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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SETH HASSAN SMITH,

APPELLANT

APPELLATE CASE NO 2019-001418

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. In this trial for accessory after the fact to murder, did the trial judge err in refusing to direct a verdict of acquittal when the State failed to prove Appellant had knowledge that the principal committed the murder and the circumstantial evidence of assistance was not substantial but merely suspicious?

2. In this trial for accessory after the fact to murder, when the jury asked if the defendant and the unknown principal could be the same person, did the trial judge commit an error of law in instructing the jury that, in theory, the defendant and the unknown principal could be the same person?

3. Did the trial judge err in refusing to grant a new trial when the supplemental instruction deprived Appellant of a fair trial?

STATEMENT OF THE CASE

In September of 2018, the Charleston County Grand Jury indicted Appellant, Seth Hassan Smith, for accessory after the fact to a felony A, B, C or murder, indictment #2018-GS-10-05300.[1] (R. p. **, indictments). On January 7, 2019, Appellant proceeded to jury trial before the Honorable R. Markley Dennis. Michael Loignon and Stephen M. Bowden represented Appellant at trial. David Osborne and Shannon Elliott prosecuted the case. The jury found Appellant guilty and Judge Dennis sentenced Appellant to fifteen (15) years. (R. p. **, sentencing sheet). On July 31, 2019, Appellant again appeared before Judge Dennis and moved for a new trial. Judge Dennis denied the motion in a written order filed August 14, 2019. (R. p. **, order denying motion for new trial). A timely notice of intent to appeal was served on August 20, 2019. This appeal follows.

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[1] It is unclear who testified before the grand jury because the witness is listed as the Charleston City Police Department.

STANDARD OF REVIEW

Directed Verdict

"[W]hen the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); see Hepburn, 406 S.C. at 429, 753 S.E.2d at 408 ("In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict."). Further, when the State relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the trial judge is concerned with the existence or non-existence of evidence, not with its weight. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. The trial judge "should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Id.* " 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Id. "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis.*" State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (emphasis added).

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). State v. Pearson, 415 S.C. 463, 469–70, 783 S.E.2d 802, 805–06 (2016).

Jury Instruction

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when

the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

STATEMENT OF FACTS

On April 18, 2015, at approximately 11:30 AM, George Bennett and Rashawn Rivers were shot as they sat in Rivers' car on Reid Street near East Bay Street in the "East Side" neighborhood of downtown Charleston. Bennett died as a result of the shooting. After viewing video from security cameras in the area of the shooting, police began to investigate two cars: the get-away vehicle, a black Cadillac Deville; and a silver Infinity. (Tr. pp. 418-420). A black Cadillac was registered to Appellant and a silver Infinity was registered to Appellant's brother, Bryant Smith. (Tr. p. 425, lines 6-19; p. 427, line 16 – p. 428, lines 1-2). A title search for the Cadillac showed a change of ownership with title transferred to Jibral Acevedo on April 20, 2015. (Tr. p. 433, line 15 – p. 434, lines 1-2). Acevedo is a cousin of both Appellant and Appellant's brother, Bryant Smith. (Tr. p. 275, line 12 – p. 276, 277, lines 1-13).

An investigator testified at trial that the motive for the shooting involved a drug deal gone bad between Appellant's brother, Bryant Smith, and the deceased, George Bennett. (Tr. p. 467, lines 2-13). Phone records establish contact between Bryant Smith and the deceased the night before the shooting. (Tr. p. 436, lines 4-15). The investigator also testified that the murder and attempted murder charges originally brought against Bryant had been dismissed by the prosecutor. (Tr. p. 467, line 23 – p. 468, lines 1-4). The prosecutor admitted in his closing argument that he could not prove that Appellant was in the Cadillac at the time of the shooting. (Tr. p. 545, lines 9-12).

Officers interviewed the cousin, Acevedo, who told them he bought the Cadillac from someone he met in the club named Tony James or TJ. (Tr. p. 440, line 24 – p. 441. lines 1-13). Acevedo told the police that the car had broken down and been towed. (Tr. p. 441, lines 7-8). Acevedo was charged with obstruction of justice for lying to the police. (Tr. p. 278, lines 21-23).

