

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Beaufort County
The Honorable Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

v.

JASMINE NICOLE FEMIA,

APPELLANT.

Appellate Case No. 2016-001771

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Was the trial court within its discretion to deny defense counsel’s request for a specific “mere association” jury charge, based upon the substance of the charges already provided and the fact that the trial judge had already charged the jury that “the mere fact the Defendant may have associated with another person or met with another person to discuss common aims and interests does not necessarily establish proof of existence of a conspiracy.”

STATEMENT OF THE CASE

On April 30, 2015, Appellant Jasmine Femia (hereinafter “Appellant”) was indicted on charges of murder and conspiracy to commit murder of Nick Degros by the Beaufort County Grand Jury. Attorney James Bannon represented Appellant at trial, while Hunter Swanson and Ann Fitz represented the State. (Tr. pp. 1-2). The Honorable Michael G. Nettles presided over the trial of Appellant on August 22nd through August 24th, 2016, and the jury convicted Appellant on both charges. Following the conviction, Judge Nettles proceeded directly to sentencing and sentenced Appellant to forty-five years for murder and five years for conspiracy, to run concurrently. Appellant filed a Notice of Appeal on August 29, 2016, and this appeal follows.

STATEMENT OF FACTS

Background

Appellant and the victim, Nick Degros (hereinafter “Degros”), had a baby boy together approximately two years prior to Degros’ murder. (Tr. Pp. 109, lines 6-12). The two did not continue their relationship and Appellant was awarded custody of their son while Degros was awarded visitation rights and paid monthly child support. (Tr. pp. 109, lines 17-22; pp. 111, lines 3-8). Degros began a new relationship with a woman named Amanda Allen; he was engaged to her and was living with her at the time of his murder on January 9, 2015. (Tr. pp. 103, lines 10-13). Just one month prior to his murder, Degros filed a Rule to Show Cause for violation of visitation rights, which was signed by Judge Peter L. Fuge and awaiting hearing on January 14th, 2015. (Tr. pp. 171, lines 8-23).

In the months leading up to the murder, Appellant was involved in two different romantic relationships. The first was with a woman named Anastasia Harley (hereinafter “Harley”), which was on and off for three years. (Tr. pp. 128, line 18 through pp. 129, line 3). The second began in late 2014 with a man named Anthony Ellison (hereinafter “Ellison”), who had recently been released on probation after serving over eight years for an armed robbery conviction. (Tr. pp. 145, lines 5-10). In the few months before the murder, Ellison was living with Appellant, and was under the impression that they were in love and planning to get married. (Tr. pp. 147, lines 1-15).

Ellison and Harley were not initially aware of each other. When Harley discovered that Appellant was also dating Ellison, she confronted Appellant and asked her why she was dating him. (Tr. pp. 132, line 10 through pp. 133, line 16). Appellant informed Harley that she was only dating Ellison so that he would help her to kill Degros. (Tr. pp. 133, line 17 through pp. 134, line

23). At the time, Harley did not believe Appellant's explanation and therefore did not report the matter to the police.

On January 9th, Anthony Ellison (hereinafter "Ellison") murdered Degros by shooting him in the head three times with a .22 caliber revolver. (Tr. pp. 143, line 25 through 144, line 15; pp. 150, line 10-11). Ellison confessed to the murder, but in the process of doing so, ultimately provided authorities with three different stories as to why the murder occurred. The first was that he did it out of anger about Appellant's prior relationship and that Appellant had nothing to do with it. (Tr. pp. 159, lines 6-22). In his second story, Ellison informed authorities that the murder was result of orders from his gang, MS 13, but still kept Appellant's involvement a secret. (Tr. pp. 154, line 24 through pp. 155, line 10). Finally, Ellison confessed that he had murdered Degros at the request, urging, and assistance of Appellant. Ellison explained that he initially lied about Appellant's lack of involvement in order to protect her, because at the time, he loved her and believed that she loved him. (Tr. pp. 154, lines 13-21; pp. 154, line 24 through pp. 155, line 10). In exchange for his cooperation at Appellant's trial, Ellison was given a negotiated sentencing range of thirty to forty years without parole. Ellison admits that even with his negotiated sentence, he may still be as old as 76 when he is released from prison. (Tr. pp. 167, line 24 through pp. 168, line 6).

