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December 9, 2013

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RE: Tiffany Sanders v. The State
Appellate Case No. 2012-212858

Dear Counsel:

I am enclosing two (2) copies of the Brief of Respondent Pursuant to White v. State, along with proof of service, in the above-referenced case.

Sincerely,

Salley W. Elliot
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

Cc: The Honorable Daniel E. Shearouse
(Original and 14 enclosed)
Victim Services

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County
Diana S. Goodstein, Circuit Court Judge
Deandrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-212858

THE STATE,

Respondent,

vs.

TIFFANY SANDERS,

Petitioner.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court correctly deny the motion for directed verdict because the State presented evidence of malice through the “hand of one, hand of all” accomplice liability theory?
- II. Must this Court consider a instruction issue relating to a charge for which Petitioner was acquitted; nevertheless, the charge was correct and error, if any, was harmless.

STATEMENT OF THE CASE

Tiffany Sanders (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment. The Dorchester County Grand Jury indicted Petitioner for murder (2010-GS-18-0707) and accessory before the fact of murder (2010-GS-18-1206). Michael O'Neal, Esquire, represented Petitioner at trial. A jury convicted Petitioner of murder and acquitted her of the accessory charge. On August 5, 2010, the Honorable Diane Goodstein sentenced Petitioner to thirty (30) years imprisonment. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief on August 3, 2011, and an amended application on August 24, 2011. In the application, Petitioner alleged her counsel was ineffective because he failed to interview a witness, failed to call a different witness to the stand, and failed to cross-examine a State witness. Also, Petitioner alleged that she did not knowingly and voluntarily waive her right to appeal. The State filed a return on November 20, 2011. A hearing was held on May 24, 2012, before the Honorable Deandrea Benjamin. An order was issued on July 27, 2012, denying relief on all claims, except Petitioner's knowing and voluntary waiver of her right to appeal. Petitioner was granted permission to proceed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Rule 243(i), SCACR; and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Petitioner filed two documents on June 12, 2013: a petition for certiorari appealing the denial of post-conviction relief and a brief of appellant pursuant to Rule 243(i). Petitioner filed an amended Brief of Appellant on August 7, 2013. This Brief of Respondent follows in response to the August 7, 2013, Brief of Appellant

STATEMENT OF FACTS

On June 8, 2007, Tiffany Sanders (Petitioner) lured Jesse Ham through trickery into her car and drove him to a secluded location where her boyfriend, Sean Kammerer, shot Jesse four times with a pistol. 2 App. 358.¹

Earlier that day, Jesse Ham and three of his friends (Kevin King, David Hughey, and Brandon Frye) were walking down the street. 2 App. 132-33; 157-58; 172. As Petitioner drove by, the group waved her down and asked what she was doing. 2 App. 134; 157-58; 173 - 75. Petitioner retorted “Nothing with y’all,” and drove off. Id. Petitioner was accompanied by her sister, Amanda Fender. 2 App. 159. Afterwards, Jesse and the group returned to Brandon’s house. 2 App. 172-73. Sean Kammerer, Petitioner’s co-defendant, called Petitioner, asked her who she was with, and directed Petitioner to bring Jesse to Publix. 2 App. 223.

Twenty minutes later, the group heard Petitioner honking her horn in front of Brandon’s house. 2 App. 134; 160; 175. She specifically asked for Kevin and Jesse but not by name. 2 App. 176. Jesse and Kevin met with Petitioner, who asked them what their names were. 2 App. 135; 160-61. At first Jesse and Kevin lied, telling her their names were Ben and Kyle, but Petitioner insisted she knew a girl who urgently wanted to meet Jesse at a nearby McDonald’s. Petitioner pleaded with them for thirty to forty-five minutes to come with her. 2 App. 135-136 161 - 66. Petitioner also answered and talked on her cell phone several times during her interaction with Jesse and Kevin. 2 App. 136. Suspicious, Kevin put his ear to the phone while Petitioner talked and heard a man’s voice. Id. However, when Jesse took the cell phone he heard a woman’s voice. Id. Jesse was hesitant, but decided to believe Petitioner. 2 App. 137. Kevin, concerned about his friend, sat in the back right passenger seat behind Jesse as Petitioner

¹ The appendix has two separately paginated volumes. Volume 1 is the post-conviction relief proceedings, cited in this brief as 1 App. #. Volume 2 is the trial transcript, cited in this brief as 2 App. #.

started the car. Id.; 150-52; 177. Petitioner's sister rode next to Kevin behind the driver's seat. 2 App. 138.

