ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM JOSEPH PHILLIPS,

APPELLANT,

Appellate Case No. 2013-001339.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF ISSUE ON APPEAL 1

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL 1

RESPONDENT'S STATEMENT OF THE CASE 2

RESPONDENT'S STATEMENT OF FACTS 3

ARGUMENT 9

The trial court did not err in denying Appellant's request to charge the jury that "in order to establish criminal liability for accessory before the fact to murder, the defendant's intent that a murder be commited [sic] by another must be proven beyond a reasonable doubt" where the jury was instructed that the State had to prove that Appellant "either procured, counseled, hired or commanded some other person to commit the crime, in this case, murder." 9

Introduction 9

How the Issue Was Raised at Trial 9

Standard of Review 11

Analysis 12

Appellant's Request Did Not Reflect South Carolina Law 12

The Trial Court Sufficiently Charged the Law of Accessory Before the Fact 18

CONCLUSION 21

TABLE OF AUTHORITIES

Statutes

1712, II., 484 14

Conn. Gen. Stat. Ann. § 53a-8 16

Cr. C. '02 § 634 (1902) 13

S.C. Code Ann. § 16-1-40 .... 12, 13, 18

S.C. Code Ann. § 16-3-10 16

Federal Cases

United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) 18

State Cases

State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003) 11

State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961) 16, 17

State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007) 17

State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011) 11

State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980) 12

State v. Farne, 190 S.C. 75, 1 S.E.2d 912 (1939) 17

State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) 11, 16

State v. Greuling, 257 S.C. 515, 186 S.E.2d 706 (1972) 17

State v. Hess, 279 S.C. 525, 309 S.E.2d 741 (1983) 12

State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) 11

State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002) 15

State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427 (1994) 13, 18

State v. Kennedy, 85 S.C. 146, 67 S.E.2d 152 (1910) 15

State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013) 11

State v. Mattison, 380 S.C. 326, 669 S.E.2d 635 (Ct. App. 2008) 19

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 11, 19, 20

State v. Sargeant, 288 Conn. 673, 954 A.2d 839 (2008) 16

State v. Thompson, 279 S.C. 405, 308 S.E.2d 364 (1983) 15

State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005) 11

Rules

Rule 20, SCRCrimP 9

Treatises

22 C.J.S. Criminal Law § 90 17

22 C.J.S. Criminal Law § 92 17

22 C.J.S. Criminal Law § 93a 17

3 Green. Ev. § 44 15

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

The trial court erred when it failed to charge the jury that in order to establish criminal liability for accessory before the fact of murder, the Appellant's intent that a murder be committed by another must be proven beyond a reasonable doubt.

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's request to charge the jury that the State had to prove beyond a reasonable doubt that Appellant intended "that a murder be committed by another" for Appellant to be guilty as an accessory before the fact of murder.

RESPONDENT'S STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant, William Joseph Phillips, in January 2013 for the murder of Charles Roberts by Jerry Leonard Allen, Jr. (R. p. 553). On June 10, 2013, Appellant's case was called to trial before the Honorable C. Victor Pyle, Jr. (R. p. 1). Appellant was represented by Cassandra Gorton during the three-day trial. (R. p. 1). Assistant Solicitor Howard Steinberg represented the State. (R. p. 1). On June 12, 2013, the jury returned a verdict of guilty. (R. p. 542, lines 1–5). Judge Pyle sentenced Appellant to life imprisonment. (R. p. 545, line 25–p. 546, line 2). Thereafter, Appellant filed a timely notice of appeal. (R. pp. 551–52).

RESPONDENT'S STATEMENT OF FACTS

Jerry "JJ" Leonard Allen, Jr. testified at trial that Appellant asked him to kill Charles Roberts (Victim). (R. p. 322, lines 5–16). Allen did not know Victim. (R. p. 13, lines 11–13; R. p. 317, lines 2–9). But Allen had a very close relationship with Appellant[1] and considered Appellant to be a mentor because Appellant had helped Allen in the past. (R. p. 314, lines 14–19). Allen was living in Appellant's home at the time. (R. p. 312, line 23–p. 315, line 4).

