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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

C.A. No. 2012-GS-26-2938
Opinion No.: 5332 (Ct. App. filed July 22, 2015)

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

v.

Kareem S. Harry .... Petitioner

REPLY IN SUPPORT OF PETITION FOR A *WRIT OF CERTIORARI*

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The Court of Appeals erred in affirming the trial court's denial of the motions for a directed a verdict of acquittal in favor of Harry where the State failed to present any direct evidence or substantial circumstantial evidence that Harry was guilty of murder under the "hand of one is the hand of all" theory of accomplice liability 1

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ARGUMENTS

The Court of Appeals erred in affirming the trial court's denial of the motions for a directed a verdict of acquittal in favor of Harry where the State failed to present any direct evidence or substantial circumstantial evidence that Harry was guilty of murder under the "hand of one is the hand of all" theory of accomplice liability.

Instead of attempting to defend the Court of Appeals' decision on its merits, the State's Return relies almost entirely upon its mischaracterizations of the record and facts of this case. The State further devolves into baseless assumptions which cannot form any justifiable basis for upholding the trial court's and the Court of Appeals' erroneous application of South Carolina law concerning the State's burden to bring forth proof of the crime charged and the standard by which a directed verdict motion must be judged.

First, this Court should reverse Kareem S. Harry's conviction because the State could not meet its burden of proving the elements necessary to find Harry guilty of the crime for which he was charged. The State wholly failed in presenting any direct evidence or substantial circumstantial evidence that Harry was guilty of murder under the hand of one hand of all theory of accomplice liability. The trial court's role is that of a gatekeeper, to ensure that the State has shown at least the modicum of actual evidence that a defendant has committed the crime for which he is charged before a jury is allowed to deliberate on the question of guilt or innocence. In cases involving conspiracies and accomplice liability, while express agreement is not required, this Court has been careful to note that rank speculation is insufficient proof. The State has created a narrative that paints Petitioner to be motivated by a need for money or revenge, yet nowhere in the record is there any evidence to support the State's narrative. The facts of this case are in contrast to those cases in which the State attempts to compare it – cases where the

evidence of motive, whether by direct or substantial circumstantial evidence, was actually presented in the State's case against the defendant.

While the State would like the Court to believe this appeal can be boiled down to the single issue of whether or not the State must present evidence of an explicit agreement between Harry and Saire Castro regarding the tragic death of Kevin Bowens, Harry has never alleged this to be the legal requirement. Instead, Harry has remained consistent in arguing the well-established law that the presentation of evidence of mere suspicion of guilt is insufficient to submit a case to a jury for determination. Here, the State presented no direct evidence and only presented scant circumstantial evidence that only amounted to mere suspicion of Harry's guilt of the crime for which he was convicted. It is well-established under South Carolina law, that mere suspicion of guilt is insufficient to send a case to a jury for deliberation. Accordingly, the Court of Appeals erred in affirming the trial court's denial of directed verdict.

"'A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.'" *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (quoting *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011).

> Under the 'hand of one is the hand of all' theory, one who joins with another **to accomplish an illegal purpose** is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. In order to be guilty as

> an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct.

State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (internal citations and quotation marks omitted) (emphasis added).

In explaining the extent of "knowledge" required to convict a defendant of murder under an accomplice liability theory, the South Carolina Supreme Court has noted that:

> 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).

"The lower court should not refuse to grant the motion 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. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408–09 (2013) (citations and internal quotation marks omitted).

The State asserts that it presented both direct and substantial circumstantial evidence to support Harry's conviction. However, it is all too telling that the State devoted a significant portion of its brief in response to continuing its focus on unsupported, speculative theories of why Kareem Harry could have possibly wanted to

commit this murder without ever mentioning any direct evidence or any substantial circumstantial evidence of a plan to commit an illegal purpose or Harry's intentional participation in or knowledge of the actual crime.