As Petitioner approached McDonald's, she drove around it once and drove to a nearby Publix/Tire King parking lot. 2 App. 137. She attempted to go in-between buildings, but a delivery truck blocked the alleyway. Id. Petitioner, still on the phone, stated "Oh, there's a delivery truck. I can't get behind there Okay." Id. Petitioner backed her car into an unlit, wooded area behind Publix. 2 App. 138. The car abutted the woods. 2 App. 137. Petitioner was asked to move the car to a more lighted area but Petitioner refused and turned the car off. 2 App. 138. Petitioner declared "No. We're not moving." 2 App. 139.

Petitioner was described as acting 'shady like.' She was acting like everything was fine, but it was obvious she knew something was about to happen. 2 App. 138 – 40. Kevin, now apprehensive, began to exit the car. 2 App. 138 – 140; 153. Kammerer, who had been lying in wait, put a gun up against Kevin's stomach. Id. Kevin knocked the away causing Kammerer to shoot between Kevin's legs. Kevin ran. Id. As he ran between the buildings where the delivery truck was located, Kevin heard three to four shots behind him. 2 App. 139-40. Petitioner drove away after the shots started. 2 App. 139 – 40; 202; 223. Jesse was shot four times, three in the back and one in the neck. He died at the scene. 2 App. 341 (Court's Exh. 1). Kevin explained that Kammerer and Jesse had been fighting for two to three years. 2 App. 144. Kammerer had been loudly telling everyone he was going to kill Jesse. 2 App. 144; 183. It was also common knowledge that Jesse beat Kammerer with a bat. Id. Petitioner was aware Kammerer wanted a revenge. 2 App. 224.

In preparation for the murder, Kammerer, who did not have a license, had asked his friend Dejuan Jenkins to drive him. 2 App. 200. Kammerer directed Dejuan to park behind the Tire Kingdom because Kammerer was meeting his girlfriend there. 2 App. 202. Dejuan parked

on one side of the Tire Kingdom building. 2 App. 202. They waited for Kammerer's girlfriend to arrive. Kammerer walked over to Petitioner's car when Petitioner arrived. 2 App. 202. After murdering Jesse, Kammerer got back into the car, and Dejuan took him home. 2 App. 204. Dejuan never informed the police about the shooting and later pled guilty to accessory after the fact. 2 App. 205.

Jessica Hans, a Publix employee, testified that she heard several loud pops while in the parking lot. 2 App. 195. When she looked in the direction of the pops, Jessica saw a person on the other side of the parking lot pointing a gun at the ground and eventually firing. Id. Jessica also saw another person running between two buildings. Id. After the shot was fired, Jessica saw the shooter disappear behind the side of the building. Id. Thirty seconds later, a Jeep Cherokee pulled out from the same side of the building and exited the parking lot. 2 App. 196. Jessica did not remember seeing any other vehicles at that end of the parking lot. 2 App. 197. She noted that the delivery truck Petitioner mentioned on her phone had recently pulled in to the parking lot. 2 App. 197.

