STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASMINE NICOLE FEMIA,

APPELLANT

APPELLATE CASE NO. 2016-001771

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to give the jury charge requested by defense counsel that "mere association with people who have committed a crime is insufficient to prove the defendant committed the crime" which was prejudicial to Appellant Femia because the state's case focused on Appellant's association with Anthony Ellison who admitted killing the deceased who was the father of Appellant Femia's child?

STATEMENT OF THE CASE

On April 30, 2015, the Beaufort County Grand jury indicted Appellant Jasmine Femia on the charges of murder and conspiracy to commit murder. On August 22-24, 2016, Appellant Femia proceeded to trial before the Honorable Michael G. Nettles and a jury. Appellant was represented by James Bannon, and the state was represented by Hunter Swanson and Ann Fitz. Tr. 1-2. The jury found Appellant Femia guilty on both charges as indicted. Tr. 302, ll. 6 – Tr. 303, ll. 3. The judge sentenced Femia to forty-five years on the murder charge and five years on the conspiracy to run concurrent. Tr. 312, ll. 3 – 12. Appellant's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

Jasmine Femia and Nick Degros had a child together around 2012. Family Court records indicated that Appellant Femia had custody and Degros paid child support and had visitation rights. Tr. 170, ll. 17 – 25; Tr. 172, ll. 11 – Tr. 173, ll. 17. On December 9, 2014, a Rule to Show Cause was filed by Degros for a violation of visitation, and the hearing was set for January 14, 2015. Tr. 171, ll. 1 – 23.

Anthony Ellison moved to South Carolina from New York City following a divorce. He "got in with some wrong people" and was convicted of armed robbery and served eight and one half years in prison. While in prison he met Daniel Lopez who was the uncle of Jasmine Femia. Tr. 143, ll. 16 -25; Tr. 145, ll. 4 – 25.

Upon his release from prison, Ellison had no where to live. Lopez invited him to come live with him in Beaufort which Ellison did. He met Femia when she went to visit her uncle, Lopez. Tr. 146, ll. 1 – 25. Femia and Ellison developed an intimate relationship, and put money down on a ring because they planned to be married according to Ellison. Ellison moved in with Femia where he lived for a couple of months until the incident. Tr. 147, ll. 1 – 14.

During this time with Ellison, Femia continued her three year romantic relationship with Anastasia (Ana) Harley. Tr. 127, ll. 18 – Tr. 128, ll. 25. Ana and Ellison did not know about each other. One day, Ana and Femia were at the nail salon when Ellison showed up. Ana saw Femia hand him something and Ellison gave Femia a kiss. When Ana asked Femia why she was with Ellison, according to Ana, Femia told her that Ellison was in her life so he could get rid of Nick Degros. Tr. 132, ll.10 – Tr. 133, ll. 25.

Ellison testified at trial that Femia told him about the family court hearing and that she would probably lose her children. She told him that she would go to jail and he would have no

where to live. According to Ellison. Femia told him that she wanted Nick Degros dead. Then they would be married and move to Tennessee. Tr. 148, ll. 1 – Tr. 149, ll. 3.

On January 9, 2015, Amanda Allen was living with her fiancée, Nick Degros and her three children. They had just returned from dinner when Nick received a call. He went outside. A few minutes later Amanda heard four gunshots. Tr. 103, ll. 1 – Tr. 106, ll. 10. She tried to call and text Degros but no answer. She went outside and found Degros lying face down close to the brick wall where the mailboxes were. He was not moving. She tried to resuscitate him but could not. She screamed for help and police officers who were down the street came. Tr. 106, ll. 11 - Tr. 108, ll. 24.

Officer Kathleen Wilson responded to Amanda's call. The officer found Degros in a pool of blood with no pulse. When she withdrew her hand after checking for a pulse, it was covered with blood and gray matter. Tr. 112, ll. 3 – 20; Tr. 114, ll. 4 – Tr. 115, ll. 2; Tr. 116, ll. 2 – Tr. 117, ll. 1.