At the time of Appellant's trial Acevedo had pled guilty to obstruction of justice but had not yet been sentenced. (Tr. p. 278, line 7 -p. 279, lines 1-18). At trial Acevedo testified that Appellant went by the nickname TJ and it stood for Tony James. (Tr. p.276, lines 3-8).

Acevedo testified that on Monday April 20, 2015, Appellant called him and asked if he still wanted to buy the Cadillac. (Tr. p. 284, line 17 – p. 285, lines 1-14). Acevedo testified that he had expressed interest in buying the car before. (Tr. p. 285, lines 15-17). According to Acevedo, Appellant picked him up in a White truck driven by Bubba. (Tr. p. 286, line 23 – p. 287, lines 1-18). They first went to the Dollar General Store and Acevedo claimed he did not know what was purchased but learned later from investigators that they purchased spray paint. (Tr. p. 289, line 8 – p. 290, lines 1-14). Acevedo testified that when they left the Dollar General Store they went to "Face's" house in Mt. Pleasant where the Cadillac was parked. (Tr. p. 292, lines 9-22). "Face's" real name is Jeremy. (Tr. p. 292, lines 15-16).

Jeremy Wright testified at trial that between 1:00 and 2:00 PM on April 18, 2015, Appellant and Bryant Smith parked a black Cadillac at his house. (Tr. p. 141, lines 2-11). Wright testified that Appellant told him the car needed to be repaired and asked if he could give them a ride. (Tr. p. 141, lines 21-25). Wright testified that he dropped Bryant off at his gray car in downtown Charleston. (Tr. p. 142, line 2 – p. 143, lines 1-24). Wright testified he then took Appellant to North Charleston. (Tr. p. 142, lines 5-12).

Acevedo testified that on April 20, 2015, after they left "Face's" house in Mt. Pleasant, he and Appellant went to the DMV in West Ashley. (Tr. p. 294, lines 4-24). Acevedo admitted that the bill of sale was dated April 1, 2015, and the purchase price was listed as $300 even though the purchase did not take place on April 1st and he paid no money for the Cadillac. (Tr. p. 298, line 11 – p. 299, lines 1-17). Acevedo testified that Appellant paid for an expedited

transfer. (Tr. p. 294, line 21 – p. 295, 296, lines 1-5). According to Acevedo, Appellant told him he should just "junk" the Cadillac. (Tr. p. 308, lines 1-11). Acevedo testified that the next day he and Appellant went back to "Face's" house and waited for the tow truck. (Tr. p. 310, lines 2 – 22). In an earlier statement to police Acevedo claimed that Appellant spray painted the wheels but at the time of trial Acevedo could not remember. (Tr. p. 311, lines 3-23). Acevedo sold the Cadillac to a tow truck driver for about $200. (Tr. p. 311, line 24 – p. 312, lines 1-4). About a week after the shooting police found the Cadillac in a junkyard in North Charleston. (Tr. p. 441, line 14 – p. 442, lines 1-12).

ARGUMENTS

1. In this trial for accessory after the fact to murder, the trial judge erred in refusing to direct a verdict of acquittal when the State failed to prove Appellant had knowledge that the principal committed the murder.

At the close of the State's case Appellant moved for a directed verdict of acquittal. (Tr. pp. 496 – 503). Appellant argued that the State failed to prove Appellant had knowledge that the principal committed the murder. (Tr. p. 500, lines 1-14). Counsel argued that the circumstantial evidence of assistance was not substantial and did not establish the other required element of knowledge. (Tr. p. 501, lines 2-24). The judge denied the motion. (Tr. p. 510, line 4 – p. 511, 512, lines 1-20). The judge found that the evidence presented with regard to assistance could establish knowledge. (Tr. p. 510, line 4 – p. 511, lines 1-7). The judge then addressed the intent to assist the principal element and found that went to the weight of the evidence citing State v. Larmand, 415 S.C. 23, 780 S.E.2d 892 (2015). (Tr. p. 511, line 7 – p. 512, lines 1-20). The judge erred in refusing to direct a verdict of acquittal when the State failed to prove the element of knowledge.

