

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM MARION COUNTY
Court of Common Pleas

SEP 29 2015

D. Craig Brown, Circuit Court Judge

SC Court of Appeals

Case No. 2011-GS-33-113

The State, Respondent,

v.

Darryl Wayne Moran, Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court err in denying Mr. Moran's motion for directed verdict and subsequent motion for new trial regarding the common law conspiracy charge because, viewed in a light most favorable to the State, there was no evidence that Mr. Moran entered into an agreement with another person for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, namely, the solicitation of the murder of Mr. Parrott?

- II. Does "Wharton's Rule" preclude a defendant's conviction for conspiracy to solicit murder when the jury acquits both of the alleged conspirators on the underlying charge of solicitation to commit murder and when the nature of the charge for the conspiracy of solicitation to commit murder requires the participation of more than one person?

STATEMENT OF THE CASE

On May 4, 2011, Mr. Moran was indicted along with James "Red" Herring by a Marion County Grand Jury for solicitation to commit the murder of James Parrott in violation of S.C. Code Ann. § 17-25-30. Mr. Moran was also indicted for conspiracy in violation of S.C. Code Ann. § 16-17-410. These offenses allegedly occurred on October 1, 2009.

The case was tried five years later on August 4 and 5, 2014 before a jury. Both Mr. Herring and Mr. Moran moved for directed verdicts following the State's presentation of its case. The trial court denied all motions.

Both defendants rested without presenting evidence and renewed their prior motions. The trial court once again denied the motions.

Following deliberation the jury acquitted Mr. Herring and Mr. Moran on the solicitation of murder charge. However, the jury convicted Mr. Moran of conspiracy.

On August 11, 2014, Mr. Moran moved the court for a new trial pursuant to Rule 29, SCRCrimP and S.C. Code Ann. § 17-23-110 (Supp. 2015). On October 28, 2014, the trial court denied Mr. Moran's motion.

This appeal follows.

FACTS

On May 5, 2011, the Marion County Grand Jury returned a true bill regarding a two-count indictment against Mr. Moran. The indictment alleged:

COUNT ONE – SOLICITATION TO COMMIT A MURDER

That Darryl Wayne Moran did in Marion County on or about October 1, 2009 did solicit another person to commit the felony of murder for them, by paying money to kill one Randy Parrott, in violation of Section 17-25-0030 of the Code of Laws of South Carolina (1976), as amended.

COUNT TWO – CONSPIRACY

That Darryl Wayne Moran did in Marion County on or about October 1, 2009 combine with themselves, and/or other persons, for the purpose of accomplishing a criminal or unlawful object or an object that is neither criminal nor unlawful through criminal or unlawful means, to wit: Solicitation to [Commit] Murder, in violation of Section 16-17-410, S.C. Code of Laws, 1976, as amended.

(R. pp. 1-2). Thus, Mr. Moran faced conviction for two things: solicitation to commit a murder under § 17-25-30¹ and conspiracy to accomplish the unlawful act of solicitation to commit murder in violation of § 16-17-410 (codifying common law conspiracy).

At trial, the State presented its case through several witnesses, none of whom were law enforcement officers or other investigators. The testimony did not amount to direct or substantial circumstantial evidence to support Mr. Moran's conviction for "conspiracy."

¹ Section 17-25-30 merely provides for punishment for any offense where the General Assembly has not provided a specific punishment. *State v. Mims*, 286 S.C. 553, 335 S.E.2d 237 (1985). Solicitation to commit a felony, however, is a common law offense and Section 17-25-30 does not govern the offense or set forth its elements. There was no challenge below, however, to the manner in which this indictment was drafted.

The purported victim, **Randy Parrott**, testified he had lived at 4015 Hoffmeyer Road in Darlington, South Carolina for 12 years. (R. p. 52, ll. 7-11; p. 56, ll. 4-9). Jennie Rabon, Mr. Moran's ex-wife, was living with Mr. Parrott at the time of trial. (R. p. 53, ll. 6-10). They met in early 2009 when Ms. Rabon was still married to and living with Mr. Moran. (R. p. 53, ll. 16-17). Ms. Rabon was a realtor and Mr. Parrott would make "punch list" repairs related to real estate transactions. (R. p. 53, l. 18 - 54, l. 8). They have been "seeing each other since that time." (R. p. 54, ll. 9-11). A private investigator did some surveillance on Mr. Parrott's home in relation to Mr. Moran's divorce from Ms. Rabon. (R. p. 57, ll. 3-13).