The testimony of the witnesses at trial established the following facts:

Amanda Allen

Ms. Amanda Allen is the fiancé of Degros. She testified that just minutes before the murder, Degros received a phone call from a number he did not recognize. (Tr. pp. 105, lines 2-7). After ending the phone call, Degros grabbed his cigarettes and stepped outside of the apartment for a smoke. (Tr. pp. 105, lines 8-9). Moments later she heard gunshots. She attempted

to contact Degros by his cell phone numerous times, but received no answer. She then proceeded outside where she found Degros dead. (Tr. pp. 107, line 13-25).

Ms. Allen testified that Degros' cell number was (646) 982-4061. (Tr. pp. 106, line 19-20). Cell phone records show that Degros' number was called by Anthony Ellison's phone at 7:43pm on January 9th, 2015; records also show that Degros' phone returned the call at 7:44pm. (Tr. pp. 180, lines 10-12; pp. 176, lines 23-25; pp. 177, lines 4-6); See State's Exhibit 7.

Ms. Allen testified that the only person she knew Degros to have any conflict with was Appellant. After being recalled for rebuttle purposes, Ms. Allen testified that she knew that Anthony Ellison was Appellant's boyfriend, but that Ellison had never been to their home, and to her knowledge, Degros had never met Ellison. (Tr. pp. 121, line 24 through pp. 122, line 13).

Officer Kathleen Wilson

Officer Kathleen Wilson testified that she responded to a shot's fired call; the dispatch for the call was at 7:53pm. (Tr. pp. 112 line 23 through pp. 113, line 10.) In responding, she found Amanda Allen next to the Degros' body. (Tr. pp. 115, lines 1-2). She also testified that in the original interview she conducted with Ms. Allen, Anthony Ellison and Appellant were identified as individuals that Degros had disputes with. (Tr. pp. 120, lines 19-23).

Anastasia Harley

Harley testified that she knew Appellant from work and some school. (Tr. pp. 128, lines 4-7). Her and Appellant had a romantic relationship together that was on and off for three years. (Tr. pp. 128, line 18 through pp. 129, line 3). Harley testified that on multiple occasions Appellant spoke to her about hating Degros, wanting to get rid of him, and wanting him out of her life. (Tr. pp. 130, line 23 through pp. 131, line 5; pp. 134, lines 5-9). When she first learned that Appellant was romantically involved with Ellison, she confronted Appellant about it. (Tr.

pp. 133, lines 17-22). Appellant told her that she was dating Ellison in order to have Ellison kill Degros for her. (Tr. pp. 133, lines 17-25). Prior to the murder, both Appellant and Degros had asked Harley about acquiring a gun (Tr. pp. 134, lines 10-24). Harley also heard Appellant speaking to Ellison about acquiring a car and having an alibi. (Tr. pp. 135, lines 11-19; pp. 141, line 17 through pp. 142, line 2).

Harley testified that she did not go to the authorities before the murder occurred because she did not believe Appellant and Ellison would actually do anything. (Tr. pp. 135, lines 20-22). However, as soon as she heard that Degros was murdered, Harley called the police and informed them of what she knew and what she had been told. (Tr. pp. 131, lines 6-25).

Anthony Ellison

Upon being released from prison, Ellison initially lived with a fellow inmate Daniel Lopez. Daniel Lopez was Appellant's uncle and Ellison met Appellant when she came to visit. The two began a relationship in the fall of 2014 and Ellison moved in with Appellant at her apartment in Port Royal, SC. (Tr. pp. 147, lines 4-14). Ellison testified that he did not know who Degros was, did not have his phone number, nor did he know where Degros lived prior to multiple conversations and vehicle trips instigated by Appellant (Tr. pp. 148, lines 2-12; Tr. pp. 152, lines 3-4). Appellant showed Ellison where Degros lived specifically for the purpose of having Degros killed. (Tr. pp. 148, lines 7-12). Ellison was told by Appellant that Degros' Rule to Show cause would result in her losing custody and being imprisoned, which would result in Ellison no longer having a place to live, and for that reason "Nick had to go". (Tr. pp. 148, line 20 through pp. 149, line 3).