In State v. Fuller, 346 S.C. 477, 480, 552 S.E.2d 282, 283 (2001), the South Carolina Supreme Court wrote:

> The elements of accessory after the fact to a crime are 1) the felony has been completed, 2) the accused must have knowledge that the principal committed the felony, and 3) the accused must harbor or assist the principal felon. State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) (Collins II). A defendant may not be found guilty as an accessory when indicted solely as a principal. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) (Collins I).

The first element of accessory after the fact, a completed felony, in this case murder, is not challenged in the present case. As to the third element, the accused must harbor or assist the principal felon, the State presented evidence that after the shooting Appellant parked his Cadillac in a co-worker's yard in Mt. Pleasant, attempted to change the appearance of the Cadillac,

quickly sold the Cadillac to his cousin, Acevedo, falsifying dates and amounts in the bill of sale and then encouraging Acevedo to "scrap" the Cadillac. While the actions in regard to the Cadillac may be suspicious, this evidence is not substantial circumstantial evidence that Appellant harbored or assisted the principal felon. As to the second element, knowledge by the accused that the principal committed the felony, the State and the trial judge, in denying the directed verdict motion, relied on Appellant's actions in regard to the Cadillac together with the purported drug deal gone bad between Appellant's brother and the deceased to infer knowledge. This evidence is not sufficient to establish that Appellant knew that the murder had been committed.

In State v. Pearson, 415 S.C. 463, 473, 783 S.E.2d 802, 807–08 (2016), the South Carolina Supreme Court wrote:

> In contrast, the trial court, when ruling on a directed verdict motion, "views the evidence in the light most favorable to the State and must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.' " Id. (quoting Littlejohn, 228 S.C. at 329, 89 S.E.2d at 926). Based on this distinction, the Court explained:
>
> [A]lthough the *jury* must consider alternative hypotheses; the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.
>
> Id.; see State v. Larmand, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was substantial circumstantial evidence from which the jury could infer Respondent's guilt.").

Viewing the evidence in the light most favorable to the State, the State failed to present substantial circumstantial evidence which reasonably tends to prove the guilt of Appellant, or from which his guilt may be fairly and logically deduced. Appellant is not arguing, as in Pearson and Larmand, that there are other plausible explanations for Appellant's actions with regard to the Cadillac. Instead, Appellant argues the State failed to prove knowledge of the murder, a necessary element of accessory after the fact. In State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004), the South Carolina Supreme Court wrote, "The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. Id. at 409, 535 S.E.2d at 127. 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001)." The evidence presented by the State merely raises a suspicion that Appellant knew a murder had been committed. The trial judge erred in refusing to direct a verdict of acquittal.

2. In this trial for accessory after the fact to murder, when the jury asked if the defendant and the unknown principal could be the same person, the trial judge committed an error of law in instructing the jury that, in theory, the defendant and the unknown principal could be the same person.

The trial judge instructed the jury on the law of accessory after the fact to murder as follows:

> The defendant is charged, as I mentioned, with the criminal offense of accessory after the fact of a felony murder. And in order to obtain a conviction the State must prove beyond a reasonable doubt the following: First, that the defendant knew that another person called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal

> committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection.
>
> While the State must prove that the principal did commit the murder, it is not necessary that the State prove the identity of the principal or that the principal has been prosecuted for you to return a verdict of guilty of the crime of accessory after the fact of committing the murder.
>
> Intentionally means willful in attaining the results which actually occurred. Not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Although the actions of the defendant may have in fact helped the principal to escape detection or arrest, this would not be enough to be found guilty of accessory after the fact. The State must also prove that the defendant acted with the intention or the purpose of helping the principal to escape detection or arrest.
>
> So if a person charged with being accessory after the fact did not intend that his act should help the principal escape detention -- detection or arrest then he is not an accessory after the fact even though his acts in fact have resulted in helping or aiding the principal to escape arrest or detection. There must be some affirmative act tending towards the concealment of the commission of a crime and assisting the principal. Silence alone is not sufficient to make a person an accessory after the fact to a felony for murder.

