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 APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

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.

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on the charge of accessory before the fact of murder. See Indictment. The State of South Carolina, represented by Howard Steinberg, called the case for trial on June 10, 2013, before the Honorable C. Victor Pyle, Jr. Cassandra Gorton represented Appellant. On June 12, 2013, the jury returned a verdict of guilty on the charge of accessory before the fact of murder. (R. p. 542, lines 1-5). Judge Pyle sentenced Appellant to life. (R. p. 545, line 25-p. 546, line 2).

Thereafter, Appellant filed his timely notice of appeal.

ARGUMENT

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.

A. Relevant Facts

Charlie Roberts was shot and killed by Jerry Allen on July 8, 2011. (R. p. 326, lines 12-13; R. p. 330, line 24-p. 332, line 25). Police discovered Roberts's body approximately one month later on August 15, 2011. (R. p. 144, line 9-p. 145, line 7). Allen turned himself into police on August 16, 2011, after learning that Roberts's body had been found. (R. p. 343, line 19; R. p. 344, lines 20-23; R. p. 345, lines 18-19). That same day, Allen confessed to being solely responsible for shooting Roberts. (R. p. 346, lines 19-23). Nine days later, Allen gave a second statement to police in which he partially recanted his first statement and instead alleged that Appellant shot Roberts – a story he later admitted was a lie. (R. p. 348, line 12-p. 349, line 1). On August 29, 2011, Allen offered yet another version of the events of the crime. This time he told police that Appellant crafted a plan to kill Roberts and Allen volunteered to, and did in fact, carry it out.[1] (R. p. 349, lines 9-11; R. p. 422, line 17-p. 423, line 20). Allen pled guilty to murdering Roberts. (R. p. 312, lines 6-11). In exchange for testifying consistently with his third statement to police, Allen expected the State to recommend a thirty-year sentence. (R. p. 312, lines 12-22; R. p. 375, line 17-p. 376, line 11).

Testimony at trial showed that Allen had previously visited, and had personal familiarity with, the property where he shot Roberts. (R. p. 60, line 22-p. 61, line 18; R. p. 328, lines 23-24; R. p. 329, lines 10-14). Testimony also showed that Allen was familiar with the area where he buried the murder weapon. (R. p. 62, lines 7-18). The State and Appellant both introduced evidence

[1] Allen testified during trial that he was scared of facing the death penalty when he gave his second and third statements to police but not when he gave his original statement. (R. p. 460, line 1-p. 462, line 9).

that Allen suffers from mental illness and had been admitted to mental institutions prior to killing Roberts.[2] (R. p. 363, line 20-p. 364, line 1; R. p. 373, lines 5-18). Allen testified to being on drugs when he killed Roberts. (R. p. 328, lines 13-19; R. p. 331, lines 12-13). Allen also testified that he makes poor decisions when he is using drugs. (R. p. 352, lines 17-19).

Prior to his death, Roberts was dating Christina Gentry. (R. p. 14, lines 8-11). Before she began dating Roberts, Gentry and Appellant were in an off-and-on relationship for six years and had two children together. (R. p. 11, lines 11-24). Allen is Gentry's brother and he lived with Gentry and Appellant for at least a year prior to Gentry moving out in March 2011. (R. p. 12, lines 4-25; R. p. 58, lines 15-17). Allen continued to live at Appellant's residence thereafter until his arrest. (R. p. 315, lines 1-4). According to Gentry, Allen treated Appellant like a brother and would do anything for him. (R. p. 13, lines 1-3). At trial, Allen testified that he looked to Appellant as a mentor. (R. p. 314, lines 14-19). Allen also testified that he viewed himself as Appellant's watch-dog and did everything that needed to be done when Appellant was gone from the house. (R. p. 316, lines 4-10). Allen testified that Appellant provided him with housing, food, cigarettes, and drugs in exchange for various household duties. (R. p. 392, line 24-p. 394, line 9). Moreover, Allen referred to Appellant as "brother" during recorded jail calls, and told Appellant that he was going to pay him back for his help. (R. p. 367, line 18-p. 368, line 4).