The paramedic who responded, Shayna Orsen, arrived at 8:19 pm. She found the person and pronounced him dead. There was an entry wound to the right side of the head with coagulated blood around the body and brain matter visible. Tr. 123, ll. 11 – Tr. 126, ll. 14. The autopsy indicated that the cause of death were gunshot wounds to the head. The manner of death was homicide. Tr. 228, ll. 3 – 8. The forensic pathologist, Dr. Lee Tormos, reported that there were three gunshot wounds to the head two of which were fatal. One was a wound to the nose. Tr. 223, ll. 1 – 5; Tr. 225, ll. 10 – Tr. 226, ll. 24. The wounds were consistent with a .22 caliber revolver. Tr. 227, ll. 25.

Ana Harley testified that when she heard of Nick Degros' death, she called the police and talked to Investigator Charles Raley. She told him what Femia had said to her about wanting to

get rid of Degros. She also told him that Ellison and Femia had asked Ana about getting a gun which she did not do. She also heard Femia tell Ellison she would find a car. Tr. 130, ll. 2 – Tr. 135, ll. 22.

Anthony Ellison was charged with the murder of Nick Degros. Tr. 143, ll. 16 – Tr. 144, ll. 2. The first time he talked to the police, he told them that he committed the crime and that Femia had nothing to do with it. He testified at trial that he was protecting her because he loved her. Tr. 154, ll. 9 – 23.

He talked to the police investigators again later and told them that it was the MS 13 gang that killed Degros. Again he said at trial that he was trying to keep Femia out of jail because he thought she loved him. Tr. 154, ll. 24 – Tr. 155, ll. 14.

On July 22, 2016, the state offered Ellison a plea deal that he accepted to plead guilty to murder and conspiracy for a negotiated cap between thirty to forty years. In exchange he agreed to testify against Appellant Femia which he did. Without this plea deal, he was looking at a life without parole sentence. Tr. 165, ll. 15 – Tr. 166, ll. 19; Tr. 144, ll. 3 – Tr. 145, ll. 3.

At trial as a state's witness, Ellison testified that Femia wanted Nick Degros dead. The plan was after Degros was dead, Femia and Ellison would get married and move to Tennessee. She would pay off his probation so he would be finished with that. Tr. 148, ll. 1 19.

Femia paid for the .22 revolver gun that Ellison got from someone they met behind her apartment building. Femia then put her car in the shop because she told Ellison that it needed work. She paid for a rental car which Ellison drove to Degros' house the night of the incident after Femia had allegedly given him directions. Tr. 149, ll. 4 –Tr. 151, ll. 2. He waited for Degros and his family to get home. When they did, Ellsion called Degros to get him outside. Ellison then shot Degros three times to be sure he was dead. He returned to Femia's apartment

and they immediately went to Walmart as Femia had planned so they could be seen on the store cameras as an alibi. Tr. 151, ll. 3 – Tr. 154, ll. 8.

Eric Kyle, manager of the area Enterprise Rent A Car, identified the rental contract signed by Jasmine Femia for January 9, 2015 for a Hyundai Elantra. It was admitted into evidence with no objection by defense. Tr. 192, ll. 14 – Tr. 195, ll. 20.

Richard Stantsy owned the Tuffy Auto Service in Beaufort. He confirmed that Appellant Femia brought her car, a 2007 Toyota Camry, to his shop for service. The invoice showed the service was completed on January 10, 2015 at 9:30 in the morning. Tr. 219, ll. 1 – Tr. 221, ll. 25.

James Tallon, a crime scene agent with SLED, processed the rental car on January 13, 2015, which had previously been rented by Femia. The car was returned to Enterprise on January 10, 2015. Tr. 196, ll. 1 – Tr. 197, ll. 25; Tr. 57, ll. 1 – 11. Agent Tallon used the Bluestar test which was presumptive for blood on the driver's floorboard. He admitted the substance could be something other than blood as the test was only presumptive. He took cuttings from the floor carpet. Tr.199, ll. 1 – 25; Tr. 202, ll. 10 – 25.

Verona Herrera, the forensics serologist with SLED, confirmed that the substance from the driver's floorboard carpet cuttings was blood. The blood stained carpet cuttings were admitted into evidence with no objection by defense counsel. Tr. 205, ll. 1 – Tr. 207, ll. 24.

In pretrial motions, defense counsel moved to suppress the evidence and search of the rental car, a Hyundai Elantra that was seized based on insufficient probable cause. The judge ruled that there was sufficient probable cause and that Appellant Femia did not have "standing" nor a reasonable expectation of privacy in a rental car which she was no longer renting. Tr. 56, ll. 2 – 58, ll. 18.