Ellison and Appellant purchased a .22 revolver from behind their apartment complex near a hotel; Appellant paid for the gun. (Tr. pp. 149, lines 4-12). Ellison also testified that Appellant

claimed her car was messed up, though he does not recall it having a problem, and therefore Appellant rented a car. (Tr. pp. 150, lines 13-23). At the instruction of Appellant, Ellison used the rental car as transportation to Degros' home to perform the murder. (Tr. pp. 150, line 24 through 151, line 2). Ellison attempted to drive to Degros' home, but got lost on the way and had to call Appellant for directions. (Tr. pp. 151, lines 3-22). Phone records show that Ellison called Appellant and Appellant called Ellison just minutes before Ellison called Degros to lure him outside. (Tr. pp. 180, line 7-8; Tr. pp. 176, line 18-25; Tr. pp. 152, lines 1-8); See State's Exhibit 7.

Ellison testified that he called Appellant after he murdered Degros, which is confirmed by phone records. (Tr. pp. 152, lines 12-13). Appellant wanted the whole family to go to the nearby Wal-Mart so that they could establish an alibi by being videoed on security cameras; Ellison called her immediately after the murder so that she would be ready to take Appellant's Toyota Camry to Wal-Mart for their alibi. (Tr. pp. 152, lines 12-18). Ellison destroyed his phone the next day at Appellant's instruction to get rid of everything. (Tr. pp. 152, line 23 through pp. 153, line 4.) They later drove down to a park in Hilton Head to dispose of the gun. (Tr. pp. 149, lines 14-18).

Ellison admits to initially telling authorities lies about why the murder took place, and for specifically omitting Appellant from any participation or planning. However, he was consistent as to his reasoning in that he wanted to protect Appellant out of his love for her.

David Jenkins

On the night of January 9, 2015, David Jenkins was in front of his mother's home which is located in the same area as Degros' home. (Tr. pp. 185, lines 19-25). David Jenkins heard the gunshots and then saw an individual walking from the area. (Tr. pp. 185, lines 19-25). Soon

after, he saw a car come out of the field with its headlights off; it drove all the way down the street and then turned its lights on. (Tr. pp. 186, lines 1-6). Jenkins testified that the vehicle was a silver car, that had something that looked like a “rhino horn” on the top of the car (he later agreed it could be the radio antenna). (Tr. pp. 186, lines 7-17). Jenkins was not immediately able to say what make or model the vehicle was, but a couple of days later he saw the same make vehicle and relayed the information to police officers that it was a Hyundai (Tr. pp. 186, lines 18 through 187, line 21).

Eric Kyle

Eric Kyle is an area manager for Enterprise Rent-a-Car. (Tr. pp. 192, lines 14-22). Mr. Kyle identifies an executed rental agreement filled out and signed by Appellant for a silver Hyundai Elantra, (Tr. pp 193, line 5 through pp. 195, line 11). The vehicle was rented just two hours before the murder occurred, listed Ellison’s phone number as the phone number of record, and was only driven twenty-four miles before being returned. *Id.*

James Tallon

James Tallon testified that he is a SLED agent and was tasked with searching for forensic evidence in the Hyundai Elantra rented by Appellant. Mr. Tallon conducted a chemiluminescence test called “Bluestar” and discovered multiple spots in the floorboard carpet that reacted as presumptive for blood. These carpet spots were cut, removed, and sent for further testing.

Verona Herrera

Verona Herrera is a SLED forensic serologist in the forensics laboratory and DNA department. Among other tests, her department performs presumptive testing for certain body fluids, including blood, semen, and saliva. (Tr. pp. 205, lines 18-21). Her findings as to the

floorboard carpet evidence also show that the presumptive test for blood was positive. (Tr. pp. 207, lines 9-12).

Shonette Mungin

Shonette Mungin works for Wal-Mart security, and confirms the accuracy of the Walmart security cameras showing Ellison, Appellant, and her kids, at the Walmart near her home at 8:23pm on January 9, 2015. (Tr. pp. 209, line 13 through pp. 210, line 12). (Tr. pp. 254, lines 8-13); See States Exhibits 14, 15, 16, and 17.