Mr. Parrott did not know either Mr. Herring or Mr. Moran, nor had he ever met or seen either of them. (R. p. 54, l. 14 - p. 55, l. 8; p. 55, l. 14 - p. 56, l. 3; p. 56, l. 15 - p. 57, l. 2). Mr. Parrott was aware that Ms. Rabon had a son, Dalton, during her marriage with Mr. Moran, but Mr. Parrott did not know Dalton. (R. p. 57, ll. 17-23). Mr. Parrott knew that Mr. Moran had full custody of Dalton. (R. p. 57, l. 24 - p. 58, l. 1).

Jennie Rabon was living with Mr. Parrott at the time of trial. (R. p. 59, ll. 9-12). They first met in February or March 2009 while Ms. Rabon was still married to Mr. Moran. (R. p. 59, 17-24; p. 73, ll. 21-22). She moved in with Mr. Parrott four months later in July 2009. (R. p. 59, ll. 13-16).

Ms. Rabon and Mr. Moran met in 1988, began a relationship in 1994, and married in 1996. (R. p. 60, ll. 13-21; p. 81, ll. 10-12). They had a son, Dalton, who was 16 years old at the time of trial. (R. p. 60, l. 22 - p. 82, l. 1; p. 74, ll. 6-13). Ms. Moran has another son by a prior marriage, James "Carlyle" Rabon, who was 25 years old at the time of trial.

(R. p. 74, ll. 18-23; p. 75, ll. 8-9; p. 81, ll. 3-4). Carlyle lived with Ms. Rabon and Mr. Moran during their marriage. (R. p. 74, ll. 24-25).

The marriage began to deteriorate in January or February 2009. (R. p. 61, ll. 5-11; p. 73, ll. 16-20). Ms. Rabon decided to separate from Mr. Moran and moved out of the home in May 2009. (R. p. 61, ll. 12-23; p. 72, ll. 15-18; p. 81, ll. 13-15). She moved to an apartment until July 2009, when she moved in with Mr. Parrott. (R. p. 61, l. 24 - p. 62, l. 21; p. 72, l. 19 - p. 73, l. 15; p. 83, ll. 1-5). Ms. Rabon had no contact with Mr. Moran during the period of their separation except to talk about Dalton's care. (R. p. 62, l. 22 - p. 63, l. 1; p. 83, ll. 8-22). She has been with Mr. Parrott since July 2009. (R. p. 68, ll. 20-24). To her knowledge Mr. Parrott has never met Mr. Moran or Mr. Herring. (R. p. 72, ll. 4-8).

Mr. Moran and Ms. Rabon were eventually divorced in December 2010. (R. p. 71, l. 20 - p. 72, l. 1; p. 80, ll. 15-17; p. 83, ll. 6-7). Ms. Rabon did not file for divorce. (R. p. 81, ll. 18-20). Mr. Moran hired a private investigator to perform video surveillance of Ms. Rabon and Mr. Parrott. (R. p. 82, ll. 12-15). Mr. Moran received custody of Dalton and the family court ordered Ms. Rabon to pay child support, although she never did. (R. p. 80, ll. 18-19; p. 82, ll. 2-5; p. 81, ll. 18-23; p. 84, ll. 2-3).

At the time of the trial Dalton was still living with Mr. Moran. (R. p. 82, ll. 24-25). Ms. Rabon has not seen or spoken with Dalton since May 2009. (R. p. 83, l. 23 - p. 84, l. 1). Ms. Rabon attempted to deliver a "care package" to Dalton but Mr. Moran located Ms. Rabon at WalMart in Florence and returned it to her, saying Dalton did not want it. (R. p. 84, l. 9 - p. 85, l. 22).

Mr. Parrott's home on Hoffmeyer Road is isolated. (R. p. 69). Ms. Rabon described it as follows:

There is - - on Hoffmeyer Road, there is, like, an old abandoned house and it looks like you're turning into that old abandoned house onto a dirt road, and the dirt road kind of turns and veers. There's farms, old barns on both sides. When you're going down, there's a field and there's woods and going around and down and we're back there at the very back of that dirt road.

(R. p. 69, ll. 6-12; see also p. 69, l. 25 - p. 70, l. 8). The home is about a mile from Hoffmeyer Road in Darlington County and there are no other houses down that road. (R. p. 69, ll. 13-19; p. 78, ll. 21-23). Ms. Rabon and Mr. Parrott consider the home as belonging to them both. (R. p. 78, l. 24 - p. 79, l. 2).

