

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113
2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2106)

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S.C. SUPREME COURT

The State, Respondent,

v.

Darryl Wayne Moran, Petitioner.

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Darryl Wayne Moran, Appellant.

Appellate Case No. 2014-002331

Appeal From Marion County
D. Craig Brown, Circuit Court Judge

Unpublished Opinion No. 2016-UP-406
Heard June 8, 2016 – Filed August 24, 2016

AFFIRMED

John S. Nichols, of Bluestein Nichols Thompson &
Delgado, LLC, of Columbia for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Susannah Rawl Cole, both of
Columbia, and Solicitor Edgar Lewis Clements, III, of
Florence, for Respondent.

PER CURIAM: Darryl Wayne Moran appeals his conviction of conspiracy for solicitation to commit murder, arguing (1) the trial court erred in denying his

motion for a directed verdict and motion for a new trial based on lack of evidence, and (2) Wharton's Rule¹ precludes the conspiracy conviction. We affirm.

In 2011, Moran was indicted for conspiracy for solicitation to commit murder and solicitation to commit the murder of Randy Parrott, the boyfriend of his ex-wife. In August 2014, Moran was tried with codefendant James Earl Herring Jr., who was also indicted for solicitation to commit the murder of Parrott. The jury found Moran and Herring not guilty on the charge of solicitation but found Moran guilty of conspiracy for solicitation to commit murder. The trial court sentenced Moran to five years' imprisonment suspended upon two years' imprisonment and three years' probation.

As to Moran's argument the trial court erred in denying his motion for a directed verdict and subsequent motion for a new trial on the ground the State presented no evidence Moran had conspired with another person to solicit someone to murder Parrott, we find the trial court did not err in finding the State presented substantial circumstantial evidence reasonably tending to prove Moran's guilt. *See State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) ("On appeal from the denial of a directed verdict, this [c]ourt must view the evidence in the light most favorable to the State."); *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) ("[I]f there is any direct or *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." (emphasis in original)); S.C. Code Ann. § 16-17-410 (2015) ("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."). At trial, James Carlyle Rabon Jr. testified to conversations he overheard or to which he was a party while living in Moran's home with his younger brother and Herring. Specifically, James stated he

¹ Under Wharton's Rule,

Where co-operation or concert between two or more persons is essential to the commission of a substantive crime, and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, the persons necessarily involved cannot be charged with conspiracy to commit the substantive offense and also with the substantive crime itself.

16 Am. Jur. 2d *Conspiracy* § 6 (2009).

overheard a conversation between Moran and Herring in which Moran asked questions such as: "Will he do it? How much would it cost? Will he do it for \$2,000?" James also testified Moran asked him if he knew where he could get a silencer and if he knew anyone who "would f*** [Parrott] up?" James recalled Moran discussed the plot to murder Parrott, stating:

[t]he plan was somebody was going to hide at the end of [Parrott's] driveway, throw a large object in the driveway. Somebody would be hiding in the woods. When [Parrott] stopped and exited his vehicle to get to whatever was blocking the driveway, somebody was going to jump out and shoot him dead.

Moreover, Keith Douglas Caulder, a friend of Herring's, testified Herring approached him with an offer to split \$3,000 for killing a man who lived in Florence—where Parrott lived.² Caulder recalled Herring "went into detail about somebody had offered him money to kill somebody" and explained he and Herring

were supposed to meet the guy [who had offered money to have someone killed] the next morning[,] and the guy was going to give [Herring] the money[,] and we were supposed to go to the house and kill someone and then break in[to] the house and make it look like a robbery, if I'm not mistaken.

Considering James's recollection of the discussion between Moran and Herring regarding whether an individual would "do it for \$2,000," Moran's need for a silencer, Moran's description of the plan to murder Parrott, Moran's knowledge and surveillance of Parrott's property, with Caulder's testimony for added context, we find the State presented sufficient substantial circumstantial evidence such that the trial court did not err in denying Moran's motion for a directed verdict.

As to Moran's argument Wharton's Rule precluded his conspiracy conviction, we find this issue was not preserved because Moran first raised this issue in his post trial motion and it was not ruled on by the trial court. *See State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("In criminal cases, the appellate court sits only

² James testified Moran knew where Parrott lived because he had surveilled Parrott's home.

to review errors of law which have been properly preserved, i.e., the issue has been raised to and ruled on by the trial court.").

AFFIRMED.

HUFF, KONDUROS, and GEATHERS, JJ., concur.

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

Appellate Case No. 2014-002331

The State, Respondent,

v.

Darryl Wayne Moran, Appellant.