Next, Petitioner drove back to Brandon's house and told Brandon "something happened." 2 App. 177. Brandon rode in the car with her to the scene. Id. While driving, Petitioner told Brandon that Petitioner, Jesse and Brandon had seen somebody come out of the woods and then Petitioner drove off, leaving the two friends. 2 App. 178. Petitioner drove around the parking lot a few times before dropping Brandon off back at his house. Id. Brandon noted she seemed fake and had "alligator tears." Id. Concerned, Brandon called and asked David to go with him to the crime scene. Id. He also instructed David to bring a gun. Id. By the time the two of them arrived at the scene the police had cordoned off the area. 2 App. 178-179. The police questioned both of them. 2 App. 179-180. Afterwards, David threw the gun into a ditch. 2 App. 169. Brandon left in the middle of questioning and was chased down. 2 App. 179-180. During

a search, the police found marijuana in his pockets, and charged him with simple possession. Afterwards, Brandon went home. 2 App. 180.

The next day, the police brought Petitioner in for questioning. She signed a confession admitting she took Jesse to the scene, but claimed she only took him there because Kammerer wanted to fight. 2 App. 342-44 (Court's Exh. 2). She also disclaimed knowledge that Kammerer had a gun. Id. Kammerer pled guilty to murder before Petitioner's trial. 2 App. 68

The State charged Petitioner with two alternative offenses: accessory before the fact to murder and murder. 2 App. 351-358. If Petitioner had been present at the scene of the murder, she would be guilty of murder, but if she had not been present, she would have been guilty of accessory before the fact of murder. Before trial, the parties stipulated that Kammerer murdered Jesse. 2 App. 341 (Court's Exh. 1).

At trial, the State argued that, under the "hand of one, hand of all" accomplice liability theory, Petitioner was guilty of murder. 2 App. 107. Petitioner and Kammerer formed a common scheme to take Jesse to a secluded location and murder him. 2 App. 107-108. The State presented testimony from Jesse's friends Kevin King, David Hughey and Brandon Frye. Also, the State also presented testimony from Jessica Hans and Dejuan Jenkins as well as testimony from two police officers, photographic evidence of the scene, and Petitioner's written confession. At the close of the State's case, Petitioner made a motion for directed verdict, arguing that the State had failed to prove malice. 2 App. 225-226. The judge denied the motion. 2 App. 228.

Petitioner did not present a case and renewed the directed verdict motion. 2 App. 235; 237. Also, she objected to the charge on accessory before the fact of murder, arguing the phrase "the crime of murder" should be used instead of "any crime." 2 App. 297-298. The judge denied this objection. 2 App. 299-300.

During deliberations, the jury asked the Court several questions. 2 App. 302-313; 345-348 (Court's Exh. 2-7). After four hours of deliberation, the jury found Petitioner guilty of murder. 2 App. 314. She was sentenced to thirty years in prison. 2 App. 324-325.

ARGUMENTS

I.

The trial court correctly denied the motion for directed verdict because the State presented evidence of malice through the “hand of one, hand of all” accomplice liability theory.

Petitioner claims the trial judge improperly denied her motion for directed verdict because the State failed to prove malice. But the State proved Petitioner was guilty through its “hand of one, hand of all” accomplice liability theory. Since Kammerer clearly demonstrated malice towards Jessie, and the “hand of one, hand of all” theory transfers liability to Petitioner, the State proved malice, and the trial court correctly denied the motion for directed verdict.

In ruling on a motion for directed verdict, a trial court is concerned with the existence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). “A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.” State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362–63 (2006). “On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State.” State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). “If there is any direct evidence or any 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. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004).

“‘Murder’ is the killing of any person with malice aforethought, either express or implied.” S.C. Code Ann. § 16-3-10 (2003). “Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing

of a wrongful act intentionally and without just cause or excuse.” Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002).

Under the “hand of one is the hand of all” theory, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by the other incidental to the execution of the common design and purpose. State v. Condrey, 349 S.C. 184, 562 S.E.2d. 320 (Ct. App. 2002); State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). “It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.” State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted); see also State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987). Under an accomplice liability theory, “a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.” Langley, 334 S.C. at 648-49, 515 S.E.2d at 101 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)).

It was stipulated at trial that Kammerer murdered Jesse Ham. 2 App. 341 (Court’s Exh. 1). Thus, Kammerer killed Jesse with malice aforethought, pursuant to the stipulation. Under accomplice liability theory, if Petitioner was (1) present at the scene and (2) through a common design aided, abetted, or assisted in the commission of that crime through some overt act, then Petitioner is also guilty of murder.