Victim was dating Christina Gentry, Allen's sister and Appellant's ex-girlfriend and the mother of two of Appellant's children. (R. p. 11, lines 11–18; R. p. 12, lines 4–10; R. p. 13, line 17–p. 14, line 7). Gentry and Victim had started dating shortly after she moved out of Appellant's house in March 2011. (R. p. 11, lines 19–24; R. p. 14, lines 8–11). Gentry moved in with her mother, but she testified that she would stay with Victim a couple days a week. (R. p. 11, line 25–p. 12, line 3; p. 14, lines 12–15). According to Allen, Appellant was "infatuated" with Gentry, and Appellant was "furious" when he found out Victim and Gentry were seeing each other. (R. p. 314, lines 20–23; R. p. 318, line 11–p. 319, line 6). According to Allen, Appellant offered him money and drugs in exchange for killing Victim. (R. p. 322, lines 17–23).

On July 8, 2011, Appellant did not want to wait any longer for Allen to kill Victim. (R. p. 324, lines 5–7). Appellant came up with a plan for Allen to go to Victim's house, hold him at gunpoint, and then break his neck. (R. p. 324, lines 10–13). According to Allen, Appellant provided him with a gun—a .380 Hi-Point pistol with two bullets—to use. (R. p. 324, lines 14–22). Allen went to Victim's house at 5:00 a.m. on July 8th, but he did not follow through with the plan because he "thought it was stupid" since there were a number of trailers around Victim's

[1] For example, Allen cleaned and remodeled Appellant's home, did automotive work for Appellant, and watched Appellant's kids. (R. p. 315, line 20–p. 316, line 14). Allen testified that he considered himself a "watch-dog" for Appellant. (R. p. 316, lines 4–10).

home. (R. p. 324, line 25–p. 325, line 10). Allen testified that Appellant was mad that he did not follow through with the plan, and they made another plan—for Allen "[t]o wait across in the woods and catch [Victim] when he come home from work and walk across the street, hold him at gunpoint[,] and kill him in his house." (R. p. 325, lines 15–25). However, again, Allen refused to follow through with the plan, thinking it was "kind of crazy." (R. p. 326, lines 1–5). The final plan the pair came up with was for Allen to get Victim to take him to an area under the premise of searching for an alternator to fix Appellant's van and then for Allen to shoot Victim. (R. p. 326, line 10–p. 327, line 4).

Appellant called Victim on the morning of July 8th, and, according to Allen's recollection of the phone conversation, Appellant asked Victim "if he'd take his old lady's brother to go get an alternator for the van, said the van was tore up." (R. p. 327, lines 5–13). Appellant told Victim that he could not get the alternator himself because he had to watch the kids. (R. p. 327, line 24–p. 328, line 4). Appellant then dropped Allen off up the road from Victim's house. (R. p. 328, line 25–p. 329, line 6). Appellant had given Allen very specific instructions for the murder—Allen was supposed to shoot Victim, dispose of his body in a well, and then take Victim's phone, car keys, and wallet. (R. p. 329, line 12–p. 330, line 1). According to Allen, Appellant wanted the phone "[t]o see if Christina and Charlie were having sex." (R. p. 330, lines 2–3). Appellant also directed Allen to drive Victim's car up to Gap Creek, run the car off the side of a hill into a ravine, and throw the keys in the woods. (R. p. 330, lines 4–20). Appellant was then supposed to pick Allen up from the area. (R. p. 330, lines 21–23).

Allen testified that he followed through with some parts of the plan. (R. p. 330, line 24–p. 336, line 21). In particular, Allen shot Victim in the head[2] while they looked for an alternator. (R. p. 332, line 1–p. 333, line 15). Allen then called Appellant from Victim's phone. (R. p. 333, lines 16–23). According to Allen, Appellant got sick to his stomach and started crying when Allen told him what he had done. (R. p. 333, lines 22–25). Allen then drove Victim's truck to Gap Creek Road where he called Appellant and told him to come pick him up. (R. p. 334, line 21–p. 336, line 3). Appellant was not alone when he came to pick Allen up—he was with his mother, his uncle, and his son. (R. p. 336, lines 4–9).