Petition for Rehearing

Pursuant to Rules 221 and 240, SCACR, Appellant/Petitioner Darryl Wayne Moran files this Petition for Rehearing regarding this Court's decision in *State v. Moran*, 2016-UP-406 (S.C. Ct. App. filed Aug. 24, 2016). The Court overlooked or misapprehended the following points in affirming the judgment below.

- A. In finding the State presented sufficient substantial circumstantial evidence of conspiracy to solicit murder such that the trial court did not err in denying Petitioner's motion for directed verdict, the Court failed to consider the following:
1. The Court relied upon the testimony of Keith Caulder as "context." The Court overlooked that Mr. Caulder stated he never discussed any details of the "job" (R. p. 91, ll. 22-25), had never heard of or spoken with Petitioner

(R. p. 88, ll. 2-8; p. 95, ll. 14-17; p. 103, ll. 7-13, 17-19), and did not know who the alleged victim was (*i.e.*, he never even spoke Mr. Parrott's name at trial). (R. p. 91, ll. 22-25). Mr. Caulder also did not testify about details regarding the alleged agreement between Petitioner and Mr. Herring to solicit Mr. Caulder to kill Mr. Parrott; rather, his testimony is all about the purported crime of actual solicitation, a crime for which the jury *acquitted* both Petitioner and Mr. Herring. (Resp. Br. p. 18, ¶¶ 7-9).

2. The Court pointed testimony by Carlyle Rabon about conversations he overheard and an alleged discussion of a plot to kill Randy Parrott, the purported victim. The Court overlooked Appellant's argument that the testimony adds nothing to the charge of *conspiracy* to solicit the murder of Mr. Parrott, and was not 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.>").
3. The Court described Caulder's testimony that "Herring approached him with an offer to split \$3,000 for killing a man who lived in Florence – where Parrott lived." In fact, Mr. Parrott testified he lived in Darlington, not Florence. (R. p. 52, ll. 7-11; p. 56, ll. 4-9). Jenny Rabon confirmed that fact (R. p. 69, ll. 13-19; p. 78, ll. 21-23), as did Carlyle. (R. p. 111, ll. 11-16; p. 134, l. 24 - p. 135, l. 9).

4. The Court also pointed to Mr. Caulder's testimony that Mr. Herring "went into detail about somebody had offered him money to kill somebody" and explained he and Herring

were supposed to meet the guy [who had offered money to have someone killed] the next morning[,] and the guy was going to give [Herring] the money[,] and we were supposed to go to the house and kill someone and then break in[to] the house and make it look like a robbery, if I'm not mistaken.

The Court overlooked that 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). Furthermore, Mr. Herring never mentioned Petitioner'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 allegedly 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). This testimony is not substantial circumstantial evidence of any conspiracy to solicit anyone to do anything.

5. The Court also overlooked that the jury found that the State did not prove either Petitioner or Mr. Herring solicited anyone to murder Mr. Parrott, and therefore there was insufficient proof that they conspired to solicit murder. That is, there was no substantial circumstantial evidence that they conspired to solicit murder.

B. In finding Petitioner's argument regarding Wharton's Rule was not preserved for review, the Court overlooked Petitioner's arguments that he sufficiently raised the point below and obtained a ruling thereon. Petitioner's counsel challenged the jury's ability to convict Petitioner 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. (R. p. 214, ll. 8-17). Importantly, counsel then requested 10 days to make a more formal motion which the trial court permitted. (R. p. 214, ll. 18-23). In that formal motion Petitioner argued 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 Petitioner's case because "the crime of solicitation only requires one actor...." (R. pp. 16-17). The State did not contend the issue had been waived. In reply, Petitioner once again contended that Wharton's Rule is the law of South Carolina and that it applied to this case. (R. p. 21). The trial court summarily denied the motion, thereby expressly ruling on the argument.

For the reasons stated this Court should grant this petition, withdraw its prior opinion, and issue a new opinion addressing the arguments Petitioner made and reversing the judgment below.

Respectfully submitted,



September 8, 2016

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The South Carolina Court of Appeals

The State, Respondent,

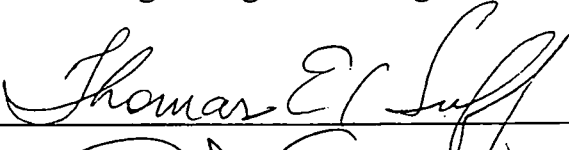
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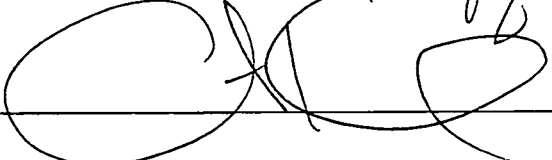
Darryl Wayne Moran, Appellant.