Richard Stantsy

Richard Stantsy owns an automotive shop in Beaufort called Tully Auto Service located over by the Walmart. (Tr. pp. 219, lines 9-16). Mr. Stantsy identifies an invoice from his shop for Appellant, for her 2007 Toyota Camry. (Tr. pp. 219, line 20 through pp. 220, line 25). The work was completed at 9:37am on January 10, 2015, and was only in the shop for an oil change and filter replacement. (Tr. pp. 220, line 21 through pp. 221, line 3). There were no notes on the invoice showing any malfunctions or needs for repair. (Tr. pp. 221, lines 1-9).

Standard of Review

“An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.” *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, “[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006). “The law to be charged must be determined from the evidence presented at trial.” *Id.* “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” *State v.*

Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) (citing *Orders Distributing Co., Inc. v. Newsome Carpets & Wallcovering*, 308 S.C. 429, 418 S.E.2d 550 (1992)). If there is any evidence to support the requested charge, the trial court should grant the request. *Williams*, at 195, 624 S.E.2d at 445. “However, if the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request.” *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). “The substance of the law is what must be charged to the jury, not any particular verbiage.” *State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464, (Ct.App.2003). The evidence must be reviewed in the light most favorable to appellant. *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

“Generally, the trial judge is required to charge only the current and correct law of South Carolina.” *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct.App.2005). If a charge is substantially correct and covers the law there is no need for reversal. *Id.* “Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.” *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). Jury instruction errors are a fact intensive inquiry, and are subject to a harmless error analysis. See *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

SUMMARY OF ARGUMENT

In Appellant’s trial for murder and conspiracy to commit murder, the trial court did not err in refusing to give the *precise* “mere association” jury charge requested by Applicant. See *State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct.App.2003). The trial court provided an explicit “mere association” charge of its own verbiage that adequately informed the jury that association is insufficient to prove guilt. Additionally, even in the absence of the trial court’s specific charge, the remaining instructions as a whole were more than adequate to

encompass a “mere association” charge; the trial court’s instructions provided charges as to mere presence, mere knowledge, requisite intent, and “hand of one”, all of which informed the jury that simply being associated with an individual who has committed a crime is insufficient to prove the defendant committed the crime. See *State v. Kelsey*, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76-77 (1998).

In arguendo, even if error is found for the denial of the specific verbiage requested by defense counsel, the evidence presented at trial demonstrated a relationship between Appellant and Ellison that extended well beyond “mere association”. The evidence presented by the State demonstrated Appellant’s assistance in planning, accomplishing, and covering up the murder, along with the motives Appellant had for wanting Degros murdered. The omission of the specific charge did not influence the verdict of the jury and therefore any error by the court is rendered harmless in this case. *State v. Jefferies*, 316 S.C. 13, 23, 446 S.E.2d 427, 432 (1994).

The conviction of Appellant should therefore be affirmed.

ARGUMENT

How the Issue Was Presented at Trial

After setting forth Appellant's rights, and the Defense resting without putting forth evidence or testimony of its own, Judge Nettles proceeded with his jury charge conference outside the presence of the jury.

Among the list of charges outlined by the trial court, Judge Nettles listed that he would charge "hand of one is the hand of all", the substantive law for both murder and conspiracy, and other basic charges regarding evidence and burden. (Tr. pp. 234, lines 6-25). Judge Nettles then asked if there were any additional requests. Trial counsel for Appellant requested that the court charge "mere presence, and that association is not guilty". (Tr. pp. 235, lines 6-14). The initial reaction from the court was that presence is irrelevant in this case; no one testified that Appellant was actually present when the murder took place, and presence is not necessary to show conspiracy. (Tr. pp. 235, lines 15-21).

In response, trial counsel narrowed his request to include a charge that "mere association by a defendant with people who have committed a crime is insufficient to prove the Defendant committed the crime." (Tr. pp. 236, lines 1-9). This time, in response, the court noted that the "hand of one is the hand of all" charge goes into great detail on the fact that simply being around someone is inadequate without a meeting of the minds. (Tr. pp. 236, lines 10-19). Judge Nettles was confident that the hand of one is the hand of all charge would adequately cover trial counsel's requests, but instructed counsel to make additional requests if either party felt that further charges were needed. (Tr. pp. 236, lines 10-19).

In addition to accurately charging the law as discussed above, Judge Nettle's also provided charges as to mere knowledge, mere presence, and mere association. Pertinent to

defense counsel's requests, Judge Nettle's charge included the following:

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.