Ms. Rabon has known Mr. Herring since 1998. (R. p. 63, l. 5 - p. 64, l. 3). Mr. Herring became an employee of Mr. Moran's business after the Morans moved to Marion County. (R. p. 64, ll. 4-14). Ms. Rabon and Mr. Herring became friends and she would see him on a weekly basis. (R. p. 64, ll. 18-25; p. 75, ll. 17-19). They would often "do stuff together," including planting flowers, yard work, and putting up Christmas decorations. (R. p. 65, ll. 1-5; p. 76, ll. 4-22). It was not unusual for Mr. Herring to eat dinner at their home. (R. p. 76, ll. 23-24). It was also not unusual for Mr. Herring to speak with her when Mr. Moran was not around. (R. p. 76, l. 25 - p. 77, l. 2). The friendship lasted from 1998 until 2009. (R. p. 65, ll. 9-16; p. 75, l. 20 - p. 76, l. 3).

Ms. Rabon continued to speak with Mr. Herring even after she separated from Mr. Moran and had no contact with Mr. Moran. (R. p. 65, ll. 17-23). She also saw Mr. Herring on occasion. (R. p. 65, ll. 21-23). This included seeing him twice sitting in a

truck in the parking lot at Huntington Apartment Complex where she was living. (R. p. 65, l. 25 - p. 66, ll. 7). She also saw him at an "open house" on Park Avenue in Florence where she was the realtor in charge. (R. p. 66, ll. 8-20). The open house was advertised locally in the "Real Estate Weekly." (R. p. 66, l. 24 - p. 67, l. 1; p. 77, l. 16 - p. 78, l. 4). Mr. Herring spoke to her and said he was in the area and had just dropped by. (R. p. 67, l. 8 - p. 68, l. 1). Mr. Herring also stopped by Exit Goldstar Realty twice for a visit. (R. p. 68, ll. 2-6).

Ms. Rabon did not invite Mr. Herring to any of these places but he would just show up on his own. (R. p. 68, ll. 14-19). Ms. Rabon described these visits as "very strange" because "it was not in his character to show up at these particular places." (R. p. 68, ll. 10-13). She claimed it was unusual for him to stop by even though they were friends. (R. p. 77, ll. 5-15). Mr. Herring was never threatening to her in any way, nor did he make any negative remarks regarding Mr. Parrott. (R. p. 78, ll. 11-20).

Ms. Rabon met with law enforcement officers in the first part of October 2009 at the Hoffmeyer Road home. (R. p. 70, l. 13 - p. 71, l. 5; p. 71, ll. 11-16; p. 79, ll. 3-5). Mr. Parrott joined them a bit later. (R. p. 71, ll. 6-7). Prior to law enforcement coming to the home neither Ms. Rabon nor Mr. Parrott had "any idea anything was going on." (R. p. 71, ll. 8-10). Law enforcement officers did not ask her to make a statement or write anything down, nor did they ask her to call them. (R. p. 79, ll. 11-19). She also did not mention that Mr. Herring had stopped by the realty office, the apartment complex, or the open house. (R. p. 79, l. 20 - p. 80, l. 14).

Keith Caulder is the supposed "hit man." He has lived in Marion County his

entire life. (R. p. 87, ll. 20-24). In 2009 he was convicted of breach of trust. (R. p. 93, ll. 1-8; p. 96, ll. 15-17). In 2014 he was convicted of giving false information to law enforcement. (R. p. 93, ll. 9-11; p. 98, ll. 5-9).

Mr. Caulder did not know Mr. Moran. (R. p. 88, ll. 2-4; p. 95, ll. 14-17). He never met Mr. Moran nor had he ever heard of him. (R. p. 88, ll. 5-8; p. 103, ll. 7-9). Mr. Caulder had never spoken to Mr. Moran. (R. p. 103, ll. 10-13).

Mr. Caulder did, however, know Mr. Herring. (R. p. 88, 9-11; p. 95, ll. 19-20). He referred to Mr. Herring as "Little Man." (R. p. 88, l. 22 - p. 89, l. 4). He has known Mr. Herring since he was about 15 years old, or about 25 years. (R. p. 89, ll. 5-10; p. 95, ll. 21-23). During that time Mr. Caulder and Mr. Herring had "occasion to hang out" and "do things together." (R. p. 89, ll. 14-18; p. 96, ll. 1-3).

Mr. Caulder testified that in October 2009, Mr. Herring came to his home. (R. p. 89, ll. 19-21; p. 96, ll. 18-22). Mr. Caulder had not seen Mr. Herring in about four or five years "if I'm not mistaken." (R. p. 96, ll. 7-11, 24-25; p. 98, ll. 10-12). His written statement to law enforcement did not mention that fact. (R. p. 100, ll. 14-17).