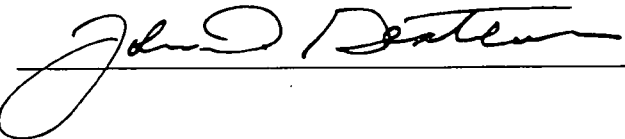
Appellate Case No. 2014-002331

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
John S. Nichols, Esquire
Susannah Rawl Cole, Esquire
Edgar Lewis Clements, III, Esquire

FILED

October 21, 2016

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,



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September 21, 2015

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2014-002331

RECEIVED

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SC Court of Appeals

THE STATE,

Respondent,

v.

DARRYL WAYNE MORAN,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

Though unpreserved for review, Wharton's Rule did not preclude the conviction of conspiracy to solicit murder, regardless of whether co-defendants were ultimately acquitted of an additional solicitation charge, because South Carolina does not recognize Wharton's Rule as controlling law. Even if this Court does recognize Wharton's Rule, the rule is inapplicable here, because more than the minimally necessary actors were implicated in the commission of the crimes. (Appellant's Issue II)

II.

The trial court properly denied Appellant's motions for a directed verdict and new trial because ample evidence supported the jury's finding of Appellant guilty of conspiracy. (Appellant's Issue I)

STATEMENT OF THE CASE

Appellant was indicted for solicitation to commit murder and conspiracy to solicit murder by a Marion County grand jury on May 5, 2011. (R. pp. 1-2.) His co-defendant, James Herring Jr., was indicted only for solicitation to commit murder. (R. p. 28, lines 15-23.) Appellant and his co-defendant were tried before the Honorable D. Craig Brown on August 4 and 5, 2014. (R. p. 25) The jury acquitted them of the solicitation charge, but found Appellant guilty of conspiracy. (R. p. 206, lines 16-23.) Appellant filed a Motion for a New Trial on August 25, 2014. Judge Brown denied the Motion in an Order dated October 28, 2014. This Appeal follows.

STATEMENT OF FACTS

Randy Parrot, the victim in this case, is a fifty-eight year old residential construction worker. (R. p. 52, lines 1-24.) He met his girlfriend, Jennie Rabon, in 2009. (R. p. 53, lines 8-17.) Rabon was a realtor, and Parrot completed the punchlist for the homeowner before the home was sold. (R. p. 53-54, line 20 – p. 75, line 8.) At the time Parrot and Rabon met, Rabon was still married to Appellant. (R. p. 59, lines 21-24.)

Appellant and Rabon were married in 1996 and had one child together named Dalton. (R. p. 60, line 20 – p. 61, line 1.) The marriage deteriorated in 2009, and by May of 2009, Rabon moved out of the home. (R. p. 61, lines 6-23.) In July of 2009, Rabon moved in with Parrot. (R. p. 62, lines 13-18.) They shared a home located at the back of a dirt road, approximately one mile off the main road. (R. p. 69, lines 6-12.) Along the dirt road are some abandoned buildings and old barns leading to their house (R. p. 69, lines 9-12.) At some point, Appellant hired a private detective to conduct surveillance of Rabon and Parrot together. (R. p. 82, lines 12-15.) After a family court hearing, Appellant was granted custody of their son and Rabon was ordered to pay child support. (R. p. 82, lines 18-23.)

After her separation from Appellant, Rabon no longer spoke to him, other than to discuss their son. (R. p. 62, lines 22-24 and p. 83, line 12.) During her marriage to Appellant, Rabon became friends with James Herring, who was her husband's employee. (R. p. 63, line 5 – p. 64, line 8.) Rabon and Herring saw each other on a weekly basis, doing odd projects together, such as planting flowers or putting up Christmas lights. (R. p. 64, line 22 – p. 65, line 5.) Though she mostly stopped communicating with her

husband after her separation, she continued her friendship with Herring. (R. p. 65, lines 17-20.)

Rabon testified she would see Herring at unexpected times, however, such as sitting in the parking lot of her apartment complex, or attending an open house for a home she was showing. (R. p. 65, line 21 – p. 66, line 22.) On two occasions, Herring also stopped by her realty office “for a visit.” (R. p. 68, lines 4-9.) Rabon thought the visits were strange, as she had not invited Herring to these events, and he was out of place at these locations. (R. p. 68, lines 10-19.) Rabon testified about another unusual instance in which her whereabouts appeared to be being tracked. (R. p. 84, lines 22.) Rabon prepared a care package for her son Dalton and sent it to Appellant’s home. (R. p. 84, lines 16-20.) A few days later, she was shopping in her closest Walmart in Florence, and Appellant approached her inside the store with the care package in hand. (R. p. 85, lines 1-9.) Appellant pushed the package into her chest, telling her their son did not want it. (R. p. 85, lines 1-2.) Rabon did not know how Appellant knew where to find her at exactly that moment in order to return the package. (R. p. 85, line 20.)