Specifically, while on one hand the State alleges in its brief that Harry was angry that his ex-girlfriend had given his television to another man and was desperate for money to pay his probation fees, the record supports a different set of facts. During trial, Ashley Bledsoe testified that she gave Harry's television to Kevin Bowens and that Harry had a probation appointment scheduled for the day following Bowens' death. However, Bledsoe never testified that Harry was angry with Bowens for having the television. Instead, the record reflects that Bledsoe mislead both Harry and Bowens regarding the arrangement for the television and that Harry did not know that Bowens possessed his television until shortly before meeting Bowens about the television. Prior to meeting Bowens, Harry had no heated exchanges with Bowens – only Bledsoe participated in such communications. (R. pp. 53-55.); (R. pp. 66-67.); (R. pp. 72-73.); (R. pp. 75-76.) If Harry was angry with anyone in this situation, it was Bledsoe, not Bowens.

Also, the State argues in its brief that Harry was a cocaine-dealing kingpin with a ready supply of sellable cocaine that he was allegedly giving away. Yet, on the eve of a probation hearing where he was required to pay fees, instead of selling this alleged cocaine supply, the State argues that he was so concerned with recovering a television or money for a television that he would resort to deadly force to do so. The record 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. The

trial court had an obligation to make sure such unsubstantiated allegations did not go before a jury.

But, more importantly, although the State implied that Harry should have known Saire Castro carried a handgun at the time of Bowens' homicide, the State has failed to provide any evidence during the trial or provide this Court with any citation in the record to support any claim that Harry actually knew that Castro had a weapon when they went to recover the television from Bowens. During the trial, the State could only present evidence that Castro was a person in the community commonly associated with weapons. Not one witness could testify that Harry had any knowledge that Castro had a weapon on the day of Bowens' killing. A review of the record actually indicates the opposite.

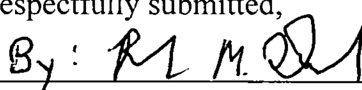
In the State's case, Thomas Byrne testified only that it was common knowledge that Castro was known to carry a gun. (R. p. 143, lines 19-20.) He further testified that, on the day of the shooting, Harry did not see Castro retrieve any weapon. (R. pp. 156-157.) Sage McPhail testified that he knew Castro very well, but that he was not aware of Castro to regularly carry a weapon on his person. (R. p. 244, lines 19-20.) Simply put, the State showed no evidence that Harry had any knowledge that Castro had weapons in his possession or that Castro was carrying a weapon the night Bowens was shot. The Court of Appeals recently reaffirmed the propositions that "suspicion, however strong, does not suffice to sustain a conviction," and that "a defendant is entitled to a judgment of acquittal . . . where the evidence is such as to permit the jury to merely conjecture or to speculate as to the accused's guilt." *See State v. Pearson*, Op. No. 5251, (Ct. App. Filed July 30, 2014) (Shearouse Adv. Sh. No. 30 p. 41) (internal citations and quotation marks omitted).

The law is clear that the State carries a burden of establishing more than mere suspicion of guilt, but must present evidence of every element of the crime. The State all but concedes its failure to meet this burden by not giving the Court one reference to any direct evidence or any substantial circumstantial evidence of a plan to accomplish an illegal purpose, relying instead on biased statements such as irrelevant references to Harry and Castro's similar aspirations as hip-hop musicians, to imply that Harry must have enlisted Castro for some clandestine enterprise. This type of irrelevant and prejudicial information is precisely what directed verdict motions are intended to prevent from unfairly influencing a jury to convict, not on the merit of the evidence but simply on the reputation of the defendant. Therefore, the trial court should have granted Harry's motion for directed verdict and the Court of Appeals erred in affirming Harry's conviction.

CONCLUSION

For the reasons stated above, it is clear that the trial court abused its discretion when it denied Harry's motion for a directed verdict. The State presented no direct evidence or substantial circumstantial evidence of Harry's guilt of the crime for which he was charged; particularly failing to demonstrate the Harry had any knowledge that Castro was armed on the day of the shooting and failing to demonstrate the existence of a plan or scheme to accomplish an illegal purpose involving Harry. Therefore, this Court should reverse Kareem S. Harry's conviction.

Respectfully submitted,



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December 15, 2015

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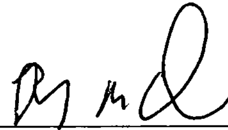
CERTIFICATE OF SERVICE

I certify that a true copy of the reply in support of the petition for a writ of certiorari, in this case has been served on J. Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 15th day of December, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of December, 2015.

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