Allen gave the cell phone to Appellant, and Appellant asked Allen to read the text messages to him.[3] (R. p. 337, lines 12–22). Allen testified that Appellant then broke the phone and buried it. (R. p. 337, line 23–p. 338, line 1). Allen later buried the .380 pistol along with a 9mm Smith and Wesson that Appellant asked Allen to get rid of. (R. p. 338, line 8–p. 339, line 7). Allen also testified that he returned to the murder scene about a week after shooting Victim at Appellant's direction to take Victim's body and put it in the well. (R. p. 339, line 24–p. 340, line 8; R. p. 449, lines 3–25). Appellant was mad that Allen did not put the body in the well when he shot Victim. (R. p. 340, lines 20–22). When Allen returned to the body, he found it bloated with bees and yellow jacket flying around it. (R. p. 341, lines 17–23). Instead of putting

[2] Allen testified that he was "one hundred percent" certain he shot Victim in the back of the head. (R. p. 333, lines 3–7). Allen explained at trial that he thought he shot Victim in the back of the head because he saw blood coming out of Victim's eye. (R. p. 333, lines 12–15). The forensic pathologist who performed Victim's autopsy testified that Victim was shot in the face through his right eye. (R. p. 176, line 16–p. 179, line 4).

[3] Appellant has a limited ability to read and write. (R. p. 39, lines 8–13).

the body in the well, Allen dragged the body down to a creek and threw some dirt and limbs on top of it.[4] (R. p. 340, line 23–p. 342, line 12).

At trial, the State presented evidence of the calls between Victim's cell phone and Appellant's cell phone on the day of Victim's murder. (R. p. 208, line 18–p. 218, line 1). There was a call from Appellant's phone to Victim's phone at 9:22 a.m. (R. p. 211, line 21–p. 213, line 3). There were also calls from Victim's phone to Appellant's phone at 10:05, 10:06,[5] 10:14, 10:17, and 10:49 a.m. (R. p. 212, line 25–p. 214, line 2). The call at 10:05 a.m. originated near the closest cell tower to the location where Victim was killed. (R. p. 213, lines 10–22). The call at 10:14 a.m. came from the same cell tower. (R. p. 214, lines 4–6). The next call (10:17 a.m.) originated at a different cell tower. (R. p. 214, lines 7–14). The final call from Victim's phone to Appellant's phone came at 10:49 a.m. from a cell tower located just across the state line between North and South Carolina. (R. p. 214, lines 15–21). The final cell tower is the closest tower to where Victim's truck was located. (R. p. 214, lines 22–24). The call records corroborate Allen's story that Appellant first called Victim about helping Allen find an alternator and then Allen called Appellant from Victim's phone after committing the murder. (*See* R. p. 326, line 12–p. 328, line 4; R. p. 330, line 16–p. 336, line 5).

The State also presented testimony that Appellant bought a pistol prior to Victim's murder. Roy Barrett testified that Appellant called one day and asked if Barrett had a pistol that Appellant could buy, but Barrett told him no. (R. p. 94, lines 7–21). Later that day, Barrett encountered Appellant at a gas station, and Appellant, again, inquired if Barrett had a pistol for

[4] The preceding recitation of facts is consistent with Allen's testimony at trial. It is also consistent with Allen's third statement to police. (R. p. 375, line 15–p. 377, line 5). The first two statements Allen gave to police varied from his testimony at trial. (R. p. 345, line 18–p. 351, line 25).

[5] This call did not connect. (R. p. 213, line 23–p. 214, line 3).

sale. (R. p. 95, lines 1–23). According to Barrett, Appellant indicated that "he needed a throw-away gun. He'd paid a man to do a job and he was going to have to furnish the gun." (R. p. 95, line 11–p. 96, line 19). Barrett testified that he told Appellant that he would not sell Appellant a gun for any amount of money. (R. p. 95, lines 16–20). Barrett agreed that the conversation took place before Victim went missing. (R. p. 96, line 20–p. 97, line 4). T-Bird Starling confirmed that he was with Barrett when Appellant was asking about buying a gun. (R. p. 85, line 16–p. 92, line 10). Another witness, Bobby Sweet, testified that he sold Appellant a Hi-Point .380 a few days before he heard about Victim's disappearance. (R. p. 107, line 23–p. 113, line 16).