Mr. Caulder's aunt called him and told him Mr. Herring was looking for him. (R. p. 89, l. 25 - p. 90, l. 5). Mr. Herring came by the house but Mr. Caulder was not there. (R. p. 90, ll. 6-7). Mr. Caulder returned home once he heard from Mr. Herring. (R. p. 90, ll. 8-10). Mr. Herring arrived about five to ten minutes later. (R. p. 90, ll. 17-18).

According to Mr. Caulder, "[Mr. Herring] had said something about a job and I asked him what kind of job and that's when he went into detail about somebody had offered him money to kill somebody." (R. p. 90, ll. 22-24; p. 98, ll. 13 - 25). Mr. Caulder

added:

He said that the guy was - - we was supposed to meet the guy the next morning and the guy was going to give him the money and we were supposed to go to the house and kill somebody and then break in the house and make it look like a robbery, if I'm not mistaken.

(R. p. 91, ll. 3-7; see also p. 92, ll. 10-11; p. 94, ll. 15-19). When asked how much money would "be involved in the case," Mr. Caulder responded "If I'm not mistaken, it was \$3,000." (R. p. 91, ll. 13-15). That was the sum Mr. Caulder claimed he and Mr. Herring were going to divide. (R. p. 91, ll. 16-19). When asked if Mr. Herring had told him "a lot of the details," Mr. Caulder said:

No, not really a lot of the details. Just that he was - - somebody in Marion was going to pay him to kill someone and that we were supposed to go to Florence and the guy was going to pay us in advance.

(R. p. 91, ll. 22-25).

Mr. Herring never mentioned Mr. Moran's name. (R. p. 103, ll. 17-19). Mr. Herring did not describe the property or "anything along those lines to" Mr. Caulder. (R. p. 92, ll. 6-8; p. 93, ll. 22-24). All Mr. Caulder knew was the crime was to occur in Florence. (R. p. 93, ll. 12-17). According to Mr. Caulder, the transaction was to have occurred the following morning. (R. p. 92, ll. 1-5). Mr. Caulder agreed that that was his "understanding of what Mr. Herring wanted [him] to do for him." (R. p. 94, ll. 20-22).

Mr. Caulder left shortly after that conversation and said he would call Mr. Caulder later. (R. p. 92, ll. 12-16). Mr. Caulder testified Mr. Herring called back later but he did not answer the phone (although the written statement Mr. Caulder gave to law enforcement did not reflect that fact). (R. p. 99, ll. 13-22; p. 100, ll. 12-13; p. 101, l. 25 -

p. 102, l. 5). Mr. Caulder could not recall what time that call came in. (R. p. 104, ll. 15-25). Mr. Caulder then “sat around and thought about it for about an hour” and then went to the Sheriff’s Department. (R. p. 92, ll. 18-22; p. 94, l. 24 - p. 95, l. 3; p. 105, ll. 1-5). Mr. Caulder spoke with investigator Martin Bell. (R. p. 95, ll. 4-5). He gave law enforcement a written statement. (R. p. 93, l. 25 - p. 94, l. 2; p. 100, l. 2 - p. 101, l. 14). The statement does not mention Mr. Moran at all. (R. p. 103, ll. 14-16).

The next morning officers from the Sheriff’s Department were at Mr. Caulder’s home waiting on Mr. Herring. (R. p. 102, ll. 10-15). Mr. Herring did not show up at Mr. Caulder’s home at 5:00 a.m. (R. p. 102, ll. 6-17). When asked if Mr. Moran was there, Mr. Caulder stated “I never even heard of him.” (R. p. 102, ll. 18-19). Mr. Caulder stated he did not call Mr. Herring back and “tip him off.” (R. p. 102, ll. 22-23).

Mr. Moran never came to Mr. Caulder to encourage, entice, offer, or order Mr. Caulder to commit any crime. (R. p. 103, l. 20 - p. 104, l. 6). In fact, Mr. Caulder has “never had any dealings with [Mr. Moran] whatsoever in [his] entire life.” (R. p. 104, ll. 7-9).

The State next called **James Carlyle Rabon, Jr.** (R. p. 106, ll. 22-23). Carlyle was 25 years old at the time of trial. (R. p. 107, ll. 19-20).

At the beginning of 2009 Carlyle was living in Conway, South Carolina. (R. p. 108, ll. 2-4). A few weeks after Ms. Rabon left Mr. Moran, Carlyle moved in with Mr. Moran and Dalton to be there for Dalton. (R. p. 108, ll. 7-18; p. 109, ll. 12-15; p. 110, l. 25 - p. 111, l. 3; p. 120, l. 19 - p. 121, l. 5; p. 121, l. 18; p. 122, ll. 12-16). Carlyle had lived in Mr. Moran’s home from fifth grade until Carlyle was 17 years old. (R. p. 108, ll.

