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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

Opinion No. 2021-UP-283 (S.C. Ct. App. Filed July 21, 2021)
Lower Court Case No. 2015-GS-23-03343

THE STATE,

RESPONDENT,

V.

JANE KATHERINE HUGHES

PETITIONER

APPELLATE CASE NO. 2018-000659

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jane Katherine Hughes, Appellant.

Appellate Case No. 2018-000659

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

Unpublished Opinion No. 2021-UP-283
Heard December 7, 2020 – Filed July 21, 2021

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Caroline Scrantom, all of Columbia, for Respondent.

PER CURIAM: Jane Katherine Hughes appeals her convictions for conspiracy to commit murder and the murder of John Michael Ferrell (Victim), her husband.

Hughes asserts the trial court erred in (1) denying her motion for a directed verdict on the conspiracy charge, (2) failing to instruct the jury on the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and (3) denying her trial counsel's motion to be relieved. We affirm.

FACTS/PROCEDURAL HISTORY

At 11:54 P.M. on January 24, 2015, Hughes called 911 and asked the operator to send officers to her home, where she lived with her two children, her boyfriend Andrew Martin, her parents John Hughes (Father) and Margaret Hughes (Mother), and sometimes her brother Jacob Hughes (Brother). When the first officer arrived, Father was standing outside the front of the home holding a handgun and Victim was lying unresponsive on the ground, bleeding from his head and multiple gunshot wounds. Hughes, Martin, Mother, Brother, and the children were inside the home. Victim was pronounced dead at 12:13 A.M.

On January 28, 2015, Hughes, Martin, Father, Mother, and Brother were arrested. Hughes was indicted for conspiring with Father, Mother, and/or Brother to kill Victim, the murder of Victim, and possession of a weapon during the commission of a violent crime.

On January 5, 2018, Hughes and her appointed counsel (Counsel) appeared before the trial court for a hearing on Counsel's motions for a continuance and to be relieved. Counsel requested the continuance in order to obtain the trial transcript of a previous trial—for which she also had applied for funds due to Hughes's indigent status—and the trial court granted the motion. However, the trial court denied the motion to be relieved as counsel. In April 2018, Hughes and Brother were tried jointly for murder and conspiracy to commit murder, and the following evidence was presented.[1]

In the months preceding Victim's murder, he and Hughes were involved in a custody dispute over their children. Victim and Hughes previously lived in California, and Victim sought enforcement of a California court order giving him custody of the children. Hughes and her parents were extremely worried Victim would receive custody or unsupervised visitation. One witness talked with Hughes, Father, and Mother the night before Victim's murder, and the witness said Hughes was angry and adamant that Victim not get custody of the children. The

[1] The State did not go forward with the weapon possession charge.

witness testified Hughes said "I wish he was just gone. Things would be so much easier if he was just gone," and everyone chuckled.

On the night of Victim's murder, Victim and Brother sat in a bar and talked from 8:07 P.M. to 10:35 P.M., and then they went to a restaurant approximately two miles from Hughes's home and talked from 10:49 P.M. until 11:21 P.M. While Brother was with Victim, there were multiple calls and text messages between Father and Brother. At 10:03 P.M., Brother sent Father a text message reading "Call when you're ready for pie."[2] Father replied several times between 10:04 P.M. and 11:10 P.M., stating, "Will do," "Almost," "Just a few minutes," and "Call me." In each of Father's text messages, he ended the message with "green dragons and elm trees" in quotation marks. When Victim and Brother left the restaurant, they drove to Hughes's home.

At Hughes's home, Father told Martin that Victim was coming to talk about the custody dispute, and he asked Martin to wait outside. While he was outside, Martin heard a large crash from inside. When he entered the house, he saw the kitchen table had been overturned and Hughes was standing in the kitchen entryway wielding and swinging a hammer. Father was crouching and pointing a gun at Victim, who was kneeling on the floor and bleeding, and Brother was standing behind Victim. Martin then pulled Hughes into the foyer so she could call the police, and he heard Brother try to tase Victim. Victim tried to escape through the kitchen window, but Brother and Mother grabbed at him to try to prevent his escape while Father ran out the front door. Victim escaped through the window, and Martin heard him begging for his life before Martin heard Father shoot Victim several times. Mother began cleaning the kitchen, and Brother helped before he went to the back of the house. Martin later heard Brother say he broke the taser and flushed it down the toilet. When Martin asked Hughes why she hit Victim with the hammer, she told him she did it to "protect her family" and "because [Father] hesitated." Martin testified Father stated twice that nobody would be in trouble if the police did not find out what happened inside the house, which Martin interpreted as threats.

When officers found Victim, they observed that the bottom of his shirt was ripped and his pants and underwear were around his ankles. Officers found a trail of blood running from Victim's body to the kitchen window, and they found Victim's blood on the kitchen blinds, a hammer and blanket in the kitchen, and Hughes's

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[2] On the day before Victim's murder, Father sent Brother a text message saying, "Stop on [the] way home, need[] to discuss dessert. 'Revolution is the solution.'"

shirt and pants. Officers discovered nonvisible blood stains on the kitchen floor and table, the foyer wall, the hallway bathroom, and a damp rag found in the kitchen trash can.