At Appellant's trial, several witnesses testified to various statements Appellant made about Victim prior to Victim's disappearance. Both Roy White and Tammie Timmons testified about an incident at a racetrack where Appellant approached White and offered him "a hundred dollars to knock that red headed mother fucker out." (R. p. 77, line 23–p. 79, line 7; R. p. 81, line 7–p. 85, line 4). According to White, Victim had light red hair, and Appellant later confirmed to White that he had been talking about Victim. (R. p. 78, line 20–p. 79, line 7). Gentry testified about an incident on June 12th where Appellant came to Victim's house, beat on his door, and started yelling threats toward Victim. (R. p. 17, line 10–p. 20, line 1). According to Gentry, Appellant "called Charlie . . . a pussy for not coming out to fight him and stuff" and threatened "to beat his eyeballs out of his sockets." (R. p. 18, lines 8–22). Later that evening Appellant called Victim's home, but Victim had called the police, so Appellant spoke with the police officer who was there. (R. p. 67, line 2–p. 69, line 11). According to the officer, Victim seemed intimidated and scared after the incident. (R. p. 67, lines 16–18).

Victim's truck was discovered on the evening of Friday, July 8th. (R. p. 232, line 16–p. 233, line 4). Police began investigating the case as a missing person's case. (R. p. 233, lines 1–

9). Victim's body was eventually discovered on August 15th. (R. p. 140, line 10–p. 141, line 20).

ARGUMENT

The trial court did not err in denying Appellant's request to charge the jury that "in order to establish criminal liability for accessory before the fact to murder, the defendant's intent that a murder be commited [sic] by another must be proven beyond a reasonable doubt" where the jury was instructed that the State had to prove that Appellant "either procured, counseled, hired or commanded some other person to commit the crime, in this case, murder."

Introduction

The trial court did not err in denying Appellant's request to charge the jury that the State had to prove beyond a reasonable doubt that Appellant intended that a murder be committed by another in order for Appellant to be guilty as an accessory before the fact of murder because the standard requested by Appellant is not the law in South Carolina. Moreover, by instructing the jury that the State had to prove beyond a reasonable doubt that Appellant "either procured, counseled, hired or commanded some other person to commit the crime, in this case, murder" the trial court sufficiently covered both the affirmative act and the intent required for accessory before the fact. (R. p. 525, lines 3–4).

How the Issue Was Raised at Trial

After the State rested its case, defense counsel requested a number of charges relating to accessory before the fact. (R. p. 470, line 9–p. 474, line 12). The trial court directed defense counsel to put her requests in writing and gave her time to do so. (R. p. 472, line 7–p. 474, line 12). After a short recess, defense counsel submitted her requests in writing.[6] (R. p. 474, line 15–p. 475, line 15). Part of defense counsel's requests included a charge that "[i]n order to establish

[6] Defense counsel failed to provide a citation for the requested charge as required by S.C. R. Crim. P. 20(a), which provides, "All requests must include accurate citation to authorities relied upon." Though defense counsel stated that she "pulled this jury charge for accessory before the fact off of the College of Charleston or Charleston Bar Association[,]" (R. p. 470, lines 14–16), she never indicated where she got the charge that she submitted regarding intent, (R. p. 470, line 9–p. 472, line 6).

criminal liability for accessory before the fact to murder, the defendant's intent that a murder be commited [sic] by another must be proven beyond a reasonable doubt." (R. pp. 547–50). The trial court reviewed the requests and filed them as Court's Exhibit 1, but Judge Pyle stated that he would charge accessory before the fact consistent with the charge he had previously shown the attorneys. (R. p. 474, line 15–p. 475, line 20).

During the charge, the court instructed the jury regarding the reasonable doubt standard. (R. p. 523, lines 1–25). The trial court also gave the following charge regarding accessory before the fact:

> Now, as you know, as I told you, the Defendant in this case is indicted for being an accessory before the fact, and in this case, that being murder. Now, in this case—in this case I charge you that an accessory before the fact is one who while being absent at the time a crime is committed did nevertheless procure, counsel or command someone else to commit that crime.
>
> Now, the Defendant in this case is not charged with murder. He is charged with being an accessory before the fact of murder. Therefore, the evidence in this case must satisfy you beyond a reasonable doubt that this Defendant counseled, hired or otherwise procured Mr. Allen to commit the murder.
>
> Now, murder, ladies and gentlemen, is the killing of any person with malice aforethought either express or implied. And as a necessary element of murder it must have been committed without just cause or excuse. Stated differently and in other words, ladies and gentlemen, an accessory before the fact is one who aids, or abets principal alleged to have committed the offense, but who was not present at its commission.
>
> The Defendant cannot be convicted unless you find that Mr. Allen actually committed the murder. However, it is not necessary that he, being Mr. Allen, has been convicted of the crime, only that he committed it.
>
> So for the Defendant in this case to be convicted, the State must prove three things. First of all, that this Defendant either procured, counseled, hired or commanded some other person to commit the crime, in this case, murder, that the Defendant was not present at the time it was committed, and, third, that Mr. Allen committed the murder.