There is abundant evidence in the record before this Court to support the trial court’s denial of Petitioner’s directed verdict motions. It was common knowledge that there was bad blood between Jesse and Kammerer to the point Kammerer declared his intent to kill Jesse to anyone who would listen. Petitioner admitted she knew about the bad blood and prior physical altercations between the two as well as Kammerer’s desire

to fight Jesse that night. Kevin, David and Brandon all testified that Petitioner drove by and watched them. She left when confronted. 2 App. 134, 158, 175. Petitioner realized she was in contact with Jesse and communicated that fact to Kammerer. By cell phone, Kammerer instructed Petitioner to take Jesse to the Publix shopping area. Kevin, David and Brandon testified that Petitioner came to the house and persisted for thirty to forty-five minutes to verify Jesse's identity and to convince Jessie to go to McDonalds with her to meet an unidentified girl who urgently wanted to see Jesse. 2 App. 135, 162-63, 176-77. Petitioner was talking on her cell phone for the majority of the time.

Kevin testified that, instead of meeting a girl at McDonald's as Petitioner promised, Petitioner drove Jessie and Kevin around McDonald's to a remote, dark area behind the Publix/Tire King parking lot which abutted the woods where Kammerer was waiting. Kammerer immediately ambushed Kevin and Jesse. 2 App. 138. Petitioner admitted she took Jesse to fight with Kammerer and was on her cell phone receiving driving directions when she entered the Publix shopping area. 2 App. 342-344 (Court's Ex. 2). She drove off when the shooting started.

Dejuan Jenkins drove Sean Kammerer to the scene and away from the scene. Id. Dejuan testified that he saw Sean's girlfriend, Petitioner, in the car that transported Jesse to the scene. 2 App. 202. He drove Kammerer to that location at Kammerer's direction because he was meeting his girlfriend, Petitioner, there. Petitioner tried to call Kammerer after the shooting but was not successful. She returned to Brandon's house. She was untruthful about what happened and was described by Brandon as attempting to appear upset. Also, Petitioner confessed that Sean called her and told her to bring Jessie under false pretenses. 2 App. 342-344 (Court's Ex. 2).

After coming upon Jesse and his friends, Petitioner plotted with Kammerer to seek Jesse out at his friend's home, lure Jesse into Petitioner's car under false pretenses, and deliver Jesse to Kammerer with a full understanding of the underlying bad blood between the two, the prior physical altercations, and Kammerer's purpose. Thus, the trial court correctly denied the request for a directed verdict.

II.

This Court need not consider a jury instruction issue relating to a charge for which Petitioner was acquitted; nevertheless, the charge was correct and error, if any, was harmless.

Petitioner's contends the trial court "erred in instructing the jury that it could find the defendant guilty of murder if it found evidence that the defendant was aware of any crime." Brief of Appellant 17. But it appears the jury charge Petitioner objects to is mischaracterized by Petitioner and relates to accessory before the fact to murder, not the murder charge for which Petitioner was convicted. The charge in question is as follows:

Now, ladies and gentlemen, **we are going to first of all talk about accessory before the fact to felony.** This—the felony here being murder. And once we have talked about that offense, then we're going to talk about murder. **So, to give you an overview we're first going to talk about accessory before the fact to murder** and then we're going to talk about murder.

Ladies and gentlemen, the defendant is charged and indicted with being an accessory before the fact of murder. In order to prove this crime, the State must prove beyond a reasonable doubt that the defendant either advised, agreed, urged, counseled, hired, or in some way aided or abetted another person to commit a crime; and that the defendant was not present when the offense was committed. **The defendant may also be held criminally responsible for accessory before the fact of any other crime which is the natural and probable result of the agreed upon crime.**

Now, that concludes my instruction on accessory before the fact.

Now I'm going to talk to you about the crime of murder. . . .