At trial, the State played Hughes's 911 call for the jury, in which Hughes tells the 911 operator that Victim broke into the house and was trying to kill her and her children. However, before the 911 operator answered and before Father shot Victim, the call recorded Hughes asking where Victim was and repeatedly saying "you gotta get to him" and "you gotta get him."

The doctor performing Victim's autopsy found at least five gunshot wounds and determined those wounds were the cause of Victim's death. The doctor also noted blunt force trauma on Victim's head and found two different wound patterns, one of which was consistent with the claw side of a carpentry hammer. The doctor testified Victim had been hit with the claw side of the hammer at least four to six times.

The jury found Hughes guilty of murder and conspiracy to commit murder, and the trial court sentenced her to concurrent sentences of thirty years and five years, respectively, with credit for time served. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). An appellate court's review "is limited to determining whether the trial court abused its discretion." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007).

LAW/ANALYSIS

I. Directed Verdict

Hughes argues the trial court erred in refusing to direct a verdict of acquittal on the conspiracy charge. We disagree.

"In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight." *State v. Phillips*, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016). The trial court must deny a motion for directed verdict when "there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" *Id.* at 192–93, 785 S.E.2d at 452 (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "On appeal from the denial of a directed verdict, [appellate courts] view[] the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014).

Conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2015). "The essence of a conspiracy is the agreement. It may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement." *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) (citation omitted). "[P]roof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *Id.*

We find the trial court did not err in denying the motion for a directed verdict on the conspiracy charge. When viewed in the light most favorable to the State, the text messages between Father and Brother and Father's threatening statements regarding the need to conceal the events occurring inside Hughes's home from the police could lead the jury to "fairly and logically deduce[]" there was a conspiracy to murder Victim. *See Butler*, 407 S.C. at 381, 755 S.E.2d at 460 (stating all evidence is viewed in the light most favorable to the State on appeal from the denial of a directed verdict); *see Phillips*, 416 S.C. at 192–93, 785 S.E.2d at 452 ("[T]he trial court must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" (quoting *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127)). The State also presented evidence indicating Hughes was a part of the conspiracy. Before Father shot Victim outside the house, Hughes's 911 call recorded Hughes telling others "you gotta get to him" and "you gotta get him." The State also showed that Hughes was worried about losing custody of her children to Victim, that she struck Victim multiple times in the head with a carpentry hammer, and that she did so "to protect her family" and "because [Father] hesitated." A jury could find this evidence shows Hughes acted to further the conspiracy by attacking Victim and then directing others to prevent Victim from escaping and to complete the murder. *See Buckmon*, 347 S.C. at 323, 555

S.E.2d at 405 (stating a conspiracy can be proven by acts done in furtherance of the conspiracy).

Because the State presented competent evidence of a conspiracy between Hughes and her family, the trial court did not err in denying her motion for a directed verdict. *See State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776–77 (2011) ("Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial [court] to direct a verdict of acquittal is not error." (quoting *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978))). Accordingly, we affirm the trial court on this issue.

II. ABHAN as a Lesser-Included Offense

Hughes argues the trial court erred in failing to charge the jury on ABHAN as a lesser-included offense to murder. We disagree.

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2015). A person commits ABHAN "if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1) (2015). When "there is no dispute the victim died as a result of the battery alleged in the indictment, . . . ABHAN [is] not [a] lesser included offense[] of murder." *State v. Fields*, 314 S.C. 144, 145, 442 S.E.2d 181, 182 (1994).

In the indictment, Hughes was charged with murdering Victim by "shooting him multiple times with a handgun and assaulting him with a hammer." There is no dispute that Victim died of gunshot wounds and that Father fired the shots. The State argued at trial that Hughes was guilty of murder under the doctrine of accomplice liability. *See State v. Harry*, 413 S.C. 534, 540, 776 S.E.2d 387, 390 (Ct. App. 2015) ("The doctrine of accomplice liability arises from the theory that the hand of one is the hand of all." (quoting *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014))); *id.* at 540, 776 S.E.2d at 391 ("Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." (quoting *Reid*, 408 S.C. at 472, 758 S.E.2d at 910)); *see also Reid*, 408 S.C. at 472–73, 758 S.E.2d at 910 ("A person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act to be guilty under a theory of accomplice liability.").

As discussed above, there was evidence that Hughes joined with her family to murder Victim and that she participated in Victim's murder. Because it is not disputed that Victim died as a result of one of the batteries alleged in the indictment—i.e., the gunshots—ABHAN is not a lesser-included offense under the facts of this case. *See Fields*, 314 S.C. at 145, 442 S.E.2d at 182 ("[When] there is no dispute the victim died as a result of the battery alleged in the indictment, . . . ABHAN [is] not [a] lesser included offense[] of murder."). Accordingly, the trial court did not err in declining to charge the jury with ABHAN, and we affirm the trial court on this issue.

III. Motion to be Relieved

Hughes argues the trial court erred in denying Counsel's motion to be relieved. We disagree.

Whether to grant or deny a motion to relieve counsel rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). "The movant bears the burden to show satisfactory cause for removal." *State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *Gregory*, 364 S.C. at 152–53, 612 S.E.2d at 450.