(Tr. p. 575, line 24 – p. 576, 577, lines 1-10). There was no objection to the charge as given. (Tr. p. 582, lines 3-5). The jury began deliberations at 3:53 PM. (Tr. p. 582, lines 8-9).

During deliberations the jury sent a note to the judge asking, "Are the accused, (defendant) and "unknown" principal mutually exclusive in the eyes of the law? Can they be the same person?" (Tr. p. 584, lines 3-6). The note was marked as Court's Exhibit #2. (R. p. ** Court's Exhibit #2). Prior to answering the question from the jury, the judge asked defense counsel, "You object to my saying that the principal can – he can – the person accused of accessory after the fact can also be the principal, the unknown principal, because of the <u>Blakely</u> case?" (Tr. p. 582, lines 14-17). Defense counsel answered, "Yes, sir. And I actually like the way you stated it before as opposed to that direct language." (Tr. p. 582, lines 18-19). The trial

judge asked, "That they have to – that they don't have to be mutually exclusive?" (Tr. p. 582, lines 20-21). Defense counsel answered, "Yes, sir, I do object to that. I would argue that if a person is a party to the crime then they are a principal and they cannot then be an accessory after the fact to that crime." (Tr. p. 582, lines 22-25). Defense counsel cited State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013), for the proposition that a person cannot be both a party to the crime and accessory after the fact. (Tr. p. 583, lines 2-7).

The judge overruled the objection and stated:

> All right. Thank you. And in reading that case I think it is distinguishable because Blakely was a case involving a question of whether it was vindictive and double jeopardy to try – to try a person who has been acquitted of a crime itself. And the case that they cite is a Georgia case. And it really deals with more being an accomplice. And an accessory after the fact is not an accomplice. That is a separate crime altogether.
>
> I think we use the term – rather, Georgia uses accomplice apparently. We use they are involved, because they are – the hand of one is the hand of all, which says they assisted in some fashion. So that is not what he is facing. It is totally separate., truly. So I mean it is a different situation.

(Tr. p. 583, lines 8-22).

The judge then answered the jury's question stating:

> I am going to answer that by recharging a portion of my charge where I define the elements of -- for the crime of accessory after the fact of committing a felony of murder.
>
> And, as you will recall, there are basically three: The felony must have been completed. The accused must have knowledge of the principal that the principal committed the felony. And the accused must harbor or assist the principal felon from being detected. And harboring must have the intention to protect the principal.
>
> As I further charge you that accessory -- a person may be convicted even if the principal is unknown or has not been charged or has not yet been prosecuted.
>
> And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the

> person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal -- had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested.
>
> If those elements are present it doesn't matter what -- who the principal was, because you are not dealing with the principal. You are dealing with the person accused of basically in this case being an accessory after the fact of the crime that was committed by the principal. So the identity, as I have stated, is really not significant in so far as your determination. The key is whether those elements pertaining to the person accused of the accessory are present. Okay.

(Tr. p. 584, line 7 – p. 585, lines 1-13). The judge then noted Appellant's "Blakely" exception. (Tr. p. 585, lines 19-21). Importantly, and as will be discussed further in issue two, in the "re-charge" the judge omitted the "another person" language included in the initial instruction. In the initial instruction the judge told the jury:

> The defendant is charged, as I mentioned, with the criminal offense of accessory after the fact of a felony murder. And in order to obtain a conviction the State must prove beyond a reasonable doubt the following: First, that the defendant knew that **another person** called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection.

(Tr. p. 575, line 24 – p. 576, lines 1-8). The jury then continued deliberating at 5:14 PM. (Tr. p. 585, line16). At 5:35 PM, twenty minutes after the "re-charge," the jury reached a verdict. (Tr. p. 585, line 25. The verdict of guilty was announced at 5:48 PM. (Tr. p. 593, line 13).

Prior to the announcement of the verdict Appellant renewed the objection to the "re-charge" citing State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998), and arguing that, based on the facts presented, if Appellant was at the scene, he could only be acting as a principal as either the shooter or the get away driver. (Tr. p. 587, line 3 – p. 588 – 591, lines 1-3). Appellant also cited State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976), for the proposition that the State has to prove the guilt of the principal in the trial of the accessory. (Tr. p. 589, lines 15-17). The

judge overruled the objection. (Tr. p. 588, line 9 – p. 589 -593, lines 1-10). The trial judge erred in instructing the jury that the principal and the accessory after the fact could be the same person.

In Blakely the South Carolina Court of Appeals found no error in the State seeking an indictment for accessory after the fact to a felony following an acquittal for murder. The State originally indicted Teresa Blakely for murder based on a theory that she aided and abetted the principal, Paul Morris, in the murder of Blakely's husband, Houston Fuller. The jury acquitted Blakely and found Fuller guilty of voluntary manslaughter. After Blakely's acquittal, the State indicted her for accessory after the fact to a felony. In Blakely the Court of Appeals wrote:

> An exception to these modern notions of criminal liability applies to an accessory after the fact. While an accessory before the fact may be treated like a principal upon proper proof, an accessory after the fact is not generally treated like a principal of the crime. *See* S.C.Code Ann. § 16–1–55 (2003) (outlining lower classifications of punishment for persons convicted of the offense of accessory after the fact to a felony as compared to punishment for the principal felon); State v. Good, 315 S.C. 135, 139, 432 S.E.2d 463, 466 (1993) (holding there was no error in refusing to charge accessory after the fact because "there is no exclusionary situation which eliminates one [defendant] or the other from having participated in the murder as a principal."); State v. Fuller, 346 S.C. 477, 481, 552 S.E.2d 282, 284 (2001) (finding the defendant was not entitled to a jury instruction on accessory after the fact to murder, as the evidence did not eliminate the defendant as a principal first); Vergara v. State, 287 Ga. 194, 695 S.E.2d 215, 218 (2010) ("A person cannot be both a party to a crime and an accessory after the fact." (internal quotation marks omitted)). Moreover, accessory after the fact to a felony is not a lesser- included offense of murder. Fuller, 346 S.C. at 481, 552 S.E.2d at 284; *see* Good, 315 S.C. at 138–39, 432 S.E.2d at 465–66 (noting accessory after the fact is not a lesser-included offense of any of the offenses with which the defendant was charged, including murder, armed robbery, grand larceny of a motor vehicle, and criminal conspiracy). Accordingly, double jeopardy does not attach under these facts. *See* State v. Parker, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) ("Under the law of double jeopardy, a defendant may not be prosecuted for the *same* offense after an acquittal, a conviction, or an improvidently granted mistrial." (emphasis added) (internal quotation marks omitted)).

402 S.C. at 657, 742 S.E.2d at 32–33 (n. #3 omitted). Blakely supports the proposition that a defendant who is indicted solely for accessory after the fact to murder cannot also be the principal.

In Collins the Court removed the element of absence from the scene of the crime for accessory after the fact writing:

> We concur with the law espoused by these authorities. It is untenable to suggest that a defendant who is "merely present" at the scene of a crime may not be convicted as an accessory if he thereafter aids the perpetrator to cover it up or escape from the crime. The mere fact of one's "presence" at the time of commission of the substantive offense is insufficient to relieve him of liability as an accessory. Accordingly, we modify existing case law to recognize that **absence** is not an essential element of the offense of accessory after the fact and that "mere presence" at the scene will not preclude an accessory verdict where the defendant becomes involved **after** commission of the substantive offense.

329 S.C. at 27–28, 495 S.E.2d at 205. If the jury found that Appellant was at the scene, there was no evidence presented that he was merely present. Under the facts of this case, if the jury found Appellant was at the scene, he was acting as a principal as either the shooter or the get away driver. Appellant was not indicted as a principal, only as an accessory after the fact. Under these facts, Appellant cannot be the accessory and the principal.

In Massey the Court found that the State should not be barred from prosecuting someone as an accessory after the fact simply because the principal was acquitted. The Court affirmed Massey's conviction for accessory after the fact although the principal was acquitted in an earlier separate trial. The Court, however, specifically noted that, "That the jury in the trial of the accessory must find as a fact that the principal did actually commit the crime involved is a rule that remains as valid and unchanged as before. Burbage, supra; Hess, supra. This rule affords the accused accessory the necessary degree of protection. Unless the State can prove at the trial of the accessory that the principal is guilty, the accessory cannot be convicted." 267 S.C. at 446,

229 S.E.2d at 339. The language from Massey further supports the fact that the principal and the accessory cannot be the same person when the sole charge is accessory after the fact to murder.

The judge erred in instructing the jury that, in theory, the defendant and the unknown principal could be the same person. In response to the question from the jury the judge should have simply recharged the original instruction he gave the jury on the law of accessory after the fact to murder. The instruction constituted an error of law as well as an improper comment on the facts. The error was not harmless. After the erroneous "re-charge" it only took the jury twenty minutes to reach a verdict.

3. The trial judge erred in refusing to grant a new trial when the supplemental instruction deprived Appellant of a fair trial.

On January 18, 2019, following conviction and sentencing Appellant filed a motion for a new trial. (R. p. **, Motion for new trial). In July a trial brief was prepared and on July 31, 2019, Judge Dennis heard the motion for a new trial. (R. p. ***, Memorandum in support of motion for new trial). After hearing argument from both sides Judge Dennis denied the motion for new trial. July 31, 2019, Tr. p. lines 15-16). The motion was denied by written order dated August 14, 2019. (R. p. **).

Prior to instructing the jury the judge advised the attorneys about the charge on accessory after the fact stating:

> Yeah, this is what it says: The defendant knew that another person, the principal, committed a felony and after the crime intentionally helped – knew the – committed a felony and the felony was complete basically. I put that – that is consistent with Massey. Which that's – has been committed a felony. Has committed the crime of murder. So I mean that is all it says. It doesn't say that he has to be guilty of it. Massey doesn't say that. Because Massey specifically stands for the principle he doesn't have to prove that. Because in Massey the principal was acquitted.

(Jan. Tr. p. 524, lines 5-11).

The trial judge instructed the jury on the law of accessory after the fact to murder as follows:

> The defendant is charged, as I mentioned, with the criminal offense of accessory after the fact of a felony murder. And in order to obtain a conviction the State must prove beyond a reasonable doubt the following: First, that the defendant knew that **another person** called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection.
>
> While the State must prove that the principal did commit the murder, it is not necessary that the State prove the identity of the principal or that the principal has been prosecuted for you to return a verdict of guilty of the crime of accessory after the fact of committing the murder.

(Jan Tr. p. 575, line 24 – p. 576, lines 1-14). During deliberations the jury sent a note to the judge asking, "Are the accused, (defendant) and "unknown" principal mutually exclusive in the eyes of the law? Can they be the same person?" (Jan. Tr. p. 584, lines 3-6). The note was marked as Court's Exhibit #2. (R. p. ** Court's Exhibit #2). The judge answered the question stating:

> I am going to answer that by recharging a portion of my charge where I define the elements of -- for the crime of accessory after the fact of committing a felony of murder.
>
> And, as you will recall, there are basically three: The felony must have been completed. The accused must have knowledge of the principal that the principal committed the felony. And the accused must harbor or assist the principal felon from being detected. And harboring must have the intention to protect the principal.
>
> As I further charge you that accessory -- a person may be convicted even if the principal is unknown or has not been charged or has not yet been prosecuted.
>
> And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the

> person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal -- had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested.
>
> If those elements are present it doesn't matter what -- who the principal was, because you are not dealing with the principal. You are dealing with the person accused of basically in this case being an accessory after the fact of the crime that was committed by the principal. So the identity, as I have stated, is really not significant in so far as your determination. The key is whether those elements pertaining to the person accused of the accessory are present. Okay.

