STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

SETH SMITH,

Appellant.

Appellate Case No. 2019-001418

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLET A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, S. C. 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying the motion for directed verdict for accessory after the fact because Appellant went to great and unusual lengths to dispose of his own vehicle shortly after the murder, evidencing his knowledge of the murder; and Appellant's actions were calculated to aid the principals to the murder in evading detection or arrest.

II.

The trial court correctly answered the jurors' question that a person who is a principal could also be an accessory after the fact, and it correctly refocused the jurors' attention on the pertinent question, as to whether the State proved Appellant guilty of the crime charged, accessory after the fact, regardless of whether it was possible for Appellant to also be a principal because Appellant was not charged as a principal.

III.

Appellant failed to contemporaneously object to the supplemental instruction, so the issue is not preserved for review, and Appellant was not prejudiced by the purported error.

STATEMENT OF THE CASE

Appellant Smith was indicted by the Charleston County grand jury for accessory after the fact to a felony (A, B, C, or murder). The jury convicted Appellant following jury trial on January 7, 2019, before the Honorable R. Markley Dennis, Jr. Judge Dennis sentenced Appellant to fifteen years' imprisonment. Subsequently, on July 31, 2019, a hearing was held before Judge Dennis on Smith's motion for a new trial. Judge Dennis denied the motion for new trial by written order dated August 14, 2019.

STATEMENT OF FACTS

Officer Marchent Faustin of the Charleston Police Department was the first witness for the prosecution. He discussed footage recovered from the murder on Reid Street. Reid Street is a one-way street coming from the direction of East Bay Street in Charleston. The victim, Bennett, was found slumped over the steering wheel in a white Crown Victoria. Meanwhile in surveillance footage, a black vehicle is depicted driving hastily in reverse the wrong way on the one way street while the passenger side door is still open. Although the shooting itself was not captured on camera, it occurred at roughly 11:40 a.m. on a Saturday, April 18, 2015.[1] Tr. p. 100; pp. 103-04; p. 111; State's Exhibit 23 (11:41:30-50)[2]; see also Tr. p. 396 (testimony that the 18th was a Saturday); State's Exhibit 142 (map of Charleston).

Randall Unterbrink with the crime scene unit processed the white Crown Vic. He found

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[1] Investigator Paul Krasowski, testified later explained that the cameras pan through multiple sessions on an automatic timer. Tr. p. 406. The cameras rotate up to 360 degrees to view multiple vistas at intersections. Tr. p. 412, lines 19-25.

[2] The exhibit, on file with the Court of Appeals, is a CD containing the video file of the surveillance. Another file is the software tool for viewing the footage. It is labeled OcularisViewer.exe. Clicking on the file opens the software tool and the video footage can be opened through the software tool.

several casings and transfer blood on the armrest of the vehicle. Also a Crown Royale bag was found under the armrest between the front seats. Tr. pp. 117-21. The contents of the Crown Royale bag are displayed in State's Exhibits 88 and 89. Both pictures show a sizable bag of green plant matter and a digital scale.

Investigator Ashley Wojslawowicv went to the hospital to retrieve items on Bennett's person which included his cell phone and counterfeit hundred dollar bills totaling a pretend $3,000. It was obvious the bills were counterfeit because they all had the same serial number and lacked the requisite watermark. Also recovered was $153 in real cash. Tr. pp. 187-89. Officer Faustin testified he was familiar with Bennett. He was recently released from prison for narcotics charges. Tr. p. 109.

Rayshawn Rivers was sitting in the car with Bennett when Bennett was shot. He made clear he did not want to testify even though Bennett was like family to Rivers. Tr. pp. 126-29. Rivers was sitting in the car with his three year-old child and Bennett when the shooter came out of what Rivers described as a brown or black Cadillac and fired repeatedly, killing Bennett. Rivers was shot in the leg. Rivers could not identify the shooter. Tr. pp. 130-32. The shooter jumped back in the Cadillac, and the Cadillac left. Tr. pp. 134-35.

Dr. Nicholas Batalis, the pathologist, testified Bennett was shot twelve times in the back from between the shoulder blades all the way to the upper buttocks. Marijuana remained in Bennett's system. Multiple internal organs bled out because of the gunshot wounds to Bennett's trunk causing Bennett's death. Tr. pp. 272-73.

Jeremy Wright was another prosecution witness that did not want to testify. He admitted he told police that Appellant and Appellant's brother, Bryant Smith, parked Appellant's black Cadillac

in the driveway at Wright's girlfriend's house where he was staying. They showed up at his girlfriend's house on the day of the shooting between 1 p.m. and 2 p.m. Appellant claimed his Cadillac needed to be repaired, and Appellant and Bryant asked Wright for a ride. Wright drove them downtown and he dropped Bryant off at Hanover Street, then he continued with Appellant to North Charleston. Tr. pp. 139-42. After he let Bryant out of the car, Wright saw Bryant drive away in a grey car. Tr. p. 143. Wright testified the black Cadillac is Appellant's vehicle. They left the vehicle parked in Wright's driveway until it was later towed away while Wright was at work. Tr. p. 145. The black Cadillac reportedly had a pinstripe that is not discernable in the footage provided to the jury. This was a point of contention during the trial. Tr. pp. 149-50; pp. 155-56; see pp. 444-47. Wright was equivocal about whether or not the vehicle looked different the day it was left at his residence. Tr. pp. 145-46. However, he identified the vehicle in State's Exhibits 128-30 and State's Exhibit 141 as Appellant's Cadillac. Tr. p. 155. Explained more fully later, those photographs are stills taken approximately half an hour earlier in the area where the murder would occur, and the vehicle in those stills appears to be the same vehicle depicted hastily backing away from the murder in State's Exhibit 23.

Officer Richard Wiersma responded to the crime scene. He recovered four casings from around the white Crown Vic and a cell-phone outside the passenger side of the vehicle. Tr. pp. 174-76. He was called on May 2 to a residence on Green Park Avenue in the West Ashley neighborhood. A search of the residence resulted in the discovery of two bags of green-leaf substance, letters, and lots of money. Law enforcement found a social security card and other documents at the residence with Appellant's name and address. Tr. pp. 179-81.