The alleged conflict of interest was Counsel's belief that Hughes or her family pressured several of Counsel's other clients to file grievances against Counsel.[3] Our supreme court has held "the filing of a disciplinary complaint should not result in automatic removal of appointed counsel." *Richardson v. State*, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008) (per curiam). The trial court asked Hughes if she coerced Counsel's other clients to file the grievances, and she denied doing so. The trial court noted Counsel's reputation as an excellent criminal attorney and considered Counsel's representation following the grievances. Specifically, the court commended Counsel for requesting both the transcript from a previous trial and the funds for the transcript, stating that many attorneys would not have done the same. The trial court, noting Counsel was in a difficult position if her assertion was true, expressed concern that relieving Counsel "midstream" would be

[3] Counsel informed the court that four grievances had been filed, but all were determined to be without merit before the hearing on the motion to be relieved.

detrimental to Hughes. We find the trial court properly exercised its discretion in denying Counsel's motion.

Furthermore, Hughes has failed to show the trial court's denial prejudiced her as the record shows Counsel's representation was not affected by the grievances. *See id.* ("[T]he filing of a disciplinary complaint should not result in automatic removal of appointed counsel"). Counsel successfully objected to evidence that would have strengthened the State's case on the conspiracy charge and effectively cross-examined the State's witnesses. Based on the foregoing, we affirm the trial court's denial of Counsel's motion to be relieved.

CONCLUSION

Accordingly, Hughes's convictions are

AFFIRMED.

HUFF, WILLIAMS, and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

Opinion No. 2021-UP-283

THE STATE,

RESPONDENT,

V.

JANE KATHERINE HUGHES,

PETITIONER

APPELLATE CASE NO. 2018-000659

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Jane Katherine Hughes petitions the Court for rehearing and respectfully submits that this Court overlooked the significance of the fact that, with regard to the trial judge's failure to instruct the jury on the law of assault and battery of a high and aggravated nature [ABHAN], **after** Petitioner struck her estranged husband with a hammer inside her parents' home but **before** her father fatally shot the husband outside of the home, Petitioner called 911 asking for help because her husband broke into the home and was trying to kill her and her children. The 911 call is important as a rational break in causation, separating the non-fatal hammer blows by Petitioner from the fatal shooting by her father. The break required the judge to instruct the jury on ABHAN with regard to the non-fatal injuries. Under the narrow facts of this case, ABHAN is a lesser included offense of murder and should have been charged.

Counsel additionally respectfully submits, with regard to the trial judge's failure to direct a verdict of acquittal for conspiracy, that this Court overlooked the fact that the State failed to present any direct or substantial circumstantial evidence reasonably tending to prove a conspiracy involving Petitioner. The text messages between Petitioner's father and brother and the statements made by the father about concealing what happened inside the home are not connected to Petitioner. The statements Petitioner made on the 911 call, "you gotta get to him" and "you gotta get him" after telling the 911 operator that her husband broke into the house and was trying to kill her and her children are not evidence that Petitioner was part of a conspiracy. Her purported statements that she struck her husband with a hammer "to protect her family" and "because [Father hesitated]" are not evidence that Petitioner was part of a conspiracy. Petitioner's concern about the custody dispute is not evidence of a conspiracy. Viewing the evidence together and in the light most favorable to the State, the State failed to prove a conspiracy involving Petitioner.

Finally, counsel respectfully submits that this Court overlooked the facts that counsel's motion to be relieved as counsel was not based simply on the filing of one disciplinary complaint, the motion was made two months prior to trial and Petitioner was not required to show prejudice. Trial counsel informed the judge that Petitioner or a member of her family publicly defamed her and intentionally hurt her career, creating the conflict of interest requiring that she be relieved from representing Petitioner. (R. p. 7, lines 11-20). Trial counsel told the judge that Petitioner or a member of her family encouraged other detainees who were clients of counsel to file grievances against counsel with the Office of Disciplinary Counsel. (R. p. 5, line 22 – p. 6, p. 7, p. 8, lines 1-6). Petitioner also asked the judge to relieve counsel. (R. p. 8, lines 7-20). Counsel respectfully petitions for rehearing on all three issues overlooked.

1. **In this murder and conspiracy trial, the trial judge erred in refusing to instruct the jury on the law of assault and battery of a high and aggravated nature when there was evidence from which the jury could decide that Petitioner only committed an assault and battery that did not result in death.**

There is evidence in the record from which the jury could have determined that Petitioner, in striking her estranged husband with a hammer, was guilty only of assault and battery of a high and aggravated nature [ABHAN]. The trial judge, however, refused to instruct the jury on the law of assault and battery of a high and aggravated nature. During the trial the judge asked for proposed jury instructions and trial counsel stated, "I don't have mine typed up because I thought we were doing that after lunch. I just have one additional. I was going to request an ABHAN." (R. p. 393, lines 17-19). The judge indicated that he would review the proposed instructions during the lunch break. (R. p. 393, lines 20-21). Later, the judge denied the requested jury instruction on ABHAN stating, "As to the jury charge, I know that Defendant Jane Hughes has – had requested a charge for ABHAN, assault and battery of a high and aggravated nature. And I think that is a totally separate issue and would not be – that would be a separate charge. It would not be a lesser included offense of the charges here. So I'm going to decline to charge that. But, at this time, I'll be glad to have anybody put anything on the record they need to." (R. p. 507, lines 6-15).