* * *

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.

Intent is also a necessary element for there must have been a common desire or intent to commit the crime. The crime must have been committed pursuant thereto, with the person aiding and abetting by some overt act.

Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the Defendant in other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

* * *

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 person a 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 does not necessarily establish proof of existence of a conspiracy, or that the Defendant was involved in the conspiracy.

* * *

In order to convict the Defendant of conspiracy, the State must prove beyond a reasonable doubt not only that the Defendant knew of the unlawful conduct, but that the Defendant agreed to combine with the other persons for – person or persons for the purpose of accomplishing the unlawful conduct.

(Tr. pp. 279, line 20 through pp. 285, line 18.)

At the conclusion of the charge, Judge Nettles asked counsel if there were any objections from the parties as to the charge. Defense counsel again renewed his request for “mere

association from the accomplice liability charge be added.” (Tr. pp. 290, line 25 through pp. 291, line 2). Judge Nettles responded by informing counsel that he specifically charged that and then reiterated the charge he provided on mere presence. (Tr. pp. 291, line 5-8). On clarification from counsel that he wanted:

mere association by a defendant with people who have committed a crime is insufficient proof the 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 think the jury should be instructed that the mere association between the two is not enough.

(Tr. pp. 291, lines 12-20).

The court, again in efforts to reassure counsel, states:

And it goes on to say, prior knowledge that a crime was 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. I think that covers it.”

(Tr. pp. 291, line 21 through pp. 292, line 2).

No further instruction was given before the jury was permitted to begin deliberations. However, before reaching a verdict, the jury sent a question to the court asking for “clarification on South Carolina law of 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.” The court made the note part of the record and then proceeded to recharge those areas requested in full. (Tr. pp. 294, lines 2 through pp. 300, line 23).

Judge Nettles recharge was practically verbatim of his first, with only two differences in the substantive wording of his charge. In re-charging conspiracy, Judge Nettled stated “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 of committing a lawful act by unlawful means.” (Tr. pp. 299, line 15-19). Judge Nettles initially used the phrase “permitting a lawful act by unlawful means” in the original charge. (Tr. pp. 284, line 14). In re-charging, implied mutual understanding of a criminal conspiracy, Judge Nettles stated, “No overt act need be shown to establish a conspiracy.” (Tr. pp. 300, lines 14-15). Judge Nettles initially used the phrase “No overt act may be shown. . .”. (Tr. pp. 285, lines 9-10).¹

The jury then returned a verdict of guilty on both charges against Appellant.

I. The trial court properly instructed the jury regarding mere association and did not commit error in declining to charge the exact language requested by defense counsel.

The trial court properly charged “mere association” to the jury, both *explicitly* and by *overall substance*. The court’s decision not to charge the exact phrase requested by Defense does not constitute error by the court in this matter.

a. The trial court explicitly charged “mere association” to the jury.

While the law of South Carolina instructs that a charge should be considered as a whole, and not by its isolated parts, it would be precipitant to not take notice that a “mere association” type charge was *explicitly* incorporated by Judge Nettles in his instructions to the jury. The charge and the re-charge from the trial court state the following:

(Initial jury charge)

Similarly, the mere fact that Defendant may have associated with another person or met with another person to discuss common aims and interests does not necessarily establish proof of existence of a conspiracy, or that the Defendant was involved in the conspiracy.

(Tr. pp. 284, lines 20-25).

¹ These diminutive changes in language do not render either charge inaccurate or improper as a charge of the law of South Carolina.

(Recharge to the jury following the jury's note to the court)

Similarly, the mere fact the Defendant may have associated with another person or met with another person and discussed common aims and interests does not necessarily establish proof of existence of a conspiracy, or that the Defendant was involved in a conspiracy.

(Tr. pp. 299, line 25 through pp. 300, line 5).

Both the charge and recharge by the trial court used the terminology “the mere fact that the Defendant may have associated with another person” when informing the jury that such would not be sufficient for finding guilt of conspiracy.² (Tr. pp. 299, line 25 through pp. 300, line 5). There is no substantive difference between the court’s verbiage and counsel’s requested verbiage. This is an explicit “mere association” charge given to the jury; the fact it is not the exact verbiage requested by defense counsel is legally insufficient to constitute error. *State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct.App.2003).