Jeff Miller with the Charleston Police Department processed the 2000 Cadillac after it was

towed from a salvage yard. The Cadillac's wheels were painted, and it did not appear the wheels were factory painted. The Cadillac was missing the bumper. The car had been picked apart for parts. Tr. pp. 200-02; p. 206.

Debra Turner, the district manager for several Dollar General Stores, testified about records showing the purchase of two cans of brown spray paint on April 20. She also authenticated surveillance video footage showing two men purchasing two cans of spray paint in the store on April 20. Tr. pp. 227-34; State's Exhibit 119. Later when Appellant's cousin testified, he would identify Appellant as one of the two men in the Dollar General video purchasing spray paint. Tr. p. 291.

Susan Amerman from the Department of Motor Vehicles testified a 2005 Infinity was registered in Bryant Smith's name. She testified one of the addresses Bryant listed was the same Green Park Avenue address searched by law enforcement. Appellant also showed one of his addresses for his driver's license was the matching Green Park Avenue address. Tr. pp. 239-40. Appellant was the registered owner of a 2000 Cadillac Deville with the license plate of KSM819. Tr. p. 240.

She testified Jibral Acevedo, Appellant's cousin, transferred title into his own name on April 20, paying the expedited fee. The sale price was purported to be $300. Tr. pp. 246-48; State's Exhibit 158D. However, Acevedo did not get a new license plate, which would mean he would not be able to drive the car. Tr. pp. 251-52. Despite Acevedo paying an expedited fee, the paperwork stated the purported date of sale was April 1, 2015. Tr. pp. 252-53.

Jibral Acevedo testified Appellant is his cousin. They met when he was a teenager and became close. Acevedo testified he calls Appellant "TJ," which is short for Tony James. Bryant Smith is Appellant's brother. Bryant is known as "Brisk" and "Little B." Tr. pp. 275-77. Prior to

trial, Acevedo pled guilty to obstruction of justice and was facing a sentencing range of zero to ten years imprisonment. Tr. p. 278. Acevedo confirmed Bryant owned a silver Infinity. Tr. p. 281. Acevedo claimed he had been interested in buying Appellant's Cadillac. On April 20, Appellant called Acevedo before he went to work and asked Acevedo if he still wanted to buy Appellant's Cadillac. Tr. p. 284. Appellant and someone Acevedo only knew as Bubba picked up Acevedo in a white pick-up truck and took Acevedo to the DMV. Before arriving at the DMV, they stopped at a Dollar General store. Appellant and Bubba went into Dollar General while Acevedo smoked a cigarette outside. Tr. pp. 286-89. Acevedo identified Appellant and Bubba in video surveillance from the Dollar General store. Tr. p. 291. Next, they went to Jeremy Wright's house, where Acevedo saw the Cadillac he was supposed to buy. Tr. pp. 292. An hour later they left Wright's house and went to the DMV. They left the Cadillac at Wright's. Acevedo claimed the reason he did not leave Wright's with the Cadillac was because he wanted title in his name. Appellant gave Acevedo money to pay for the title transfer. Appellant wanted the transfer completed that day. However Acevedo found out from the DMV employee assisting him that he did not have enough money to pay for the expedited transfer, so he asked Appellant for more money to complete the transfer. Acevedo admitted Appellant did not sell him the car on April 1, contrary to the documentation. Tr. pp. 292-99. Acevedo never paid for the Cadillac. Tr. p. 305, lines 18-24.

Even though Acevedo never paid for the Cadillac, Appellant told Acevedo he could keep the car or sell it. They went back to Wright's house, but Acevedo never took possession of the Cadillac. Instead, Acevdo, who stayed overnight with Appellant, decided to junk the car the next morning, as recommended by Appellant, because he did not have a driver's license. Tr. pp. 304-08. Acevedo admitted he saw the bumper was removed and the car wheels were spray-painted. At Appellant's

suggestion, Acevedo agreed to junk the car. The "truck dude" (tow-truck driver?) paid Acevedo $200 and took the Cadillac. Acevedo never paid Appellant for the Cadillac. It was free money for him. Tr. pp. 310-12. Acevedo explained to the jury he lied to the police and told them the car broke down two weeks earlier and he bought the vehicle from someone named TJ, instead of telling them he bought the car from Appellant. Acevedo spent a year in jail for his lies. Tr. pp. 314-16.

On cross-examination, Acevedo claimed he did not believe Appellant would set him up and Appellant never told him anything about a murder. Tr. p. 338; p. 343. This opened the door to Acevedo admitting he heard on the streets that Bryant committed the murder. Acevedo admitted he told law enforcement he thought the Cadillac might have been involved in a crime. But he also told them he was in possession of the car two weeks earlier. He claimed he told law enforcement this to help himself, not Appellant. Tr. pp. 343-45. Acevedo testified, "I said I burned [the car] . . . I said I did something with the car so I wouldn't be in possession of the car." Tr. p. 346, lines 6-8. Acevedo testified he was hoping to get a benefit from testifying at trial, but then he admitted it would also be a benefit to still get along with his cousin, Appellant. Tr. pp. 346.

Detective Sergeant Paul Krasowski took over as case agent when the first case agent retired because he already was significantly involved in the case. Tr. pp. 395-97. He explained four casings were found outside the vehicle and eight inside. All were .40 caliber casings. Tr. p. 399.

