THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113

The State, ... Respondent,

v.

Darryl Wayne Moran, ... Appellant.

INITIAL REPLY BRIEF

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I. The Trial Court Should Have Directed a Verdict for Mr. Moran or Granted him a New Trial Regarding the Charge for Common Law Conspiracy

The State presents the Court with evidence it contends supports the jury's decision to convict Mr. Moran of conspiracy even though the jury acquitted Mr. Moran and Mr. Herring of solicitation to commit murder. (Resp. Br. pp. 17-19). The Court should not be persuaded by the State's brief.

Contrary to the State's assertion, Mr. Caulder did not testify "about the existence of a plot to kill [Mr. Parrott]" and his testimony did not corroborate Carlyle Rabon's testimony. (Resp. Br. p. 17, ¶ 1). Mr. Caulder stated he never discussed any details of the "job" (Tr. p. 112, ll. 22-25), and had never heard of or spoke with Mr. Moran (Tr. p. 109, ll. 2-8; p. 116, ll. 14-17; p. 124, ll. 7-13, 17-19), and did not know who the alleged victim was (*i.e.*, he never ever spoke Mr. Parrott's name at trial). (Tr. p. 112, ll. 22-25). Mr. Caulder also did not testify about details regarding the alleged agreement between Mr. Moran and Mr. Herring to solicit Mr. Caulder to kill Mr. Parrott; rather, his testimony is all about the purported crime of solicitation, a crime for which the jury *acquitted* both Mr. Moran and Mr. Herring. (Resp. Br. p. 18, ¶¶ 7-9).

Although Carlyle Rabon stated he ultimately concluded there was a plot to kill Mr. Parrott, that conclusion was reached only after a SLED agent showed up and Carlyle "put the pieces together." (Tr. p. 140, ll. 23-24). He never stated he was affirmatively aware of a plot to kill Mr. Parrott.

As for the fact that Mr. Moran knew where Mr. Parrott and Ms. Rabon lived and

Mr. Moran asked Carlyle to conduct surveillance (Resp. Br. p. 17, ¶ 2), the testimony proves nothing about a conspiracy to solicit someone to kill Mr. Parrott. When placed in its proper context, the testimony establishes the purpose of the surveillance, which was to establish Ms. Rabon's adultery for the divorce. After all, the men all went to see the private investigator immediately after conducting the videotape surveillance. (Tr. p. 138, ll. 6-17; p. 161, ll. 15-22).

Regarding the conversation Carlyle claimed to have heard about "Will he do it? How much would it cost? Will he do it for $2,000?," (Resp. Br. p. 17, ¶ 3), even Carlyle stated he heard nothing about a conspiracy to solicit anyone, including Mr. Caulder, to commit a murder, and that he thought the conversation was benign until SLED showed up and suggested otherwise. (Tr. p. 140, ll. 15-20, 23-24; p. 166, ll. 4-9; p. 166, l. 24 - p. 167, l. 6).

The State points to Carlyle's testimony that Mr. Moran could get a silencer (Resp. Br. p. 17, ¶ 4) and that Mr. Moran asked Carlyle if he knew anyone who "would fuck Randy [Parrott] up?" (Resp. Br. p. 18, ¶ 5). Again, this testimony (Tr. p. 140, l. 25 - p. 141, l. 4; p. 141, ll. 7-14; p. 143, ll. 13-15) adds nothing to the charge of conspiracy to solicit the murder of Mr. Parrott. It is, in fact, no different than the statements that the Supreme Court found to be woefully insufficient in *State v. Smith*, 316 S.C. 53, 57, 447 S.E.2d 175, 177 (1993) (Court held "[a]sking a person 'What would it take to take care of somebody' is insufficient evidence of solicitation [to commit murder] as a matter of law.").

As for Ms. Rabon's testimony that Mr. Herring "would appear at unexpected

times and places" and that Mr. Moran returned the "care package" to Ms. Rabon in WalMart unannounced (Resp. Br. p. 18, ¶¶ 10-11), this testimony proves nothing about an alleged conspiracy, that is, an agreement between Mr. Moran and Mr. Herring to hire Mr. Caulder to kill Mr. Parrott. This evidence is even more remote than the evidence the Supreme Court found insufficient in *Smith*.