Defense counsel then moved to suppress the blood evidence taken from the rental car because the blood evidence was found to be of no value for comparison, and it was more prejudicial than probative. Counsel argued that the rental car had been rented to another party before it was searched. The judge denied the motion and said the issue could be examined on cross examination.[1] Tr.58, ll. 18 – Tr. 60, ll. 17.

The judge held a "charge conference' before closing arguments. Tr. 234, ll. 1 – Tr. 235, ll. 11. When the judge asked if there were any additional requests, defense counsel asked if the judge would consider "charging mere presence, and that association is not guilty." The judge said he did not think that applied because no one was alleging that Femia was present when it took place. The state agreed it was not appropriate to charge. Tr. 235, ll. 12 – 25.

Defense counsel explained that he was referring to the second part of the mere presence charge which was relevant to the facts of this case and that said:

> The mere association by a defendant with people who have committed a crime is insufficient to prove the defendant committed the crime.

Tr. 236, ll 1 – 9.

The judge responded that his charge on the hand of one is the hand of all "goes into that in great detail." He explained that "it takes more than just being around someone; it takes a meeting of the minds." The judge told counsel that he could make additional requests if he thought that the hand of one is the hand of all charge was not "adequate to cover that particular point." Tr. 236, ll. 10 – 19.

> The judge's "hand of one is the hand of all" charge with the pertinent parts was:

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[1] Defense counsel did not object when the blood samples as carpet cuttings were admitted into evidence. Tr. 206, ll. 9 – Tr. 207, ll. 7.

If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act that's criminal is responsible for everything done by the other person, which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose.

For example, two people can be guilty of killing another person when only one of the two had a gun. There was only one bullet and the only one ---and the only one of the two fired the shot that caused the death. If two or more people are together, acting together, assisting each other in committing the attempt, the act of one is the act of all, or as is said, the hand of one is the hand of all.

Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict a defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal.

Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The state must prove beyond a reasonable doubt by competent evidence that the theory of the hand of one is the hand of all.

A principal in a crime is one who either actually commits the crime or who is present, aiding and abetting or assisting in committing the crime. When a person does an act in the presence of and with the assistance of another, the act is done by both.

Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. Present at the commission of the crime means to be sufficiently near to aid and abet and assist in the commission of the crime. However, mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting.

Tr. 279, ll. 20 – Tr. 281, ll. 18.

The judge later charged in his conspiracy charge:

> The defendant is charged with conspiracy. The state must prove beyond a reasonable doubt that the defendant combined with one or more persons for the purpose of committing an unlawful act or permitting a lawful act by unlawful means. There must be a mutual understanding, agreement, a common intent and plan. Mere passive knowledge of or consent to the criminal conduct of another is not enough to make a persona conspirator. There must be guilty knowledge and participation. Similarly, the mere fact that the defendant may have associated with another person or met with another person to **discuss common aims and interests [emphasis added]** does not necessarily establish proof of existence of a conspiracy, or that the defendant was involved in the conspiracy.[2]

Tr. 284, ll. 9 – 25.

At the close of the charge, defense counsel renewed his request for the mere association language from the "accomplice liability "charge be added. Counsel said that he understood that the court "declined to do so the first time, but he just wanted to preserve the record." Tr. 290, ll. 25 – Tr. 291, ll. 4.

The judge responded that he specifically charged that when he charged that mere presence at the scene of a crime was not sufficient to convict one as a principal in the theory of aiding and abetting. He said to counsel: "It's mere presence. That's kind of what you wanted, wasn't it?" Tr. 291, ll. 5 – 10.

Defense counsel responded:

> It specifically said mere association by a defendant with people who have committed a crime is insufficient proof that defendant has committed a crime, is sort of the specific language that I think should be ---I mean much was made about the association both between my client and Mr. Ellison before the crime was committed, as well as after the crime was committed. And so I

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[2] The judge's conspiracy charge continued. Tr. 285, ll. 1 – 18.

> think the jury should be instructed that the mere association between the two is not enough.

Tr. 290, ll. 24 – Tr. 291, ll. 20.

The judge repeated his charge that prior knowledge without more was insufficient to make a person guilty. The judge said he thought that covered it, but he told counsel that he might be correct. The judge told counsel that he was protected on the record. Tr. 291, ll. 21 –Tr. 292, ll. 6.