Detective Krasowski described still images from the city's surveillance cameras found in the eastern side (Eastside) of Charleston. The location of the cameras are shown in the map introduced as State's Exhibit 142. State's 125 shows a still taken at 11:00 a.m. from the Columbus/Aiken camera depicting the vehicle later determined to be Bryant Smith's Infinity. State' 126 is a photograph captured on the Reid and Drake Street camera showing the Infinity driving down the

street at 11:01 a.m. State's 127 is a photograph from the Hanover and Cooper camera taken at 11:04 a.m. While the eye would naturally go to the gentlemen in a white t-shirt standing by a black car, the evidentiary value is the front end of the Cadillac seen approaching the intersection in the upper left corner of the picture. It is seen more fully in State's Exhibit 128. State's Exhibit 129 shows a vanity plate in the front of the Cadillac. Also noteworthy is the Cadillac's black bumper and the lack of a grill emblem. State's 130 depicts the Cadillac completing the turn onto Hannover Street at 11:04 a.m. State's 131 shows the Infinity appearing on the same camera at Hanover and Cooper at 11:05 a.m., and at 11:06, the Infinity is turning down Cooper Street in the direction from which the Cadillac previously approached the intersection in State's 132-34. State's Exhibit 135 shows the Infinity at Columbus and Aiken at 11:09 a.m. The Infinity appears yet again at 11:10 a.m. in the Reid and Drake camera in State's 136. This camera then captures the Infinity's license plate in State's Exhibits 137-39. It was fortunate for law enforcement to have this quality of stills because the camera zooms in and out, and also rotates at 360 degrees. Tr. pp. 412-13. From these stills, law enforcement was able to determine the license plate number and match the vehicle depicted to Bryant Smith's Infinity. State's 140 shows the Infinity making a turn on Reid Street. Somewhat hidden in the middle right of the still is a vehicle appearing to be the Cadillac following the Infinity to the intersection. The next still, State's 141, appears to show the Cadillac following the Infinity west down Reid Street. The Infinity is in the darkened band at the top of the still. See Tr. p. 413, line 22 – p. 414, line 5. The movement described is more readily depicted in State's Exhibit 23, the surveillance video, at 11:12:50 to 11:13:10. Therefore, surveillance from the area shows the Cadillac and Bryant's silver Infinity together in the area of the shooting, and they are circling a small area of Charleston where Bennett was shot within half-an hour. See Tr. pp. 406-10.

Investigators cross-referenced DMV records with ALPR snapshots. ALPR is an acronym for an automated license plate reader system in which the State has cameras located at various points in Charleston that take photographs of license plates. The photographs are maintained in a database. A snapshot of the Cadillac was captured on April 17 at 10:49 p.m. on East Bay Street. The snapshot shows Appellant's license plate number, which is KSM819. Tr. pp. 420-26. Detective Krasowski noted Appellant was cited for a traffic violation in the Cadillac in March 2015, indicating that he drives the Cadillac. Tr. pp. 432-33.

Detective Krasowski noted the Cadillac de Ville captured in the footage was somewhat unique due to customization. The grill was all black and featured all-black rims, both customized features. Additionally, the windows were heavily tinted. Finally, the Cadillac emblem that normally would be located on the grill and also would be mounted on the front hood was not present in this Cadillac, and had been removed. Tr. pp. 418-19.

Two phone numbers were found on Bennett's phone: one for "TJ" and one for "little B." Detective Krasowski noted Appellant has a tattoo that says TJ and identifies himself on social media as "Tony James." Tr. pp. 435-37. As mentioned before, Bryant is known as Little B. Tr. p. 276, line 21 – p. 277, line 4.

When Detective Krasowski and another detective recovered the Cadillac from the junkyard, Detective Krasowski smelled the distinct odor of spray paint on the vehicle. Tr. p. 443. He noted the condition of the Cadillac was different from how it appeared on surveillance footage. Tr. pp. 443-44.

During cross-examination, Detective Krasowski testified the apparent motive for the murder was the result of a drug deal gone bad or some kind of robbery during a planned drug transaction

between Bennett and Bryant Smith. Tr. p. 467. On redirect examination, Detective Krasowski specified he had two independent sources providing information that the night before the murder (December 17), Bennett committed a robbery of drugs in West Ashley. Tr. p. 489.

Was Bryant the victim of Bennett's robbery? Phone records introduced into evidence show multiple calls between Bennett and Bryant Smith on Friday, December 17, including a series of phone calls from 7:47 p.m. until 8:09 p.m. There is a gap of about six to seven minutes between an inbound call from Bennett concluding at 8:02:21 and an outbound call from Bryant to Bennett at 8:08:04 p.m. that the prosecutor theorized as when the robbery could have occurred. State's Exhibit 152, pp. 4-5. Critically, a series of phone calls ensued between Bryant and Appellant that night, starting with an approximately five-minute call from Bryant to Appellant at 8:10 pm., and occurring over the course of the evening until 10:38 p.m., with another all at 1:51 a.m. on Saturday, December 18th. State's Exhibit 116, a cellular analysis by FBI Special Agent Simmonds, shows Bennett's phone using the towers near Bryant and Appellant's West Ashley address at around 8:00 a.m. until 8:13 a.m., then using cell towers in North Charleston starting at 8:16 p.m. until 8:20 p.m., moving away from West Ashley towards the Charleston International Airport. From 9:02 p.m., until 01:36 a.m., Bennett's phone is using cell towers located in the eastern side of Charleston's peninsula near East Bay Street. The same report show's Bryant Smith's phone using cell towers in West Ashley from 7:07 p.m. until 10:37 p.m. and later using cell towers in North Charleston at 1:01 a.m. and 1:05 a.m. Appellant's phone is located in West Ashley at 7:30 p.m. and in North Charleston at 8:00 and then 8:10 p.m., but is located near downtown Charleston towers, on the peninsula, from 8:39 p.m. until 10:51 p.m. See Tr. pp. 367-77 (Agent Simmonds explaining the movement depicted in the cellular analysis).

ARGUMENT

I.

The trial court did not err in denying the motion for directed verdict for accessory after the fact because Appellant went to great and unusual lengths to dispose of his own vehicle shortly after the murder, evidencing his knowledge of the murder; and Appellant's actions were calculated to aid the principals to the murder in evading detection or arrest.

In response to the motion for directed verdict, the prosecution noted the extraordinary efforts Appellant made to dispose and alter the Cadillac after the murder. Appellant undertook these actions after the Cadillac and Bryant's silver Infinity seemingly sought and found Bennett. A reasonable juror could believe Bennett was shot as a result of his possession of a sizeable bag of marijuana after he reportedly staged a robbery for marijuana in West Ashley – Appellant and Bryant's neighborhood. Evidence established Appellant and Bryant were drug dealers in contact with Bennett, the sort with motive to murder Bennett. And Appellant's Cadillac was the vehicle used to do it. Reasonable jurors could find Appellant's attempts to dispose of the Cadillac was with the knowledge of the murder and the intent to aid at least one of the principals.

