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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

C.A. No. 2012-GS-26-2938

Appellate Case No.: 2013-000336

The State of South Carolina. .....Respondent,

v.

Kareem S. Harry .....Appellant.

APPELLANT KAREEM S. HARRY'S
PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellant Kareem S. Harry ("Appellant") petitions the Court for rehearing of its Opinion No. 5332 filed July 22, 2015 (the "Opinion"), on the grounds that the Court "overlooked or misapprehended" the points set forth below. Because of the importance of the issues involved, Appellant requests rehearing by the full Court sitting *en banc*.

I. The Court Erred When It Found That The State Presented Substantial Circumstantial Evidence From Which The Jury Could Infer Harry Planned To Confront And Assault Bowens Or Otherwise Take The Television By Force.

The Court's opinion overlooks the State's failure to present any direct or substantial circumstantial evidence of any initial illegal purpose, much less a planned assault, as a basis for which Harry could have been criminally liable for everything done by Castro incidental to that initial illegal purpose. The Court affirmed the lower court's denial of the directed verdict motions based on the suspicion that Harry intended to confront, assault, or otherwise take the television from Bowens by force without any proof to support this suspicion. This Court's prior jurisprudence articulates that "[t]he lower court should not refuse to grant the motion [for directed verdict] where the evidence **merely raises a suspicion that the accused is guilty**." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Instead, **"[t]he trial court should grant the directed verdict motion . . ., as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof**." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408–09 (2013) (citations and internal quotation marks omitted).

There is no evidence in the record that Harry had an acrimonious encounter or conversation with Bowens regarding the television. The record actually establishes the very opposite. The only evidence in the record regarding the interaction between Harry and Bowens about the television prior to the meeting at Bowens' home concerns one telephone conversation. Ashley Bledsoe testified that Harry talked to Bowens by cell phone about getting the television back prior to arriving at the home. (R. p. 58, lines 14-18.) Christina Patterson, Bowens' girlfriend, testified that Bowens told her that Bledsoe "had some guy that was calling him about the TV and the guy didn't even know the situation." (R. p. 316, lines 13-14.) Harry testified that he had a conversation with Bowens about arranging to meet about the television, during which Harry learned that he and Bowens had some common friends (R. p. 446, line 9- R. p. 447, line 10.) There is nothing in the record to even suggest that Harry and Bowens were confrontational with each other about the television.

There is no evidence in the record that Harry knew anything about Bowens' "encounter" with Bledsoe prior to arriving at Bowens' home. As discussed above, the evidence in the record only demonstrated that Harry knew Bledsoe had given the television to Bowens, which Harry had arranged to pickup from Bowens without any indication of conflict or provocation for disagreement. The Court's suggestion that Harry may have been upset, jealous, or otherwise emotionally charged by Bowens and Bledsoe's "encounter" is merely supposition. Bledsoe testified she first told Harry that she sold the television to a girl, (R. p. 66, line 13-p. 67, line 3.), and later admitted to him that Bowens had possession of the television and where Bowens lived. There is no evidence in the record that Harry knew that Bledsoe and Bowens had an "encounter"

before he went to pick up the television from Bowens. The record is equally absent of any evidence to support the assumption that Harry would be upset had he known about the "encounter." Bledsoe, herself, testified that she previously had an "encounter" with Tommy Byrne. (R. p. 75, lines 3-13.) Harry obviously was unconcerned that Bledsoe had an "encounter" with Byrne, and there is nothing in the record to support a finding that Harry would have held contempt for Bowens had Harry been aware that Bowens spent the night with Bledsoe.

> 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. Also, the courts have required that the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions.

State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (quoting 40 Am. Jur. 2d Homicide § 26 (2010)) (emphasis in original). As set forth in the appellate briefs to the Court, the record simply does not support an adversarial relationship between Harry and Bowens, but rather the whole case is base on a fabrication invented to suit the narrative of the State's theory of motive. Because the case presented by the State was too insubstantial to rise above a mere suspicion that Harry was guilty of murder under the "hand of one is the hand of all" theory of accomplice liability, the Court should withdraw and reconsider its opinion.