After the jury had begun deliberations, there was a question. The jurors requested "clarification on the South Carolina law on murder and conspiracy to commit murder with specific reference to the hand of one is the hand of all and the weight of circumstantial evidence." Tr. 293, ll. 22 – Tr. 294, ll. 1. The judge said that question covered about all of the charge so he would just recharge them the law "with regard to each of these." Tr. 294, ll. 2 – 5.

The judge then recharged the jury on the law. Tr. 294, ll. 6 – Tr. 300, ll. 25. Following the recharge, defense counsel said he would like to "reiterate my previous request to give the other language." The judge said it had been covered. Tr. 301, ll. 1 – 11. The jury delivered its verdict of guilty on both murder and conspiracy. Tr. 302, ll. 14 – Tr. 303, ll. 3.

At the close of the trial, defense counsel raised all of his pretrial motions as well as objections including his motion for a directed verdict. He argued to the judge that he believed that some of the judge's rulings "were narrow" and he asked for a new trial. The judge denied the motion but told counsel he was "protected on the record." Tr. 312, ll. 18 – Tr. 313, ll. 11.

The judge sentenced Femia to forty-five years on the murder charge and five years on the conspiracy charge to run concurrent. Tr. 312, ll. 3-12.

ARGUMENT

The trial court erred in refusing to give the jury charge requested by defense counsel that "mere association with people who have committed a crime is insufficient to prove the defendant committed the crime" which was prejudicial to Appellant Femia because the state's case focused on Appellant's association with Anthony Ellison who admitted killing the deceased who was the father of Appellant Femia's child.

The trial judge believed that his jury charge on conspiracy and hand of one is the hand of all and mere presence covered the mere association jury charge requested by defense counsel. However, these charges given by the trial judge continued to contain the language: "association with another person to **discuss common aims and interests.**" [Emphasis added]. This was error.

The law to be charged must be determined from the evidence presented at trial. State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016). In reviewing jury charges for error, the appellate court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Id. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *Supra.*

An abuse of discretion occurs when the circuit court's ruling is based on an error of law. State v. Brandenburg, Jr.,419 S.C. 346, 797 S.E.2d 416 (Ct. App. 2017). To warrant reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Id.

In State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010), Mattison was convicted of murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. The Supreme Court held that a defendant who has not actually

committed the homicidal act must have aided, abetted, assisted, encouraged, or advised the killing and acted with the intention of encouraging and abetting the commission of the homicide in order to be regarded as a participant in a homicide.

Mattison and a co-defendant, Ervin, were accused of luring three men—Jose and Robetro Garcia and Jorge Lemus-Patricio—to the home of Ervin's grandfather on the promise of buying their car. Instead, Ervin and Mattison killed Jorge and Roberto and wounded Jose.

Ervin admitted to shooting one of the victims but said his gun discharged when the men struggled over the weapon. He further stated that when his gun discharged, Mattison fired his weapon. Mattison was convicted of killing Jorge but had a mistrial on the murder of Roberto.

Defense counsel had asked the trial judge to charge the jury on "mere knowledge," "mere association," and "mere presence." The trial judge said he would but "not exactly" as counsel requested. The judge then did not give the requested charges. The Court of Appeals affirmed Mattison's conviction by holding that the charges that mere knowledge that a crime was going to occur, or mere association with one who commits a crime were "implicit" in the charge given by the trial judge.

In Mattison, the Supreme Court discussed the cases of In State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998), and State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989).

In Kelsey, a murder case of a teenage girl by three teenage boys, Kelsey argued on appeal that the trial judge failed to give the "mere association" charge and that the judge's instructions on "mere presence" and conspiracy were improper. The Supreme Court found that although the judge failed to give a "mere association" charge, the instructions on mere presence and accomplice liability were proper as a whole, and that mere presence was not enough to sustain a conviction.

In Austin, the Supreme Court found that the judge's "mere presence" charge made it clear that to find a person guilty, the person must personally commit the crime or through a common design, aid, abet or assist the crime through some overt act. The judge did not give the charge request by Austin on mere presence.