The night of the robbery, a Friday, Bryant and Bennett exchanged several phone calls, particularly around 8 p.m. Afterwards, Bryant was in contact with Appellant, and Appellant soon went down to the same downtown area and traversed the territory around where Bennett would be murdered the next day.

Saturday, both Appellant's Cadillac and Bryant's Infinity circled the middle section of the East Bay area half an hour before Bennett was murdered in that same area. When Bennett was shot, the Cadillac is seen in video surveillance hastily backing away from the murder scene, going the

wrong way down the one-way street, and driving away with the passenger door flung open. An hour and a half after the shooting, Appellant and Bryant show up unannounced at Jeremy Wright's door, asking to leave the Cadillac, claiming it was broken down.

On Monday, Appellant picks up Acevedo to change title to the Cadillac with a retroactive bill of sale. Acevedo admitted he did not actually buy the Cadillac on April 1. Really, Acevedo never bought the car at all. Instead, he received the payout for a strawman sale to dispose of the vehicle, pocketing the money for selling the Cadillac to the scrapyard when Appellant sensibly should have received the proceeds of the scrap sale. However, even after Appellant was supposedly going to sell Acevedo the vehicle, Appellant attempted to alter the appearance of the vehicle, spray-painting the hubcaps brown (a clashing shade of brown) and removing the bumper. The prosecution also pointed out a reasonable juror would expect that Appellant knew something since he backdated the bill of sale. Tr. p. 508, lines 14-22. The trial court observed evidence of Appellant's defacement and disposal of the Cadillac made no sense and those actions were coincidently after the murder. Tr. p. 510, lines 9-20. Of course, what the trial court was implying is the timing of these otherwise nonsensical actions are explained by Appellant's knowledge that the Cadillac was involved in Bennett's murder. Simply put, in the present case, the circumstantial evidence and its reasonable inferences, taken as a whole, points to Appellant disposing of the Cadillac knowing it has been involved in a felony, which means he is guilty of accessory after the fact to murder.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). Ultimately, the question for review of the denial of a motion for directed verdict is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the

elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016).

To be sure, the prosecution relied, in part, on circumstantial evidence. The United States Supreme Court made the following observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1954) *cited with approval in* Jackson v. Virginia, 443 U.S. 307, 317 n.9 (1979). The standard for appellate review of the denial of directed verdict "does not require excluding every hypothesis other than the guilt of the accused beyond a reasonable doubt." State v. Stokes, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989).

Circumstantial evidence carries the same probative weight as direct evidence. State v. Logan, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013) (noting the circumstantial evidence charge supplies a framework for a "rational" and "cumulative" assessment for guiding the jury's consideration of

circumstantial evidence). "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." State v. Rogers, 405 S.C. 554, 567, 448 S.E.2d 265, 272 (Ct. App. 2013).

Pearson recognized the United States Supreme Court's observation as follows:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Pearson, 415 S.C. at 471 n.2, 783 S.E.2d at 806 n.2 (quoting Jackson, at 319) (emphasis in the original); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

To prove a defendant guilty of accessory after the fact, the State must prove the following elements: (1) a completed felony; (2) the accused knew the principal committed the felony; and (3) the accused harbored or assisted the principal felon. State v. Legette, 285 S.C. 465, 466, 330 S.E.2d 293, 294 (1985); State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013). "The assistance or harboring rendered must be for the purpose of enabling the principal felon to escape detection or arrest." Legette, 285 S.C. at 467, 330 S.E.2d at 294. "An accessory after the fact is one who, knowing a felony to have been committed receives, relieves, comforts, or assists the felon." State v. Nicholson, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952) (citation and internal quotation marks omitted). The person must know of the felony and know the person aided is the guilty party,

and the accused must intend to shield the person aided from the law. Id.

The Kentucky Court of Appeals observed:

> Any assistance whatever given to a felon to hinder his being apprehended, tried, or suffering punishment makes the assistor an accessory. IV Blackstone 37. 'The true test for determining whether one is an accessory after the fact is, to consider whether what he did was done by way of personal help to his principal, with the view of enabling the principal to elude punishment – the kind of help rendered appearing to be unimportant.' Bishop's Criminal Law 365 (§634).

Maddox v. Commonwealth, 349 S.W.2d 686, 689 (Ky. Ct. App. 1960).

It is beyond dispute that there was a felony, Bennett was shot multiple times and perished. It was murder. Defense counsel challenged the second element, knowledge the principal committed the felony, and here is where the closest analysis is required. On the other hand, defense counsel seemingly conceded the third element, the element of assistance to the felon, explaining, "So they presented a lot of evidence that Seth Smith did something to harbor or assist the principal. No doubt they presented some circumstantial evidence about that." Tr. p. 500, lines 18-21.

Defense counsel further argued, "So I mean they have a DMV title. They have Seth seen by Jeremy Wright with the car an hour and a half to two hours after the murder. And then they have Acevedo saying that Seth helped alter the appearance of the car." Tr. p. 501, lines 6-8. Defense counsel then, perhaps backtracking, argued that was not substantial evidence and that "it has nothing to do" with the knowledge element.

Defense counsel was wrong – Appellant's actions afterwards are proof of his knowledge. In State v. Pinckney, 339 S.C. 346,529 S.E.2d 526 (2000), the Supreme Court reversed this Court's unpublished opinion to find that the trial court properly denied directed verdict. The defendant was

convicted of burglary and argued the State failed to prove he had the requisite intent to commit a crime in the dwelling at the time he entered it. The defendant's series of less-than-rational actions, including barricading himself in the bathroom and threatening to light the house on fire when law enforcement arrived, were not found sufficient proof to survive directed verdict by this Court, but the Supreme Court agreed with the State that a jury could find the defendant's actions after he entered the house as evidence of his intent to commit a crime in the house. In so holding, the Supreme Court explained:

> In a burglary trial, the defendant's actions after he entered the house can be evidence used to determine if he had the intent to commit a crime at the time of entry. For example, if a defendant entered a house and committed criminal sexual conduct (CSC), the jury could find him guilty of burglary even though there may not have been any specific evidence that at the time he entered the house he intended to commit CSC. His actions after entering the house (i.e. the commission of the CSC) would be evidence of his reason for entering the house and would at least support the denial of a directed verdict motion. . . . Here, respondent's actions after he entered the house were some evidence of respondent's intent to commit a crime therein.