II. *The Court Erred When It Departed From South Carolina Precedent And Relied On California Jurisprudence To Affirm The Lower Court Decision.*

In affirming Harry's conviction, the Court ignored established South Carolina law. It is well established that where the State relies solely on circumstantial evidence, the trial

court should submit the case to the jury only if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. *State v. Bostic,* 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (citing *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "The jury weighs the evidence **but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict. Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt**." *Id.* (citing *State v. Schrock*, 283 S.C. 129, 133-34, 322 S.E.2d 450, 452–53 (1984)). **It is wholly insufficient to take the case to the jury when the evidence raises no more than a "mere suspicion" of guilt.** *State v. Lewis*, 403 S.C. 345, 353, 743 S.E.2d 124, 128 (Ct. App. 2013). **"Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof."** *State v. Buckmon,* 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *State v. Lollis,* 343 S.C. 580, 541 S.E.2d 254 (2001)). If the State does not demonstrate substantial circumstantial evidence that the defendant committed the particular crime, the defendant is entitled to a directed verdict. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

The California case *People v. Miller*, 2008 WL 1899560 (Cal. Ct. App. 2008), cited by the Court, is distinguishable from the instant case on appeal. In *Miller*, the prosecution presented evidence that the defendant intended to confront the victim prior to arriving at the victim's home. Most notably, the evidence demonstrated that: 1) the defendant was angry with the victim; 2) the defendant called the victim multiple times during which they argued, yelled, and became angry with each other; 3) the defendant admitted he went to the victim's home for to purpose of confronting him; 4) the

defendant admitted that he was aware that the shooter normally carried a gun; 5) the defendant knew that the shooter and the victim did not get along; and 6) as planned, the defendant and the victim were in a physical altercation immediately prior to the shooting. *Id.* Unlike the *Miller* case, the State produced no evidence that Harry ever intended to confront Bowens about the television or otherwise engage in forcible conduct to procure the return of the television. Therefore, *Miller* is factually distinguishable from the case at hand.

Furthermore, California law requires the court inform the jury of the target (or predicate) offense, including the elements required to prove such offense, that a defendant allegedly committed from which a natural and probable consequence resulted in the charged crime. *People v. Prettyman*, 14 Cal. App. 4th 248, 266-67 (Cal. Ct. App.1996). The very purpose of this requirement is to prevent the jury from engaging in the type of speculation relied upon by the trial court in denying the directed verdict motion and this Court in rendering its opinion, where jury's might convict under the natural and probable consequences doctrine based on a generalized belief that the defendant was engaged in undefined nefarious behavior, rather than based on evidence of an actual underlying target offense. *See People v. Hickles*, 56 Cal.App.4th 1183, 1194-95 (1997) (quoting *People v. Solis*, 20 Cal. App. 4th 264 (Cal. Ct. App. 1993); s*ee also People v. Prettyman*, 14 Cal.4th 248, 266-67 (1996) (recognizing that the purpose of this rule is to prevent the jury from "indulg[ing] in unguided speculation" as to the nature of the target offense). Consequently, California courts have found reversible error when the prosecution fails to prove the target offense or the trial court does not enumerate the potential target offenses that could be argued from the evidence. *Hickles*, 56 Cal.App.4th

at 1186; 1198. As required by California law, the trial court in *Miller* explained that the target offense in that case was assault and battery. *See Miller*, 2008 WL 1899560 at *6. Here, the State did not submit evidence of any underlying criminal act or plan. Instead, it relied on generalized, unsupported theories of why Harry might have wanted to confront Bowens, leading to only suspicions of guilt not amounting to proof sufficient to send this case to a jury. Had the Court acknowledged the legal requirements of California law in comparing *Miller* to the circumstances of this case, the circumstances presented in this appeal would warrant reversal of Harry's conviction.

While the Court leaves to the province of the jury whether the evidence presented by the State rises to the quantum of proof required for conviction, it remains with the Court to ensure that the State has presented evidence – some facts or circumstances amounting to proof – that the charged crime has been committed. The State failed to present any direct or substantial circumstantial evidence that Harry had any criminal intent or ill-will towards Bowens when Harry went to Bowens' home about the television.

CONCLUSION

For these reasons, Appellant respectfully asserts that this Court overlooked and/or misapprehended the facts and legal authority applicable in this case; and therefore, respectfully asks that the Court rehear this case *en banc,* reconsider its Opinion, and reverse his conviction.

Respectfully submitted,

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August 6, 2015

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CERTIFICATE OF SERVICE

The undersigned counsel for appellant certifies that the foregoing Appellant Kareem S. Harry's Petition for Rehearing has been served upon all other counsel of record as follows:

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SUBSCRIBED AND SWORN TO before me
this 6th day of August, 2015.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.