24-25; p. 121, ll. 6-16). When he moved back in 2009 Dalton was 11 years old. (R. p. 109, ll. 9-11). Mr. Herring also moved in with Mr. Moran, Dalton and Carlyle. (R. p. 109, ll. 16-24; p. 110, ll. 22-24; p. 134, ll. 8-16). Carlyle lived there from June through September 2009. (R. p. 123, ll. 6-11).

At some point during the summer 2009 Mr. Moran had discovered where Ms. Rabon was living. (R. p. 111, ll. 11). Carlyle did not know how Mr. Moran found out where Ms. Rabon was living. (R. p. 112, l. 24 - p. 113, l. 8). Mr. Moran took Carlyle and Dalton and Mr. Moran's nephew, "Little Grayland," to the home in Darlington County where Ms. Rabon's car was. (R. p. 111, ll. 11-16; p. 134, l. 24 - p. 135, l. 9). This was between midnight and 1:00 a.m. that night. (R. p. 111, ll. 17-18). They "snuck up" on the house. (R. p. 111, ll. 22-23). Mr. Herring was not with them. (R. p. 113, l. 24 - p. 114, l. 3). Carlyle estimates this was sometime between June and July 2009. (R. p. 124, ll. 20-22).

The home was about a mile down a driveway. (R. p. 113, ll. 11-12). Mr. Moran indicated to Carlyle that the house was where Ms. Rabon was staying. (R. p. 111, l. 24 - p. 112, l. 3). Ms. Rabon's car was parked there. (R. p. 135, ll. 13-14). They ended up staying all night long to videotape Ms. Rabon walking out of the house the next morning. (R. p. 112, ll. 6-8; p. 135, ll. 15-16). They finally left around 9:00 a.m. and went to a private investigator's house. (R. p. 112, ll. 9-17; p. 135, ll. 17-22). Mr. Moran spoke with the investigator for a while and then Carlyle went to work. (R. p. 112, ll. 20-21).

Carlyle did not call his mother to let her know they had come to her home to videotape her. (R. p. 124, ll. 7-10). As for Mr. Parrott, Carlyle said he "left ugly

voicemails on [Mr. Parrott's] phone." (R. p. 124, ll. 11-17; p. 136, ll. 22-23). Carlyle said he did not like Mr. Parrott because "he had been married three times and had been to jail for CDV and stuff of that nature." (R. p. 145, ll. 10-19). Carlyle testified that Mr. Moran made unfavorable comments about Ms. Rabon and Mr. Parrott all the time. (R. p. 111, ll. 4-8).

Carlyle was asked if, after that particular night, he happened to overhear conversations between Mr. Moran and Mr. Herring. (R. p. 114, ll. 7-8). Carlyle responded:

Yes, sir. The kitchen in the house in Marion is tile; so if anybody has ever had tile, you can't whisper in a tiled room. And just regular talking in there goes. So I mean I would hear [Mr. Moran] ask [Mr. Herring] to talk to him. Will he do it? How much would it cost? Will he do it for \$2,000? Questions of that sort.

(R. p. 114, ll. 9-14; see also p. 124, l. 23 - p. 125, l. 7). Carlyle was asked if he had any idea at the time what Mr. Moran was talking about, and he responded:

No. At that particular time, [Mr. Moran] owned a stumping business; so he all the time had pieces of equipment and stuff that had to be fixed, moved, hauled, whatever. So that's what I really thought he was talking about.

(R. p. 114, ll. 15-20; p. 140, ll. 4-9). All he heard was "how much would it cost, what would he do it for..." (R. p. 140, l. 24 - p. 141, l. 6). He added, "[w]hen SLED showed up to my house, that's when I knew. I put the pieces of the puzzle together." (R. p. 114, ll. 23-24).

Carlyle also stated that before SLED came to his house, Mr. Moran "asked me if I knew where I could get a silencer. I asked him for what, a 9 or a .45, and it didn't matter. So that was the first thing that struck me." (R. p. 114, l. 25 - p. 115, l. 4). Mr. Moran also

asked him "do I know anybody that would fuck [Mr. Parrott] up." (R. p. 115, ll. 7-14; see also p. 117, ll. 13-15). Carlyle agreed he did not call Mr. Parrott, Ms. Rabon or Officer Bell to tell them about the statement. (R. p. 127, ll. 7-17).

When the Sheriff's deputy came to Mr. Parrott's home and questioned him "about this stuff here" Carlyle decided he would leave. (R. p. 115, ll. 21-23). Carlyle added:

Okay. The police come to the house and questioned [Mr. Moran]. It was Martin Bell. [Mr. Moran] told him that they (sic) he said/she said bullshit, that they had nothing that would hold up in court. The plan was somebody was going to hide at the end of [Mr. Parrott's] driveway, throw a large object in the driveway. Somebody would be hiding in the woods. When [Mr. Parrott] stopped and exited his vehicle to get to whatever was blocking the driveway out of the driveway, somebody was going to jump out and shoot him dead.

(R. p. 116, ll. 11-19). This was what Carlyle claimed Mr. Moran told Carlyle the plan was for Mr. Parrott. (R. p. 117, ll. 2-8, 16-17). The next day Carlyle moved out. (R. p. 117, ll. 9-10, 18-19). Carlyle added that after Mr. Herring was arrested Mr. Moran bailed him out. (R. p. 117, l. 24 - p. 118, l. 3).

Carlyle wrote a statement for the police on September 28, 2010. (R. p. 119, ll. 2-25; p. 120, ll. 10-11). This was about 11 months after Mr. Herring had been arrested. (R. p. 120, ll. 1-7; p. 137, ll. 16-22). Carlyle agreed that even though he left in August 2009 and Mr. Herring was arrested in October 2009, he did not go to law enforcement to tell them about any conversations he heard or had with Mr. Moran. (R. p. 125, l. 14 - p. 126, l. 18; p. 138, ll. 14-17; p. 139, l. 11 - p. 140, l. 3). It was not until September that law enforcement came to him and he wrote the statement. (R. p. 126, ll. 21-25).

Carlyle also claimed that he woke up one evening and Mr. Herring asked Carlyle

to go with him to “fuck Randy up.” (R. p. 128, l. 2 - p. 129, l. 4). Carlyle never called Ms. Rabon or Mr. Parrott to tell them what Mr. Herring allegedly said. (R. p. 129, l. 5 - p. 130, l. 9). He also did not call Officer Bell. (R. p. 130, ll. 10-11). Carlyle claimed they went back the next day and sat in the field parked across from Mr. Parrott’s driveway, but he never called Ms. Rabon, Mr. Parrott or Officer Bell to tell them. (R. p. 130, l. 16 - p. 131, l. 3). Carlyle then testified that his statement was all mixed up and they did not go back the next day. (R. p. 131, ll. 13-24).

Carlyle agreed that he never heard Mr. Moran “offer anybody a dime to hurt Mr. Parrott.” (R. p. 142, ll. 9-12).

At the close of the State’s case, both defendants moved for directed verdicts. (R. p. 146 - p. 156). The trial court denied the motion as it related to all charges against both defendants. (R. p. 156, l. 11 - p. 159, l. 4). Thereafter both defendants rested without presenting any evidence. (R. p. 164, ll. 11-15). Both defendants renewed their motions and the court denied them. (R. p. 164, ll. 18-25).

The jury began its deliberations after closing arguments and receiving instructions. The jurors sent three questions to the court during deliberations, First, they wanted “the definition of conspiracy according to the law” (R. p. 203, ll. 3-4), to which the court recharged the law of conspiracy. The second question was “can you tell us what the punishment may be if found guilty of conspiracy?” to which the court responded “no.” (R. p. 204, ll. 13-15). Finally, the jury asked if they could “have a copy of the written statements of the witnesses.” (R. p. 204, ll. 19-20). The court reminded the jury that the

statements were not admitted into evidence so they could not have them. (R. p. 204, ll. 21-23).

Following additional deliberation the jury returned verdicts of not guilty for Mr. Herring and Mr. Moran on the charges of solicitation to commit a felony. (R. p. 206, ll. 19-21; p. 207, ll. 3-8). However, the jury found Mr. Moran guilty of conspiracy. (R. p. 206, ll. 22-23). The court sentenced him to five years imprisonment, suspended to two years and three years probation. (R. p. 213, ll. 2-6).

Mr. Moran then moved for a new trial on the ground that the verdicts were not consistent. (R. p. 214, ll. 6-17). The court permitted Mr. Moran 10 days to file post-verdict motions.

Mr. Moran made a written motion for a new trial. (R. p. 9). The State filed a memorandum in opposition. (R. p. 13). The trial court then denied the motion for new trial. (R. p. 4).

This appeal follows.

ARGUMENT

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 trial court should have directed a verdict for Mr. Moran on the conspiracy charge at the close of the evidence. Further, the court should have granted Mr. Moran a new trial since the evidence did not support the charge. This Court should reverse those rulings and remand the matter for proceedings consistent with that ruling.

Section 16-17-410 provides:

The common law crime known as “conspiracy” is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means.

A person who commits the crime of conspiracy is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years.