Appellant also argues that the trial court’s recitation of “mere association” within the context of the charge of conspiracy renders the charge in error for failing to also apply it to the charge of murder. This is inaccurate.

The following excerpts from the trial court’s jury charge directly convey this necessity:

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***.

* * *

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.

² Appellant *consistently* misquotes the trial court as having said “Defendant’s mere association with another person to discuss common aims and interests”. The distinction is small, but it is worth noting that the trial court’s *exact* phrasing provides an explicit “mere association” charge to the jury, without qualification or condition.

* * *

When a person does an act in the presence of *and with the assistance with another*, the act is done by both.

* * *

Present at the commission of the crime means to be sufficiently near *to aid and abet and assist* in the commission of the crime.

* * *

The crime must have been committed pursuant thereto, with the person aiding and abetting *by some overt act*.

* * *

Intent may be shown by acts and conduct of the Defendant in other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

(Tr. pp. 279, line 20 through pp. 282, line 4) (emphasis added).

These instructions as to the charge of hand of one is the hand of all are mutually exclusive to “mere association”; which is to say that, in light of this instruction, a jury could not possibly find “mere association” with a person who commits a crime as sufficient to find the associate also guilty of the crime. The charge by the court thoroughly informs the jury that participation is required to find a party guilty under the hand of one is the hand of all theory. To assert that a “mere association” charge is needed in isolation of the conspiracy charge, so that the jury can know to apply it to Appellant’s murder charge, would require the jury to ignore the entire charge of murder by hand of one is the hand of all. While the *exact phrase* requested by defense counsel was not utilized, Judge Nettles gave explicit instruction that mere association would be insufficient to convict for conspiracy, and did not need to expound on mere association for the charge of murder, given the detail of his instructions to that charge. See *State v. Kelsey*, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76-77 (1998).

There is therefore no error in Judge Nettles’ jury instruction, and the conviction of Appellant should be affirmed.

b. The trial court substantively encompassed “mere association” within his other charges given to the jury.

Even if the absence of the express mere association language utilized by the trial court, the substance of the trial court’s jury charge, *as a whole*, easily establishes for the jury the proper parameters that trial counsel requested in his seeking a “mere association” instruction. No further instruction was needed, and the court did not err in refusing to instruct the precise charge requested by defense counsel.

South Carolina already has controlling authority on this matter. See *State v. Kelsey*, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76-77 (1998). In *Kelsey*, the trial court was requested to charge “mere association” but declined to do so. The Supreme Court of South Carolina affirmed the trial court’s decision, noting that the charge as a whole was sufficient to cover the requested charge, as it was not misleading, provided clear explanation that all elements for each crime must be met to convict, discussed the requisite criminal intent, and noted the need for the defendant to be a *knowing party* to the conspiracy. *State v. Kelsey*, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76-77 (1998). All of these instructions can be found in the charge given by Judge Nettles. Our Court ruled similarly in two other cases. *State v. Austin*, 299 S.C. 456, 385 S.E.2d 830 (1989) (holding that trial court’s refusal to charge mere presence was not in error when charge given made clear that guilt may only be found when defendant commits the crime, or is present at the scene and intentionally, or through common design, aids, abets, or assists in the commission of the crime through an overt act); *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010) (Relying upon *Kelsey* and *Austin* and finding that when read as a whole, the trial court’s jury charge encompassed a charge for “mere association”, thereby rendering an explicit charge for mere association unnecessary and within the trial court’s discretion to deny).

Appellant relies on *State v. Mattison*, and attempts to distinguish the case by the fact that, unlike *Mattison*, Appellant was not present at the murder. Appellant suggests that this fact made a “mere association” charge (disregarding the “mere association” charge Judge Nettles actually provided) absolutely necessary. In conjunction, Appellant argues that the charge should have been given independent of any “to discuss common aims” language, so that the jury would know to apply it to the murder charge as well. However, Appellant disregards the main crux of the *Mattison* decision that demonstrates, like *Kelsey* and *Austin*, that thorough instruction on requisite intent and overt acts negates the need for a “mere association” charge for either murder or conspiracy. *Mattison*, at S.C. 480-82, at S.E.2d 584-85.

At the renewal of defense counsel’s request for mere association instruction, Judge Nettles specifically references his mere presence and mere knowledge charges as covering the request of defense counsel for mere association. (Tr. pp. 290, line 24 through pp. 292, line 4). Judge Nettles relied upon this position in denying defense counsel’s renewed request for the charge. *Id.* The substance of the jury charge on intent, overt acts, and hand of one is hand of all, along with the mere presence and mere knowledge charges, substantively encompass the charge of mere association. See *Kelsey*, at S.C. 76-77, at S.E.2d 76-77. The jury charge, when read as a whole, fully and accurately conveys the law and the trial court was within its discretion to deny further instruction. No error arises.

There must also be a showing of prejudice in order to find reversible error for omission of a jury charge. *State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” *State v. Burkhart*, 350 S.C. 252, 263, 565

S.E.2d 298, 304 (2002) (citing *Orders Distributing Co., Inc. v. Newsome Carpets & Wallcovering*, 308 S.C. 429, 418 S.E.2d 550 (1992)).

Appellant makes no allegation that the instructions given were an inaccurate charge of the law, only that the omission of the *specific* “mere association” charge was in error. Given that the trial court utilized its own language to address “mere association”, and did so accurately, there is no actual omission to consider. But if *in arguendo*, the alleged omission is taken as true, the instructions to the jury still cannot be deemed prejudicial in this matter. Given the evidence against Appellant which paints a clear picture of her orchestration of Degros’ murder, “mere association” with Ellison would not be a reasonable conclusion for the jury. (*Infra*). Furthermore, the instruction given provided the jury with an even more stringent explanation of insufficient proof of guilt. Mere association can result simply by being familiar or commonly around a certain person, without any knowledge of what that person may be doing. Judge Nettle’s charge demonstrates that even if a defendant is commonly around someone and also *knows* that that person intends to break the law, it is *still* insufficient for proving guilt. This is a standard that goes well beyond association, and therefore no prejudice can result from Appellant’s claim, even if presumed true.

The law was properly charged, and while the exact verbiage requested was not used, the jury was well educated on the fact that mere association cannot be sufficient to prove guilt. No prejudice arises in this matter and the Appellant’s conviction should be affirmed.

Harmless Error

In alternative to the arguments above, if error is found to arise from the trial court’s omission of defense counsel’s “mere association” charge, such would constitute harmless error given the evidence presented at trial.

Harmless error analysis is applicable in the context of alleged omitted jury charges. The Supreme Court notes that it must determine beyond reasonable doubt that the complained of error did not contribute to the verdict; the analysis is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (citing *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct.App.1998)). It is a fact-intensive inquiry wherein the court must consider the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict. *Id.* (citing *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994)).

In *State v. Jefferies*, the court approached the issue of harmless error with the same analysis, but first determined what portion of the jury instruction ultimately confused the jury. *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994). The Court concluded that given the facts, the impermissible jury charge did not contribute to the guilty verdict. *Id.* at 23. In the case at hand, the jury sent a note to the court requesting 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. pp. 293, line 22 through pp. 294, line 1). Appellant suggests that the note requesting clarification is an indication that the jury was confused by the lack of “mere association” charge for murder and that the jury had doubts as to Appellant’s involvement. Contrastingly, it is more likely that the jury understood that considerable circumstantial evidence existed against Appellant, and need to be sure it could base its verdict on such evidence. It is of particular importance to note that the jury delivered its

verdict just fifteen minutes after gaining clarification as to the requested instructions.³ This would indicate that the jury likely had their verdict determined beforehand, but wished to confirm their understanding of the law before delivering the verdict to the court. It's also equally reasonable to assume that given the gravity of the situation, the jury wished to reassure itself of its instruction, given the length and complexity that accompanies the law and evidence in a case such as this.