> Now, ladies and gentlemen, if from the evidence in this case you have a reasonable doubt whether the Defendant is guilty as charged in the indictment, then it would be your duty to acquit him.

(R. p. 524, line 1–p. 525, line 10). As indicated during the charge conference, the trial court did not use the language submitted by defense counsel in its charge. (R. p. 519, line 13–p. 528, line 7).

Standard of Review

As this Court has stated, "[t]he trial court is required to charge the correct law applicable to the case. When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle." *State v. Marin*, 404 S.C. 615, 619–20, 745 S.E.2d 148, 151 (Ct. App. 2013) (citations omitted).

"'In reviewing jury charges for error, [appellate courts] must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial.'" *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)).

"'To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" *Id.* at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Zeigler*, 364 S.C. 94, 105, 610 S.E.2d 859, 865 (Ct. App. 2005) (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994)).

Analysis

Respondent submits that the trial court did not err in refusing to charge defense counsel's request regarding the criminal intent required to be liable as an accessory before the fact because the request was erroneous. Under South Carolina law, "[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 . . . ." S.C. Code Ann. § 16-1-40. As an initial matter, Respondent would note that the language used by the trial court in explaining accessory before the fact to the jury substantially tracks the statutory language of S.C. Code Ann. § 16-1-40. *See State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980) (finding no trial court error where "[g]iven the adequacy of the statutory language, appellant's request to charge was unnecessary"). As discussed in detail below, the Appellant's requested charge did not reflect South Carolina law and, thus, was properly denied, and no further charge was necessary regarding intent as the jury instructions properly covered the law of accessory before the fact in South Carolina.

Appellant's Request Did Not Reflect South Carolina Law

In his charge request, Appellant asked the trial court to inform the jury that, to be guilty as an accessory before the fact of murder, Appellant had to have had the intent "that a murder be committed by another." However, such specific intent is not required by the statute, nor has any South Carolina court established what level of intent is required for an accessory before the fact. Respondent submits that the trial court correctly rejected the request to charge specific intent without indication from the legislature or any South Carolina court that such intent comported with South Carolina law. *See State v. Hess*, 279 S.C. 525, 530, 309 S.E.2d 741, 744 (1983) (finding "requests. . . supported by no authority were properly refused").

The Supreme Court of South Carolina encountered a similar issue (where no intent was set by statute or previous case law) with respect to the charge of kidnapping in the case *State v. Jeffries*, 316 S.C. 13, 446 S.E.2d 427 (1994). In that case, Jeffries had submitted charges containing the element of "specific intent" or "purpose" for the charge of kidnapping, but the court found that the *mens rea* for kidnapping was a lesser degree of culpability, "knowledge." 316 S.C. at 18–19, 446 S.E.2d 430–31. "Because the charges requested by Jeffries on the required *mens rea* for the crime of kidnapping included a level of *mens rea* not required under [the kidnapping statute], the trial judge correctly refused to give the requested charges." *Id.* at 19–20, 446 S.E.2d at 431.

In *Jeffries* the Court "look[ed] to common law and the development of the statute to determine whether the legislature intended the crime to require a *mens rea*." *Id.* at 18, 466 S.E.2d at 430. The operative language used in defining accessory before the fact has not changed dramatically over time. For instance, an earlier version of S.C. Code Ann. § 16-1-40 enacted in 1902 states, "Whoever aids in the commission of a felony, or is accessory thereto before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the manner prescribed for the punishment of a principal felon." Cr. C. '02 § 634. That statute references an earlier "Act that Accessaries in Murder and divers Felonies shall not have the benefit of Clergy[,]" which provides:

> FOR the due punishment of such as command, counsel or hire any person or persons to commit, perpetrate or do any petty treason, wilful murder, or any of the offences in this present Act mentioned; [2] be it enacted, that all and every person and persons, that after the 1st day of March next coming **shall maliciously command, hire or counsel** any person or persons to commit or do any petty treason, wilful murder, or to do any robbery in any dwelling-house or houses, or to commit or do any robbery in or near any highway in the realm of England, or in any other the Queen's dominions, or to commit or do any robbery in any place within the marches of England against Scotland, or wilfully to burn any dwelling-house or any part thereof, or any barn then having corn or grain in the same; that

> then every such offender or offenders, and every of them, being outlawed thereof, or being thereof arraigned and found guilty by the order of the law, or being otherwise lawfully attainted or convicted of the same offence; or being arraigned thereof do stand mute of malice or forward mind, or do challenge peremptory above the number of 20 persons, or will not answer directly to such offence, shall not have the benefit of his or their clergy.