Trial counsel responded, "Certainly, Your Honor. May it please the Court. As I stated in chambers and just to put it on the record, I do believe that there's been sufficient evidence that the State has introduced, at this point, that establishes that the Defendant – or the victim died from a gunshot wound. I believe gunshot wound number four, the pathologist testified to – that that was the mortal would and cause of death. And so that is the basis for me asking for the instruction." (R. p. 507, lines 18-25). The trial judge responded, "And I understand your argument. Again, I find that, under the law, that would not be appropriate to charge." (R. p. 508, lines 1-3). The trial judge erred.

Petitioner was indicted for murder and conspiracy involving the shooting death of John Ferrell, her estranged husband and the father of her two young children. Petitioner and Ferrell were involved in a highly contested custody dispute that originated in California where the couple once lived. At the time of the shooting, Petitioner, her boyfriend, Andrew Martin, and her two children were living in South Carolina with her parents, John and Margaret Hughes. (R. p. 306, lines 15-17). Petitioner's father, John Hughes, and brother and co-defendant at trial, Jacob Hughes, as well as the boyfriend, Martin, were all charged in connection with the shooting of Ferrell. Martin testified at trial that on the day of the shooting John Hughes told him that he was trying to arrange a meeting with Ferrell at the house to work out the custody issue. (R. p. 312, lines 9-25). According to Martin, he was asked to stay out of sight so as not to be a detriment to the custody case. (R. p. 313, lines 13-15).

The State introduced evidence that earlier in the evening of the shooting Jacob Hughes, Petitioner's brother, and the estranged husband, Ferrell, went to the Station Bar for two to three hours and then went to the Waffle House. (R. pp. 450-457). The time stamp of video surveillance showed the two leaving the Waffle House at approximately 11:20 PM. (R. p. 456, lines 1-12). The State also introduced evidence of text messages and phone calls between Petitioner's father and brother prior to the shooting. (R. pp. 461-464). There was no evidence of any text messages or phone calls between Petitioner and her father or brother or Ferrell on the night of the shooting.

Martin testified at trial that on the night of the shooting he was in the backyard when he heard a loud crash inside the house. (R. p. 315, lines 4-11). Martin testified that he went inside to investigate and, "[w]hen I entered the sliding glass door, I saw framed in the kitchen entry way, Jane with a hammer, John Michael Hughes with a gun, John Ferrell on his knees bleeding, and Jacob Hughes behind him." (R. p. 315, lines 21-25). The kitchen table was overturned. (R. p. 316, lines 1-6). Martin testified that he pulled Petitioner back and took the hammer out of her hand so she could call the police. (R. p. 318, line 19 – p. 319, lines 1-12). The State entered a CD of

Petitioner's call to 911, State's exhibit #94, in evidence without objection. (R. p. 55, lines 11-19). The 911 call was later player for the jury. (R. p. 448, lines 6-7). The 911 call was made at 11:54 PM. (R. p. 55, lines 5-9). During the 911 call Petitioner told the operator that her husband broke into the home and was trying to kill her and her children.

According to Martin, Ferrell tried to escape through a kitchen window but Petitioner's mother, Margaret Renee Hughes, and co-defendant brother, Jacob Hughes, tried to prevent him from going out the window. (R. p. 320, lines 6-22). When asked if Ferrell made it out of the window, Martin answered that he believed Ferrell made it out of the window because he did not use the door and his body was found outside. (R. p. 321, lines 1-9). Martin testified that he saw John Hughes go outside and then Martin heard several gunshots. (R. p. 321, line 14 – p. 322, lines 1-11). Martin stayed seated on a bench in the foyer with Petitioner until they were asked to leave the house when the police arrived. (R. p. 323, line 24 – p. 324, lines 1-3). Ferrell died as a result of multiple gun shot wounds. (R. p. 371, lines 2-3). The pathologist also testified that Ferrell had non-lethal injuries consistent with being struck by a hammer. (R. p. 381, lines 1-11).

The murder indictment alleges, "That JANE KATHERINE HUGHES did in Greenville County, on or about the 24th day of January, 2015, unlawfully and with malice aforethought kill JOHN MICHAEL FERRELL by means of shooting him multiple times with a handgun and assaulting him with a hammer, and that JOHN MICHAEL FERRELL died as a proximate result thereof. This in violation of the South Carolina Code of Laws (1976) as amended." (R. p. 596). The State sought to prosecute both Petitioner 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. The prosecutor argued accomplice liability, hand of one is the hand of all, in closing argument. (R. p. 537, lines 10-18). The judge instructed the jury with the law on accomplice liability, hand of one is the hand of all. (R. p. 571, line 8 – p. 572, lines 1-17). The jury had two specific questions about the hand of one is the hand of all charge. (R. p. 579, lines 7-10; p. 580, lines 6-8). There is

evidence in the record from which the jury could have determined that Petitioner, in striking her estranged husband, 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. The jury, however, was not given this option.

Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. Id. at 665, 594 S.E.2d at 472-73. "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); see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* at 570, 647 S.E.2d at 166–67. "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167. "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

In State v. Fields, 314 S.C. 144, 145, 442 S.E.2d 181, 182 (1994), the South Carolina Supreme Court wrote, "Whether AB and ABHAN are lesser included offenses of murder is a novel question in this State. We now hold 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. See Martin v. State, 342 So.2d 501 (Fla.1977) [superceded by rule as stated in Daugherty v. State, 211 So.3d 29 (Fla. 2017); Commonwealth v. Myers, 356 Mass. 343, 252 N.E.2d 350 (1969)." Fields was charged with murder for his alleged participation in the victim's beating. The jury found Fields guilty of voluntary manslaughter. The case provides the facts as follows, "At trial, the State presented evidence that Petitioner participated in beating the victim by kicking him while he was on the ground. Petitioner testified he only pushed the victim from behind and the others then beat him. Petitioner claimed he acted in self-defense because he thought the victim had a gun and was about to shoot someone. He denied any participation in the beating." Fields, 314 S.C. at 145, 442 S.E.2d at 182. The indictment in Fields alleged, "that Glen Fields did in Spartanburg County on or about the 16th day of November 1988 feloniously, wilfully and with malice aforethought beat and/or aid and abet others in beating Steven Allen Greer with fists and/or various other weapons and that Steven Allen Greer died as a proximate result thereof." 314 S.C. at 145, 442 S.E.2d at 182. The Court found that Fields was not entitled to the lesser included offense of ABHAN, or assault and battery, because, "There is no dispute that the victim died as a result of the battery alleged in the indictment, i.e. the beating. We conclude AB and ABHAN are not lesser included offenses of murder **in this case**." Fields, 314 S.C. at 146, 442 S.E.2d at 182 (emphasis added).

In contrast, in the present case, Ferrell died as a result of the shooting alleged in the indictment but **not** the battery with the hammer alleged in the indictment. Importantly in the present case, unlike in Fields, there was an intervening event, the 911 call, between the non-lethal strikes with the hammer by Petitioner and the fatal shooting by Petitioner's father.

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The issue in State v. Tyler, 348 S.C. 526, 531-32, 560 S.E.2d 888, 890 (2002), involved an erroneous but harmless jury charge equating ABHAN with manslaughter. Tyler was accused of fatally setting her husband on fire. The State charged her with murder. Tyler presented evidence that her husband's death was the result of medical malpractice rather than Tyler's act of setting him on fire. The trial judge in Tyler properly instructed the jury that, in the event it found Tyler's actions did not proximately cause her husband's death, then it could consider the offenses of assault and battery with intent to kill (ABIK) and assault and battery of a high and aggravated nature (ABHAN). Addressing the harmless error in Tyler, the South Carolina Supreme Court wrote:

> Under the above authorities, it is clear the trial court's charge equating ABHAN and manslaughter was erroneous. However, we find the error harmless under the facts of this case. Immediately prior to charging the jury on ABHAN and ABIK, the trial court instructed the jury that "**if the causal link between the defendant's act and the victim's death is broken so that she may not be convicted of murder or voluntary manslaughter,**" the defendant may still be convicted of ABIK or ABHAN. (Emphasis supplied). Accordingly, ABHAN and/or ABIK were possible verdicts if, and only if, the jury concluded that Tyler's actions had not proximately caused her husband's death. The jury did not find such a break in the causal chain and, instead, convicted Tyler of murder.

State v. Tyler, 348 S.C. 526, 531, 560 S.E.2d 888, 890 (2002) (n. #3 omitted)(emphasis in original).

While the present case does not involve an intervening act of medical malpractice, the present case does involve an intervening act of Petitioner calling 911. The causal link between Petitioner striking her husband with a hammer and the husband dying as a result of being shot by the father was broken by the 911 call. Petitioner's act of striking her estranged husband with a hammer was not the proximate cause of his death.

While not specifically argued at trial with regard to the conspiracy charge and without conceding the argument presented below that the State failed to present sufficient evidence of a conspiracy involving Petitioner to survive the directed verdict motion, even if the jury believed there was a conspiracy, Petitioner's act of calling 911 is evidence of her withdrawal from any alleged conspiracy. As a result, there is evidence from which the jury could conclude that

Petitioner is only guilty of ABHAN and the judge erred in refusing to instruct the jury with the law of ABHAN. In State v. Vang, 353 S.C. 78, 86, 577 S.E.2d 225, 228–29 (Ct. App. 2003), this Court wrote, "The law of withdrawal is set forth in State v. Woods, 189 S.C. 281, 288, 1 S.E.2d 190, 193–94 (1939), which states that one who has entered a common design to commit a crime escapes responsibility for the acts of his associates '... if, before the [crime] is committed, he withdraws entirely from the undertaking, and the fact of his withdrawal is communicated to his associates, under such circumstances as would permit them to take the same action.'" Once Petitioner called 911 both her father and brother could have stopped and waited on the police to arrive. Instead, Petitioner's father went outside and fatally shot Ferrell. The trial judge erred in refusing to charge ABHAN.

In affirming the conviction this Court wrote:

> As discussed above, there was evidence that Hughes joined with her family to murder Victim and that she participated in Victim's murder. Because it is not disputed that Victim died as a result of one of the batteries alleged in the indictment—i.e., the gunshots—ABHAN is not a lesser-included offense under the facts of this case. See Fields, 314 S.C. at 145, 442 S.E.2d at 182 ("[When] there is no dispute the victim died as a result of the battery alleged in the indictment, ... ABHAN [is] not [a] lesser included offense[ ] of murder."). Accordingly, the trial court did not err in declining to charge the jury with ABHAN, and we affirm the trial court on this issue.