The Supreme Court found in Mattison, that based on their prior decisions in State v. Kelsey, *supra,* and State v. Austin, *supra,* the trial judge correctly charged the law on "mere presence" and "mere association" as Mattison had included the two charges together and said they were "essentially synonymous." The Court held that Mattison was distinguished from Kelsey and Austin for the reason that Mattison asked for the charges and included them as being synonymous.

Then the Supreme Court found in conclusion in Mattison, that the trial judge's instruction: (1) was confusing and contradictory with respect to an explanation of "mere presence," (2) omitted an express instruction regarding "mere association," and (3) omitted an express instruction regarding "mere knowledge." The Court then wrote: "However, when the trial judge's instruction was read as a whole, we find it adequately covered the law and sufficiently covered the substance of Mattison's requests to charge."

The Court then wrote:

> We modify the portion of the Court of Appeals' decision regarding the use of the term "implicit." In view of this modification, our decision should dispel any inference that a trial judge's general instruction is necessarily sufficient to cover a defendant's specific request to charge a correct statement of the law. Rather, we would urge trial judges to carefully consider charging a request to charge that is factually accurate and a correct statement of the law.

In State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997), the Supreme Court "reminded the state" that mere association with admitted members of the conspiracy was insufficient to tie other persons to the conspiracy.

The trial judge in Appellant Femia's case committed an abuse of discretion by not charging the "mere association" language as requested by defense counsel. The language defense counsel wanted that "mere association by a defendant with people who have committed a crime" was different from the judge's instruction which included the language that the "defendant's mere association with another person to **discuss common aims and interests." [Emphasis added].**

The mere association charge requested by defense counsel was necessary in Femia's case because she was not present at the scene of the crime. Her case is distinguished from Mattison because she was not present during the murder. That was the reason it was essential that the trial judge charge mere association without the language that he used: to **discuss common aims and interests** as this language continued to describe conspiracy.

The only evidence against Appellant Femia was the testimony of two extremely biased witnesses: Anthony Ellison and Ana Harley. Both Ellison and Harley were rejected lovers of Femia. In addition, Ellison wanted to avoid a LWOP sentence; he wanted to avoid spending the rest of his life in prison. He allegedly lied initially to police by saying Femia had nothing to do with the crime. Then when he realized he was facing life in prison, he changed his story to testify against Femia and say she planned it. Which story was true was an unknown factor.

Ana Harley did not know about Ellison being in Femia's life until shortly before the crime. She did not like seeing Ellison kiss Femia at the nail salon. Ana Harley was quick to call

the police when she thought Femia was involved in Degros' death. She was quick to seek revenge against Femia.

The trial judge in Appellant Femia's case needed to craft his jury instructions to fit the facts of Femia's case. The only evidence against her was her association with Ellison who did the actual killing. The judge seemed to think that his charge covered the requested charge, but it did not because the judge continued to use the conspiracy language. Defense counsel's requested charge was not implicit in the judge's other charges.

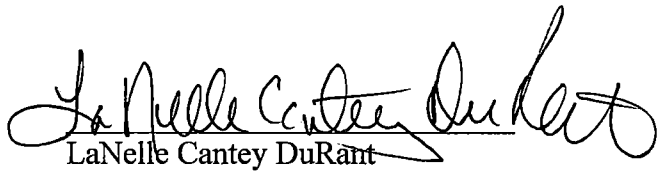
The jury was confused by the judge's charges as indicated by the question they asked. Tr. 293, ll. 22- Tr. 294, ll. 1. They wanted clarification on the hand of one is the hand of all and circumstantial evidence. This question indicated the jury had doubts about Femia's guilt and her degree of involvement. Therefore, if the judge had given the requested charge on mere association without the conspiracy language, there was a reasonable probability that the jury would have found Femia not guilty or at least there would have been a mistrial.

As the Supreme Court found in Mattison, the trial judge should not have considered that defense counsel's requested charge on mere association was **implicit** in his other charges. This was error. It was error not to give a charge that was based on the evidence. As the Supreme Court made clear in Mattison:

> We would urge trial judges to carefully consider charging a request to charge that is factually accurate and a correct statement of the law.

CONCLUSION

Based on the above, Appellant Femia's convictions and sentences should be reversed, and her case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of June, 2017.

STATE OF SOUTH CAROLINA

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THE STATE,

RESPONDENT,

V.

JASMINE NICOLE FEMIA,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jasmine Femia, #369480, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 22nd day of June, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of June, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027