Keith Caulder testified he has known James Herring for approximately twenty-five years. (R. p. 89, lines 8-10.) They had mutual friends, and they would hang out together. (R. p. 89, lines 12-16.) In October of 2010, Caulder’s aunt informed him Herring was looking for him to discuss a job. (R. p. 90, lines 1-2.) Caulder instructed his aunt to tell Herring he would be home soon to discuss it, and Herring arrived within five to ten minutes after Caulder returned home. (R. p. 90, lines 4-18.) Herring told Caulder he was offered money to kill someone. (R. p. 90, lines 23-24.) According to Caulder, Herring was going to meet someone the next morning to be paid, and then they were to go to the intended victim’s house, park behind a barn and wait for him to get home. They

would then kill him and make it look like a robbery. (R. p. 91, lines 3-7 and p. 94, line 15.) They would be paid \$3000 for the job; and the victim lived in Florence. (R. p. 91, lines 15-24.) In the middle of the conversation, Herring received a phone call and had to leave, saying he would call Caulder later that night. (R. p. 92, lines 15-16.) Caulder thought about Herring's offer for about an hour, and then went to the Sherriff's Department. (R. p. 92, lines 18-19.) Herring called Caulder later that night, but Caulder did not answer his phone. (R. p. 99, lines 12-13.)

Rabon's son from her first marriage, James Carlyle Rabon Jr., (Carlyle) also testified at trial. (R. p. 107, lines 16-20.) Carlyle moved in with Appellant and his half-brother Dalton after his mother moved out of the home. (R. p. 108, lines 7-13.) Carlyle testified James Herring also moved in with Appellant and his brother after the separation. (R. p. 109, lines 16-20.) Carlyle testified Appellant made many disparaging remarks about his mother while he lived there the summer after she moved out, and at one point enlisted Carlyle's help in surveilling his mother at Parrot's house. (R. p. 111, lines 4-16.) They arrived at the property around midnight, snuck up on the house, and watched the house until the next morning in order to videotape his mother leaving. (R. p. 111, line 18 – p. 112, line 10.) Carlyle testified Appellant knew how to find Parrot's home, despite its difficult location far off of a dirt road. (R. p. 112, line 22 – p. 113, line 17.)

Carlyle overheard conversations between Appellant and Herring, in which Appellant asked Herring, "Will he do it? How much will it cost? Will he do it for \$2000? Question of that sort." (R. p. 114, lines 12-14.) Carlyle was not certain what Appellant was talking about at the time, though he was concerned when Appellant asked him if he knew where he could get a silencer. (R. p. 114, line 21 – p. 115, line 4.) Appellant also asked Carlyle if he knew anyone who would "fuck Randy up." (R. p. 114, lines 13-14.)

Carlyle had been asked to accompany Herring to assault Parrot on one occasion, but the attempt failed. (R. p. 128, line 2 – p. 130, line 19.)

Carlyle finally realized Appellant's intentions after law enforcement came out to speak with Appellant following Caulder's report. (R. p. 114, lines 23-24.) Appellant told Carlyle the plan was to have someone block the driveway of Parrot's house and hide. When Parrot drove up and exited his car to remove the blockage, the assailant would shoot and kill him. (R. p. 116, lines 11-19.) Shortly after law enforcement began their investigation and Appellant told Carlyle about the plan to kill Parrot, Carlyle moved out of the house. (R. p. 117, lines 16-19.) Carlyle later learned Appellant bailed out Herring after his arrest related to this case. (R. p. 117, line 20 – p. 118, line 3.)

ARGUMENT

I.

Though unpreserved for review, Wharton's Rule did not preclude the conviction of conspiracy to solicit murder, regardless of whether co-defendants were ultimately acquitted of an additional solicitation charge, because South Carolina does not recognize Wharton's Rule as controlling law. Even if this Court does recognize Wharton's Rule, the rule is inapplicable here, because more than the minimally necessary actors were implicated in the commission of the crimes. (Appellant's Issue II)

Appellant's argument concerning the conspiracy charge is a shifting house of cards in which the failure to convict on one crime compels an abandonment of all others. Appellant fails to understand the nuances of conspiracy and solicitation crimes, however, particularly when a co-defendant is tried and exonerated of one of the crimes charged. Added to the confusion is an archaic tenant of conspiracy law, which is not applicable to the facts at hand. Nonetheless, the trial court judge properly denied Appellant's motions for a directed verdict and new trial. His ruling should be affirmed.