Id. at 349-50, 529 S.E.2d at 527-28. In the instant case, Appellant's actions after the murder are evidence of his knowledge of the murder.

The Kentucky Court of Appeals observed, "Certainty of knowledge [a felony has been committed] is not required. It is sufficient that the accused had actual knowledge of facts which would give him good reason to believe the person assisted to be the felon." Maddox v. Commonwealth, 349 S.W.2d 686, 688-89 (Ky. Ct. App. 1960).

Certainly, the sole element at issue was knowledge. Bennett was murdered and given that the getaway vehicle was the Cadillac, Appellant's actions ridding of the vehicle would be actions aiding the principals to the crime. The only real question is whether Appellant was wittingly or unwittingly

aiding the principals. The extremity of his actions alone could lead a reasonable juror to believe he aided the principals with knowledge a felony was committed. A reasonable juror could rationally find it is not mere coincidence Appellant is leaving the Cadillac at an acquaintance's house, and then transferring title, backdating an alleged sale, and altering the vehicle's appearance, all so close in time to Bennett's murder by a passenger in Appellant's Cadillac. Appellant's actions are best explained as actions knowingly undertaken to aid the principal in escaping detection by disposing of the getaway vehicle.

A reasonable juror could even reasonably conclude this knowledge of the murder was first-hand knowledge. Evidence overwhelmingly shows the black Cadillac was involved in the murder as the getaway vehicle. A jury could readily infer Appellant was inside the vehicle because at the time of the murder, it was a vehicle registered in his name which he drove. Appellant and Bryant appeared at Wright's door only an hour and a half after the murder and left the black Cadillac on the street by his house. This recent-in-time possession of his own vehicle used in the crime creates a reasonable inference of his presence, and therefore, knowledge, that the shooting occurred. See State v. Dewitt, 254 S.C. 527, 176 S.E.2d 143 (1970) (finding defendant's possession of stolen grain drill two months after it was stolen from a farm twenty miles away, and the inability of law enforcement to confirm the defendant's exculpatory explanation that he purchased it from an unidentified black male, was sufficient evidence for the trial judge to deny the motion for directed verdict). Of course, the bottom line is his actions are evidence of his knowledge that the Cadillac was involved in a felony, whether or not he learned first-hand.

For sure, a person merely present at the time of the crime may become an accessory after the fact if the person "thereafter aids the perpetrator to cover it up or escape from the crime." State v.

Collins, 329 S.C. 23, 27, 495 S.E.2d 202, 205 (1998). This is a recent modification to case law that now recognizes absence from the scene of the crime is not an essential element of accessory after the fact, and that "mere presence at the scene will not preclude an accessory verdict where the defendant becomes involved after the commission of the substantive offense." Id. at 27-28, 495 S.E.2d at 205 (emphasis removed, internal quotation marks omitted).

Moreover, the prosecution presented motive for the murder, adding additional circumstantial evidence to combine with the already abundant evidence, gaining strength as discussed in Rogers. "That the defendant had a motive for [a] particular crime increases the inference of the defendant's identity. . . . The courts assume that motive has strong probative value because a motive naturally leads to action." Mitchell v. State, 865 P.2d 591, 597 (Wyo. 1993) (quoting Edward J. Imwinkelried, Uncharged Misconduct Evidence (1992 & Supp. 1993)). Evidence was presented that Bennett took marijuana in a robbery in West Ashley on the seventeenth. Bryant Smith was at or near Bryant and Appellant's West Ashley address that night. A subsequent search yielded two bags of leafy green substance and substantial cash in their house. A reasonable juror could conclude Bryant and Appellant were marijuana dealers. Phone records established contact between Bennett and Bryant Smith that night. Then Bryant Smith contacted Appellant. Appellant's Cadillac then would go downtown that night at roughly the same time Bennett's vehicle went downtown that night. A reasonable juror could believe that Bennett robbed Bryant, Appellant was looking for Bennett Friday night, and Bryant and Appellant were looking for Bennett the next day, finding him and killing him.

Motive, and circumstantial evidence, combined with direct evidence the Cadillac was involved in the murder, set the stage for proving Appellant's guilt as an accessory after the fact, but when combined with evidence of Appellant's actions in disposing and altering the Cadillac, provides

ample evidence for the trial court to send the charge to the jury. The depth of Appellant's actions are too astounding to be easily accepted as mere coincidence, and therefore his actions are proof of his knowledge of the Cadillac's use in the felony. Appellant attempted to alter the appearance of the vehicle even after he allegedly informed Acevedo he would sell Acevedo the car. He bought the spray paint at the beginning of the trip to the DMV to transfer the title to Acevedo's name. The date of sale was backdated which a reasonable juror could believe was an attempt to hide Appellant's possession of the vehicle at the time of the murder two days earlier. Then, Acevedo never took actual possession of the vehicle, nor did he ever pay for the vehicle. Instead, title was transferred (without a license plate being issued), and then Acevedo, at Appellant's suggestion, sold the vehicle for scrap and pocketed the money for the car that he never paid for himself. Acevedo admitted he did not even have a driver's license, which makes his alleged initial intention of buying the car illogical. "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). A reasonable juror could see these actions by Appellant for what they were, evasive measures taken to hide the escape vehicle from law enforcement's investigation.

When taking each piece of circumstantial evidence, not to mention the direct evidence, and making reasonable inferences from each piece of evidence, a rational juror could reasonably find the cumulative and propulsive effect of the evidence pointed conclusively beyond a reasonable doubt to Appellant's guilt. Rogers, supra. Therefore, the trial court did not err in denying the motion for directed verdict and Appellant's conviction and sentenced should be affirmed.