State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *4 (S.C. Ct. App. July 21, 2021). Petitioner respectfully submits that this Court overlooked the fact that this case is distinguished from Fields by the facts 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. Under the facts of this case ABHAN is a lesser-included offense of murder. Petitioner respectfully seeks rehearing on this issue.

2. The trial judge erred in refusing to direct a verdict of acquittal for conspiracy when the State failed to prove that an agreement existed between Petitioner and anyone else to commit murder.

At the close of the State's case Petitioner moved for a directed verdict of acquittal for the conspiracy charge arguing, "Your Honor, at this point, I would make a motion to have the Court rule on the conspiracy charge. I don't believe the State has met the burden, even in the light most favorable to them, at this point." (R. p. 499, lines 6-9). The judge denied the motion stating, "All right. I think there is enough for this matter to go to the jury on the conspiracy charge. So I'm going to deny your motion." (R. p. 499, lines 10-12). The trial judge erred.

In State v. Pearson, 415 S.C. 463, 469–70, 783 S.E.2d 802, 805–06 (2016), the South Carolina Supreme Court wrote:

> "[W]hen the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); see Hepburn, 406 S.C. at 429, 753 S.E.2d at 408 ("In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict."). Further, when the State relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the trial judge is concerned with the existence or non-existence of evidence, not with its weight. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. The trial judge "should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Id.* " 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Id. "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis.*" State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (emphasis added).
>
> "On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014).

"If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004). "A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be

fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. The State failed to produce substantial circumstantial evidence that Petitioner was part of a conspiracy to murder her estranged husband. The State's evidence, at best, merely raises a suspicion about Petitioner's involvement in a conspiracy with her family. The trial judge erred in refusing to direct a verdict of acquittal on the conspiracy charge.

The conspiracy indictment alleges, "That JANE KATHERINE HUGHES did in Greenville County, on or about the 24th day of January, 2015, willfully and unlawfully combined with Margaret Hughes and/or Jacob Hughes and/or John Hughes for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, to wit: Murder. This is in violation of §16-17-0410 of the South Carolina Code of Laws (1976) as amended." (R. p. 598).

S.C. Code §16-17-410 provides, "The common law crime known as 'conspiracy' is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." In State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001), the South Carolina Supreme Court wrote:

> A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). The essence of a conspiracy is the agreement. Id. It may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement. Id. To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

The State failed to prove an agreement or combination between Petitioner and anyone else to commit murder. The circumstantial evidence presented by the State failed to establish a conspiracy involving Petitioner. In denying the directed verdict motion made by the brother co-defendant, the judge stated, "And I kind of kept a tally just because I knew it would be an important

issue at this point. And I believe that based on the – all of the evidence when we look at the phone calls, the evidence of the testimony, evidence of Martin – again, I'm not to determine whether its credible or not – and all the evidence there, I believe that this is enough for this matter to go to the jury." (R. p. 500, lines 4-11). The text messages and telephone calls between the co-defendant brother, Jacob Hughes, and the shooter father, John Hughes, did not include Petitioner. The State failed to prove that Petitioner knew about the text messages and telephone calls between Father and Brother. The State failed to establish that Petitioner knew that her co-defendant brother was meeting with Ferrell on the evening of the shooting or that the father was trying to arrange a meeting with Ferrell at the house to work out the custody issue, as testified to by the boyfriend, Andrew Martin. (R. p. 312, lines 9-25). Wishing Ferrell was "just gone" and anger about custody issues is not evidence of an agreement. (R. p. 440, lines 12-14). Petitioner's purported comment that she hit Ferrell with the hammer because her father hesitated is not evidence of an agreement. (R. p. 324, lines 18-19). The father's discussion about the "Castle Doctrine" and self-defense, as testified to by Martin, (R. p. 329, lines 5-14), is not evidence of an agreement. The evidence presented by the State does not establish that Petitioner unlawfully combined with Margaret Hughes and/or Jacob Hughes and/or John Hughes for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, to wit: Murder, as alleged in the indictment.

Viewing the evidence in the light most favorable to the State, the State failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused. The trial judge erred in refusing to direct a verdict of acquittal on the conspiracy charge. This Court should reverse the conspiracy conviction.

In affirming the convictions this Court wrote:

> We find the trial court did not err in denying the motion for a directed verdict on the conspiracy charge. When viewed in the light most favorable to the State, the text messages between Father and Brother and Father's threatening statements regarding the need to conceal the events occurring inside Hughes's home from the police could lead the jury to "fairly and logically deduce[ ]" there was a conspiracy to murder Victim. See Butler, 407 S.C. at 381, 755 S.E.2d at 460 (stating all

> evidence is viewed in the light most favorable to the State on appeal from the denial of a directed verdict); see Phillips, 416 S.C. at 192–93, 785 S.E.2d at 452 ("[T]he trial court must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.' " (quoting Mitchell, 341 S.C. at 409, 535 S.E.2d at 127)). The State also presented evidence indicating Hughes was a part of the conspiracy. Before Father shot Victim outside the house, Hughes's 911 call recorded Hughes telling others "you gotta get to him" and "you gotta get him." The State also showed that Hughes was worried about losing custody of her children to Victim, that she struck Victim multiple times in the head with a carpentry hammer, and that she did so "to protect her family" and "because [Father] hesitated." A jury could find this evidence shows Hughes acted to further the conspiracy by attacking Victim and then directing others to prevent Victim from escaping and to complete the murder. See Buckmon, 347 S.C. at 323, 555 S.E.2d at 405 (stating a conspiracy can be proven by acts done in furtherance of the conspiracy).