Any conclusion as to jury confusion is inherently speculative, but it is still provable that Appellant's alleged error in jury charge did not influence the verdict of the jury. In the case at hand, the jury heard extensive evidence of Appellant's involvement in planning, assisting, and covering up the murder of Degros. Specifically, the jury heard evidence that:

- Appellate explicitly instructed Ellison to murder Degros; (Tr. pp. 152, lines 5-11).
- Appellant gave Ellison a motivation to murder Degros by telling him he'd be without a home if the Rule to Show Cause proceeded; (Tr. pp. 148 line 22 through pp. 149, line 3).
- Appellant provided Degros's phone number to Ellison for purposes of accomplishing the murder; (Tr. pp. 152, lines 3-8).
- Appellant drove Ellison to Degros's home in order to show him how to get there; (Tr. pp. 148, lines 5-10).
- Appellant provided directions over the phone to Ellison when he got lost attempting to drive himself to Degros's home the night of the murder; (Tr. pp. 151, lines 12-22).
- Appellant rented the Hyundai used for transportation to and from the murder; (Tr. pp. 150, lines 13-23).
- Both Appellant and Ellison approached Harley to inquire about obtaining a gun; (Tr. pp. 134, lines 10-24).
- Appellant helped arrange to purchase the gun used in the murder, and paid for it; (Tr. pp. 149, lines 6-12).
- Appellant expressed her motives and desires for the murder to both Ellison and Harley; (Tr. pp. 148, line 22 through pp. 149, line 3) and (Tr. pp. 133, lines 17-22).

³ The jury exited at 11:57am with deliberations beginning shortly after. They re-entered at 2:20pm for Judge Nettles' recharge of the law, and exited at 2:28. The Jury returned with a verdict at 2:43 pm. (Tr. pp. 288, lines 5-17; pp. 294, lines 3-10; pp. 301, line 1-2; pp. 302, lines 4-8).

- Appellant discussed the need for an alibi with Ellison and Harley; (Tr. pp. 152, lines 14-18) and (Tr. pp. 142, lines 1-2).
- Appellant devised a plan to be seen by surveillance camera footage for alibi purposes; (Tr. pp. 152, lines 14-18).
- Appellant participated in the disposal of the murder weapon and cellphones; (Tr. pp. 149, lines 13-22) and (Tr. pp. 152, line 23 through pp. 153, line 4).
- The forensic evidence showed that the Hyundai used in the murder had spots that tested positive as presumptive for blood. (Tr. pp. 206, line 9 through pp. 207, line 12).

With this evidence in mind, the court must determine whether the omission of the precise requested jury charge for mere association contributed to the jury reaching its guilty verdict for murder and conspiracy to commit murder. *Jefferies*, 316 S.C. at 22-23, 446 S.E.2d at 432-33. As Appellant's trial strategy was a ubiquitous effort to challenge the credibility of the State's evidence, as opposed to offering its own case in chief, the issue is simplified into a question of elements and credibility.

The jury found Appellant guilty beyond a reasonable doubt; they could only have done so if they believed the testimony and evidence presented to be sufficiently credible and sufficient to meet the elements of the charges. The lack of the precise mere association charge would not influence whether the jury found the evidence credible or not, nor would it effect the jury's satisfaction that elements of overt acts, intent, and participation in a common plan (among others) were met by the evidence, as charged. These elements, in and of themselves, are contrary to "mere association". Thus, the lack of the specific requested charge would have had no influence upon the verdict reached by the jury in this matter, and any error is rendered harmless. The conviction should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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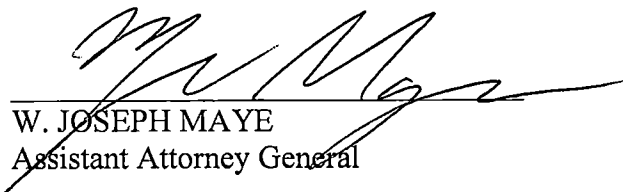
October 31, 2017.

CERTIFICATE OF SERVICE

I, **W. Joseph Maye**, hereby certify that I have served the Initial Brief of Respondent and Designation of Matter in the foregoing by depositing copies in the InterAgency mail addressed to:

LaNelle Cantey DuRant
Appellate Defender
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 31st day of October, 2017.


W. JOSEPH MAYE
Assistant Attorney General

RECEIVED
OCT 31 2017
SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

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OCT 31 2017
SC Court of Appeals

October 31, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Jasmine Nicole Femia
Appellate Case No. 2016-001771

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to W. Joseph Maye
Assistant Attorney General

/lbb

cc: LaNelle Cantey DuRant, Esquire
Isaac McDuffie Stone, III, Solicitor
Trisha Allen, Victim Advocacy Division