Failure to Preserve Issue for Review

As a preliminary matter, Appellant failed to preserve his argument for appellate review. Appellant's argument that Wharton's Rule prohibited his conviction for conspiracy was raised for the first in his motion for a new trial. A defendant may not use a motion for a new trial to raise an issue for the first time. State v. King, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999). In order to be timely, an objection usually must be made at the earliest possible opportunity. Scott v. Porter, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000). Moreover, while a party need not use the exact name of a legal doctrine in the trial court in order to preserve it for appellate review, it must be clear that an argument has been made on such ground. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Given the nature of the Wharton's rule argument, which will be discussed in

detail in the following section, the proper time for the objection to the conspiracy charge on that basis would have been at the close of the State's case, during Appellant's motion for a Directed Verdict. Instead, Appellant's directed verdict motion was based entirely on the sufficiency of the evidence. (R. pp. 150-53.)

Moreover, after the verdicts were returned, Appellant moved for a new trial on the basis of inconsistency of the verdicts after the jury acquitted him and his co-defendant of the solicitation charge:

At this time, Your Honor, I'd like to make a motion for the thirteenth juror. This is clearly an inconsistent verdict form that was returned.

Your honor, the defendant, Mr. Moran, was charged with solicitation to commit a felony and charged with conspiracy. Your Honor, clearly that has to be two or more persons involved in a crime for it to be a conspiracy. There was no other defendant charged with conspiracy.

Your honor, by the fact that the co-defendant was found not guilty of solicitation, that clearly – and as well as Mr. Moran found not guilty for solicitation, that is clearly an inconsistent verdict for this jury to return a finding of guilty for the conspiracy charge.

(R. p. 214, lines 4-17.) If any argument could be inferred from the objection presented, it would be because Appellant was acquitted of the solicitation charge, it was impossible for him to have been convicted of the conspiracy charge without a co-defendant.

Alternatively, he appears to have argued the crimes merged, and his acquittal of solicitation should have also acquitted him of conspiracy to solicit. The judge denied the motion, responding:

My understanding of the law and my reading of the law is that inconsistent verdicts don't—I mean exist anymore or exist in this state. The conspiracy charge doesn't say he conspired – the indictment doesn't say that he combined or conspired with only this individual.

Individuals can be indicted on conspiracy without naming who the conspiracy was with, and my charge to the jury was that they could find him guilty on one charge and not the other, find him not guilty on both charges or find him guilty on each charge.

(R. p. 214, line 24 – p. 215, line 8.) The trial judge ruled solely upon the scope of Appellant’s objection, which was concerning the consistency of the charges. At no point does Appellant mention Wharton’s Rule, nor does he approximate a Wharton’s Rule argument, which might sound something like “The conspiracy charge was improper because the underlying crime is already conspiratorial in nature.” Appellant broached the Wharton’s rule argument only in his post-trial motion, and Judge Brown did not rule on that issue in his Order denying the motion, dated October 28, 2014. Appellant cannot argue inconsistency of verdicts, or merger of charges, at the trial level and then introduce the Wharton’s rule argument in his motion for new trial and appeal. See State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-391 (1995) (A party cannot argue one ground below then argue another on appeal.). For all these reasons, the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review by this court. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

Inapplicability of Wharton’s Rule

Should the court conclude the issue was preserved, however, the State submits Wharton’s Rule is inapplicable. The Rule is somewhat complicated: “...when the law says, ‘a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,’ it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—e.g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the

offense as conspiracy.” Iannelli v. United States, 420 U.S. 770, 773, 95 S. Ct. 1284, 1288, 43 L. Ed. 2d 616 (1975) (citing 2 F. Wharton’s Criminal Law § 1604, p. 1862 (12th ed. 1932)). In sum, Wharton’s Rule prohibits a conspiracy charge when the underlying crime requires collusion between actors. The Rule prevents the State from bolstering the charges of one evil by claiming it is actually another, or in other instances, charging two crimes for the same activities.¹ For example, Wharton’s Rule would prohibit a charge for conspiracy to commit adultery because two actors are necessarily required to act in concert to commit adultery.

The courts have acknowledged the Rule’s existence, but have also been hesitant in its application. “Wharton’s Rule reflects an era where conspiracy law was still developing, and it traditionally applied to offenses such as adultery, incest, bigamy, and dueling that were characterized by the general congruence of the agreement and the completed substantive offense” U.S. v. McNair, 605 F.3d 1152 (2010) (quoting Iannelli, 420 U.S. at 782.) “Wharton’s Rule is, to some extent a relic of the discredited merger doctrine and should be interpreted narrowly. ... The Rule does not forbid charging both a conspiracy and the substantive offense, even when it applies as it merely forbids sentencing on both counts.” United States v. Previte, 648 F.2d 73, 77 (1st Cir.1981); United States v. McNair, 605 F.3d 1152, 1215 (11th Cir. 2010).