State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *3 (S.C. Ct. App. July 21, 2021).

Petitioner respectfully submits that this Court overlooked the facts that, viewing the evidence in the light most favorable to the State, the text messages between the Father and Brother and Father's threatening statements regarding the need to conceal the events occurring inside the Hughes's home from the police could only allow the jury to fairly and logically deduce there was a conspiracy between Father and Brother, **not** Petitioner. Again, the State failed to present evidence of an agreement. Without evidence of an agreement, Petitioner's statements on the 911 call that "you gotta get to him" and "you gotta get him" and her purported statements that she struck her husband with a hammer "to protect her family" and "because [Father hesitated]" are not acts in furtherance of a conspiracy. These statements and Petitioner's concern about the custody dispute do not add up to substantial circumstantial evidence reasonably tending to prove that Petitioner conspired with her family to commit murder. The statements are consistent with Petitioner's statement to the 911 operator that her husband broke into the home and was trying to kill her and her children. The State failed to present evidence that Petitioner was part of any conspiracy.

In State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001), the South Carolina Supreme Court found that there was sufficient evidence to present the conspiracy charge to the jury. The State presented evidence that Petitioner and his co-defendants discussed committing an unlawful

act, getting some cheese or money and getting a lick, a burglary or robbery, prior to the victim's death. There is no evidence in the present case that Petitioner discussed committing an unlawful act with anyone. A member of Petitioner's church, Christine Boisher, who had experience in family court as a guardian-ad-litem, met with Petitioner and her family the night before the shooting. Boisher testified that Petitioner was angry about a court hearing in a few days to address custody issues. (R. p. 439, line 15 – 25). Boisher also testified, "And she [Petitioner] said, I wish he [Ferrell] was just gone. Things would be so much easier if he [Ferrell] was just gone. And everybody chuckled." (R. p. 440, lines 12-14). Wishing that the estranged husband was gone and back in California, leaving Petitioner and her children in South Carolina is not a discussion about committing an unlawful act. Even if wishing the estranged husband was just gone could be construed as a wish that he was dead, simply wishing someone dead is a far stretch from the proof required to prove a conspiracy to commit murder.

The State failed to present any direct or substantial circumstantial evidence that Petitioner entered an agreement with anyone to murder her estranged husband. The trial judge erred in refusing to direct a verdict of acquittal for the conspiracy charge. Petitioner respectfully seeks rehearing on this issue.

3. The trial judge erred in refusing to grant trial counsel's motion to be relieved as counsel.

In January of 2015, prior to the April trial date, the Honorable Letitia H. Verdin heard a motion for a continuance and motion to be relieved as counsel, both filed by counsel for Petitioner, Lauren M. Taylor. (R. pp. 1-17). Judge Verdin granted the continuance motion to allow trial counsel to obtain a transcript from a previous trial, presumably the father's trial. (R. p. 4, line 13 – p. 5, lines 1-7). Judge Verdin, however, denied the motion to be relieved as counsel. The judge erred.

During the hearing on the motion to be relieved counsel claimed that Petitioner or a member of her family encouraged other detainees who were clients of counsel to file grievances against counsel with the Office of Disciplinary Counsel. (R. p. 5, line 22 – p. 6, p. 7, p. 8, lines 1-6). Trial counsel told the judge, "This is very concerning to me, as far as the conflict of the relationship that this has created. I think any amount of trust that existed between us that has, you know, occurred over the last two years is simply evaporated by this. It shows me that this is an intentional act, on either, you know, her family's part or hers, to publicly defame me and, you know, intentionally hurt my career." (R. p. 7, lines 11-20). Petitioner denied the allegation but asked the judge to relieve counsel. (R. p. 8, lines 7-20).

In denying the motion to be relieved, the judge stated:

> Here's what I'm going to do, it puts Ms. Taylor in a horrible position – and Ms. Taylor, I understand the position that you are in – but Ms. Hughes, I am not going to relieve Ms. Taylor. She's an outstanding attorney. I'm not going to relieve her as your attorney because I want you to have the benefit of her experience. I want you to have the benefit of her know-how on your case and knowledge of your case. What I do want you to do, Ms. Hughes, is I want you to figure out ways to work with Ms. Taylor, to work out this problem that you've got with Ms. Taylor and discuss it with her.

(R. p. 13, lines 6-19). The judge also stated, "But here's what I'm going to say, to the extent that you did anything to harm Ms. Taylor – if you did, I – then my apologies to Ms. Taylor in asking her to continue as your attorney. This is probably the worse [sic] situation I've put an attorney in about this, but my understanding from our brief talk about this case is it is nearly three years old." (R. p. 14, lines 12-20). The age of the case is not justification to refuse to relieve an attorney who has accused her client or her client's family of defaming her and intentionally hurting her career. The judge abused her discretion in refusing to relieve counsel.

This Court reviews the trial judge's refusal to grant trial counsel's motion to be relieved for an abuse of discretion. State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005). "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be

disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants. Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. *See* Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). However, a defendant need not demonstrate prejudice if there is an actual conflict of interest. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) *citing* Cuyler v. Sullivan, 446 U.S. 335, 348-350, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980).

The Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Where counsel is guaranteed, the client has the right to conflict-free representation. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Violation of this principle is grounds for reversal. Id. A defendant need not demonstrate prejudice if there is an actual conflict of interest. State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). The trial judge's refusal to relieve counsel violated Petitioner's Sixth Amendment right to conflict-free representation and the violation requires reversal. The conflict in the present case did not involve dual representation. Instead, the conflict existed directly between Petitioner and counsel based on counsel's belief that Petitioner and or family had encouraged other clients to file grievances.

The present case is distinguished from Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008), where the South Carolina Supreme Court found that the PCR judge properly denied the motion to be relieved as counsel. In Richardson the Court noted that a mere disagreement about

strategy is not sufficient to relieve counsel. Additionally, the Court noted with regard to complaints filed with the Office of Disciplinary Counsel, the Court wrote, "We caution the bench that the filing of a disciplinary complaint should not result in automatic removal of appointed counsel. If this were not the case, applicants could obtain substitute counsel by the simple expedient of filing an ethical complaint even if that complaint is without any factual or legal basis. Instead, the basis for the complaint should be explored and the PCR judge should exercise discretion in determining whether the basis for the complaint constitutes sufficient cause to relieve counsel." Richardson, 377 S.C. at 107, 659 S.E.2d at 495. The present case involves more than a mere disagreement in regard to strategy and involves more than Petitioner filing a grievance. In the present case the attorney accused the client or her family of defamation and intentionally hurting her career. Both the attorney and the client asked the judge to relieve counsel. The judge had already granted a continuance which would have provided newly appointed counsel time to prepare. The judge erred in refusing to relieve counsel. The error is not harmless and requires reversal.

In affirming the convictions this Court wrote:

> The alleged conflict of interest was Counsel's belief that Hughes or her family pressured several of Counsel's other clients to file grievances against Counsel. Our supreme court has held "the filing of a disciplinary complaint should not result in automatic removal of appointed counsel." Richardson v. State, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008) (per curiam). The trial court asked Hughes if she coerced Counsel's other clients to file the grievances, and she denied doing so. The trial court noted Counsel's reputation as an excellent criminal attorney and considered Counsel's representation following the grievances. Specifically, the court commended Counsel for requesting both the transcript from a previous trial and the funds for the transcript, stating that many attorneys would not have done the same. The trial court, noting Counsel was in a difficult position if her assertion was true, expressed concern that relieving Counsel "midstream" would be detrimental to Hughes. We find the trial court properly exercised its discretion in denying Counsel's motion.

State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *4 (S.C. Ct. App. July 21, 2021). Counsel respectfully submits that this 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.

As discussed above, the present case is distinguished from Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008) because the present case involves more than a mere disagreement in regard to strategy and involves more than Petitioner filing a grievance. Additionally, the Court in Richardson was addressing a specific problem writing:

> However, we take this opportunity to address the recurring problem of PCR applicants seeking repeatedly, and without sufficient cause, to have their appointed counsel relieved. In the case at hand, although the exact number of these motions is unclear, at least nine motions to relieve PCR counsel or to be relieved as PCR counsel were made, and many of those motions were granted. Such tactics constitute an abuse of the judicial process, resulting in significant delays, and should not be tolerated, much less acquiesced in, by judges presiding over PCR matters.

377 S.C. at 105, 659 S.E.2d at 494 (n #2, #3 omitted). The motion to be relieved in the present was the first one made and made for good cause, an actual conflict, not an attempt to manipulate the PCR process, as discussed in Richardson.

This Court also found that Petitioner failed to show prejudice from the judge's refusal to relieve counsel writing, "Furthermore, Hughes has failed to show the trial court's denial prejudiced her as the record shows Counsel's representation was not affected by the grievances. State v. Hughes., No. 2018-000659, 2021 WL 3076693, at *4 (S.C. Ct. App. July 21, 2021). Petitioner respectfully submits that this Court overlooked the fact that Petitioner is not required to show prejudice because an actual conflict existed. Petitioner respectfully seeks rehearing on this issue.

Based on the above arguments, Petitioner respectfully seeks rehearing on all three issues. Based on the argument presented in issue one, this Court should reverse the murder conviction and remand for a new trial. Based on the argument presented is issue two, this Court should reverse the conspiracy conviction and remand the case to the trial court to direct a verdict of acquittal.

Alternatively, based on the argument presented in issue three, this Court should reverse both convictions and remand for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
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PO Box 11589
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ATTORNEY FOR PETITIONER

This 5th day of August, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JANE KATHERINE HUGHES,

PETITIONER

APPELLATE CASE NO. 2018-000659

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 Petition for Rehearing 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 on Jane Katherine Hughes, #375988, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 5th day of August, 2021.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

RECEIVED
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 where 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

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[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 months[3] 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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August 23, 2021

ATTORNEYS FOR RESPONDENT

RECEIVED
Aug 23 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2018-000659

THE STATE,

Respondent,

vs.

JANE KATHERINE HUGHES,

Appellant.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Jane Katherine Hughes, Appellant.

Appellate Case No. 2018-000659

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Kathrine Haggard Hudgins, Esquire
Caroline M. Scrantom, Esquire
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The Honorable Perry H. Gravely

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