The State contends it "need only show [Mr. Moran] formed an agreement with another to solicit for the conspiracy charge to stand." (Resp. Br. p. 19). But this statement ignores that the jury found that the State did not prove either Mr. Moran or Mr. Herring solicited anyone to murder Mr. Parrott. If there is insufficient proof that they solicited murder, how can there by sufficient proof that they conspired to solicit murder? The reasoning the State proposes makes no sense.

The State argues "our jails are undoubtedly full of criminals who conspired to commit some heinous crimes but were thwarted in their attempts to do so for various reasons." (Resp. Br. p. 19). There is a meaningful difference, however, between a thwarted attempt to *actually commit* a crime and a completed conspiracy to solicit the *future* commission of a crime. This difference is more pronounced where the jury has announced that the defendant did *not* solicit the commission of that crime. In other words, even though Mr. Moran was acquitted of asking someone else to commit a crime, he is still guilty (supposedly) of agreeing to ask someone else to commit a crime, which the jury affirmatively says he didn't actually do.

The crime for which Mr. Moran was convicted (conspiracy) is not like other crimes – it is, in fact, difficult to define with precision. *E.g.*, *State v. Cole*, 107 S.C. 285,

288, 92 S.E.2d 624, 625 (1917) ("It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy."). The State's argument here makes no sense – the State did not set out to prove that Mr. Moran conspired to solicit Mr. Parrott's murder but was thwarted in his attempt. Instead, the State set out to prove completion of the crime (solicitation to commit murder), but the jury rejected their proof. Mr. Moran takes issue with whether the State's hyperbolic statement that the jails are full of thwarted conspirators is "undoubtable" - the very jury in this case doubted the veracity of the State's proof.

Simply put, with regard to the charge of conspiracy on this record, "there is no there there." *U.S. v. Hanson*, 41 F.3d 580 (10th Cir. 1994) (quoting Gertrude Stein, *Everybody's Autobiography* (1937) in reversing Hanson's conviction). The trial court should have directed a verdict of acquittal. This Court should reverse that decision on appeal.

II. Wharton's Rule Precludes Mr. Moran's Conviction for Conspiracy Because the Underlying Charge (Solicitation of Murder) Requires the Participation of Multiple Actors and Mr. Moran Was Acquitted of That Charge

The State compares Mr. Moran's argument here to a "shifting house of cards," and accuses Mr. Moran of failing to understand "the nuances of conspiracy and solicitation crimes...." (Resp. Br. p. 7). The State also calls Wharton's Rule an "archaic tenant of conspiracy law" and asserts (1) it is not the law of South Carolina, (2) even if it is the law of South Carolina, it would not apply here, and (3) even if it is the law of South Carolina and it applied here, Mr. Moran did not preserve this issue. (Resp. Br. pp. 7-15). The Court should not be persuaded by these arguments.

A. Wharton's Rule Is the Law of South Carolina

Although the Supreme Court of South Carolina has not expressly stated that Wharton's Rule, by name, is the law of South Carolina, the Court has on several occasions indicated that the rule adheres in this State but simply was not applicable to the particular cases.

For instance, in *State v. Ferguson*, Mr. Ferguson and D.O. Spires along with 17 other persons were charged with conspiring to set up a numbers lottery. A second count charged them with actually setting up the lottery. Sixteen of the defendants pled guilty, the case against another defendant was withdrawn from the jury, and the case was tried against Mr. Ferguson and Mr. Spires. Mr. Ferguson was convicted of both charges, but Mr. Spires was convicted solely on the conspiracy charge. On appeal, the appellants contended they could not be charged at the same time with conspiracy and with setting up a lottery. The Supreme Court stated:

> It is true that in some cases where concerted action is necessary, as for example in certain sexual offense, it is not permitted to charge one in the same indictment with a conspiracy and also with the substantive crime. The setting up of a lottery, however, is not necessarily one which requires concerted action. One person may set up a lottery or expose it to be played.

221 S.C. 300, 303, 70 S.E.2d 355, 356 (1952). This is a classic expression of Wharton's Rule and its exceptions. William Shepard McAninch, W. Gaston Fairey & Lesley M. Coggiola, *The Criminal Law of South Carolina* 385-386 (5th Ed. 2007) (noting Wharton's Rule is "inapplicable if the particular conspiracy involves more persons than required for the particular offense," citing *Ianelli v. US*, 420 U.S. 770 (1975)). And in *State v. Wells*, the Court applied the *Ianelli* exception to Wharton's Rule because a larger number were involved in the conspiracy than those necessary to commit the substantive offense (*i.e.*, to commit an abortion). 249 S.C. 249, 153 S.E.2d 904 (1967). *See also* McAninch, Fairey and Coggiola, at 385 (discussing *Wells*).

Wharton's Rule is the law of South Carolina.

B. Wharton's Rule Applies to the Facts of this Case

The State misunderstands Mr. Moran's argument here. Mr. Moran does not quarrel with the State's argument that under most circumstances, conspiracy to commit a crime does not merge with the completed offense. *See, e.g., State v. Rutledge*, 232 S.C. 223, 229, 101 S.E.2d 289, 292 (1957) ("a conspiracy to commit a crime is not merged in the commission of the completed offense"). However, Wharton's Rule is an exception to the general rules governing conspiracy, and applies where the offense underlying the conspiracy charge requires more than one person for completion. *See Iannelli v. United*

States, 420 U.S. 770 (1975) (Wharton's Rule states an exception to the principle that the crime of conspiracy is separately punishable from the crime which is the object of the conspiracy).

It has long been the law of this State that the crime of "conspiracy" requires more than one person. *State v. Jackson*, 7 S.C. 283 (7 Rich.) 283, 287 (1876) ("conspiracy" implies a combination between two or more to do either an unlawful act or to accomplish by unlawful means a legal end; the concurring will of at least two persons is as necessary to the offense). So does solicitation to commit murder. *E.g.*, *State v. Prince*, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("Solicitation is counseling, enticing or inducing *another* to commit a crime." (emphasis added)). And under Wharton's Rule, the trial court should not have permitted the conspiracy charge to go to the jury as a matter of law.

The Court should reject the State's argument here and hold that Wharton's Rule applies to this case because the State charged both conspiracy (which requires two or more persons) and solicitation (which also requires two or more persons).

C. Mr. Moran Preserved this Issue

The State contends this issue is not preserved, contending Mr. Moran raised it for the first time in his motion for a new trial. (Resp. Br. p. 7-9). The Court should not be persuaded by this argument.

The State first contends the issue should have been raised in the directed verdict motion but Mr. Moran only argued the sufficiency of the evidence. (Resp. Br. pp. 7-8). Of course, Mr. Moran did argue the lack of evidence as a basis for his directed verdict

motion because a directed verdict motion is aimed *solely* at the sufficiency of the evidence. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003) (noting a trial and appellate court is concerned with the existence of evidence in ruling on a directed verdict motion in a criminal case). *See also* Rule 19, SCRCrimP (trial court shall direct a verdict "if there is a failure of competent evidence tending to prove the charge in the indictment"). And in a criminal case the only motion available post-trial that is directed at the sufficiency of the evidence is a new trial motion. *State v. Follin*, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002).

The State points to *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) purportedly for the rule that "[a] defendant may not use a motion for a new trial to raise an issue for the first time." (Resp. Br. p. 7). This is an overstatement of the holding in that case.

In *King*, the Supreme Court described the issue as follows:

> Immediately before beginning closing arguments, the trial judge ordered the bailiff not to allow anyone "to leave or reenter [the courtroom] once the arguments begin or [during] the charge of the law." In the middle of the judge's charge to the jury, a television news reporter entered the courtroom. With the use of a video camera, the reporter filmed the proceedings until the end of the jury charge.
>
> Appellant did not object to this situation prior to the jury's verdict. Instead, appellant raised this issue three days later in his post trial motion for a new trial. During the post trial motions' hearing, defense counsel admitted he discussed the situation with appellant and appellant's father prior to the verdict and "a conscious decision [was] made not to make a motion for a mistrial." Only after the jury returned with an unfavorable verdict did defense counsel attempt to raise this issue.
>
> In denying the new trial motion, the trial judge found appellant had waived this claim because his objection was not timely. Further, the trial

