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Aug 23 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Perry H. Gravely, Circuit Court Judge

THE STATE,

Respondent,

v.

JANE KATHERINE HUGHES,

Petitioner.

Appellate Case No. 2018-000659.

RETURN TO PETITION FOR REHEARING

Petitioner, Jane Katherine Hughes, filed a petition for rehearing on August 5, 2021. This Court has called for a response. Hughes argues that the July 21, 2021 *per curiam* opinion reflects error in that this Court apparently misapprehended the facts of the case, and did so in considering all three issues presented. (Petition, pp. 1-2). Respondent submits that there is no error in this Court's opinion issued July 21, 2021, and that the murder conspiracy and murder convictions were properly affirmed.

Lesser-Included Offense Argument

Hughes leads with what is the second issue addressed by this Court in the appeal – whether the trial judge erred in declining to charge ABHAN as a lesser-included offense of murder. (Petition, p. 3; see Opinion, pp. 6-7). She contends this Court missed the significance of evidence showing “a rational break in causation, separating the non-fatal hammer blows by Petitioner from the fatal shooting by her father.” (Petition, p. 1 and 9). Hughes, however, misapprehends the

significance of the referenced evidence in the record. As this Court correctly pointed out, “[t]he State argued at trial that Hughes was guilty of murder under the doctrine of accomplice liability.” (Opinion, p. 6). Hughes did not contest that was the case and conceded in her brief, “[t]he State sought to prosecute both Appellant and her brother by accomplice liability, hand of one is the hand of all, as the evidence showed that the father, John Hughes, was the shooter.” (FBOA, p. 10). The evidence supports, as the jury found, “that Hughes joined with her family to murder Victim and that she participated in Victim’s murder.” (Opinion, p. 7).

While true there was a separate battery with the hammer, the evidence supports that the gunshot produced the fatal violence, *i.e.*, was the proximate cause of death. The pathologist testified Victim “died from gunshot wounds, plural, multiple gunshot wounds to the torso.” (R. p. 371, lines 2-3). He also testified he noted “blunt force trauma to the head,” (R. p. 371, line 7), which he later described as “probably a solid five or six [blows], for sure... could be more ... some on the jaw” which was broken, (R. p. 381, lines 14-22). The pathologist testified that the gunshot that caused “severe wounding to large vessels and the heart itself,” was “[o]f all the wounds ... the most mortal.” (R. p. 376, lines 1-17; p. 378, lines 22-23).

This Court correctly relied upon and followed our Supreme Court’s case of *State v. Fields*, 314 S.C. 144, 442 S.E. 2d 181 (1994) to decide this issue. In *Fields*, the Court resolved that “where there is no dispute the victim died as a result of the battery alleged in the indictment, AB and ABHAN are not lesser included offenses of murder.” *Id.*, at 145, 442 S.E.2d at 182. Hughes argues, though, that the *Fields* holding should not apply here as the evidence at trial showed “that Ferrell did not die as a result of the hammer strikes alleged in the indictment and Petitioner’s act of calling 911 broke the causal link between the non-fatal hammer blows by Petitioner and the fatal shooting by her father.” (Petition, p. 9). A careful reading of the argument shows its flaws. First,

the indictment references both the blows and the shooting; second, her “causal link” argument referencing the 911 call is a jury argument,¹ not a showing of legal or factual infirmity; and, third, she concedes again that the shooting was fatal.² Because there is no dispute the victim died from one of the gunshots, the trial judge did not err in declining to charge ABHAN.

Further still, the flaw in the argument is shown in the Final Brief of Appellant. Hughes encouraged this Court to accept that the trial court erred because “evidence in the record” could support a jury finding that Hughes “in striking Ferrell with the hammer, was guilty only of assault and battery of a high and aggravated nature *and not guilty of murder by accomplice liability, hand of one is the hand of all.*” (FBOA, p. 10) (emphasis added). But Hughes was not charged with this assault separately. “[A] defendant is not entitled to a charge on lesser-related offenses.” *State v. Dickerson*, 395 S.C. 101, 121, 716 S.E.2d 895, 906 (2011). The trial judge correct reasoned that the requested charge would actually go to “a totally separate issue ... a separate charge,” and “not a lesser included offense of the charges here.” (R. p. 507, lines 6-15). Hughes argument amounts to a preference in charges, one that did not depend on actually causing death, but she was charged with murder, and the evidence supports her guilt of the murder under accomplice liability, hand of

¹ The 911 recording contains “get him” statements and reference to that he “escaped” at one point, all of which are not favorable to Hughes. (See R. p. 448, State’s Exhibit No. 94, published; see also R. 552, line 1 – p. 555, line 10 (summary in prosecutor’s closing)). At that time, the recording would start prior to a dispatcher answering and would record before one knew the call was being recorded which would logically allow for capturing perhaps more candid comments. (See R. p. 52, line 6- p. 53, line 2).

² Underscoring the jury’s role is the fact that the jury found Hughes did not withdraw from the conspiracy, but remained part of the conspiracy to murder. As this Court also found in regard to evidence of conspiracy, “Hughes’s 911 call recorded Hughes telling other ‘you gotta get to him’ and ‘you gotta get him,’ ” and evidence could support that Hughes struck Victim because her father “hesitated,” and, further, that the “jury could find this evidence shows Hughes acted to further conspiracy by attacking Victim and then directing others to prevent Victim from escaping and to complete the murder.” (Opinion, p. 5). In a most pointed showing of knowledge, the record contains testimony from Andrew Martin that Hughes stated Hughes beat Victim with a hammer “because her dad hesitated” which shows an action within the conspiracy to further the goal of the conspiracy. (R. p. 324, lines 14-18).

one is hand of all. There is no doubt that Victim died, and whether or not Victim would have died because of the separate, vicious hammer beating (which chipped his skull), was not necessary to prove as he actually died from one of the gunshot wound. There is no error in this Court's opinion affirming the trial court's ruling. There simply is no error at all.

Evidence Supporting Conspiracy Sufficient to Overcome Directed Verdict Motion

Hughes argues again that “[t]he State failed to prove an agreement or combination between Petitioner and anyone else to commit murder.” (Petition, p. 11). In essence, Hughes separates and attacks the multiple pieces of evidence that combine to show the conspiracy, but she fails to show either this Court or the trial court erred.

Specifically, Hughes complains that State did not show “the text messages between” and other statements by Hughes’s father and brother involved her participation. (Petition, p. 13). She argues without evidence of a prior agreement, her acts in participation may not be considered acts showing the existence of a conspiracy. (Petition, p. 13). Hughes arguments run counter to well-established law. “[S]ubstantive crimes committed in furtherance of the conspiracy may constitute circumstantial evidence from which a jury could infer the existence of the conspiracy, its object, and scope.” *State v. Larmand*, 415 S.C. 23, 31, 780 S.E.2d 892, 895 (2015). As this Court correctly observed in resolving the issue, “the conspiracy may be sufficiently shown by circumstantial evidence *and the conduct of the parties.*” (Opinion, p. 5 (quoting *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001)) (emphasis added). It is difficult to imagine a less compelling act of agreement than joining in the planned assault against Victim. Further Hughes actively attempted to provide evidence of events that did not occur to provide a possible defense to the killing, even while encouraging family to “get him,” and later admitting knowledge of the scope and intent of the conspiracy prior to her bludgeoning of the Victim with the hammer by

admitting her father “hesitated.” (See n. 1 and 2, *supra*). This Court properly found that the record could not be read to show “a total failure to competent evidence as to the charges alleged,” such that Hughes was entitled to a directed verdict. (Opinion, p. 6 (quoting *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011))). Hughes’s argument to the contrary is without merit.

Denial of Motion to Relieve Counsel

Hughes also submits the Court erred in affirming the trial court’s denial of counsel’s motion to be relieved. Hughes argues that the “Court overlooked the facts that counsel’s motion to be relieved as counsel was not based simply on the filing of one disciplinary complaint and the motion was made two months prior to trial, providing sufficient time for newly appointed counsel to prepare for trial.” (Petition, p. 18). An immediate problem with Hughes’ position is reflected by her complaint – no one renewed the motion during the almost three months³ before trial, or at trial. Counsel informed the circuit court judge (not the trial judge) at the time of the motion that the various disciplinary complaints had already been resolved, thus, no active complaints were still pending. (See R. p. 6, lines 15-17; see also Opinion, p. 7 n. 3). In fact, counsel stated that she had filed the motion the prior November after meeting with Hughes and other clients. (R. p. 5, line 22 – p. 6, line 14). Consequently, the record shows a situation that had developed months before the trial actually began, and that the complaints had been resolved without any finding against counsel. Further, though counsel had complained, Hughes did not complain of a conflict based on the allegations against counsel or mistrust between Hughes and counsel.

Rather, Hughes sought to relieve counsel because Hughes had not received discovery and

³ The motion was made on January 5, 2018 on the same day that counsel was making a motion for continuance in order to obtain a transcript from a separate proceeding. (See R. p. 4, lines 2-8). The trial did not begin until April 2, 2018. The continuance was granted for counsel to be able to obtain indigent funding to cover the costs of the transcript request and allow time for the court reporter to provide the transcript. (R. p. 4, line 18- p. 5, line 7).

wanted “to call witnesses for ... trial.” (R. p. 8, line 22 – p. 9, line 2). Counsel explained that some evidence from the family court was under a protective order, and in her “legal opinion,” calling witnesses “would not be an effective strategy,” but cautioned that “[w]e have not gotten even into the bare bones of discussing that,” making reference to other delays in the matter from the prosecution side. (See R. p. 9, line 16- p. 10, line 3). Hughes stated she personally did not “feel prepared yet to go to trial.” (R. p. 10, lines 13-14). Hughes further stated “[t]he only issue I have is communication and visits” claiming counsel visited only six times over thirty-four months, and asserted that she “would love to communicate with [counsel] more.” (R. p. 13, lines 20-25). Thereafter, counsel actually asked for a set trial date. (R. p. 15, lines 3-21). Again, there is no evidence of renewal by counsel or Hughes, nor complaint from Hughes on that basis.⁴ At any rate, there is no showing of an actual conflict existing at the time of trial.

This Court is correct to note our Supreme Court’s guidance in *Richardson v. State*, 377 S.C. 103, 659 S.E.2d 493 (2008), (Opinion, pp. 7-8), as it guides resolution in two distinct ways. First, the case sets out that “mere disagreement between an applicant and his counsel as to how to proceed” in the circuit court case “is not sufficient cause, in itself, to require” relieving and replacing appointed counsel. *Id.*, at 106, 659 S.E.2d at 495. Again, that was Hughes’s basic complaint, along with an alleged lack of sufficient communication. Second, our Supreme Court in

⁴ Additionally, the State submits that there is a preservation issue within these facts. *See State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) (“The movant bears the burden to show satisfactory cause for removal.”).⁴ *See also I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (explaining “the long-established preservation requirement that the losing party generally must both present his issues and arguments to the [circuit] court and obtain a ruling before an appellate court will review those issues and arguments”); *State v. Gilmore*, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (issue conceded and/or waived cannot be argued on appeal). If Hughes had not understood the nature of counsel’s motion at the time of the January hearing, there is no logical reason to believe she did not understand the argument after counsel made her argument at the hearing. The “right to conflict-free representation, like the right to counsel itself, may be the subject of a waiver.” *United States v. Swartz*, 975 F.2d 1042, 1048–49 (4th Cir. 1992).

Richardson “caution[ed] the bench that the filing of a disciplinary complaint should not result in automatic removal of appointed counsel.” *Id.*, at 107, 659 S.E.2d at 495. That, in itself, shows that there can be a concern over “divided loyalties” that will not result in the necessity to remove counsel. Here, such concern was expressed by counsel herself, but the matters sparking that concern were resolved months before trial. Hughes did not complain of perceived conflict based on her relationship with counsel, and the record does not show that counsel expressed a concern after the January hearing. Again, as this Court noted, “[t]he mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” (Opinion, p. 7 (quoting *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005))).

Further still, and again as this Court has already noted, there was no showing that counsel’s subsequent performance at trial was somehow negatively affected, which, in turn, would support some abuse of discretion. (Opinion, p. 8). *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (“In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.”). *Accord Gregory*, 364 S.C. at 154 n. 1, 612 S.E.2d at 451 n. 1 (“The possibility that the ardor of counsel’s defense was dampened by his representation of the solicitor is apparent from the record.”). Even so, Hughes suggests legal error in this portion of the ruling. She suggests that the Court required a showing of prejudice. (Petition, p. 18). Neither the Court nor Respondent suggested prejudice from an actual conflict must be shown to gain redress. (See FBOR, p. 30). Rather, the problem for Hughes is as the Court sets out: Hughes failed to show an actual conflict negatively affecting performance at the time of trial. Under *Richardson*, simply because there was a filing of a “disciplinary complaint,” that does not equate with a conflict that requires “automatic removal of appointed counsel.” *Richardson*, at 107, 659 S.E.2d at 495. Consequently, something

more must be shown, but it is not shown on this record. Hughes has failed to show an error in this Court's opinion or the circuit court's ruling.

CONCLUSION

For all the above reasons, and those more fully argued and presented in the Final Brief of Respondent, Hughes has not shown an error in this Court's opinion. Consequently, rehearing is not warranted, and the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Kathrine H. Hudgins, Esquire via email today, August 23, 2021 to Khudgins@sccid.sc.gov and to her assistant Chris Stock, at cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of August, 2021.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General