

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Nov 15 2021

S.C. 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,

APPELLANT

APPELLATE CASE NO. 2021-001116

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this murder trial, did the Court of Appeals err in finding that the trial judge correctly refused 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?
2. Did the Court of Appeals err in finding that the trial judge correctly refused 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?
3. Did the Court of Appeals err in finding that the trial judge correctly refused to grant trial counsel's motion to be relieved as counsel?

ARGUMENTS IN REPLY

- 1. In this murder trial, the Court of Appeals erred in finding that the trial judge correctly refused 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.**

At trial the State argued that Petitioner was guilty of murder under the doctrine of accomplice liability. The State, however, failed to produce sufficient evidence that Petitioner acted as an accomplice and joined with her family to commit murder. Instead, the State produced evidence that Petitioner struck her estranged husband in the head with a hammer and then called 911. After the 911 call, Petitioner's father fatally shot the estranged husband. Under the specific facts of this case, assault and battery of a high and aggravated nature [ABHAN] is a lesser included offense of murder. There is evidence in the record that Petitioner only committed ABHAN. The trial judge erred in refusing to instruct the jury of the lesser included offense.

The State's failure to produce sufficient evidence of accomplice liability is related to the State's failure to produce sufficient evidence of a conspiracy as discussed in issue two. The essence of a conspiracy is the agreement. With regard to accomplice liability, in State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276–77 (2017), the South Carolina Supreme Court wrote:

“Under the hand of one is the hand of all theory [of accomplice liability], 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.” State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). “Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt.” Id. at 262, 647 S.E.2d at 705. “However, ‘presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].’” Id. (alteration in original) (quoting State v. Hill, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

Additionally, in State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010), the South Carolina Supreme Court wrote:

For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing. Also, the courts have required that the **alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide**, or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions. 40 Am. Jur. 2d *Homicide* § 26 (2010) (emphasis added); see 40 C.J.S. *Homicide* § 30 (2010) (“To be guilty as an accomplice to homicide, a defendant must have acted with the state of mind required for guilt.”).

It is undisputed that the estranged husband, John Ferrell, died as a result of gunshot wounds fired by Petitioner’s father **after** Petitioner struck Ferrell with a hammer and called 911. On the recording of Petitioner’s 911 call Petitioner reports that Ferrell had broken into the home and was trying to kill her and her children. State’s exhibit #94. Her statement, “you gotta get him” while on the phone with 911 and her later purported statements that she did it because her dad hesitated, and that she did what she had to do to protect her family are not sufficient to show that she aided and abetted her father in fatally shooting Ferrell outside of the home. The statements reflect that she acted to protect herself and her family not that she acted with the intention of encouraging murder.

The State failed to prove that Petitioner knew about the text messages and telephone calls between her 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 her 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). The State failed to establish that Petitioner was present at the scene of the crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime. The State was not entitled to an accomplice liability charge with

regard to Petitioner¹. As a result, there is evidence in the record that Petitioner was only guilty of ABHAN by striking Ferrell with the hammer.

In addition to the intervening 911 call discussed in the petition for writ of certiorari, the present case is also distinguished from State v. Fields, 314 S.C. 144, 145, 442 S.E.2d 181, 182 (1994), because, “At trial, the State presented evidence that appellant [Fields] participated in beating the victim by kicking him while he was on the ground. Appellant testified he only pushed the victim from behind and the others then beat him. Appellant 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.” The deceased in Fields died as a result of being beaten by a group of people. In the present case Ferrell died as a result of a gunshot wound. The State in the present case failed to present evidence that Petitioner participated in the shooting. Under the unusual and specific facts of this case, the trial judge erred in refusing to instruct the jury on the law of ABHAN as a lesser included offense of murder. The error requires reversal of the murder conviction.

¹ There was no objection to the accomplice liability charge.

2. The Court of Appeals erred in finding that the trial judge correctly refused 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.

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. The case is distinguished from State v. Phillips, 416 S.C. 184, 785 S.E.2d 448 (2015). In Phillips the South Carolina Supreme Court wrote:

We find there is direct and circumstantial evidence that, when construed in the light most favorable to the State, could allow the jury to conclude Phillips acted with extreme indifference in administering the medication that caused Child's death. The testimony indicates the administration of multiple doses of Tussionex and a concentration of at least two-and-a-half times the therapeutic amount of the drug in Child's blood. It is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous. Importantly, Phillips herself testified she would never give Child medication not prescribed to him and nor would she give any medication to a child under the age of two. There is no question that Child was in the care and custody of Phillips and her son at the time of the lethal dose; Phillips herself testified he was never alone during the weekend. Accordingly, the evidence was sufficient to allow a reasonable juror to conclude Phillips acted with extreme indifference to human life in administering the Tussionex.

416 S.C. at 196–97, 785 S.E.2d at 454.

The evidence presented by the State against Petitioner in the present case is far less than the direct and circumstantial evidence presented in Phillips. The Court of Appeals found that 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" constitute acts in furtherance of a conspiracy. State v. Hughes, No. 2018-000659, 2021 WL 3076693, at *3 (S.C. Ct. App. July 21, 2021). These statements, however, viewed with Petitioner's concerns about the custody dispute and her prior comment that she wished her estranged husband was just gone are still not sufficient to establish a conspiracy to commit murder.

Viewing the evidence in the light most favorable to the State, the State failed to present evidence from which the jury could fairly and logically deduce that there was an agreement between Petitioner and anyone to murder the estranged husband, Ferrell.

3. The Court of Appeals erred in finding that the trial judge correctly refused to grant trial counsel's motion to be relieved as counsel.

Two months prior to trial counsel representing Petitioner moved to be relieved claiming 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). The judge denied the motion to relieve counsel. (R. pp. 13-14). The trial judge erred.

Counsel’s motion to be relieved was not based on grievances filed against counsel by Petitioner. Counsel’s motion was not based on a disagreement involving trial strategy. Instead, the motion was based on lack of trust between Petitioner and counsel based on counsel’s belief that Petitioner or her family intentionally attempted to publicly defame her and hurt her career. Counsel’s belief created a conflict which required the judge to grant the motion to relieve counsel and appoint conflict free counsel. Petitioner’s request that the judge relieve counsel was not an attempt to manipulate the PCR system as discussed in Richardson v. State, 377 S.C. 103, 659

S.E.2d 493 (2008). The Court of Appeals erred in finding that the trial judge properly exercised his discretion in denying counsel's motion to be relieved.

The Court of Appeals 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). It is undisputed that the estranged husband, John Ferrell, died as a result of gunshot wounds fired by Petitioner's father, not Petitioner. The same judge sentenced the father to forty (40) years in prison. (R. p. 585, lines 18-22). The jury found the co-defendant brother not guilty of murder but guilty of conspiracy. The judge sentenced the brother to four (4) years for conspiracy. The judge sentenced Petitioner to thirty (30) years for murder and five (5) years concurrent for conspiracy. While Petitioner submits that the facts of the present case constitute an actual conflict where Petitioner is not required to show prejudice, the fact that the jury found the brother not guilty of murder, despite evidence of the text messages between the brother and the father, supports prejudice from the failure to relieve counsel.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.



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This 15th day of November, 2021.