A person who is convicted of the crime of conspiracy must not be given a greater fine or sentence than he would receive if he carried out the unlawful act contemplated by the conspiracy and had been convicted of the unlawful act contemplated by the conspiracy or had he been convicted of the unlawful acts by which the conspiracy was to be carried out or effected.

S.C. Code Ann. § 16-17-410 (1976). Thus, the statute that criminalizes “conspiracy” contemplates either an underlying unlawful act or a lawful object by unlawful means.

The essence of a conspiracy is the agreement. *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (1993); *State v. Dasher*, 278 S.C. 454, 298 S.E.2d 215 (1982); *State v. Stuckey*, 347 S.C. 484, 556 S.E.2d 403 (Ct. App.2001). It may be proven by the specific overt acts done in furtherance of the conspiracy, but the crime is the agreement. *State v. Wilson*. A formal agreement is not necessary to establish a conspiracy, as the conspiracy

may be proven by circumstantial evidence and the conduct of the parties. *State v. Stuckey*. What is needed is proof the conspirators intended to act together for their shared mutual benefit within the scope of the conspiracy charged. *Id.* In making this determination, “[t]he substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope.” *State v. Wilson*, 315 S.C. at 294, 433 S.E.2d at 868.

The third paragraph of section 16-17-410 contemplates that when the conspiracy charge is grounded on the agreement to accomplish an unlawful act, the punishment may not be greater than the punishment that would be meted out for directly committing that wrongful act. Thus, in the circumstances where the State claims the conspiracy is to accomplish an unlawful act, the State must establish the existence of the wrongful act for the conspiracy charge to stand.

When reviewing a denial of a directed verdict in a criminal case, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *State v. Galimore*, 396 S.C. 471, 721 S.E.2d 475 (Ct. App. 2012). The appellate court may reverse the circuit court’s denial of a motion for a directed verdict only if there is no evidence to support the court’s ruling. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002); *State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. *State v. Brandt*, 393 S.C. 526, 713 S.E.2d 591 (2011); *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006).

In this case, the State charged Mr. Moran with conspiracy to commit an unlawful act, namely, solicitation of murder. But the State failed to establish the elements of solicitation to commit murder. Furthermore, the jury exonerated both defendants of that charge. It is thus impossible for Mr. Moran to have conspired to commit an unlawful act that the jury found he did not commit. The jury's verdict is illogical, and the Court should not let it stand.

As proof of the agreement, the State presented testimony of conversations Mr. Moran purportedly had with Mr. Herring and statements he allegedly made to his stepson. But none of these conversations regarded an agreement to solicit murder.

Neither Mr. Parrott nor Ms. Rabon knew anything about any alleged agreement Mr. Moran entered into to commit an unlawful act, much less the crime of murder. Their testimony is useless to the inquiry.

The remaining witness testimony is equally wanting: The alleged "hit man," Mr. Caulder, offered no evidence that would support a conviction for conspiracy. While he told a story about Mr. Herring approaching him to kill someone, he had never heard of Mr. Moran, he never heard of Mr. Parrott, he received no details regarding where the alleged murder was to take place, and while the crime was to occur the next morning, nobody showed up when Mr. Caulder had the police waiting at his home. Even the jury did not believe Mr. Caulder, for they acquitted both Mr. Herring and Mr. Moran of soliciting Mr. Caulder to kill someone.

The last witness, Carlyle Rabon, also offered no testimony of an agreement between Mr. Moran and anyone to commit a felony. Even though Mr. Rabon claims to

have put things together regarding a conversation he overheard, the content of that conversation does not establish an agreement. At worst, it establishes that Mr. Moran and Mr. Herring were discussing how they could approach someone to accept an amount to commit the crime.

As for the alleged conversation about how the crime was going to be carried out, again, nothing in Mr. Rabon's testimony hints at, much less establishes, that Mr. Moran had entered into an agreement with anyone to commit a crime, much less a murder.

Notably, the State called no law enforcement officers to the stand, even though Investigator Bell was in the courtroom. They also did not offer any witness statements, nor did they offer any other evidence that these defendants actually entered an agreement to do anything, much less kill Randy Parrott.

Although there is no question there were strong emotions in this case (Mr. Rabon's dislike for Mr. Parrott, for instance), there is simply no direct or substantial circumstantial evidence that Mr. Moran entered an agreement with anyone, including Mr. Herring, to do anything, including the crime of murder.

The trial court should have never let this case go to the jury. Even the jury, through its questions, demonstrated that it was struggling with the concept of conspiracy in this case. But once the jury returned a verdict of guilty, the court should have granted Mr. Moran's motion for a new trial against the paucity of evidence the State presented.