1712, II., 484 (emphasis added). Respondent notes that the laws have consistently used words that denote both affirmative act and intent in defining what is necessary to be an accessory before the fact,[7] but the legislature no longer requires that one act "maliciously" in helping another to commit a crime to be an accessory before the fact. Respondent submits that the elimination of "maliciously" in conjunction with the consistent use of language that conveys both action and intent points to the legislature's intent to require a lesser *mens rea* for liability than intent "that a murder be committed by another" for an accessory before the fact of murder.

A review of South Carolina case law does not provide much insight as to the necessary intent to be an accessory before the fact. There are a number of South Carolina cases that discuss accessory before the fact and are indicative of some of the parameters for the requisite mental state of an accessory before the fact. For example, in a case from 1910, the South Carolina Supreme Court cited the following passage approvingly:

> "If the party employed to commit a felony on one person perpetrates it by mistake upon another, the party counseling is accessory to the crime actually committed. The authorities are unanimous on the point. If the principal varies totally or substantially from the solicitation, and commits an entirely different crime—one which did not and could not have probably or naturally resulted from the effort to commit the crime incited—the person who incited him would not be accessory to the crime committed, but where, as in this case, the principal in attempting to commit the crime to which he was incited, by mistake, accident, or design, commits another crime, the person inciting is accessory to the crime actually committed. The law transfers the original wicked intent to the result."

[7] Indeed, the "counseling, hiring, or otherwise procuring" language has been consistent in the statute since 1902.

State v. Kennedy, 85 S.C. 146, 149–50, 67 S.E.2d 152, 154 (1910) (quoting 3 Green. Ev. § 44). Thus, though transferred intent applies to an accessory before the fact, it is only applicable for crimes that naturally result from the incited crime. In another case, the South Carolina Supreme Court found that a trial court properly denied a motion for directed verdict where the defendant argued "that the evidence failed to show that she intended her words to encourage [the principal] or that their effect was to encourage his commission of the crime." *State v. Thompson*, 279 S.C. 405, 408, 308 S.E.2d 364, 366 (1983). In support of its decision, the Court pointed to the following:

> [A]pproximately one week before the murder appellant told McCurry, "If you are going to do it just do it, I don't want to know about it." In light of the amorous relationship between appellant and her co-defendant and the fact that the motive for murder was to free appellant from her marriage, the evidence was sufficient to submit the case to the jury.

Id. In the more recent case of *State v. Jarrell*, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), this Court "agree[d] with [defendant] that her conviction of accessory before the fact of murder indicated that she acted with malice aforethought in planning the murder of her child." 350 S.C. at 98, 564 S.E.2d at 367.

Again, none of the above-cited cases is directly on point. Though these cases may not answer the question of what intent is required for an accessory before the fact in South Carolina, Respondent does not believe that any of these cases establish that the requisite intent is "intent that a murder be committed by another," which was the intent proffered by Appellant in his jury charge request. Respondent would further note that Appellant now cites to Connecticut law to support his contention that "[a]ccessory before the fact of murder requires proof that the defendant acted with the intent that a murder be committed by the principal." *See* Final Br. of

Appellant at 8–9. However, the Connecticut statute for accessorial liability varies considerably from the South Carolina statute in that the Connecticut statute provides in relevant part:

> "(a) A person, **acting with the mental state required for commission of an offense**, who solicits, requests, commands, importunes, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender . . . ."

State v. Sargeant, 288 Conn. 673, 675 n.2, 954 A.2d 839, 841 n.2 (2008) (quoting Conn. Gen. Stat. Ann. § 53a-8) (emphasis added). Thus, the Connecticut statute establishes the requisite mental state for accessory. Even if the South Carolina statute were the same as the Connecticut statute, the requisite mental state to be guilty as an accessory before the fact of murder would require "malice aforethought"—not specific intent as requested by Appellant. *See* S.C. Code Ann. § 16-3-10 ("'Murder' is the killing of any person with malice aforethought, either express or implied."); *see also State v. Foust*, 325 S.C. 12, 14–15 n.2, 479 S.E.2d 50, 51 n.2 (1996) ("This court has upheld murder convictions in numerous cases notwithstanding the lack of a specific intent to commit murder.").

