STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001013

THE STATE, ...RESPONDENT,

v.

ROBERT ANTWON WRIGHT, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Because an issue cannot be raised for the first time in post-trial motions, Appellant failed to preserve his argument that his prosecution for accessory before the fact could not proceed where the principals had not been convicted and they were not on trial with Appellant.

II.

The trial court did not err in denying Appellant's motion for a directed verdict because evidence was adduced at trial from which a jury could determine he was guilty of accessory before the fact of armed robbery.

III.

Appellant never objected to the content of the solicitor's closing statement and his argument is therefore unpreserved. Further, nothing in the statement would warrant reversal.

STATEMENT OF THE CASE

Appellant was indicted at the August term of the grand jury for Newberry County for accessory before the fact of burglary or armed robbery and conspiracy. Appellant proceeded to trial by jury and was convicted of the accessory charge. He was sentenced by the Honorable Donald B. Hocker to sixteen years' imprisonment. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Precious and Cedric Mayers were at their home in Little Mountain when two men burst through their front door and held them at gun point. (Tr.68.) The men began demanding to know "Where the shit at?" and when the Mayerses responded they did not have anything, the men began rummaging through the house. (Tr.68–69.) The two men eventually absconded with some marijuana, less than a hundred dollars, and both of their phones. (Tr.70.) The Mayerses then ran to a neighbor's house to call 911. (Tr.74.)

The initial responders turned the investigation over to Investigator Garrett Lominack. (Tr.160.) The morning following the burglary, Cedric informed Investigator Lominack that his FindMyiPhone app was indicating his cell phone was at an address in Newberry. (Tr.162.) Investigator Lominack tracked the phone and found it in the trash outside the home of Precious Bates. (Tr.163.) Bates informed the officers that Lorenzo Jones had been at her home the evening prior and had discarded some items in her trash. (Tr.165.)

After returning the phones to the victims, Investigator Lominack located Jones, who had returned to Bates' home. (Tr.166.) Jones voluntarily accompanied the officers to the police station and eventually implicated Appellant and Tarakus Coleman as his accomplices to the crimes. Appellant was arrested and indicted for accessory before the fact of robbery/burglary. (Indictment.) Prior to trial, Appellant stipulated that the phone records the State planned to offer would show he contacted Jones during the time surrounding the crime. (Tr.33.) At trial, Jones testified Appellant called him and said he "had somebody for [Jones] to rob[b]ecause he was getting in [Appellant's] way." (Tr.134.) Jones explained he called Coleman to assist him in the robbery, and the two went to Little Mountain together. (Tr.136.) Jones stated they arrived at the specified location and waited for about an hour, eventually asking Appellant if they should go ahead with the robbery. (Tr.137.) Once Appellant had told him to "go ahead and kick in the

door," Jones and Coleman proceeded. (R.139.) Jones explained that all they took was a little bit of crack, a bag of marijuana, thirty or forty dollars, and two cell phones. (Tr.140–41.)

Coleman testified that Jones called him about robbing a trailer for $8,000 and some crack. (Tr.93.) Coleman explained Jones had received the information from his partner, Appellant, who Coleman did not know at the time. (Tr.95–96.) However, Coleman stated Jones called Appellant on speakerphone prior to the crime to discuss the details of who would be in the home and how they should proceed. (Tr.101.) Although Appellant did not specify the location of the money and drugs purported to be inside, Coleman testified Appellant said to just go in the house and it should be there. (Tr.101.)

The State rested and Appellant moved for directed verdict, which the trial court denied. (Tr.186–87.) In his closing argument, the solicitor discussed the evidence presented, including the stipulation to the authenticity of phone records showing Appellant and Coleman had been in contact on the day of the crime:

> We know for a fact the victims and Robert Wright lived about fifty feet apart. We know that. That's uncontested. We know that only Robert Wright knew these victims. We know Tarakus Coleman didn't know them. We know Lorenzo Jones didn't know them. We know Jones and Coleman were the ones who went and did the job. And we know about those phone records. And aren't those difficult for Mr. Wright to explain, those phone records? Do you understand that that's not been contested? Do you understand that is the evidence; that those phone records are the communications between Lorenzo Jones and Robert Wright the day of the crime and the day after?

(Tr.202–03.) Similarly, Appellant reiterated in his closing statement that he did not contest the veracity of the phone records: "We didn't dispute the phone records. No doubt my client talked on the phone with Lorenzo Jones. You guys saw the phone records for that day and we don't dispute that that happened." (Tr.215.)

Ultimately, the jury found Appellant guilty of accessory before the fact of armed robbery and accessory before the fact of first-degree burglary. (Tr.242.) Appellant was acquitted of conspiracy. (Tr.242.) Appellant moved for judgment notwithstanding the verdict, arguing there was no evidence presented indicating he aided in the commission of the crimes and that the verdict was inconsistent. (Tr.246–48.) The trial court denied the motions. (Tr.250.) The court ultimately sentenced Appellant to sixteen years' imprisonment. (Tr.279.)

Subsequently, Appellant made several post-trial motions arguing the trial court lacked subject-matter jurisdiction, the court erred in failing to direct a verdict of acquittal, and the court should grant a new trial based on the impropriety of solicitor's closing argument. (Appellant's Post-Trial Mot.) The court held a hearing and heard arguments on the jurisdictional and closing argument issues. (Tr.Post-Trial Mot.) Ultimately, the judge denied all the motions in a written order. (Trial Ct. Order dated May, 6, 2016.) This appeal followed.

ARGUMENTS

I.

Because an issue cannot be raised for the first time in post-trial motions, Appellant failed to preserve his argument that his prosecution for accessory before the fact could not proceed where the principals had not been convicted and they were not on trial with Appellant.

Appellant argues that the trial court lacked subject-matter jurisdiction to hear his case pursuant to Section 16-1-50 of the South Carolina Code (2015), which states:

> A person who counsels, hires, or otherwise procures a felony to be committed may be indicted and convicted:
> (1) as an accessory before the fact either with the principal felon or after his conviction; or
> (2) of a substantive felony, whether the principal felon has or has not been convicted or is or is not amenable to justice, and may be punished as if convicted of being an accessory before the fact.

Specifically, he claims he should not have been convicted because the principals who perpetrated the crime had not been convicted nor were they on trial with him. However, he never asserted this argument prior to trial, or objected to the indictment before the jury was sworn.[1] Accordingly, he has failed to preserve this argument. "It is well settled that an issue may not be raised for the first time in a post-trial motion." *State v. Geer*, 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010).

Nevertheless, Appellant seeks an exception to the well-settled rules of issue preservation by arguing this issue implicates subject-matter jurisdiction and can therefore be raised at any time. Appellant misconstrues the nature of his claim.[2]

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[1] Appellant admitted as much at the hearing on the post-trial motions. (Tr. Post-Trial Mot.3.)
[2] Perhaps similarly unconvinced that the trial court lacked the power to hear his case, Appellant requests a new trial in his prayer for relief. If indeed the trial court does not have subject-matter jurisdiction, such a defect would not be cured by the court hearing the case a second time.

Subject-matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong and can therefore be raised at any time in the proceeding. *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). The concepts of subject-matter jurisdiction and the sufficiency of the indictment are distinct and should not be conflated. *Id.* at 101, 610 S.E.2d at 499. Accordingly, "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." *Id.*

Here, Appellant is not alleging the circuit court does not have the power to hear cases involving the charge of accessory before the fact—he admits it is "the proper Court to preside over the charge of Accessory Before the Fact." (Appellant's Br.8.) Instead, he argues section 16-1-50 creates a "procedural hurdle" that is a prerequisite to the court obtaining jurisdiction. This is inconsistent with our jurisprudence on subject-matter jurisdiction, which is as uncomplicated as determining whether the court can hear a general class of cases; Appellant freely admits it can. Appellant was indicted pursuant to Section 16-1-40 of the South Carolina Code (2015), which states:

> A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.

The flaw alleged by Appellant appears to be that he believes the State should have proceeded under section 16-1-50(2) because the principals had not been convicted and were not on trial with him. Even assuming *arguendo* this claim has merit, it is merely an allegation that the indictment was defective and therefore does not implicate subject-matter jurisdiction.

Further, on a substantive level Appellant misapprehends the interaction of these two statutes. Section 16-1-40 illustrates the elements of the crime of accessory before the fact and

removes the distinction between the accessory and the principal for purposes of presentment. *See State v. Blakely*, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013) (discussing section 16-1-40 by explaining "the accessory's culpability no longer shadows that of the principal. Accordingly, an accessory may be convicted even if the principal is not charged, is acquitted, or is not yet prosecuted."). Section 16-1-50 then clarifies that the defendant may be prosecuted for accessory before the fact *or* a substantive felony—however, it does not allow the State to proceed under both theories. Again, to the extent the Appellant argues he should have been indicted for the substantive crime instead of as an accessory, he had the opportunity to allege that defect prior to the jury being sworn and the State would have simply reindicted him for the substantive crimes. *See* S.C. Code Ann. § 17-19-90 (2014) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). Appellant did not avail himself of that opportunity and is precluded from arguing it now.

More importantly, Appellant suffered no prejudice because the criminal acts implicated by both prongs of the statute are identical. As made plain in section 16-1-50, the illegal actions undertaken by a defendant guilty of accessory before the fact of a felony are sufficient to prove guilt under the substantive crime. Thus, in convicting Appellant, the jury found beyond a reasonable doubt that Appellant had counseled, hired, or otherwise procured a felony to be committed. Had he been indicted as a principal under subsection (2), the jury would have convicted him based on the exact same proof. Thus, he cannot even allege he was not sufficiently apprised of the elements of the crime because they are indistinguishable. Accordingly, regardless of the fact that Appellant failed to preserve his argument, it fails on the merits.

II.

The trial court did not err in denying Appellant's motion for a directed verdict because evidence was adduced at trial from which a jury could determine he was guilty of accessory before the fact of armed robbery.

When reviewing the denial of a directed verdict, the appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *Id.* "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *State v. Cherry*, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004).

Appellant's argument that the State failed to put forth any competent evidence focuses almost exclusively on the phone records, which he argues raise only a mere suspicion of guilt. However, both principals testified that Jones spoke with Appellant just prior to the incident to discuss what was going to occur, who was in the home, and what they could expect to steal. (R.100, 101.) This was not a passing reference that his neighbors may be in possession of money and drugs. Jones' specific testimony was that Appellant informed him that he "had somebody for [Jones] to rob." (R.134.) When Jones called Appellant just prior to entering the Mayers' home, he asked if he should kick the door down and did not proceed until Appellant had told him to "go ahead and kick in the door." (R.139.) From this testimony alone, the jury could have found Appellant counseled or otherwise procured through encouragement the crime of accessory before the fact of first-degree burglary.

III.

Appellant never objected to the content of the solicitor's closing statement and his argument is therefore unpreserved. Further, nothing in the statement would warrant reversal.

Initially, Appellant is procedurally barred from challenging the propriety of the solicitor's closing statement because he failed to present the issue until his post-trial motion.[3] "It is well settled that an issue may not be raised for the first time in a post-trial motion." *Geer*, 391 S.C. at 193, 705 S.E.2d at 448. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); *see State v. Robinson*, 238 S.C. 140, 153–54, 119 S.E.2d 671, 678 (1961) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding issue unpreserved because "the argument of the Solicitor was not objected to when made and no ruling thereon was requested from the Trial Judge"). Accordingly, the issue is unpreserved for appellate review. Further, even the substance of his argument fails because of this procedural defect. Despite his failure to lodge any objection during trial, Appellant devotes much of his allegation of error to the trial court's failure to provide an adequate curative instruction. The failure of a court to *sua sponte* supply an unrequested curative instruction can hardly be characterized as an abuse of discretion. Moreover, it is understandable no objection was lodged as there was nothing improper about the solicitor's closing argument.

"The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion [and the] appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion." *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted). The prosecution may not comment, directly

[3] Again, Appellant conceded as much at the hearing. (Tr. Post-Trial Mot.9.)

or indirectly, on the defendant's decision not to testify or present a defense; however, any improper comments do not require reversal unless they prejudice the defendant. *State v. Cooper*, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999). Appellate review "of the closing argument is based upon whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

Appellant complains the solicitor's closing argument violated his right to remain silent and constituted impermissible burden shifting. Specifically, he directs the Court to the solicitor's reference to the phone records in evidence as being "difficult for Mr. Wright to explain." The solicitor's brief mention that the phone records were unexplained is neither a comment on Appellant's decision not to testify nor does it shift the burden of proof. There was no intimation Appellant was required to present a defense. The solicitor states: "And aren't those difficult for Mr. Wright to explain, those phone records? Do you understand that that's not been contested? Do you understand that is the evidence; that those phone records are the communications between Lorenzo Jones and Robert Wright the day of the crime and the day after?" In the context of the solicitor's entire statement on that point, he was merely illustrating the inferences that could be derived from the existence of the records. It is undisputed Appellant and Jones communicated around the time of the crime—Appellant stipulated to that. Therefore the emphasis was not that Appellant should explain the records, but merely recapped the evidence presented—that Appellant was in contact with Jones throughout the day. Accordingly, even if Appellant had properly preserved this issue, it fails on the merits.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
September 30, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001013

THE STATE, ...RESPONDENT

v.

ROBERT ANTWON WRIGHT, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated September 30, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Mindy W. Zimmerman, Esquire
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I further certified that all parties required by Rule to be served have been served. This 30th, day of September, 2016.

Angela Bennett
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ALAN WILSON
ATTORNEY GENERAL

September, 30, 2016

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Re: The State v. Robert Antwon Wright
Appellate Case No. 2016-001013

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Ranee Saunders
Assistant Attorney General
S.C. Bar No. 100073

RS/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services