According to various witnesses, Appellant was not happy that Gentry was dating Roberts. (R. p. 16, lines 17-21; R. p. 188, line 23-p. 189, line 14). During its opening statement, the State presented its theory that Appellant was so upset about Gentry dating Roberts that he convinced Allen to murder Roberts. (R. p. 6, lines 10-23). Outside of Allen's testimony, the State did not introduce any evidence that Appellant counseled, hired, and intended for Allen to kill Roberts. (R. p. 467, lines 19-25).

[2] The State's expert further reported that Allen suffers from homicidal ideations, but this evidence was excluded over Appellant's objection. (R. p. 408, lines 17-21).

The State called witnesses to testify to one event where Appellant showed up at Roberts's house, found Gentry present, and challenged Roberts to a fight, though nothing beyond words was exchanged. (R. p. 18, lines 1-24). The State also introduced evidence of a conversation during which Appellant appeared frustrated and said "he had to do something about this guy seeing his old lady," but with no more specificity as to what he was going to do or when. (R. p. 72, lines 9-25). The State also introduced testimony that Appellant offered one-hundred dollars to Roy White while at a public racetrack to knock Roberts out. (R. p. 78, lines 1-5). White testified that he understood "knock him out" to mean physically beat Roberts up but that Appellant never asked White to kill Roberts. (R. p. 80, lines 6-9). Tammie Timmons also heard and testified to Appellant's comments at the racetrack and was of the opinion that "a lot of people have made those comments in Marrietta" and that she did not believe Appellant seriously wanted anyone to beat up Roberts. (R. p. 84, lines 3-4; R. p. 85, lines 1-4).

Based on these facts, Appellant requested the judge to modify his intended jury charge to include the following charge explaining the requirement for criminal intent:

> In order to establish criminal liability for accessory before the fact to murder, the defendant's intent that a murder be committed by another must be proven beyond a reasonable doubt.

(R. p. 471, line 22-p. 472, line 6; R. p. 549). The trial judge refused. (R. p. 475, lines 17-19). Instead, the judge charged in relevant part:

> 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 . . . 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.

(R. p. 524, line 1-p. 525, line 6). The jury found Appellant guilty of accessory before the fact of murder and the judge sentenced him to life in prison. (R. p. 542, lines 1-5; R. p. 545, line 25-p. 546, line 2).

B. Discussion

I. Legal Standards

For a conviction to comport with due process, the State is required to prove every element of the charged offense beyond a reasonable doubt. Dervin v. State, 386 S.C. 164, 168, 687 S.E.2d 712, 713 (2009) ("Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt." (citing State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004))); State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004) ("It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant.").

The State's burden of proof includes proving that the defendant acted with the requisite criminal intent required to commit the crime. State v. Lee-Grigg, 374 S.C. 388, 402, 649 S.E.2d 41, 48-49 (Ct. App. 2007) aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010) ("A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted

with the criminal intent, or mental state, required for a particular offense." (citing State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000))). Accessory before the fact of murder requires proof that the defendant acted with the intent that a murder be committed by the principal. State v. Bennett, 307 Conn. 758, 765, 59 A.3d 221, 226 (2013) ("To be guilty as an accessory one must *share* the criminal intent and community of unlawful purpose with the perpetrator of the crime and one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (quoting State v. Sargeant, 288 Conn. 673, 680, 954 A.2d 839 (2008) (internal quotation marks omitted))); *see also* State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) ("For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing. . . . [T]he courts have required that the alleged accomplice must have *acted with the intention* of encouraging and abetting the commission of the homicide . . . ." and "to be guilty as an accomplice to homicide, a defendant must have acted with the state of mind required for guilt" (quoting 40 Am. Jur. 2d Homicide § 26 (2010); 40 C.J.S. Homicide § 30 (2010)) (emphasis added; internal quotation marks omitted)).

When challenging a jury charge, a party is entitled to reversal of the judgment if he shows that: 1.) the trial judge's refusal to give a requested jury charge was error; and 2.) the error was prejudicial to the defendant. Mattison, 388 S.C. at 479, 697 S.E.2d at 583. A trial judge is required to charge the jury with the law that conforms to the evidence presented at trial. State v. Bryant, 391 S.C. 225, 233, 705 S.E.2d 465, 469 (Ct. App. 2010) (citing State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008)). Further, "[i]f there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter." Id. at 233, 667 S.E.2d at 469-70 (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law."

Id. at 233, 705 S.E.2d at 470 (citing State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007)). Finally, the "[f]ailure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." Mattison, 388 S.C. at 479, 697 S.E.2d at 583-84.

II. The Evidence Supported a Jury Charge on Intent and the Trial Judge's Failure to Charge the Jury with Criminal Intent was Erroneous.

The evidence introduced at trial supported Appellant's request for a separate jury charge on criminal intent. Appellant's theory at trial was that Allen killed Roberts out of his great affection and brotherly love for Appellant but not at Appellant's direction or intention. (R. p. 505, lines 17-22; R. p. 518, line 11-p. 519, line 3). Appellant argued that, consistent with his first statement to police, Allen acted alone to kill Roberts. (R. p. 509, lines 13-19). It was only after being arrested and realizing that he was facing a long prison sentence and the possibility of the death penalty that Allen changed his story and attempted to implicate Appellant in Roberts's death. (R. p. 460, line 1-p. 462, line 9). Allen testified that his thirty-year sentence recommendation from the State was contingent upon his testifying consistent with his third statement to police. (R. p. 312, lines 6-22; R. p. 376, lines 6-11). Gentry, the victims' girlfriend and Allen's brother, testified that Allen was close to Appellant and thought of him as a brother. (R. p. 13, lines 1-3). Allen himself testified that he looked up to Appellant as a mentor, thought of himself as Appellant's watch-dog, and was grateful to Appellant for giving him housing, food, and cigarettes for more than a year prior to Allen's arrest. (R. p. 314, lines 14-19; R. p. 316, lines 4-10; R. p. 392, line 24-p. 394, line 9; R. p. 58, lines 15-17).

Apart from Allen's self-serving testimony, during which he repeatedly admitted to lying to police, family members, and other individuals (R. p. 377, lines 9-15; R. p. 377, line 22-p. 378, line 2; R. p. 411, line 24-p. 412, line 2; R. p. 419, lines 5-7), the State did not present any direct evidence that Appellant counseled, hired or procured Allen to kill Roberts. In fact, the State did not offer

any evidence that Appellant was doing anything more than acting as an upset former boyfriend making boastful, unpleasant remarks about wanting to fight his ex-girlfriend's new boyfriend.

Additionally, it was clear during Allen's testimony that he suffers from mental illness, he lied numerous times to police and family members, he looked to Appellant as a mentor, felt that he owed Appellant for his past kindness, and thought of himself as Appellant's watch-dog. Based on Allen's own testimony, it was certainly possible, as Appellant argued, that Allen carried out this crime without any influence or direction from Appellant but rather in his self-described role as a watch-dog and in order to please or pay back Appellant.

The evidence offered during trial created issues of fact about whether Appellant intended for Allen to kill Roberts, whether Appellant did in fact procure, counsel, hire, or command Allen, and whether Allen acted on his own. Apart from Allen's testimony, the State offered only circumstantial evidence on these elements. Even several State witnesses offered contradictory accounts of whether Appellant's statements prior to the murder of Roberts evidenced a true intent that Roberts be killed. Therefore, it was proper for the judge to charge the jury that the State had to prove beyond a reasonable doubt that Appellant possessed the intent that Allen kill Roberts.

III. Failure to Charge the Jury on Criminal Intent Prejudiced Appellant

The jury instruction given by the trial judge did not sufficiently cover the requirement of criminal intent. In Mattison, Lamont Mattison appealed the trial judge's refusal to charge the jury as part of accomplice liability that "prior knowledge of the commission of a crime is insufficient to establish guilt." Mattison, 388 S.C. at 472, 697 S.E.2d at 580. The South Carolina Supreme Court observed that Mattison's "mere knowledge" instruction was a correct statement of law and that the concept of knowledge was noticeably absent from the trial judge's jury charge. Id. at 483, 697 S.E.2d at 585. The trial court in Mattison charged in part, "Intent . . . is a necessary element of the offense. There must have been a common design or attempt to commit the crime. The crime must

have been committed pursuant to the person aiding and abetting by some overt act." Id. at 476, 697 S.E.2d at 582. The Court ultimately held the jury charge sufficient because the trial judge's "explicit instruction regarding the necessary element of 'intent,'" covered the requested "mere knowledge" instruction. Id. at 484, 697 S.E.2d at 586. However, the Court modified the lower court's decision by removing reference to the challenged jury charges as "implicitly" being covered, explaining that this modification "should dispel any inference that a trial judge's general instruction is necessarily sufficient to cover a defendant's specific request to charge a correct statement of law." Id. at 485, 697 S.E.2d at 587. The Court further urged "trial judges to carefully consider charging a request to charge that is factually accurate and a correct statement of the law." Id. at 485, 697 S.E.2d at 587. Here, the trial judge did not explicitly charge the jury on criminal intent and erred when refusing Appellant's request to charge a factually accurate and correct statement of law.

Unlike the jury charge in Mattison that was saved by an explicit charge on intent, here there was nothing in the trial judge's jury charge that explicitly or impliedly redeemed the trial judge's failure to include Appellant's request for a charge on criminal intent. Nowhere in the court's jury charge did the judge explain that Appellant must possess the requisite intent that Allen murder Roberts to be guilty of accessory before the fact of murder. The trial judge did not explain to the jury that if Allen were motivated to kill Roberts to please Appellant, but Appellant did not intend for Allen to kill Roberts, then Appellant could not be convicted of accessory before the fact of murder. In fact, the judge never used the word "intent" or any derivative thereof, and his use of "otherwise procured" could have been interpreted broadly to mean indirectly "planted the seed" as Appellant argued. Thus, the trial judge's jury charge was legally insufficiently based on the law and the evidence presented at trial.

This failure was clearly prejudicial to Appellant. The jury was not asked to decide whether the State proved beyond a reasonable doubt that Appellant intended for Allen to kill Roberts. It is

possible for the jury to have concluded that Appellant was upset about Gentry dating Roberts, Allen repeatedly heard about Appellant's frustrations, and that this was enough to indirectly plant the seed of murder in Allen's mind even if Appellant never intended or instructed Allen to murder Roberts. Without including a specific charge on criminal intent, the answer to whether the jury found that Appellant possessed the criminal intent that Allen kill Roberts remains unanswered. The State is required to prove every element of the charged offense beyond a reasonable doubt and allowing Appellant's conviction to stand without the State having proven beyond a reasonable doubt that he intended for Allen to kill Roberts is prejudicial and violates due process.

CONCLUSION

The evidence presented at trial shows that a jury charge on criminal intent was warranted. The trial judge's jury instruction was insufficient to cover criminal intent as required by law and based on the evidence presented at trial. Therefore, the judge erred when he refused to charge the jury with Appellant's criminal intent charge. Appellant was prejudiced by the judge's error because he was convicted without the State proving, and the jury finding, beyond a reasonable doubt that he had the intent for Allen to murder Roberts.

Respectfully Submitted,

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This 18th day of August, 2014.

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 18, 2014

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that a true copy of the Final Brief of Appellant in the above referenced case have been served upon Kaycie S. Timmons, Esquire, State of South Carolina, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201, this 18th day of August, 2014.

By: [signature]
David L. Paavola
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of August, 2014.

[signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.