2 App. 286 . (Emphasis added);see Brief of Appellant 17-22. The trial court thereafter provides a thorough instruction on the offense of murder. 2 App. 297 – 290. No objection was presented to the murder charge which followed or the trial court's later recharge on murder. 2 App. 297 – 300; 312.

Rule 208

First, Petitioner's Statement of Issues on Appeal does not match her argument. See Brief of Appellant 4, 17-22. Since Rule 208(b)(1)(B), SCACR, states that "Ordinarily, no point will be considered that is not set forth in the statement of the issues on appeal," this Court should dismiss the issue. See also State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

Jury Charge Analysis

Second, the charge about which Petitioner complains relates to the trial court's jury instruction for accessory before the fact to murder. 2 App. 286; 297. Petitioner specifically objected to the accessory before the fact charge on this ground and the court ruled relating to the accessory charge. 2 App. 297 – 300. Petitioner was acquitted by the jury of accessory before the fact to murder. Because Petitioner was acquitted of accessory before the fact charge to which this jury instruction pertained and was convicted of murder instead, the alleged error did not contribute to the guilty verdict obtained. Therefore, error, if any, was harmless. State v. Stanko, 402 S.C.252, 265, 741 S.E.2d 708, 714 (2013) (stating that erroneous jury instructions, are subject to a harmless-error analysis) . Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. State v. Martin, 403 S.C. 19, 28, 742 S.E.2d 42, 46 (2013) (quoting State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004)). The trial court made clear to the jury that the indictment for accessory before the fact to murder was a separate and distinct charge from the murder charge and that the jury "must decide each indictment separately on the evidence **and the law applicable to it,**

uninfluenced by your decision as to the other indictment.” The trial court instructed the jury that it must write a verdict of guilty or not guilty for each charge. 2 App. 273; 291 – 93 (emphasis added). The jury is presumed to have followed these instructions from the trial court. State v. Queen, 264 S.C. 515, 216 S.E.2d 182 (1975). As stated above, no objection was raised respecting the trial court’s jury instruction on murder or the recharge on murder,. 2 App. 297; 312.

Nevertheless, the instruction, taken as a whole, clearly communicated to the jury that the crime in question for accessory before the fact was murder. This point was raised to the trial court by Petitioner after the charge and the trial court revisited the language used during the charge and concluded that it was made clear to the jury that the crime for which the accessory charge related was the murder committed by Sean Kammerer. 2 App. 297. A jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990). State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (noting the substance of the law, not any particular verbiage, must be charged to the jury); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding reversal is not warranted where the charge given is substantially correct and covers the applicable law).

Accessory before the fact of murder has three elements: (1) Petitioner 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) a principal committed the crime. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993). A full and fair reading of the trial court’s charge respecting accessory after the fact reveals the court’s charge was proper.

Nevertheless, the charge as it relates to murder, was proper. Petitioner confessed she agreed to take Jessie to a clandestine location for Kammerer to attack him out of public view. 2 App. 342-344 (Court's Exh. 2). In furtherance of this common scheme, Petitioner spent a significant amount of time (thirty to fort-five minutes and several cell phone calls) luring Jessie away from the protection of his friends and their house, lied about where and why they went, and drove him to a location out of sight where Kammerer could, according to Petitioner, "fight" with him. Id., see also testimony supra p. 8-9. Murder is a natural and probable consequence for such an act. This alone is sufficient to find Petitioner guilty of accessory before the fact to murder.

Petitioner also seems to complain of another jury instruction related to malice. Brief of Appellant 21. But this argument was never raised below and is unpreserved. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal).

CONCLUSION

For all the foregoing reasons, the State asks that this Court affirm the trial court.

Respectfully submitted,

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December 9, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diana Goodstein, Circuit Court Judge (Trial)
Deandra G. Benjamin, Circuit Court Judge (PCR)

Appellate Case No. 2012-212858

THE STATE,

Respondent,

vs.

TIFFANY SANDERS


Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent pursuant to White v. State on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 9th day of December, 2013.


Angela Bennett
Administrative Assistant

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