If this Court is inclined to look to other states' law as a guide in determining the *mens rea* for accessory before the fact, Respondent would point this Court to the North Carolina case of *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961). In *Bass*, a doctor challenged his conviction as an accessory before the fact to mayhem where he numbed the fingers of a man who planned to have his fingers cut off by his brother to collect insurance money. 255 N.C. at 51, 120 S.E.2d at 587. The North Carolina Supreme Court found that Bass was an accessory before the fact to mayhem because "[Bass], with full knowledge of [the man's and his brother's] intentions, gave advice and treatment in regard to and in furtherance of the proposed line of conduct and thereby

contributed to it." *Id.* The court used the following common law definition of accessory before the fact in finding there was sufficient evidence for the conviction:

> ["]There are several elements that must concur in order to justify the conviction of one as an accessary before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime.["] 22 C.J.S. Criminal Law § 90, p. 269.[[8]]
>
> ["]The concept of accessary before the fact has been held to presuppose some prearrangement with respect to the commission of the crime in question.["] *Id.* § 92, p. 271.
>
> ["]To render one guilty as an accessary before the fact to a felony he must counsel, incite, induce, procure, or encourage the commission of the crime, so as to, in some way, participate therein by word or act . . . . It is not necessary that he shall be the originator of the design to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design . . . .["] *Id.* § 93a, pp. 271, 272.

Bass, 255 N.C. at 51–52, 120 S.E.2d at 587. Respondent submits that this same intent—knowledge plus intent to help or further the crime—would align with the history of accessory before the fact in this state but would also be inconsistent with Appellant's proposed jury instruction.

Respondent concedes that, if the jury found that Appellant had the "intent that a murder be committed by another[,]" Appellant was guilty as an accessory before the fact of Victim's murder. However, in view of the relevant South Carolina statutes and case law, Appellant's requested charge—that "in order to establish criminal liability for accessory before the fact to murder, the defendant's intent that a murder be commited [sic] by another must be proven

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[8] This same listing of the required elements for accessory before the fact has been adopted in South Carolina case law and has been cited multiple times. *See, e.g.*, *State v. Bixby*, 373 S.C. 74, 75 n.1, 644 S.E.2d 54, 55 n.1 (2007), *State v. Greuling*, 257 S.C. 515, 523–24, 186 S.E.2d 706, 709–10 (1972), *State v. Farne*, 190 S.C. 75, 84, 1 S.E.2d 912, 915–16 (1939).

beyond a reasonable doubt"—was erroneous. Thus, the trial judge properly refused Appellant's request.

The Trial Court Sufficiently Charged the Law of Accessory Before the Fact

In his brief, Appellant asserts that "[t]he jury instruction given by the trial judge did not sufficiently cover the requirement of criminal intent." Final Br. of Appellant, p. 11. The single issue in this appeal is whether the trial judge erred by refusing to charge the specific intent charge requested by Appellant. Respondent notes that Appellant neither requested a charge on general criminal intent nor objected to the absence of such a charge. Thus, to the extent Appellant now attempts to raise such a claim, that issue has not been preserved. Nevertheless, Respondent addresses this argument below.

Though S.C. Code Ann. § 16-1-40 fails to set forth the requisite intent is required to be guilty of a crime as an accessory before the fact, the words "counsel," "hire," and "otherwise procure" contemplate that at least some criminal intent is required. *See State v. Jeffries*, 316 S.C. 13, 18 n.5, 446 S.E.2d 427, 430 n.5 (1994) ("While not explicit, implied in the common law crime of kidnapping is a *mens rea* . . . . Implicit in the word "procure," as used in the statute is taking possession of the minor child with some degree of effort of knowledge."); *see also United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (finding that, as to the words "aid and assist," "abet," "procure," "command," "counsel," "advise," and "induce," "[a]ll the words used—even the most colorless 'abet'—carry an implication of purposive attitude toward it"). The trial court used the statutory language in his jury charge (with the addition of the word "command"), specifically instructing the jury that the State had to prove that Appellant "either procured, counseled, hired or commanded some other person to commit the crime, in this case, murder . . ." for Appellant to be convicted. (R. p. 525, lines 3–4). As such, Respondent submits that, despite

the absence of a general charge on criminal intent, the jury charge was not wholly without any indication as to whether intent was required for liability as an accessory before the fact. The statutory language precluded the jury from finding Appellant strictly liable for this crime.