In South Carolina, the courts have referred to Wharton’s Rule in their analysis, but have declined to apply it. In State v. Ferguson, the court rejected Wharton’s Rule as

¹ Iannelli, at 785. “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.” Iannelli, at 792 Justice Douglas dissent: “Wharton’s Rule in its original formulation was rooted in the double jeopardy concern of avoiding multiple prosecutions.”

applied to the charge of conspiracy to set up a numbers lottery, stating, "it is true that in some cases where concerted action is necessary, as for example in certain sexual offenses, 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." State v. Ferguson, 221 S.C. 300, 303, 70 S.E.2d 355, 356 (1952).

In State v. Wells, 249 S.C. 249, 257 153 S.E.2d 904, 908 (1967) two former practicing naturopaths were charged with conspiracy to commit the crime of abortion. In that case, Wells gave a woman who was four months pregnant a series of injections to purposely cause her to miscarry. Id. at 254, 153 S.E.2d at 906. When the miscarriage did not occur, he referred her to co-defendant Jones, who would meet her in a hotel room and open her cervix with an instrument in an attempt to abort the pregnancy. Id. at 255, 153 S.E.2d at 907. The procedure did not cause an abortion, but did cause massive hemorrhaging and infection, requiring the woman to seek medical care. Id. There was no direct evidence to prove any meeting, communication or agreement between Wells and Jones. Id.

On appeal, Wells argued Wharton's Rule prohibited the conspiracy to commit abortion charge because the crime necessarily involved a direct agreement or involvement of one conspirator with another. Id. at 256, 153 S.E.2d at 907. The court refused to recognize the application of the rule, stating, "Even if it be conceded that such rule be sound, it clearly has no application to this case." State v. Wells, 249 S.C. 249, 257, 153 S.E.2d 904, 908 (1967). The court went on to say:

We think it perfectly obvious that the foregoing 'substantive offense' which was the object of the alleged conspiracy can be committed by one individual. For this

reason, the rule relied upon by appellants does not apply. The test under the rule is not whether the woman actually participated, but whether the substantive offense could be committed without any action on her part. But, even assuming that the substantive offense could not have been committed without the active participation of Franklin, the rule still would not apply because it is stated that, "*where more parties participate in the conspiracy than are logically necessary for the commission of the substantive offense contemplated by the conspiracy, the Wharton rule does not apply.*"

State v. Wells, 249 S.C. 249, 258, 153 S.E.2d 904, 908-09 (1967) (emphasis added).

Wharton's Rule was later mentioned in State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (2005), but again the Court declined to apply it. As of yet, Wharton's Rule is not the rule of law in South Carolina.

In the instant case, Appellant was charged with two crimes: 1) conspiracy to solicit murder, and 2) solicitation of murder. In these particular crimes, two distinct evils are afoot. In the first, the State alleged Appellant **conspired with another** to hire someone to commit the murder. In the second, the State tried to show Appellant and co-defendant **attempted to hire** someone to commit the crime. The crimes are not merged together, and conviction of one is not inconsistent with conviction of the other. Similarly, acquittal of one is not inconsistent with conviction of the other.

The State alleged Appellant conspired with his co-defendant Herring to approach Caulder and hire him to aid in the murder of Randy Parrot. Police did not charge Caulder with any wrongdoing because he notified them of the plot. Nonetheless, three actors were implicated in the plan to kill Parrot, but two crimes were committed: the conspiracy between Appellant and Herring to hire a hit man, and Appellant and Herring's efforts to hire Caulder for the job.

Appellant argues Wharton's Rule precludes conviction of the conspiracy charge "because the unlawful act – solicitation to commit murder—requires the participation of more than one person." (Appellant's Brief p. 21.) Appellant further claims because he was acquitted of the solicitation charge, Double Jeopardy should have prevented his conviction of the conspiracy charge. Appellant misapplies Wharton's Rule to the facts of this case, however, and also fails to see the distinction between the crimes charged.

Here, facts are somewhat analogous to Wells. Appellant and Herring are the co-defendants, as were Wells and Jones, and the crime they are accused of committing involved the participation of a third actor. In Wells, the actor was the pregnant woman. Here, the third actor was Caulder. As was claimed in Wells, Appellant argues Wharton's Rule prohibits the conspiracy charge because the underlying crime, solicitation to commit murder (in Wells it was abortion), necessarily involves the participation of another. The court rejects Wharton's application, however, when "more parties participate in the conspiracy than are logically necessary for the commission of the substantive offense..." Wells, at 258, 153 S.E.2d at 909.