II.

The trial court correctly answered the jurors' question that a person who is a principal could also be an accessory after the fact, and it correctly refocused the jurors' attention on the pertinent question, as to whether the State proved Appellant guilty of the crime charged, accessory after the fact, regardless of whether it was possible for Appellant to also be a principal because Appellant was not charged as a principal.

Appellant argues the trial court committed an error of law when it instructed the jury it was possible for someone to be a principal and also commit the separate crime of accessory after the fact. However, the trial court's response to the jury question was a correct statement of law because (1) the State is not required to prove that a person charged as an accessory after the fact was not a principal to the crime, and (2) a principal to the crime commits the crime of accessory after the fact if assisting another principal in evading detection or arrest.

After deliberations began, the jury inquired whether the person accused of accessory after the fact could also be the principal. Tr. p. 582, lines 14-17. The trial court indicated to counsel that part of its answer to the question would be an indication that someone charged as an accessory after the fact could be a principal to a crime. Defense counsel objected because he believed if a person was a party to a crime, they could not be an accessory after the fact, relying on State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013). Tr. p. 582, lines 22-25. The trial court rejected the legal argument that a party to the crime could not also be an accessory after the fact, noting in Blakely, this Court was addressing a double jeopardy issue, not the substantive question at issue. Tr. pp. 582-83.

When the jury was summoned back into the courtroom, the trial judge provided the following answer to the jury's question:

> . . . What I have now is the Court's Exhibit 2. And it is a question. And I will read: Are the accused, the defendant, in parens [sic], and unknown principal mutually exclusive in the eyes of the law? Can they be the same person?
>
> 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.

Tr. p. 584, line 2 – p. 585, line 13.

The trial court asked defense counsel if he had any other objection than the Blakely objection and defense counsel indicated he did not have any other objection. Tr. p. 585, lines 17-21. The jury reached a verdict and right before the jury was recalled to announce their verdict, defense counsel revisited the supplemental charge and cited State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) arguing again that if a person is more than merely present during the commission of a

crime, he cannot then be guilty of accessory after the fact. The trial court rejected the legal premise of the argument. Defense counsel also argued the State was required to prove the guilt of the principal, which the trial court also rejected as a matter of law. Tr. pp. 587-92.

First, the only objection to the instruction that is preserved is the argument that someone who is a principal to the crime, but not charged as a principal, cannot be found guilty as an accessory after the fact. In other words, a viable defense to the charge of accessory after the fact is a claim that the alleged accessory is really a principal.

The objection that the State is required to prove the guilt of the principal is not preserved for review, because it came after the verdict was rendered, although not yet announced. "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). A post-verdict motion made after the opportunity for a trial court to remedy the alleged wrong does not preserve an issue for review. See State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (finding the issue not preserved due to failure to move for mistrial until after the verdict: "One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal.").

The trial court's instruction was a correct statement of law. The trial court correctly advised the jury to focus on the elements of accessory after the fact and whether the State met its burden of proof and not whether Appellant might be a principal. The trial court also correctly confirmed that in theory a principal could also be an accessory after the fact. To restate the elements the State is required to prove the following: (1) a completed felony; (2) the accused knew the principal committed the felony; and (3) the accused harbored or assisted the principal felon. State v. Legette,

285 S.C. 465, 466, 330 S.E.2d 293, 294 (1985); State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013).

In the instant case, there is likely at least two principals to the crime, the shooter and the driver. "The distinction between principals in the first and second degree has been long since exploded; it is now considered a distinction without a difference." State v. Putman, 18 S.C. 175, 178 (1882) (quotation marks omitted) (quoting State v. Fley, 4 S.C.L.338 (1809) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Conceivably, Appellant might have factually been one of those two principals, but he was not charged as a principal. Because accessory after the fact is a distinct crime, a defendant charged with accessory after the fact is not entitled to a defense that he is not guilty because he was a participant in the crime itself. Recently, the Georgia Supreme Court revisited prior case law finding the statutory offense of hindering, similar to its prior common law offense of accessory after the fact, could not coexist with the charge of murder. Nalls v. State, 815 S.E.2d 38, 46 (Ga. 2018) ("One guilty of violating the hindering statute 'would be classified as an "accomplice after the fact" at common law'. . . "). The court noted its prior case law concluded a person guilty of hindering could not also have "participated in the major crime as a party to the crime." Id. But then Nalls commented:

> In so doing, the court also failed to consider whether the principle that being an accessory after the fact does not make one a party to the crime was appropriate to invert; whether a person is a party to the crime simply by being an accessory after the fact is not necessarily the same question as whether a party to the crime can also be found guilty of accessorial liability.

Id. The Georgia Supreme Court concluded:

> There is nothing in the statue that precludes a conclusion that a person who was a party to the primary crime may also be guilty of the

> separately charged crime of hindering, where the evidence shows that the person has hindered the apprehension or punishment of another person who also is a party to that crime. To conclude otherwise would read into the statute an element – that the defendant was not a party to the primary crime – that is not present.

Id. at 47-78. The court concluded a jury could find the defendant (co-appellant Baskin) was one of the gunmen who shot at the murder victim and also subsequently hindered the apprehension of codefendants Baty and Nalls by driving them away from the scene of the crime. Therefore, "it would not have been a correct statement of law to tell the jury that it had to choose between convicting Baskin of murder and convicting him of hindering." Id. at 49.

This holding is consistent with the Georgia Supreme Court's observation, "An accessory after the fact is not considered an accomplice to the underlying crime itself, but is guilty of a separate, substantive offense in the nature of obstruction of justice." Vergara v. State, 695 S.E.2d 215, 219 (Ga. 2010) (citations and internal quotation marks omitted).