> judge found the reporter's activities were in accordance with Rule 605, SCACR, and did not distract or disrupt the proceedings.
>
> We conclude appellant waived review *of this issue* by failing to object prior to the jury's verdict. Rule 103(a)(1), SCRE; *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, which usually requires it be made at the earliest possible opportunity); *see also State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (a new trial motion may not be used to raise *an evidentiary issue* for the first time); *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 468 S.E.2d 633 (1996) (an issue may not be raised for the first time in a motion for a new trial); *State v. Penland*, 275 S.C. 537, 538, 273 S.E.2d 765, 767 (1981) (finding appellant waived the issue where he did not make a motion for a mistrial until after the verdict).
>
> Defense counsel, after consultation with appellant, made a strategic trial decision not to object. Appellant and defense counsel weighed their options and, rather than moving for a mistrial, decided to take the chance appellant would be acquitted. *Under these facts*, appellant has no basis on which to assert error.

334 S.C. at 509-510, 514 S.E.2d at 581 (emphasis added). Thus, the *King* Court limited its holding to "these facts," specifically noting the case involved a claim for a mistrial and that appellant and his lawyer made a conscious, strategic decision not to object until they made a post-trial motion. *King* is a limited holding and is distinct from this case in very meaningful ways.

The State also asserts that the appropriate time to raise Wharton's Rule "would have been at the close of the State's case, during [Mr. Moran's] motion for a Directed Verdict." (Resp. Br. pp. 7-8). A directed verdict motion, however, challenges the existence of evidence to support the charge. *E.g. State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (in ruling on a directed verdict motion the trial court is concerned with the existence of evidence, not its weight; a defendant is entitled to a directed verdict when

the state fails to produce evidence of the offense charged). A directed verdict motion is not the appropriate vehicle for raising the issue in this case which is not a challenge to the sufficiency of the evidence – that vehicle is a new trial motion.

Mr. Moran's counsel challenged the jury's ability to convict Mr. Moran of conspiracy and solicitation, contending the verdict of acquittal on solicitation was inconsistent with the conviction of conspiracy since conspiracy required the concerted action of two people and the jury acquitted Mr. Herring. (Tr. p. 240, ll. 8-17). Importantly, counsel then requested 10 days to make a more formal motion which the trial court permitted. (Tr. p. 240, ll. 18-23). In that formal motion Mr. Moran raised Wharton's Rule and the State filed a memorandum in opposition specifically addressing (1) whether Wharton's Rule is the law in South Carolina and (2) whether Wharton's Rule applied to Mr. Moran's case because "the crime of solicitation only requires one actor...." (State's Memo in Opp, pp. 4-5). The State did not contend the issue had been waived. In reply, Mr. Moran once again contended that Wharton's Rule is the law of South Carolina and that it applied to this case. (Def. Reply to State's Memo, p. 3). The trial court summarily denied the motion.

As for trial counsel's failure to use the words "Wharton's Rule" when orally stating the new trial motion, the Supreme Court has pointed to Justice Cardozo's words that "the law has outgrown its primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973), *citing Wood v. Duff-Gordon*, 118 N.E. 214 (N.Y. 1917). Contrary to the State's position, courts in South Carolina do not elevate form over substance or require

"magic words."

The Court should find that Mr. Moran appropriately raised whether Wharton's Rule precluded a conviction on the conspiracy charge. The Court should address his arguments on this point, reverse the conviction, and remand the matter for further proceedings.

CONCLUSION

For the reasons stated in Mr. Moran's principle brief and this reply brief, this Court should reverse the denial of Mr. Moran's motion for directed verdict and should remand for entry of judgment of acquittal. Alternatively, the Court should reverse the denial of Mr. Moran's motion for new trial, and should remand the matter for further proceedings consistent with this Court's ruling.

Respectfully submitted,

August 14, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Initial Reply Brief* and *Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Alan M. Wilson
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August 14, 2015

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ATTORNEYS AT LAW

August 14, 2015

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Darryl Wayne Moran
Case Tracking No.: 2014-002331

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Reply Brief and Designation of Matter to be Included in the Record on Appeal. I have also enclosed a proof of service of these documents upon counsel for the Respondent. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

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Enclosures
cc: Alan M. Wilson, Esquire
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