The reason Mr. Moran presented this Court with a detailed summary of the testimony is that this is all of the evidence the State presented in the case. The Court should find that even when viewed most favorably for the State the evidence failed to

present direct or substantial circumstantial evidence to sustain Mr. Moran's conviction for conspiracy. The Court should reverse the conviction and remand for either an entry of judgment of acquittal or, alternatively, a new trial.

II. Under the Facts of this Case, Wharton's Rule Precludes a Conviction for Conspiracy Where the Underlying Charge (Solicitation of Murder) Requires the Participation of Multiple Actors, and Mr. Moran Was Acquitted of That Charge

The trial court should have directed a verdict of acquittal on the charge of conspiracy because the unlawful act – solicitation to commit murder – requires the participation of more than one person and “Wharton’s Rule” precluded conviction of both charges in the indictment. Furthermore, once the jury convicted Mr. Moran the court should have granted him a new trial because the acquittal on the solicitation charge precluded conviction on conspiracy to commit solicitation under the Double Jeopardy clause.

“Wharton’s Rule” is a doctrine of criminal law attributed to Francis Wharton and traced to *Shannon v. Commonwealth*, 14 Pa. 226 (Pa. 1850). *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. *Iannelli*. As generally stated, the Rule prohibits prosecution of a conspiracy to commit a particular crime when the commission of that underlying crime requires the participation of more than one person. *Iannelli*, 420 U.S. at 773, citing 2 F. Wharton, *Criminal Law* § 1604, at 1862 (12th ed. 1932). The Rule arises from the element of plural conduct that is the basis of the crime of conspiracy. 2 W. LaFare & A. Scott, *Substantive Criminal Law* § 6.5, at 112 (1986).

Wharton’s Rule is widely applied by both Federal and State courts. *Iannelli*, 420 U.S. at 774. The Court in *Iannelli* described the Rule as follows:

The classic Wharton's Rule offenses – adultery, incest, bigamy, dueling – are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large. Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. It cannot, for example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct.

* * *

Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved.

Iannelli, 420 U.S. at 783-786.

South Carolina Supreme Court has not expressly decided whether Wharton's Rule is followed in South Carolina. *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967) (discussing the Rule and noting “[t]he rule does not apply where the substantive offense that is the object of the alleged conspiracy can be committed by a single person”); however, the Court found it need not decide whether to follow the rule because it would not have precluded the charge in that case). *See also State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005) (noting *Wells* recognized the existence of Wharton's Rule in South Carolina, but denied its application under the facts of *Wells*). The *Crawford* Court

described the Rule as follows:

if the substantive offense requires by definition the concerted action of two persons, as for example the crime of adultery, then those persons cannot be convicted of conspiracy to commit the offense because this would merely be a subterfuge to increase the legislatively authorized punishment for the substantive offense.

362 S.C. at 639, 608 S.E.2d at 892.

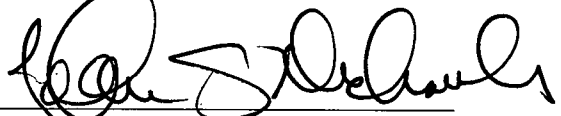
Mr. Moran was indicted for conspiracy to solicit murder. The underlying crime, solicitation of murder, is a common law offense whereby “it is only necessary that the actor, with intent that *another person commit a crime*, have enticed, advised, invited, ordered, or otherwise encouraged *that person* to commit a crime.” *State v. Smith*, 316 S.C. 53, 447 S.E.2d 175 (1993) (emphasis added). Thus, the underlying crime – solicitation to commit murder – requires the participation of more than one person. It requires a plurality of criminal agents and collective criminal activity. Had the state proved the substantive offense of solicitation to commit murder, then the conspiracy would have merged. The same is no less true simply because the jury acquitted Mr. Moran of solicitation to commit murder.

Wharton’s Rule precluded conviction of both solicitation of murder and conspiracy to solicit murder. The trial court should have directed a verdict as to conspiracy, and once the jury acquitted Mr. Moran of the underlying charge (solicitation of murder), the court should have set aside the conviction.

CONCLUSION

For the reasons stated 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,



September 21, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113

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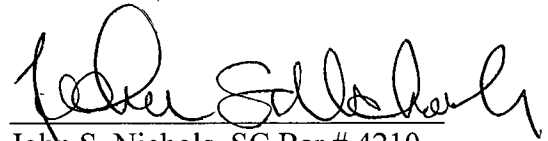
The State, Respondent,

v.

Darryl Wayne Moran, Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant and Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.



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September 29, 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 *Final Brief of Appellant, Reply Brief and Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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