In Ramos v. State, 696 So.2d 461 (Fla. Dist. Ct. 1997), Ramos was charged and convicted as an accessory after the fact. She lived with the perpetrator of the robbery, Cruz, and shared a child with him. Ramos worked at a drug store, and as part of her duties, would, along with a co-worker, walk and make daily deposits of cash proceeds at the nearby bank. Prior to the robbery, she told Cruz about the deposit procedures and even commented in the presence of her mother and Cruz how easy it would be for someone to rob them of the deposit. Cruz robbed Ramos and her unwitting coworker. Ramos then provided a description of the perpetrator to law enforcement contrary to the description provided by her coworker. After law enforcement located Cruz and the coworker identified Cruz as the robber, Ramos claimed she was not sure, but she did not think Cruz was the perpetrator. Subsequently, Cruz admitted to the robbery, and three weeks later, Ramos admitted for

the first time to her relationship with Cruz. The prosecutor argued Ramos' conduct before as well as after the crime supported her guilt as an accessory after the fact. Ramos argued the trial judge erred in refusing a proposed jury instruction that if she was guilty as the principal, she could not be convicted as an accessory. Id. at 461-62. The reviewing court cited Staten v. State, 519 So.2d 622 (Fla. 1988), citing in relevant part the following:

> Although Florida has abolished the common law distinctions between principals, aiders and abettors, and accessories before the fact, accessory after the fact remains as a separate offense. The accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice. . . . Thus, the culpability of the accessory after the fact is substantially different from that of a principal, reflecting an intent to punish as an accessory after the fact only those persons who have had no part in causing the felony itself but have merely hindered the due course of justice.

Ramos, 696 So.2d at 463 (quoting Staten, 519 So.2d at 626). Ultimately, the reviewing court found no fault with the trial judge's analysis which observed the jury, under the facts of the case, could have found Ramos provided assistance both before and after the robbery, and the trial judge did not consider Staten to preclude that possibility. The trial judge's principle reason for refusing the instruction is that it would confuse the jury because the jury could be led to believe that if Ramos assisted Cruz both before and after the crime, she could not be convicted after the fact even though the government proved the crime of after the fact beyond a reasonable doubt. Ramos, 696 So.2d at 465.

In State v. Mitchell, 337 So.2d 1189 (La. 1976), the Louisiana Supreme Court held Mitchell could be charged as both a principal and an accessory after the fact. Mitchell was a passenger in a car, who jumped out and snatched a purse from a pedestrian. She then switched places with the

accomplice and driver, Butler, and drove away from the crime scene. The court observed the fallacy in Mitchell's argument that there was only one principal. Mitchell and Butler left the car together and robbed the victim together before running back to the car. Therefore, both Mitchell and Butler were principals to the crime, and Mitchell became an accessory after the fact by driving the getaway vehicle. The court further noted that even though Mitchell's chief objective may have been to save herself from apprehension, "she must have adverted to the fact that she was also aiding another principal . . . to escape from arrest, trial, conviction or punishment." Id. at 1190 (internal quotation marks omitted).

Like Mitchell, the evidence in the instant case points to two principals, the triggerman who was driven away by the other principal, the driver in the black Cadillac. South Carolina courts make no distinction between those who aid and abet another in committing a crime and the actor who is aided:

> All persons present, aiding and abetting a murder, are regarded as principals, and equally guilty. The actual perpetrator is regarded as the agent or instrument by which the crime is perpetrated, not as the chief criminal or more guilty than his associates. . . . The distinction between principals in the first and second degree has been long since exploded; it is now considered a distinction without a difference.

State v. Putman, 18 S.C. 175, 178 (1882) (quotation marks omitted) (quoting State v. Fley, 4 S.C.L.338 (1809) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

As in Mitchell, if Appellant was in fact one of the two principals, although not charged as one, he nevertheless could be found guilty as an accessory after the fact based on his actions in disposing of the vehicle.

Appellant's argument, made after the jury reached its verdict, that the State needed to prove the guilt of the principal to prove Appellant guilty as an accessory after the fact, is based on an incorrect reading of State v. Massey, 267 S.C. 432, 229 S.E.2d 332, 339 (1976). In Massey, the Supreme Court found that the accessory statute did not require the principal to be convicted and if the principal was acquitted, a person aiding the principal after the fact could still be convicted as an accessory, modifying the common law rule. The Supreme Court quoted favorably a Wisconsin case, in relevant part:

> It seems very clear that the legislative intent . . . was to provide for the prosecution of an accessory independent of the prosecution and outcome of the principal. The crime of the accessory is a substantive offense . . . .
>
> If failure to apprehend the principal, his death or acquittal necessitates acquittal of the accessory, then our statute is no improvement over the common law. . . .

Id. at 444-45, 229 S.E.2d at 338-39 (quoting State v. Hess, 288 N.W. 275, 276-77 (Wisc. 1939)).

In the instant case, the prosecution only needed to prove the murder occurred. It was never required to prove the identity of the gunman or the identity of the driver. Accordingly, the argument based on Massey is insufficient to impugn the trial court's instructions to the jury regardless of whether the argument was timely raised.

The identity of the actors in committing the murder were not positively identified in the instant case, and the evidence certainly left open the possibility that Appellant was present in his own vehicle or even driving the vehicle, and therefore the possibility Appellant was the principal. If Appellant was actually a principal, this would only mean that he was guilty both as a principal of murder and an accessory after the fact to murder under the sound reasoning in Mitchell. However, as in Ramos, the possibility Appellant was maybe guilty of another crime should not obscure the jury's

determination that Appellant committed the charged crime it was required to pass upon of accessory after the fact. The trial court's jury instruction was appropriately tailored to refocus the jury on the only charge the jury was called upon to determine, the accessory after the fact charge. Accordingly, the trial court's supplemental instruction was proper and appropriate.

III.

Appellant failed to contemporaneously object to the supplemental instruction, so the issue is not preserved for review, and Appellant was not prejudiced by the purported error.

Appellant argues the trial court erred because "another person" was missing from the original instruction that the jury must find "the defendant knew that another person called the principal committed a murder" in its recharge to the jury on the elements of accessory after the fact when the trial court responded to the jury note discussed in Issue II. Defense counsel did not make an objection on this basis to the trial court either before or after the trial court answered the jurors' note. Defense counsel only raised an objection to this language for the first time in his motion for a new trial.