Appellant necessarily had to involve another (Herring **or** Caulder) to be charged with solicitation, but involving another to recruit a third (Herring **and** Caulder) was an escalation of his criminal wrongdoing. By contrast, had the evidence shown Appellant conspired with and attempted to hire only Herring to kill Parrot, Wharton's Rule may be a consideration in some jurisdictions. However, the court need not address whether South Carolina recognizes Wharton's Rule, because under the facts of this case, the Rule is inapplicable. Thus, Appellant's argument that Wharton's Rule precludes a conspiracy to solicit murder charge in this case is without merit.

Inapplicability of Double Jeopardy

Concerning Appellant's claim of Double Jeopardy because he was acquitted of the solicitation charge, but convicted of conspiracy to commit solicitation, Appellant misapplies the law to the underlying facts of the case. A conspiracy to commit a crime does not merge with the completed offense. State v. Rutledge, 232 S.C. 223, 101 S.E.2d 289 (1957) A conspiracy is a distinct offense in itself and punishable as such, notwithstanding that the object of the conspiracy has been accomplished. State v. Ferguson, 221 S.C. 300, 303-04, 70 S.E.2d 355, 356-57 (1952). Even the conspiracy statute contemplates such a scenario in which a person may be guilty of the conspiracy but not the underlying crime:

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 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 (emphasis added). As a sentencing guideline, the statute directs the judge to impose no more than the maximum based on a possible nonevent (a failure to convict, for example). The statute acknowledges the relationship between the conspiracy charge and the underlying crime for sentencing purposes, but that relationship

should not be confused with Double Jeopardy. See U.S. Const. amend. V (“No person shall be... subject for the same offense to be twice put in jeopardy of life or limb...”).

In this case, the jury found the object of the conspiracy, the solicitation to commit murder, was not accomplished, and the jury acquitted the defendants. Two crimes were charged: conspiracy to solicit and the actual solicitation of the murder. Evidence clearly showed Appellant conspired with Herring to solicit someone to kill Parrot, as will be discussed in more detail in the following section. The State was unable to convince the jury beyond a reasonable doubt, however, Appellant and Herring solicited Caulder to commit the crime. In other words, the verdicts suggest the jury believed they plotted it, but did not believe they went so far as to actually hire the hit man. Appellant’s acquittal of the solicitation charge is neither inconsistent nor preclusive of his conviction of the conspiracy charge. Indeed, the jury rightly believed Appellant guilty of some wrongdoing and convicted him on the charge they believed was more supported by the evidence.

II.

The trial court properly denied Appellant's motion for a directed verdict and new trial because ample evidence supported the jury's finding of Appellant guilty of conspiracy. (Appellant's Issue I)

Appellant contends the circuit court erred in denying his motion for a directed verdict, arguing the evidence did not support the charge. He cites relevant case law from South Carolina for this contention, but reaches a completely inapposite result.

"In criminal cases, the appellate court sits in review of errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court, reviewing the denial of a directed verdict motion is concerned with the existence, or nonexistence of evidence, not its weight. State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (2008). "On appeal from the denial of a motion for directed verdict, the evidence must be viewed in the light most favorable to the state." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

Appellant was charged with conspiracy to solicit murder. A conspiracy is the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890, 896 (Ct. App. 2005). The primary element of a conspiracy charge is the agreement

or combination, and an overt act in furtherance of the conspiracy is not necessary to prove the crime. Id.; see also S.C. Code Ann. §16-17-410 (2003) (codifying common law crime of conspiracy). Thus, the conspiracy is complete when the agreement to commit an illegal act is formed. The State must prove Appellant agreed with another to solicit a third to commit murder. Once an agreement has been reached, the crime of conspiracy has been committed; no further act need take place. State v. Crawford, 362 S.C. 627, 639, 608 S.E.2d 886, 892 (Ct. App. 2005). Solicitation to commit a felony requires the actor, with the intent that another person commit a crime, have enticed, advised, invited, ordered, or otherwise encouraged that person to commit a crime. See State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993).

At trial, the State presented the following evidence indicating Appellant actively participated in the conspiracy to solicit murder, or from which his participation could be inferred:

- 1) Both Carlyle and Caulder testified about the existence of a plot to kill Parrot, and the two men's testimonies corroborated each other.
- 2) Carlyle testified Appellant knew where Victim lived and asked Carlyle to assist him in sneaking up on Victim's house to conduct surveillance. (R. p. 111, lines 11-23.)
- 3) Carlyle testified he overheard Appellant and Herring talking in the kitchen of their house. Appellant asked Herring, "Will he do it? How much will it cost? Will he do it for \$2000?" (R. p. 114, lines 9-14).
- 4) Carlyle testified Appellant asked him if he knew where he could get a silencer. (R. p. 115, lines 2-3.)

- 5) Carlyle testified Appellant asked him if he knew anyone who “would fuck Randy [Parrot] up?” (R. p. 115, lines 13-14.)
- 6) Carlyle testified Appellant discussed the plot against Parrot after law enforcement came to their house to investigate Caulder’s report. Appellant told Carlyle “the plan was somebody was going to hide at the end of Randy’s driveway, throw a large object in the driveway. Somebody would be hiding in the woods. When Randy stopped and exited his vehicle to get to whatever was blocking the driveway, somebody was going to jump out and shoot him dead.” (R. p. 116, lines 14-19.)
- 7) Caulder testified Appellant’s employee and friend Herring “went into detail about somebody had offered him money to kill somebody.” (R. p. 90. lines 22-24.)
- 8) Caulder testified they were to meet the third person the next morning to get paid, then they were to go kill the man and make it look like a robbery. (R. p. 91, lines 3-7.)
- 9) Caulder did not know much detail about the crime, but was told the Victim lived in Florence, and that they would park behind a barn, and then make it look like a robbery. (R. p. 94, lines 12-17.)
- 10) Rabon testified Herring would appear at unexpected times and places, such as her place of business and outside her apartment complex. (R. pp. 65-67.)
- 11) Rabon testified Moran approached her in Walmart to return a care package to her, when no prior arrangements had been made to meet. (R. p. 85, lines 3-21.)

Taken in the light most favorable to the State, the evidence certainly shows Appellant formed an agreement with his co-defendant to solicit Caulder to kill Randy Parrot. As the trial judge concluded, "the Jury, weighing the evidence and testimony in this case, could have reasonably found that Moran conspired with Herring, but never acted to solicit someone to carry out the plan." (R. pp. 7-8.) The testimonies of Carlyle and Caulder filled in the missing details of each other to convince the jury of the co-defendants' plan. The fact that Caulder never had dealings with Appellant does not lessen Appellant's culpability.

Appellant argues "[i]t 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." (Appellant's Brief p. 18.) As stated in Crawford, the State need only show Appellant formed an agreement with another to solicit for the conspiracy charge to stand. The State need not show Appellant actually did solicit someone. The actual solicitation is a separate charge, and Appellant was found not guilty. Fortunately for Mr. Parrot, Appellant was unsuccessful in his attempts to solicit someone to kill him. 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. The outcome, in which Appellant is found guilty of conspiracy but not the underlying charge, does not make the verdict illogical; it makes the jury reasonable.

The circuit court properly considered the existence of evidence from which Appellant's guilt could be determined, and the record amply supports the denial of Appellant's directed verdict motion and motion for a new trial. Accordingly, the circuit court's ruling should be affirmed, and the jury's conviction should stand.

CONCLUSION

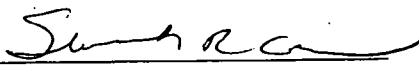
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

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September 25, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM MARION COUNTY
Court of Common Pleas

SEP 29 2015

SC Court of Appeals

D. Craig Brown, Circuit Court Judge

Case No. 2011-GS-33-113

The State, Respondent,

v.

Darryl Wayne Moran, Appellant.

REPLY BRIEF

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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 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" (R. p. 91, ll. 22-25), and had never heard of or spoke with Mr. Moran (R. p. 88, ll. 2-8; p. 95, ll. 14-17; p. 103, 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). (R. p. 91, 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." (R. p. 114, 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. (R. p. 112, ll. 6-17; p. 135, 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. (R. p. 114, ll. 15-20, 23-24; p. 140, ll. 4-9; p. 140, l. 24 - p. 141, l. 6).

The State points to Carlyle's testimony that Mr. Moran asked where he 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 (R. p. 114, l. 25 - p. 115, l. 4; p. 115, ll. 7-14; p. 117, 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 be 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 did not 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. (R. p. 214, ll. 8-17). Importantly, counsel then requested 10 days to make a more formal motion which the trial court permitted. (R. p. 214, 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...." (R. pp. 16-17). 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. (R. p. 21). The trial court summarily denied the motion.

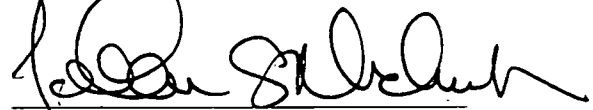
As for trial counsel's failure to use the words "Wharton's Rule" when orally stating the new trial motion, the Supreme Court has pointed to Justice Cardozo's words that "the law has outgrown its primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." *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.

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