prove that anyone other than Keri Pope had allegedly conspired with Miller to commit the murder. The record therefore lacks any evidence of separate acts or circumstances to support an agreement to conspire between Miller and anyone else. Accordingly, Miller's conviction for criminal conspiracy to commit murder must be reversed as it constitutes a legal impossibility.

CONCLUSION

Based upon the foregoing arguments, Appellant Christopher Miller respectfully requests that this Court reverse his conviction for criminal conspiracy under S.C. CODE ANN. § 16-17-410 and issue an Order of Acquittal.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 4th, 2013



Carmen V. Ganjehsani
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

DEC 04 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Steven H. John, Circuit Court Judge

RECEIVED

DEC 04 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

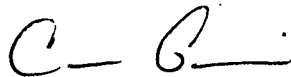
V.

CHRISTOPHER MILLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of December, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of December, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.