Respondent further submits that this case is unlike *State v. Mattison*, 388 S.C. 469, 697 S.E.2d at 578 (2010), where the South Carolina Supreme Court rejected the notion that a charge could be "'implicit' in the judge's instructions." 388 S.C. at 482–84, 697 S.E.2d 585–86. Defendant Mattison had requested that the trial court charge that mere knowledge was not enough to sustain a conviction, and the Court of Appeals held:

> Implicit in the charge given to the jury was that mere knowledge a crime was going to occur, or mere association with one who commits a crime is insufficient to constitute guilt, but that Mattison must have, while present at the commission of the crime, aided, abetted, or assisted in the commission of the crime pursuant to a common design or purpose before a conviction could be had.

State v. Mattison, 380 S.C. 326, 336, 669 S.E.2d 635, 640 (Ct. App. 2008). The Supreme Court disagreed and cautioned "that to require jurors to delve into and interpret a judge's 'implicit' instructions is contrary to the purpose of a trial judge being an instructor on the law." 388 S.C. at 483, 697 S.E.2d at 586. Nevertheless, the Court affirmed Mattison's conviction, finding that the trial court's instruction "adequately covered the law and sufficiently covered the substance of Mattison's requests to charge" because the judge gave an explicit instruction regarding intent in conjunction with an explanation of each element of the offenses and an "instruction that the jury find 'beyond a reasonable doubt that the homicide was the probable and natural consequence of the acts which was done in pursuit to the common design[.]'" *Id.* at 484–85, 697 S.E.2d at 586–87. Respondent submits that in this case the trial court's charge also adequately covered the law. Here, Respondent is not arguing that intent was "implied" as the term was used in *Mattison.* In *Mattison* the Supreme Court rejected the idea that an entire legal concept—that "mere

knowledge is not enough"—could be implied by other instructions, which only excluded that concept through explaining what had to be proved. Here, intent was charged to the jury through the use of the words "counsel," "hire," "command," and "procure," which all denote that both an affirmative act and some intent were required for liability as an accessory before the fact.[9]

Appellant argues that the "use of 'otherwise procured' could have been interpreted broadly to mean indirectly 'planted the seed[.]'" Final Br. of Appellant, p. 12. As argued above, the word "procure" denotes both action and intent, and Respondent does not believe that the addition of the word "otherwise" dilutes the meaning such that someone could believe that it includes "planted the seed."[10]

Because the trial court's instructions to the jury properly covered the law of accessory before the fact, the trial court did not err in refusing to charge Appellant's erroneous requested instruction.

[9] This case is further distinguishable from *Mattison* because in *Mattison* the defendant requested a charge that was consistent with South Carolina case law. Here, Appellant requested that the jury be instructed that a defendant must have the "intent that a murder be committed by another" to be guilty as accessory before the fact of murder. As discussed in detail previously, that is not consistent with South Carolina law.

[10] Respondent is not conceding that Appellant could not have been guilty as an accessory before the fact for "planting the seed." Respondent only argues that the addition of "otherwise" does not cancel the intent requirement conveyed by the term "procure."

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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August 14, 2014
Columbia, South Carolina

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IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

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V.

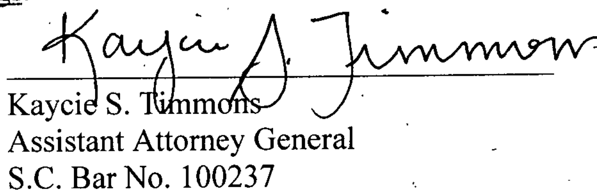
WILLIAM JOSEPH PHILLIPS,

APPELLANT,

Appellate Case No. 2013-001339.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record at:

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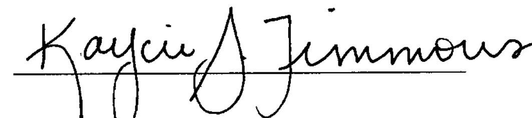
I further certify that all parties required by Rule to be served have been served.

This fourteenth day of August, 2014.



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