"[A] defendant's failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal." State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); State v. Armstrong, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge.").

An issue first raised in a post-trial motion is not preserved for appellate review. Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); State v. King, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (stating a defendant may not use a motion for a new trial to raise an issue for the first

time).

First, evidence shows at least two principals – the driver and the shooter. If Appellant was a principal, he had another principal to aid, and therefore could be an accessory after the fact. Further, Appellant was not prejudiced by the recharge that excluded the "another person" clause because Appellant's defense was not a claim that he was not guilty of accessory because he was the principal. Instead the defense was the State failed to prove he knew there was a murder. During closing argument, defense counsel argued there was no evidence Appellant was aware a murder occurred. Tr. p. 553. He argued, "There was no testimony to link Seth to this crime scene." Tr. p. 554, lines 4-7. Defense counsel concluded closing argument by telling the jury, "Not one witness to say that Seth had knowledge of a murder. Not one person currently a suspect in that murder. Not one fingerprint or shred of DNA linking Seth to the crime scene. Seth Smith did not have knowledge of murder. And Seth Smith is not guilty." Tr. p. 565, lines 3-7.

Appellant relies on State v. Johnson, 418 S.C. 587, 795 S.E.2d 171 (Ct. App. 2016) and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) to argue the trial court's omission of "another person" from the instruction on accessory after the fact resulted in an unfair trial. Neither case is applicable to the present case. In Johnson, the trial court rejected the prosecution's request for an instruction on accomplice liability and assured defense counsel he would not provide the instruction. However, after deliberations began, the jury sent a jury note inquiring as to whether they could still find Johnson guilty if another person pulled the trigger. The trial court responded to the note, over counsel's objection, by charging the jury an accomplice liability instruction. Id. at 589-91, 795 S.E.2d at 173-74. This Court found that the trial judge's decision to instruct the jury on accomplice liability was fundamentally unfair. This Court observed defense counsel crafted the closing

argument in reliance on the lack of an accomplice liability instruction and this Court agreed that providing defense counsel the opportunity to reargue closing argument was insufficient because it would require defense counsel to "shift theories." Id. at 593-94, 795 S.E.2d at 174. In the present case, the record fails to indicate that defense counsel relied on the "another person" language or would have shifted his argument if he anticipated the "another person" language would be omitted. Instead, defense counsel argued no evidence showed Appellant was at the crime scene or knew about the murder, an argument that is not contrary to the instruction provided.

In Jones, the trial judge indicated he would instruct the jury with "hesitate to act" language in the trial judge's instruction for reasonable doubt. Defense counsel crafted his closing argument using the "hesitate to act" language. Then the trial judge, based on the prosecution's subsequent objection, omitted the language from the judge's instruction. Jones, 343 S.C. 576-77, 541 S.E.2d at 820-21. The Supreme Court found the defendant reasonably relied on the judge's representation he would provide that instruction, and found, "The effect of the judge's after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury." Id. at 577-78, 541 S.E.2d at 821. In the instant case, because the instruction did not contradict any aspect of defense counsel's argument, it did not impact defense counsel's credibility in the eyes of the jury.

In contrast, in State v. Perry, 410 S.C. 91, 763 S.E.2d 603 (Ct. App. 2014), the trial judge instructed the jury that time was not an element of the offense for the charge of lewd act on a minor. On appeal, Perry argued the instruction prejudiced him because he centered his strategy on attacking inconsistencies in the evidence regarding the timing of the alleged incident. This Court rejected the argument, observing, "Because Appellant does not argue that an altered ruling impaired his trial

strategy, we find Appellant's reliance on Jones is misplaced." Id. at 198, 763 S.E.2d at 606.

In State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), the trial judge presiding over a death penalty trial initially indicated he would provide a charge to the jury during the penalty phase that if the jury found an aggravating circumstance, but recommended life, the defendant would not be eligible for parole for thirty years. However, at the beginning of the penalty phase, the trial judge stated he would not provide the parole eligibility instruction after all. The Supreme Court rejected the argument that this change was fundamentally unfair, holding: "[W]e find no evidence the trial judge's initial indication he would give a parole eligibility charge influenced either voir dire, the selection of jurors, or the presentation of evidence during the guilt phase of the trial." Id. at 391-92; 472 S.E.2d at 238.

In the instant case, there is no indication the new instruction was fundamentally unfair because it was not inconsistent with Appellant's defense. Appellant's defense was the State failed to prove he was present or otherwise had knowledge the murder occurred, not that Appellant could not be convicted as accessory after the fact because he was a participant and therefore, a principal to the murder. Therefore, the new instruction did not result in prejudice to Appellant, even assuming error. Error without prejudice does not warrant reversal. McWee, 322 S.C. at 393, 472 S.E.2d at 239. Therefore, this Court should affirm the conviction and sentence.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

SCARLET A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 3, 2021

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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 Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

SETH SMITH,

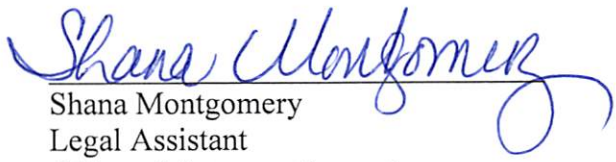
Appellant.

Case No. 2019-001418

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent along with Designation of Matter on Appellant via electronic mail to the address listed by counsel in AIS addressed to his attorney of record, Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.
This 3rd day of January, 2021.



Shana Montgomery
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Shana Montgomery

From: Shana Montgomery
Sent: Wednesday, February 3, 2021 9:18 AM
To: Hudgins, Kathrine; Stock, Chris
Cc: Shana Montgomery; David Spencer
Subject: SMITH Seth ; Appellate Case No. 2019-001418 ; Initial Brief of Respondent (02481038.PDF;1).PDF
Attachments: 02481038.PDF

Good Morning,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Seth Smith (2019-001418). Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact our office should you have any questions or concerns.

Thank You.

Shana Montgomery
Legal Assistant
Office Of The Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-7239

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