(Jan. Tr. p. 584, line 7 – p. 585, lines 1-13). Appellant objected to the "re-charge" or supplemental charge and that objection is addressed in issue two. The basis of the motion for new trial was the fact that the supplemental charge altered the original charge by omitting the words "another person." (R. p. ***, Memorandum in support of motion for new trial).

During the hearing on the motion for new trial counsel argued:

> And so we acted in reliance on the jury charge that the principal had to be another person. And essentially the supplemental charge after the closing gave the State almost a new theory of liability. It prevented us from -- it really undercut what our theory of the case was because it put in the jury's mind this idea that maybe he was there. And that support just wasn't in the evidence. We could have adjusted our closing certainly had we known that this other charge was going to be given. But unfortunately, we just weren't given that opportunity and this I think dovetails with State v Devin Johnson, and State v Jones, both which we've elaborated on in our memo.

(July Tr. p. 9, lines 5-17).

The judge then stated, "Let me just – you mentioned something that first of all we don't charge – we can't charge on the facts." (July Tr. p. 11, lines 23-25). Trial counsel agreed and then the Judge said, "So how the jury viewed it I don't really know even with that. But they asked a specific question which you have just acknowledged. Can you be present and not be a principal? You can be. And I'll give you an example." (July Tr. p. 12, lines 2-6). The jury's question, however, was, "Are the accused, (defendant) and "unknown" principal mutually

exclusive in the eyes of the law? Can they be the same person?" (Jan. Tr. p. 584, lines 3-6). The judge erred in denying the motion for new trial when the supplemental instruction deprived Appellant a fair trial by altering the original instruction with the "another person" language that trial counsel reasonably relied upon.

In State v. Johnson, 418 S.C. 587, 795 S.E.2d 171, (Ct. App. 2016), the South Carolina Court of Appeals found that the trial judge's supplemental jury instruction on the "hand of one is the hand of all" after the judge assured defense counsel he would not instruct the "hand of one is the hand of all" and trial counsel relied upon the judge's assurance in crafting his closing argument rendered the trial fundamentally unfair. In the present case the judge told defense counsel that he would instruct the jury that the elements of accessory after the fact to murder are that the defendant knew that **another person** called the principal committed a murder, which was completed; and after the crime, the defendant with knowledge that the principal committed that felony; and then intentionally helped the principal to escape from arrest, conviction, or punishment or detection. (Jan. Tr. p. 524, lines 5-11) (emphasis added). Trial counsel relied on the discussion in crafting the closing argument. The judge then instructed the jury as discussed. In response to the jury's question of whether the defendant and the "unknown principal" could be the same person, however, the trial judge omitted the **another person** language and instructed the jury that, "And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal -- had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested." (Jan Tr. p. 584, line 20- p. 585,

lines 1-4). As in Johnson, the altered supplemental instruction in the present case rendered the trial fundamentally unfair.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), The trial judge stated during a charge conference that he would instruct the jury that reasonable doubt meant a doubt that would cause a reasonable person to hesitate to act. Defense counsel specifically incorporated the "hesitate to act" language in his closing argument. The trial judge then, based on a request from the prosecution, removed the "hesitate to act" language from the reasonable doubt charge. The South Carolina Supreme Court found that the decision to alter the charge after closing argument was fundamentally unfair. As in Jones, the altered supplemental instruction given after closing argument in the present case rendered the trial fundamentally unfair.

CONCLUSION

Based on the argument presented is issue one, this Court should reverse the conviction. Based on the arguments presented in issues two and three this Court should reverse the conviction and remand for a new trial.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of April, 2020.

RECEIVED
Apr 15 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SETH HASSAN SMITH,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon opposing counsel this 15th day of April, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Seth Hassan Smith, #252146, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 15th day of April, 2020.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT