

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

**Aug 26 2020**

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

JACORY SHAROD FOSTER,

APPELLANT.

APPELLATE CASE NO. 2019-001833  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

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PO Box 11589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Where the State relied primarily on the theory of accomplice liability, did the trial court err in refusing to charge accessory after the fact as lesser included offenses?

## STATEMENT OF THE CASE

Appellant Jacory Sharod Foster was indicted in Spartanburg County for murder, armed robbery, associated weapons charges, and using a person under the age of 18 to commit a crime. R. 312. On October 21, 2019, appellant was tried before the Honorable J. Derham Cole and a jury. R. 1. Derrick B. Balsa and Lauren Gabrielle Brown represented the State. R. 1. Brendan M. Delaney represented appellant. R. 1. The jury acquitted appellant of using a person under the age of 18 to commit a crime, but convicted him on the remaining counts. R. 306, l. 12 – 307, l. 12. Judge Cole sentenced appellant to life imprisonment for murder and concurrent terms on the other charges. R. 309, l. 15 – 310, l. 12. This appeal follows.

## **STANDARD OF REVIEW**

“The law to be charged to the jury is determined by the evidence presented at trial.” State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). “The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense.” State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014).

## ARGUMENT

Because the State relied primarily on the theory of accomplice liability, the trial court erred in refusing to charge accessory after the fact as lesser included offenses.

In her opening statement, the solicitor told the jury about the law of accomplice liability, calling it “the hand of one, hand of all.” R. 60, l. 14 – 61, l. 10. She used a story from her “nana” about her cousins running in the house and breaking a favorite lamp to explain accomplice liability. R. 60, l. 14 – 61, l. 10. The State returned again to the law of accomplice liability six times during its closing argument. R. 256, l. 21 – 25. R. 259, l. 24 – 260, l. 3. R. 260, l. 6 – 20. R. 260, l. 21 – 261, l. 4. R. 262, l. 2 – 5. R. 265, l. 4 – 9.

The State’s theory of the case was that appellant conspired with Derrick Bennett and Regina Foster<sup>1</sup> to lure Kiyounnie Jackson to an abandoned house for a sham weed deal in order to rob him. R. 58, l. 13 – 60, l. 13. Bennett was the boyfriend of Foster’s sister. R. 130, l. 22 – 131, l. 7. Foster never met appellant before the night of the shooting. R. 131, l. 8 – 10.

Foster had known the decedent, Jackson, for eight years. R. 133, l. 5 – 6. Jackson sold her marijuana. R. 132, l. 25 – 133, l. 1. According to Foster, Bennett and appellant directed her to log into Facebook and message Jackson to come sell her weed. R. 133, l. 11 – 135, l. 25. She used appellant’s phone to log into Facebook and Bennett told her what to write. R. 134, l. 24 – 135, l. 6. R. 157, l. 4 – 6. Foster said she did not want to participate, but “was scared.” R. 136, l. 1 – 8.

Through Foster’s Facebook account, Jackson was told to come to an abandoned house. R. 136, l. 9 – 137, l. 8. Foster, appellant, and Bennett drove to the house in a red car. R. 137, l. 15 – 21. Appellant’s grandmother owned a burgundy Nissan Altima. R. 189, l. 9 – 13.

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<sup>1</sup> Regina Foster is not related to appellant. R. 153, l. 14 – 16.

Appellant and Bennett went in first through the back and let Foster in the front door. R. 137, l. 9 – 17. They waited on Jackson and directed him to the abandoned house when he arrived. R. 139, l. 3 – 140, l. 22.

Foster opened the door for Jackson and ran to the bathroom. R. 141, l. 3 – 141, l. 7. Appellant was in a room next to the bathroom and Bennett was in another room. R. 141, l. 10 – 15. Both had pistols. R. 141, l. 16 – 20. Foster did not know if Jackson had a pistol. R. 141, l. 21 – 22.

Foster heard Jackson call her name followed by gunshots. R. 142, l. 2 – 3. She then heard “scattering and scuffling, and then it was silent.” R. 142, l. 5 – 8. Foster waited in the bathroom for about seven minutes, then emerged to find Jackson on the floor. R. 142, l. 16 – 143, l. 8. She ran out the front door and the red car in which they arrived was gone. R. 143, l. 9 – 25.

A friend picked up Foster and took her to an apartment with appellant and Bennett. R. 144, l. 16 – 145, l. 12. “[E]verybody was just acting weird” and “freaking out.” R. 145, l. 9 – 14. They eventually made their way to appellant’s girlfriend’s apartment and Foster’s sister took her clothes and an iPad and burned them. R. 148, l. 1 – 149, l. 4. R. 151, l. 11 – 14. Foster claimed to see Bennett and appellant split up some money. R. 149, l. 11 – 150, l. 11. Bennett had a gun he took from Jackson. R. 150, l. 12 – 24.

Foster, her sister, and Bennett then left appellant and went to Jonesville in Union County. R. 152, l. 4 – 152, l. 17. Bennett told Foster’s sister that he was going to have to kill Foster. R. 152, l. 13 – 17. Foster’s sister gave her a phone and Foster texted her mom for help. R. 152, l. 13 – 17. The police entered the trailer in Jonesville and apprehended Foster, her sister, and

Bennett. R. 207, l. 4 – 208, l. 22. The police took a firearm from Bennett, but it was not the gun that fired the shots that killed Jackson. R. 208, l. 2 – 22.

Foster's sister, Reyna Jeffries, testified that Bennett and appellant left that night and when they returned they were "in a panic." R. 168, l. 14 – 169, l. 5. A friend went to retrieve Foster. R. 169, l. 9 – 170, l. 11. They went to appellant's girlfriend's apartment. R. 170, l. 14 – 171, l. 5. Jeffries saw posts on Facebook about Jackson and asked appellant what happened. R. 171, l. 6 – 17. Jeffries claimed appellant then volunteered that he shot Jackson. R. 171, l. 6 – 17. Takesha Meadors, who was briefly part of the group that evening, claimed appellant only responded to her, "Shots fired." R. 183, l. 10 – 16. Jeffries burned Foster and appellant's clothing and threw a gun down a manhole. R. 172, l. 1 – 14. The State charged Jeffries with accessory after the fact to both murder and armed robbery. R. 175, l. 2 – 4.

Appellant testified in his own defense. R. 227, l. 21. Appellant and Bennett hung out that day smoking marijuana. R. 230, l. 19 – 231, l. 7. Appellant met Bennett through his brother and had only known him for a couple of weeks. R. 230, l. 20 – 24. Appellant knew that Bennett had a reputation for robbing people and "doing all type of crazy things." R. 235, l. 18 – 20.

Bennett and appellant ran out of weed and Bennett started trying to find more. R. 231, l. 11 – 17. While riding around in appellant's grandmother's car, they saw Foster walking by a mailbox. R. 234, l. 8 – 17. Bennett told her to get into the car and she did. R. 234, l. 11 – 21. Appellant had never seen Foster before that night. R. 234, l. 22 – 24.

Bennett told Foster to contact Jackson and Foster began texting him. R. 235, l. 2 – 17. They drove straight to the abandoned house. R. 234, l. 25 – 235, l. 1. Everything Foster did, she did only at Bennett's instructions. R. 235, l. 10 – 17. Appellant had never heard of Jackson before that day. R. 236, l. 1 – 2.

When they got to the abandoned house, they climbed in a back window. R. 236, l. 25 – 237, l. 3. Appellant said he thought they went to the house to buy weed from Jackson, but that Bennett then decided he was going to rob Jackson. R. 237, l. 16 – 21. Appellant was unarmed and never intended to rob or kill anyone. R. 237, l. 10 – 15. When Jackson arrived, he heard him calling Foster’s name and then saw him walking in the hallway. R. 238, l. 2 – 14. He then heard gunshots, but did not see Bennett shoot Jackson. R. 238, l. 12 – 239, l. 2. Bennett started going through Jackson’s pockets and appellant jumped out the window and ran back to the car. R. 239, l. 3 – 10.

Appellant went to the first apartment and then took everyone to his girlfriend’s apartment. R. 240, l. 1 – 241, l. 11. Bennett still had his gun and another gun that he took off Jackson. R. 240, l. 18 – 24. Bennett tried to give appellant money, but appellant refused, saying, “I don’t want none of it.” R. 242, l. 6 – 17.

At the charge conference, appellant asked the court to charge accessory after the fact to both murder and armed robbery. R. 253, l. 9 – 22. Appellant argued that based on the evidence presented at trial, a jury could render an accessory verdict. R. 253, l. 9 – 22. The trial judge responded that accessory is not a lesser included offense and that the State had not charged appellant as an accessory. R. 253, l. 12 – 254, l. 1. The court refused to charge accessory, but charged the jury on accomplice liability and mere presence. R. 290, l. 13 – 294, l. 1.

While Judge Cole was correct that accessory has traditionally not been a lesser included offense of felonies, this case where the State relied heavily on accomplice liability warranted giving the charge. The general rule is that, absent indictment, courts should not charge accessory as a lesser included offense. State v. Fuller, 346 S.C. 477, 481, 552 S.E.2d 282, 284 (2001). Appellant’s case differs in a material respect from Fuller. In Fuller, the defendant admitted that

he was a willing participant with knowledge of the plan to rob the victim. Id. The defendant fell asleep before the robbery and remained asleep while his co-defendants stabbed the victim. Id. The defendant, with knowledge of the plan, drove his co-defendants to the victim's house and drove them away after the victim's murder. Id.

Unlike the defendant in Fuller, appellant never admitted to being an active participant in the robbery plan. Appellant testified that Bennett planned the robbery and directed Foster to lure Jackson to the abandoned house. Appellant thought they were going to the house to buy marijuana and did not learn of Bennett's intentions until they were waiting. The ballistics report strongly indicated that only one firearm was used to kill Jackson. R. 190, l. 15 – 191, l. 8. Appellant's testimony and the testimony of the State's witnesses could have supported an accessory charge because of appellant's role in helping Bennett escape the scene. "A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense." State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). The court erred in not realizing these distinctions from the general rule regarding accessory crimes and this Court should reverse.

**CONCLUSION**

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

This 26th day of August, 2020.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jacory Sharod Foster states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on October 21-24, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Jacory Sharod Foster.

Respectfully Submitted,  
s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2020.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript dated October 21-24, 2019
- (2) Indictments
- (3) Sentence Sheets
- (4) State's Exhibit No. 57 (to be transported)

I certify that this designation contains no matter which is irrelevant to this appeal.

August 26, 2020

s/David Alexander  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

August 26, 2020.

s/David Alexander  
Appellate Defender

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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 Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jacory Sharod Foster, 335911, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of August, 2020.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT