STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole

Appellant Case No 2021-000692
Lower Case Nos. 2019GS4202503, 2019GS4202504

State of South Carolina, ... Respondent,

vs.

Robert T. Gentry . . . . . Appellant.

INITIAL BRIEF OF APPELLANT

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Statement of Issues Presented

Question I: Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory before the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, that would tend to prove that Mr. Gentry knew of Tremaine Pierre Johnson's plan to kill Brechue Wiles and that he willfully aided Mr. Johnson in accomplishing the murder?

Question II: Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory after the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, that would tend to prove that Mr. Gentry knew Tremaine Pierre Johnson had killed Brechue Wiles and that he willfully aided Mr. Johnson in covering up the murder?

Statement of the Case

Procedural History

On February 12, 2019, Robert Tyrell Gentry was arrested on the charges of accessory before the fact to murder and accessory after the fact of murder. The grand jury indicted him on these two charges on May 3, 2019. He and his co-defendant, Tremaine Pierre Johnson, were tried before the Honorable J. Durham Cole and a jury on June 14 - 17, 2021. Mr. Gentry was convicted of both charges. On June 17, 2021 Judge Cole sentenced him to 30 years on the accessory before the fact to murder and 15 years on the accessory after the fact to murder. Both sentences were to run concurrently

Mr. Gentry filed his Notice of Appeal on June 25, 2021.

Factual History

Tremaine Pierre Johnson was involved in a relationship with Brechue Wiles. As a result, Ms. Wiles became pregnant with his child. The true father of the child was not known until over a year after her death. Rec. on App. at 414, l 25 to 415, l 3.

On May 9, 2019, Ms. Wiles left the residence of her aunt to meet with a person. She did not disclose to her aunt the person with whom she was meeting. She did not return from this meeting. Rec. on App. at 125, ll 22-23; 128, ll 1-7

On May 11, 2019, an early morning walker noticed a body, later identified as Ms. Wiles, in Duncan Park Lake. Rec. on App. at 121, l 4 to 122, l 11. Also found at the scene were her shoes, keys and automobile. She died of a single gunshot wound to the head. Rec. on App. at 431, ll 9-18.

Mr. Johnson was investigated because he had been involved with Mr. Wiles. He gave

permission for his cell phone to be searched. Rec. on App. at 210, ll 11-15. In the cell phone were numerous messages between Mr. Johnson and Ms. Wiles. In addition, the investigators found messages between Mr. Johnson and Mr. Gentry. Rec. on App. (exhibit 22). Based upon these messages and the fact the two people knew each other, the police investigated Mr. Gentry as a suspect. After reviewing the text messages between Mr. Johnson and Mr. Gentry, and examining the searches Mr. Gentry made, Mr. Gentry was arrested on February 12, 2019.

Standard of Review

As this is a legal question as to the sufficiency of the evidence, the standard of review is *de novo*. "But when such a purported finding is appealed, whether it was grounded upon any competent, substantial evidence is a question of law for decision by the Court, and it will be reversed in the absence of such basis." *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841, 851 (1944)

Argument

Question I

Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory before the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial would tend to prove that Mr. Gentry knew of Tremaine Pierre Johnson's plan to kill Brechue Wiles and that he willfully aided Mr. Johnson in accomplishing the murder?

"There are three elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that he was not present when the offense was committed; (3) that the principal committed the crime." *State v. Farne*, 190 S.C. 75, 1 S.E.2d 912, 915–16 (1939). While not specifically stated, the *mens rea* for the crime would be willfully and with malice aforethought.[1] This is correct because this is the *mens rea* for murder in South Carolina.

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[1] This point is made here because the trial court did not place any *mens rea* in his charge for accessory before the fact to murder. The trial judge simply stated that Mr. Gentry needed "to have in some way provided aid." Rec. on App. at 544, ll 21 - 23. South Carolina Code § 16-1-40 contains no mens rea. The indictment refers to "knowing that Tremaine Pierre Johnson intended to commit a crime." Rec. on App. (Indictment) No crime was stated. No objection was taken to this failure to charge a *mens rea*.

"Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased." S.C. Code. § 17-19-30. As the accessory before the fact statute does not have a *mens rea*, the *mens rea* is what was applicable at the common law. The New York Court has stated the applicable *mens rea* for the common law crime of accessory before the fact. "Accordingly, to be an accomplice one must have the necessary intent or 'mens rea' in the same manner as would be required to convict one of being a principal." *People v. Beaudet*, 31 A.D.2d 705, 706, 295 N.Y.S.2d 697, 700 (1968), rev'd, on other grounds 32 N.Y.2d 371, 298 N.E.2d 647 (1973)

In this totally circumstantial evidence case, the State produced no substantial circumstantial evidence to support either that Mr. Gentry had knowledge Mr. Johnson would commit a crime or he substantially aided Mr. Johnson in committing the crime. The State needs proof of both to sustain the conviction for accessory before the fact.

As this is a pure circumstantial evidence case, there are no credibility issues for the jury to resolve. As a result, this Court is in as good a position to determine if the inferences support the conviction as was the jury.

Defining Substantial Circumstantial Evidence

The first question to be answered is, exactly what is substantial circumstantial evidence? This question has never been answered by our courts, perhaps because no litigant has ever asked the court to define the term. "A conundrum exists in the criminal case law of South Carolina: the term 'substantial'- as it relates to the scope of review for directed verdict motions - has never

been defined." *State v. Cherry*, 348 S.C. 281, 295, 559 S.E.2d 297, 304 (Ct. App. 2001), aff'd but criticized, 361 S.C. 588, 606 S.E.2d 475 (2004)(Anderson, concurring in part and dissenting in part)[2]

Mr. Gentry now asks this court to define the term. Some evidence, whether the evidence be circumstantial or direct is not sufficient to convict. A probability that the facts are sufficient to convict is also not sufficient. If the theory of the state is plausible, the facts are not sufficient to convict. This principle was clearly established in *Jackson v. Virginia*, 443 U.S. 307 (1979). [3] In *Jackson,* the Court said, "But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. In the early days of reviewing the sufficiency of the evidence to sustain the conviction, the South Carolina Supreme Court said, "This court has no jurisdiction to weigh the sufficiency of testimony in a law case, and can only consider whether the verdict is wholly without evidence. We cannot say there was a total failure of evidence to convict in this case." *State v. Havird*, 88 S.C. 227, 70 S.E. 721, 721 (1911). When the standard of review was a mere "modicum," the "no weighing" was in fact required. We have moved beyond that standard.

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[2] The Courts of our state have defined "substantial" as it relates to a standard of review in appeals from administrative agencies. *See, Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 295, 299, 422 S.E.2d 118, 120 (1992)("We have defined 'substantial evidence' to mean " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Internal citations omitted). Evidence sufficient to sustain a civil verdict should not be judged by the same sufficiency standard as that to sustain a criminal verdict.

[3] The application of this case to South Carolina was first recognized by Justice Gregory in his dissent in *State v. Simpson*, 275 S.C. 426, 429, 272 S.E.2d 431, 432 (1980).

One writer has suggested that the jury in a criminal case should not weigh evidence, but simply determine if the State has proven the case beyond a reasonable doubt. "In a criminal trial, where the standard for conviction is proof beyond a reasonable doubt, a weighing proposition would be detrimental to the defendant, as it, at best, implies the use of a preponderance of the evidence standard, which the Supreme Court emphatically rejected in *Winship*." Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 238 (2007). And if the jury "weighs" the evidence, how does a jury then exclude a reasonable hypothesis of innocence? What "weight" should the jury give to a reasonable hypothesis of innocence? Does a jury say the explanation of innocence is simply not as likely? And if they do, how much less likely is required for an acquittal? These questions simply establish that under a reasonable doubt standard, if a reasonable explanation of innocence exists, then the State has not met its burden of proving the case beyond a reasonable doubt. Jurors should not be required to make a determination that the guilty explanation is highly likely, somewhat likely or probably likely. All these standards should fall short of proof beyond a reasonable doubt if the innocent explanation from the facts is reasonable. As the South Carolina Supreme Court said over 100 years ago, "Where circumstantial evidence is relied on, the absence of reasonable doubt implies impossibility of explaining the evidence on any reasonable hypothesis of innocence. The effect of evidence not being sufficient to exclude every other reasonable hypothesis than guilt is to leave doubt of guilt more or less strong, according to the circumstances of the particular case." *State v. Jackson*, 68 S.C. 53, ___, 46 S.E. 538, 539 (1904). This standard should be used to define substantial circumstantial evidence and to review the sufficiency of the evidence on

appeal.

Judge Ralph King Anderson, in his concurring and dissenting opinion in *Cherry*, discusses the concept of "weighing" evidence.[4] In that discussion he states, "Proper application of this standard requires a determination of whether the state has presented evidence that reasonably supports every element of a charged crime." *Cherry*, at 298, 559 S.E.2d at 305(Anderson, concurring in part and dissenting in part). While this broad statement is an accurate statement, it does not address what the trial judge does when the evidence is virtually undisputed and the evidence is circumstantial. A jury is well equipped to make the determinations of credibility. In the present case, the credibility of the witnesses is not an issue. When an appellate court reviews the evidence, all credibility issues should be resolved in favor of the State. This is the traditional standard of review. And with no credibility issues in the present case, making such a determination as to credibility is easy.

In a circumstantial evidence case, should a trial court send the case to the jury if, after deciding credibility issues in favor of the State, the trial court determines the circumstantial evidence could easily support either a conviction or acquittal? What if the trial court determines that the circumstantial evidence is only slightly in favor of the State on the issue of guilt? If under the traditional standard of review the jury is to determine the value of the evidence, then the jury gets to decide the 50-50 case or the 51-49 case. Under these circumstances, can any court truly say the State has proven the case "beyond a reasonable doubt"? Under these facts, is the circumstantial evidence substantial? "However, if the evidence viewed in the light most

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[4] *Cherry* is a very unique case. While six of nine judges would have reversed the conviction for one reason or another, the conviction was affirmed due to the lack of consensus as to the basis for the reversal. Regardless, the reading of the various opinions is educational.

favorable to the government supports an equal or nearly equal theory of guilt and of innocence, we must reverse the conviction because a reasonable jury, under these circumstances, necessarily entertains a reasonable doubt." *United States v. Rasco*, 123 F.3d 222, 228 (5th Cir. 1997). *See, also, People v. Rodriguez,* 63 A.D.2d 919, 920, 406 N.Y.S.2d 63 (1978)("The evidence in the present case is equally consistent with a conscious objective to cause serious physical injury or with a conscious objective to cause death. Such evidence thus equally consistent with the two intents may not form the basis for a finding against the defendant of the graver intent.") If the State has not eliminated a reasonable explanation of innocence, as a matter of law, the State has not proven the case beyond a reasonable doubt and the circumstantial evidence is not substantial.

The South Carolina Supreme Court has taken inconsistent positions as to circumstantial evidence cases. *Compare*, *State v. Bostick,* 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Arnold,* 361 S.C. 386, 605 S.E.2d 529 (2004) and *State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009) *with State v. Larmand*, 415 S.C. 23, 780 S.E.2d 892 (2015), *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016) and *State v. Pearson*, 415 S.C. 463, 783 S.E.2d 802 (2016). In *Bennett*, Justice Hearn stated:

> Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.
> *Id.* at 237, 781 S.E.2d at354

The question not answered in Justice Hearn's statement is: If a reasonable theory of innocence exists, has the State proven the case beyond a reasonable doubt? If the State has not

eliminated a reasonable hypothesis of innocence, has the State met its burden of proof? Would the language used by Justice Hearn permit a conviction to stand if both inferences are equal?

Properly understood, substantial circumstantial evidence has to mean, at the very least, that the theory for conviction is substantially more likely than the theory for acquittal. Only then should the circumstantial evidence case be submitted to the jury. Under these circumstances, a trial court and an appellate court do, to some extent, "weigh" the evidence. But if the standard of proof of beyond a reasonable doubt is to have any real meaning, then this type of weighing by judges, trial and appellate, must be done. After all, a pure circumstantial evidence case is the only type of case tried in our country where all the witnesses can be truthful, and an innocent person convicted.

Circumstantial Evidence in this Case

Against these standards the evidence in this case must be viewed. The evidence in this case, when credibility is resolved in favor of the State, shows there is no substantial evidence sufficient to convict. The State must prove each element of the crime beyond a reasonable doubt. So, before Mr. Gentry can be convicted, the State must prove beyond a reasonable doubt Mr. Johnson committed the act of murder.[5] Second, the State must prove Mr. Gentry knew Mr. Johnson was going to commit the murder. Thirdly, the State must prove Mr. Gentry willfully and with malice aforethought aided Mr. Johnson in committing the murder of Ms. Wiles. The State offered no direct evidence that Mr. Gentry knew, or even should have known, that Mr.

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[5] This sufficiency of evidence to sustain the conviction of Mr. Johnson will be fully addressed in his appeal. As the evidence in Mr. Gentry's case as to the second and third elements is so weak, Mr. Gentry will only discuss the issue of his willfully participating in the planned murder.

Johnson intended to murder his girlfriend. The State did produce evidence that Mr. Gentry and Mr. Johnson met shortly before Ms. Wiles was murdered. The State produced evidence that a few hours before the murder, Mr. Gentry and Mr. Johnson talked. State's Exhibit 22. Caprice Alo, the former girlfriend of Mr. Gentry, testified that Mr. Johnson came by the house of Mr. Gentry on May 9, 2019. Rec. on App. at 371, l 13 to 373, l 7. This was at about 4 or 5 on the afternoon of the murder. Rec. on App. at 374, l 10 -16. Mr. Gentry did not get in the car with Mr. Johnson. He simply talked to him for a period of less than 5 minutes. Ms. Alo did not see Mr. Gentry give anything to Mr. Johnson. Rec. on App. at 375, ll 5 - 24

The State offered several text messages and telephone calls between Mr. Gentry and Mr. Johnson. Both Mr. Johnson and Mr. Gentry gave permission for their phones to be searched. Rec. on App. at 199, ll 11 - 12; 210, ll 12 - 15. Mr. Gentry also gave permission for his home and automobile to be searched. Rec. on App. at 229, ll 15 - 18.

The text messages between Mr. Gentry and Mr. Johnson do not prove or suggest any knowledge on the part of Mr. Gentry that Mr. Johnson intended to murder Ms. Wiles. William Reece, the investigating officer, testified that no text message or Facebook communication between Mr. Gentry and Mr. Johnson ever mentioned Ms. Wiles or her pregnancy. Rec. on App. at 292, l 2 - 21. No communication between them ever referenced a firearm or returning a firearm. Rec. on App. at 294, ll 294, ll 1 - 24. They only show communications between two people who knew each other. This is not sufficient substantial circumstantial evidence to sustain a conviction. Granted a weapon could have been delivered to Mr. Johnson when the two people met as described by Ms. Alo. Such a conclusion, however, would be mere speculation. It would be just as speculative to say a weapon was exchanged the previous day or a week before.

The State also produced testimony that Mr. Gentry had on March 20, 2017, purchased a weapon capable of firing a bullet similar to the cartridge found at the scene. Rec. on App. at 321, ll 11 - 14. The gun box was found at Mr. Gentry's residence under his bed, but the gun was not. Rec. on App. at 234, l 3 - 23. Also, Tulammo 40 caliber ammunition, the same type of the cartridge found at the scene, was found in the glove box of his car. Rec. on App. at 231, l 14 - 20. The absence of an explanation by Mr. Gentry as to the location of the firearm cannot be considered by the jury or this Court. As the South Carolina Supreme Court said, "Argument of counsel for the State that Schrock has no alibi is without merit. It is not incumbent upon an accused person to prove that he was somewhere else at the time and place of the crime. By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act." *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). By bringing this case, the State assumed the burden of proving Mr. Gentry supplied a weapon to Mr. Johnson with full knowledge that Mr. Johnson intended to murder Ms. Wiles. They failed in that burden.

In the absence of any testimony that something was exchanged when Ms. Alo observed Mr. Gentry and Mr. Johnson meet, a conclusion a gun was exchanged is mere speculation and speculation is not sufficient to convict. And to conclude from the first speculative inference that Mr. Gentry knew, with no proof of the fact, Mr. Johnson intended to murder his girlfriend is to pile an inference upon an inference.

With no testimony that Mr. Johnson ever requested Mr. Gentry to give him a firearm, the mere fact the firearm purchased by Mr. Gentry a year before the shooting is missing is not proof Mr. Gentry gave a firearm to Mr. Johnson. "The motion [for directed verdict] should be granted

where a jury would be speculating as to the accused's guilt, * * * or where the evidence is sufficient only to raise a strong suspicion of guilt." *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996)(internal citations omitted). Based upon the absence of a firearm, a jury is not entitled to infer that Mr. Gentry gave the firearm to Mr. Johnson and, again with no proof, infer that Mr. Gentry knew Mr. Johnson was going to murder Ms. Wiles. This is building an inference upon an inference. "[T]o establish the intent, the evidence of knowledge must be clear, not equivocal. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." *Direct Sales Co. v. United States*, 319 U.S. 703, 711, (1943)(internal citations omitted)[6]. A conviction for accessory before the fact to murder also cannot be made by piling an inference upon an inference. *State v. Gunn*, 313 S.C. 124 437 S.E.2d 75 (1993)

After rejecting the exclusion of any other reasonable hypothesis standard of review, the South Carolina Supreme Court has twice reversed convictions using that standard of review on appeal. In *State v. Hernandez*, 382 S.C. 620, 626, 677 S.E.2d 603, 606 (2009), Chief Justice Toal in footnote 2 said, "Although in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) the Court abandoned this charge and held that it may confuse a jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, it nonetheless illustrates the lack of evidence against Petitioners." Again, in *State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) Chief Justice Toal stated:

> The traditional circumstantial evidence definition illustrates the deficiency in the State's evidence against Petitioner. This definition

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[6] The evidence in this case arose out of drugs sold to a physician in the small community of Calhoun Falls, SC.

> provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:
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> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

The logic of such a conclusion is compelling. If another reasonable alternative exists, the State simply has not proven its case beyond a reasonable doubt. The State should be required to negate any other reasonable explanation. As discussed by one author, if the presumption of innocence is properly understood, a juror should be looking for proof of innocence and not proof of guilt. *See,* Chauvin, at 239. ("[F]or it would seem that if a juror is looking to find a defendant guilty, she is not presuming he is innocent.") Thus, the burden being on the government to exclude any reasonable hypophysis of innocence seems reasonable and logical.

Other Courts have applied a similar standard. The Arkansas court has held, "Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture." *Morgan v. State*, 2009 Ark. 257, ___, 308 S.W.3d 147, 152 (2009). Georgia has enacted such a standard of review by statute. Georgia Code § 24-14-6. The evidence in this case certainly falls short of compelling a conclusion of guilt.

The Minnesota Supreme Court did a lengthy discussion of the proper standard of review in a circumstantial evidence case. The Court adopted a position very similar to the position used by Chief Justice Toal. The Court said, "Having preserved the jury's credibility findings, the appellate court considers at the next step whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a reasonable inference

inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole." *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). Again, here, a reasonable inference inconsistent with guilt can be drawn from the facts. Even assuming Mr. Gentry gave a firearm to Mr. Johnson, nothing in this record remotely establishes he did so with the required *mens rea* or knowledge of Mr. Johnson's intent.

Suppose the State at a trial proves the following facts and no others. Crack cocaine is found in a bag in a suitcase in the living room belonging to the Defendant and her husband. No other facts are proven. Under these facts, the State has proven that the drugs belong to the Defendant, the drugs belong to the Defendant and her husband or the drugs belong to the husband. Under these facts the jury will have two-third chance of convicting a guilty party if they convict the defendant. Is a two-thirds chance substantial circumstantial evidence to convict? Or should the trial court, or the appellate court on appeal, direct a verdict of not guilty because the State has not eliminate the one-third chance of the Defendant being actually innocent?[7]

Here the State has not eliminated the innocent explanation that Mr. Gentry did not give any firearm to Mr. Johnson or the innocent explanation that Mr. Gentry did not know of Mr. Johnson's intent to kill his girlfriend. Before this conviction can be upheld, this Court is required to make the determination that these two reasonable explanations have been eliminated by the proof presented by the State. Only then can this Court truly conclude the circumstantial evidence is in this case is substantial.

Just as this Court is bound by the United States Supreme Court decision in *Jackson*, this

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[7] An interesting discussion about the probability of guilt is contained in Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARVARD L. REV. 1187 (1979)

Court is also bound by the Fourth Circuit Court of Appeals decisions as to the constitutional sufficiency of the evidence. In *Goldsmith v. Witkowski*, 981 F.2d 697 (4th Cir. 1992), the Fourth Circuit reversed a drug conviction that was based upon circumstantial evidence. The defendant was found in the house sitting at a table with illegal drugs being on the table. The testimony established that the apartment did not belong to Mr. Goldsmith. The Fourth Circuit, applying the *Jackson* standard of review, reversed the conviction. The South Carolina Supreme Court, without referring to the substantial circumstantial evidence standard of review, had affirmed the conviction. The Fourth Circuit stated, " Essentially, the government only proved Goldsmith's presence in the apartment and his awareness of the drugs. Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs." *Id.* at 701. After recognizing that the openness of the drugs permitted an inference Mr. Goldsmith had knowledge of the presence of the drugs, the Court further said, "The state courts in this case, however, did not point to any evidence from which a jury could infer dominion or control. Nor do we find such requisite record evidence of that element of the state offense as would meet the *Jackson* standard." *Id.* The Fourth Circuit, thus, gave credence to the reasonable explanation of innocence that Mr. Goldsmith did not have dominion or control over the drugs that the South Carolina Supreme Court had rejected. To the Fourth Circuit, failure to exclude the innocent explanation of lack of dominion and control was a lack of substantial circumstantial evidence.

The circumstantial evidence charge to the jury and the appellate review should put a heavy burden on the State to prove its case to a very high standard. This is what proof beyond a reasonable doubt means. When the standard of proof before a jury or the standard of review by

an appellate court is lessened, it, of course, makes it much easier for the State to convict the guilty. But, especially in circumstantial evidence cases, it also makes it much easier for the State to convict the innocent. As one court has said, "[P]ermitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent." *Commonwealth v. Bujanowski*, 418 Pa.Super. 163, 172, 613 A.2d 1227, 1232 (1992).

Question II

Did the trial court err in failing to direct a verdict in favor of Robert Tyrell Gentry on the charge of accessory after the fact to murder when the evidence at trial failed to show any evidence, direct or circumstantial, which would tend to prove that Mr. Gentry knew Tremaine Pierre Johnson had killed Brechue Wiles and that he willfully aided Mr. Johnson in covering up the murder?

For a person to be guilty of accessory after the fact, the South Carolina Supreme Court has said three factors must be present.

> An accessary after the fact is one who, knowing a felony to have been committed receives, relieves, comforts, or assists the felon. * * *. Three conditions must unite to render one an accessary after the fact: (1) The felony must be complete. (2) The accessary must have knowledge that the principal committed the felony. (3) The accessary must harbor or assist the principal felon.
> *State v. Nicholson*, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952)

In addition, the refusal of a person to give information does not make one guilty of accessory after the fact even if the refusal, in some manner, aids in the cover up of the crime. "Where, however, the speaker reasonably believes that the information concealed could be used

against her in a criminal prosecution as an accessory or principal in the underlying felony, then the privilege bars a misprision prosecution." *State v. Smith*, 357 S.C. 182, 186, 592 S.E.2d 302, 304(2004). While *Smith* involved a misprision of a felony, the statement also applies to accessory after the fact. Based upon the facts, Mr. Gentry had a reasonable basis for believing if he told of any of his alleged involvement, he could have been prosecuted. This is especially true considering that without giving a statement to the police, he was arrested for accessory before and after the fact to murder.

As to accessory after the fact, neither the indictment nor the charge to the jury contains a *mens rea*. The accessory after the fact indictment and jury charge do contain a requirement that Mr. Gentry has knowledge that a murder by Mr. Johnson had been committed, but contains no *mens rea* as to willfully aiding Mr. Johnson in covering up the murder. As stated in Question I, the *mens rea* for an accessory is the same as the underlying crime. Thus, the *mens rea* for accessory after the fact to murder is willfully.

The principles discussed in Question I as to the proper standard of review in circumstantial evidence cases also applies to this question. As with accessory before the fact, the evidence as to accessory after the fact is also circumstantial. The evidence should be viewed by the same standard of review..

The evidence as to accessory after the fact is also devoid of any evidence that Mr. Gentry took any action to harbor or assist Mr. Johnson in concealing the crime. The record contains little, if any, evidence he knew a murder had been committed. The indictment as to accessory after the fact alleges no facts to constitute the crime. Rec. on App. at __(Indictment for Accessory after the fact.). In his closing argument, Solicitor Barnette only makes references to

the searches found on his phone.[8] He does not explain how these searches made Mr Gentry guilty of accessory after the fact. The facts do not show, and Mr. Barnette did not argue, that any of the searches hindered the investigation or aided Mr. Johnson in any manner.

The main pieces of evidence against Mr. Gentry as to accessory after the fact are internet searches listed in Exhibit 22. These searches are for a gun on a website called "Cheaper Than Dirt." In addition, there are searches about stolen pistols. Assuming these searches prove what the State contends — that Mr. Gentry knew at the time of the search his firearm had been used in a murder, the searches did nothing to cover up the crime or harbor or assist Mr. Johnson. Nothing in the record even suggests the searches were done at the request of Mr. Johnson. If Mr. Gentry had carried through on the searches and actually reported the pistol as being stolen or bought one to replace the one the State believed he gave Mr. Johnson, then perhaps, the State could argue Mr. Gentry might be guilty of accessory after the fact if he had the required intent. Mr. Gentry did not even get rid of the box the gun came in nor the ammunition that was of the same type used in the shooting. He did nothing to aid or assist Mr. Johnson in covering up the crime.[9]

The State also showed that after the murder, Mr. Gentry did not produce the firearm he

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[8] In his closing argument, Solicitor Barnette makes references to statements by Mr. Gentry in which Mr. Gentry claimed he knew where the missing pistol is located. Rec. on App. at 472, ll 8 - 18. Officer William Reece, who conducted the search of Mr. Gentry's car and house, never testified as to statements made by Mr. Gentry. At a pre-trial hearing, the State stated they were not going to introduce statements by Mr. Gentry. Rec. on App. at 87, ll 16 - 21; 89, ll 21 - 25; 90, ll 7 - 17.

[9] These internet searches at best are some evidence that Mr. Gentry learned of the murder after it occurred. Logic would dictate that if Mr. Gentry knew of the plan to use his weapon in a murder before hand, a plan to dispose of the weapon would have been made before the searches.

purchased over a year earlier. This fact does not support a claim he was guilty of accessory after the fact to the murder. To conclude from this fact that Mr. Gentry knew a murder had been committed with his weapon is speculation and certainly not substantial circumstantial evidence to sustain a conviction. As noted above, Mr. Gentry was under no obligation to aid the police in their investigation of the murder. As noted in Issue I, the State has the burden of proving Mr. Gentry knew of the crime and covered it up. The State cannot rely upon inaction on the part of Mr. Gentry to prove the crime. He was only under an obligation not to lie to them if they asked him questions. The State has failed in its effort to prove Robert Gentry was guilty of accessory after the fact.

CONCLUSION

For the foregoing reasons, this Court should reverse the convictions of Robert Gentry for accessory before and after the fact to murder.

January 25, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY

General Sessions Court
Honorable J. Derham Cole, Circuit Court Judge

Appellant Case No 2021-000692
Trial Court Case No. 2019GS4202503, 2019GS4202504

State of South Carolina ..... Respondent,

vs.

Robert T. Gentry ..... Appellant.

CERTIFICATE OF SERVICE

I hereby Certify that I, Sandy Traynham, am the Secretary for C. Rauch Wise, attorney for the Appellant in the above entitled case. That on January 25, 2022, I did send via e-mail a copy of the Initial Brief and Destination of Matter in the above case addressed to William M. Blitch, Jr., at wblitch@scag.gov.

January 25, 2022

Sandy Traynham
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January 25, 2022

VIA E-MAIL

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
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Re: State vs. Robert T. Gentry, Case No. 2021-000692

Dear Ms. Kitchings:

I am enclosing herewith for filing the Initial Brief of Appellant and Destination of Matter together with the Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc William M. Blitch, Jr. (by e-mail only)