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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONOVAN TIRRELL BRANNON,

APPELLANT.

APPELLATE CASE NO. 2022-000015

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by instructing the jury on accomplice liability, "the hand of one is the hand of all," since there was no evidence of any tacit or other agreement or plan to shoot at the decedent or the other man in the parking lot of the nightclub and the instruction on accomplice liability was therefore improper and prejudicial?

2.

Whether the court erred by allowing O'Brien Gilliam to testify that appellant was "making signs" with his hands on the dance floor on the night of the shooting since this was inadmissible evidence of gang activity in derogation of this Court's holding in Johnson v. State 433 S.C. 550, 860 S.E.2d 896 (Ct. App. 2021), since there was no evidence gang activity was probative of the motive or the intent for the shooting having occurred?

STATEMENT OF THE CASE

Appellant was indicted at the February 2016 term of the Lexington County grand jury for the offenses of murder and attempted murder. R. p.*. Appellant's case and that of co-defendant Shantrez Robertson on the same charges was called to trial on November 15, 2021 before the Honorable Walton J. McLeod IV, and a jury. Theo Williams and Hannah Williams represented appellant . David Mauldin represented co-defendant Robertson. Tr. 1

On November 19, 2021, the jury found appellant and co-defendant Robertson guilty of murder and attempted murder. Tr. 1157, ll.12-25. Appellant was sentenced to thirty-four years imprisonment for murder, and the judge imposed a concurrent sentence of thirty years for attempted murder. Co-defendant Robertson was sentenced to thirty-two years imprisonment for murder and thirty years concurrent for attempted murder. Tr. 1182, l.23 – 1183, l.17.

This appeal follows.

STANDARD OF REVIEW

Issue one – Accomplice liability instruction: "In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "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.

Issue two – Gang activity evidence: "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

STATEMENT OF FACTS

A pre-trial hearing was held on November 12, 2021, regarding, inter alia, objections to gang activity evidence. The solicitor claimed the "[d]efendants were in there [the club] throwing up gang signs and jumping around." The solicitor added that Johnson v. State, 433 S.C. 550, 860 S.E.2d. 896 (Ct.App. 2021) held that gang evidence was admissible "[i]f there's a motive or intent that connected that's connected to gang activity, Your Honor, we do have some latitude in that in presenting it." Supp. Tr. 18, l. 17 – 19, l. 24.[1]

The judge responded that given Johnson v. State, 433 S.C. 550, 860 S.E.2d. 896 (Ct.App. 2021), his "[i]nclination is to limit it. Now, whether to eliminate it may not be practical, but . . ." Supp. Tr. 19, l. 25 – 20, l. 3. Counsel for co-defendant Robertson said there had been no evidence presented to the defense pre-trial indicating that the incident in this case was gang related. An argument or "scuffle" can occur without it being gang related. Supp. Tr. 21, l. 19 – 22, l. 2.

At the end of the hearing, the judge noted it was stipulated that Johnson v. State, 433 S.C. 550, 860 S.E.2d. 896 (Ct.App. 2021) was the applicable case which all of the attorneys agreed controlled his ruling on the admissibility of gang affiliation evidence. The judge deferred ruling, however. Supp. Tr. 111, l. 1 - 126, l. 22.

At trial, Brandon Jeffrey testified that he was thirty-years-old at the time of the June 6, 2015 shooting in The Spot "parking lot."[2] Tr. 130, l. 8 – 131, l. 7. Jeffrey said that night he was "hanging with" the decedent, Tyrone Gantt a/k/a "Shine"; Andy Barnes a/k/a "Teddy P"; O'Brien Gilliam a/k/a "OB," and his cousin, Dee Dee. Tr. 131, l. 8 - 133, l. 11.

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[1] "Supp. Tr." is the November 12, 2021

[2] The parking lot was at the top of the hill above the club on a dirt road in a very rural area of Lexington County.

Jeffrey said they were all playing Madden on the PlayStation when Dee Dee convinced them to go with her to a party at The Spot. Tr. 135, l.1 – 136, l. 17. They then went to The Spot. They parked at the top of the hill above The Spot in rural Lexington County. Tr. 136, ll. 21-24.

When they went to enter the club, the bouncer would not let the decedent, Gantt, enter. Tr. 137, ll. 11-16. Since the bouncers were patting people down for weapons, it was inferred that Gantt was carrying a gun and that is why he was not allowed to enter.

Gantt returned to the club a short time later and was allowed to enter. There would later be evidence the others thought Gantt had returned to the car and placed his gun there so that he would be allowed into the club. Tr. 137, l. 12 – 138, l. 10.

Jeffrey said he saw appellant, whom everyone called "Fresh," at the club. He also saw co-defendant Robertson -- "Red Nose" -- inside the club the night. Jeffrey remembered that appellant talked to him, and he asked "What's up, Pedro? We dapped up, what's up, you know everything is everything. That's how it went. That's how I spoke to Fresh." It was later explained that "dapped up" meant exchanging "high fives." Tr. 140, ll. 5-13.

Jeffrey testified that he was bothered by people or a person "throwing up their signs" on the dance floor, and he did not like the "vibe" he was getting inside the club. Defense counsel objected to Jeffrey's speculation about what was occurring, and the solicitor agreed to "move on." Tr. 140, l. 1 – 141, l. 13

Jeffrey left the club. He remembered that "Gantt (a/k/a "Shine") and Teddy P had already left." Tr. 143, ll. 1-6. When they got to their car, Gantt was about to open the car door when "we heard a little chatter." Jeffrey recalled that Gantt said: "Hold on, man; let me see what's going on. So by that time, we was like, who y'all looking for? And Fresh (appellant) was like, '**you know we ain't looking for you**'. Next thing you know, it start(s); like shots going everywhere." Jeffrey

claimed appellant said, "where them pussy niggas at?" before this happened. Jeffrey said Red Nose (co-defendant Robertson) was with appellant and "both of them had pistols." Tr. 145, ll. 2-14.

Jeffrey remembered that after appellant told Gantt they were not looking for him "shots started getting fired." Jeffrey repeated that both appellant and co-defendant Robertson had guns in their hands. Tr. 147, l. 18 – 148, l. 6.

When the solicitor inquired about what clothes appellant and co-defendant Robertson were wearing that night, Jeffrey said appellant was wearing "a red bandanna shirt" and that co-defendant Robertson was wearing pants with stars on them.[3] When the solicitor went to introduce a Facebook photograph, state's exhibit #218, defense counsel Williams objected. Counsel said the photograph showed a gang sign, and it also showed appellant with alcohol in his hand. The solicitor said to the extent the photograph showed a gang sign or alcohol, she would redact out any display of a gang sign and the Bud Light bottle from the photograph. Tr. 165, l. 7 – 170, l. 5. Even though the photograph was redacted, defense counsel continued his objection to the photograph. Tr. 170, ll. 1-5.

On cross-examination, Jeffrey said that he remembered appellant coming up the hill towards the parked cars and him speaking to Gantt. Gantt asked appellant what he was talking about, and appellant said, "not you." The next thing Jeffrey remembered was "a bunch of shots ringing out." Tr. 200, ll. 1-9. Jeffrey admitted he never saw appellant or co-defendant Robertson

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[3] Co-defendant Robertson's attorney ridiculed any assertion that whatever happened was planned. He called Robertson's pants -- "clown pants." He told the jury "I don't think if he pulled them up, they would get to his crotch, much less his waist. You saw that video in the store. They kept falling down. So the plan is we're going to do an ambush and we're going to go and Shantrez is going to trot up that hill wearing those pants. And then he's going to run back down to the bottom lot and get the car and then drive up and come out of the car." Tr. 1118, 17 – 2229, l. 4.

"raise a gun" before he heard these gunshots. Tr. 200, ll. 1-17. On direct examination, Jeffrey nonetheless contended "from my perspective, it was coming from them [appellant and co-defendant Robertson]. Tr. 177, ll. 18-25.

When all of the shooting started, Jeffrey was hit in the leg by one of the bullets. Tr. 202, ll. 3-19. Whenever he heard the gunshots, Jeffrey crawled underneath the Dodge Charger for cover. Tr. 215, ll. 8-13. Jeffrey maintained that he did not see decedent Gantt with a gun that night, but he admitted that he did not know who shot first. Tr. 216, l. 20 – 217, l. 15.

Jeffrey testified that he saw appellant and the co-defendant with guns in their hands. He recalled appellant telling him -- "We ain't looking for you" -- immediately before the gunshots started. Tr. 221, l. 4 – 224, l. 18.

Batesburg-Leesville Police Officer Deepak Harpalani testified he was dispatched to the Creekview Apartments because a red car had pulled into the parking lot and an ambulance was needed for a gunshot victim from The Spot. It was 3:26 a.m. on June 6, 2015. Tr. 244, ll. 3-19.

Officer Harpalani remembered seeing appellant at the apartment complex early that morning. He remembered that appellant was "yelling and screaming." Appellant was wearing "red shorts with some design." However, Harpalani added he was not paying attention to what appellant was wearing because he was concerned with security at the apartment complex at that time. He did not want the scene to get out of control. Tr. 247, ll. 3-24.

There was evidence that forty-one shell casings were found after the shooting in the "parking lot" of The Spot. These shell casings had eight different "head stamps." Tr. 345, l. 10-

350, l. 24. There was evidence that the gunshot residue swabs on appellant's hands were **negative** after he was detained following the shooting.[4]

Andy Barnes a/k/a "Teddy P," was at The Spot on the night of the shooting. Decedent Gantt a/k/a "Shine" was with him, as was Jeffrey. It was Dee Dee's idea to go to the club that night and Barnes followed her there. Tr. 474, ll. 20-24; Tr. 477, l.14 – 479, l.4.

Barnes remembered that one of the bouncers said Gantt had a gun in his possession and Gantt was not allowed to enter the club at that time. After Gantt left and apparently put his gun in the car, he returned to the club. He was patted down again, paid the cover charge, and entered the club. Tr. 480, l. 25 – 481, l. 25.

Barnes said he became concerned when appellant was "doing things with his hands" so he left the club. The judge sustained defense counsel's objection to Jeffrey's statement that he told others "them boys got them guns up in the club." Tr. 485, ll. 1-11.

Barnes testified when they got to their car at the top of the hill, he saw appellant coming up the hill "swinging a gun. Appellant alleged said: "Where them pussy motherfuckers at?"" Tr. 491, ll.13-21; tr. 492 ll. 5-16. At that point a burgundy Crown Vic or Marquis drove up and stopped right in front of appellant. Barnes recalled that Gantt asked appellant: "Who is you talking about?" The next thing Barnes heard was gunshots. Tr. 493, l. 6 – 494, l. 16.

Barnes admitted he did not see appellant shoot a gun that night. Barnes explained that after he heard the first shot, "I jumped in my car to grab my gun out of the glovebox." Tr. 495, l. 13 – 496, l. 9. Barnes maintained that he was "confident" that decedent Gantt did not fire his gun at anyone before he was shot. Tr. 495, l. 13 – 496, l. 20.

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[4] SLED Agent Tyler Sturkie testified the gunshot residue kit that was performed on appellant was negative. Tr. 743 ll. 10-14.

Barnes claimed after the shooting "some guy came behind me and was like, 'man, let me get them guns, let me get them guns.' So, I mean, I wasn't thinking; I was in shock. *I just give him the gun.* He left and I stayed right there with Shine (decedent Gantt)." Tr. 500, ll. 1-9. (emphasis added).

Barnes maintained that he did not know the man he gave the guns to that evening. He claimed he later learned his name was "John Wayne," and that John Wayne was appellant's cousin. Tr. 500, ll. 1-21. Barnes later met Wayne at a hardware store, and he got the guns back from him at a local Hardee's restaurant. Tr. 501, ll. 9-14. Those guns were then turned over to law enforcement. See State's Exhibit 250 (SLED Firearms Report, Cartridge Case Summary). R. p. *.

SLED Agent Michelle Eichenmiller testified that the projectile removed from the decedent's left arm during the autopsy was a nine-millimeter bullet. Tr. 565, ll. 14-20. Eichenmiller testified that forty-one shell casings were recovered from the parking lot of The Spot nightclub after the shooting Tr. 579, ll. 4-15. Eichenmiller thought there were four firearms involved in the shooting, but she could not conclusively state that only four guns were involved. Tr. 603, ll. 11-21.

The pathologist, Dr. Janice Ross, testified victim Gantt was very likely standing and was possibly bent over when he was fatally shot. Gantt was five-foot-seven, and he had a blood alcohol reading of .229, and marijuana in his system at the time of his death. Tr. 616, l. 19 – 627, l. 19.

Gang reference allowed

O'Brien Gilliam, "OB," testified he was twenty-years-old at the time of the shooting at The Spot. Tr. 676, l. 7 – 677, l. 18. Gilliam said he was on the dance floor when he noticed appellant

was also on the dancefloor was moving his hands. Defense counsel objected to this testimony, but the judge overruled the objection.[5] Tr. 681, l. 14 – 682, l. 9.

Gilliam then said that Brandon Jeffrey "came and got me, we left the club." Gilliam recalled that Jeffrey looked worried at the time they left the club. Tr. 683, l. 4 – 684, l. 24

Gilliam said he saw appellant walking up the hill, and appellant said: "Where you pussy motherfuckers at?" Gilliam testified that appellant had a gun in his hand at the time, and there were three other people with appellant. Tr. 684 l. 13 - 685 l. 16. Appellant walked up to Gantt, and Gantt asked appellant: "Who he was talking about?" Gilliam said at this time he saw a "Crown Vic or a Marquis" pull up and stop. Tr. 686, l.11 – 688, l.3. Gilliam said he saw a man get out of the passenger side of the car. He was wearing a white shirt and "he was light-skinned." Tr. 688, ll. 2-14. This man raised his hand and Gilliam heard gunshots. Tr. 688, l. 2 – 689, l. 20.

Gilliam "ducked and covered my ears." Tr. 689, ll. 21-22. Gilliam grabbed his cousin, Jeffrey, and pulled him into the car. He then went to look for Gantt nearby but Gantt was dead. "So I just jumped in the car with them and we left." Tr. 689, l. 21 – 691, l. 18.

Additional testimony

Anija Sales was the ex-girlfriend of co-defendant Robertson. Tr. 721, ll. 3-25. Sales admitted on June 8, 2015, two-days after the shooting that she sent Robertson a message that read, "Tonio [her cousin Antonio Stroman said]: y'all need to lay low. The detective said something about my name today." Tr. 729, l. 21 – 730, l.2. Sales said she was just doing what her cousin

[5] As argued infra, this contemporaneous objection was all that was necessary to preserve this issue for appeal. The context of the objection was obvious given the pre-trial motion to exclude this gang evidence, and the judge having discussed gang evidence with the attorneys during this pre-trial hearing. Further, defense counsel objected to similar gang tainted colored exhibits and gang type evidence throughout the trial.

Antonio Stroman told her to do, and she did not know the reason behind this "lay low" message. Tr. 730, ll. 3-12.

Antonio Stroman testified that he did not want to come to court to testify. He was under subpoena and had to appear. Tr. 753, l. 16 – 754, l. 1. Stroman said that he did not remember if he saw appellant or co-defendant Robertson at The Spot that fatal night. Tr. 780, ll. 11-18.

Stroman remembered that he got shot while leaving the parking lot of The Spot. Tr. 784, ll. 6-18. Appellant was in the car with him when he got shot. Tr. 786, ll. 1- 3; tr. 789 l. 6 – 790, l. 20. When the solicitor asked Stroman to admit that he told law enforcement he went to the club that night with appellant and co-defendant Robertson, Stroman said, "sounds about familiar, but, like I said, it's been so long ago, I don't remember, ma'am." Tr. 791, ll. 11-20.

The solicitor then called Lexington County Sheriff's Investigator Todd Garrick. Tr. 809, l. 13 - 810 l. 16. Garrick testified he spoke with Antonio Stroman on two separate occasions. Tr. 810, ll. 17-20.

Garrick said he first talked to Stroman while Stroman was in the emergency room. Garrick said that Stroman first told him that he went to the club with appellant and the co-defendant. There were no signs of trouble and they left the club at approximately 2:50 a.m. While Stroman was driving away, he was shot in the neck. Tr. 812, l. 14 – 813, l. 24.

In Stroman's second statement shortly thereafter, he told Garrick he was in his car alone leaving the parking lot when he heard gunshots "and then he heard Brannon [appellant] saying 'woah, woah, woah, and then he [appellant] and Robertson got in the car." Tr. 815, ll. 1-5, Stroman told Garrick he did not see any guns at that time. While Stroman was driving he was shot. Stroman crawled into the backseat and appellant got in the front seat and drove them away. Tr. 814, l. 18 – 816, l.11

Garrick talked to Stroman a third time at Stroman's residence. Tr. 816, ll. 10-18. Garrick said Stroman told him that he arrived at the club with appellant and the co-defendant at midnight or twelve-thirty a.m. They rode together to the club in his burgundy Grand Marquis. "Stroman stated that they hung out at the club and there was no problems or fights while they were there." Tr. 817, ll. 3-11.

Stroman told Garrick he left alone at about 3:50 a.m. He did not see appellant or the co-defendant leave the club or see them walk up the hill. While Stroman was driving away he had to stop and wait for traffic. He then heard appellant yell: "Woah, woah, woah," and "then Fresh (appellant) and Red Nose (co-defendant Robertson) got in his car." While they were attempting to leave, Stroman heard gunshots and he heard "the back glass of his car break." Stroman realized he had been shot. "He stated he got out of his car and began yelling for help, and then got in the back seat of the car. Stroman stated that Fresh got into the driver's seat and Red Nose was in the back passenger seat." They then drove to Creekview Apartments. Tr. 817, l. 3- 818, l. 23.

Garrick admitted on cross-examination that he told Stroman at some point during these statements that he could be criminally charged if he did not tell the truth about what occurred. Garrick denied that he did not "like" Stroman's first statement. Garrick offered that Stroman's first statement did not "jive" with his information that he was receiving from other sources . Tr. 824, l. 20 – 825, l. 21.

Investigator Brannon Marthers of the Lexington County Sheriff's Department testified regarding various text messages around the time of the shooting. Marthers said that June 6, 2015, co-defendant Robertson sent a message to his girlfriend stating that he needed a place to "lay low" for a while . Tr. 893, ll. 10-25; tr. 898, ll. 1-3.

Marthers admitted on cross-examination that a couple of weeks before trial the authorities had obtained an arrest warrant for Tyrese White in this murder and attempted murder case. Marthers acknowledged it took law enforcement five years to conclude that White was involved in whatever happened, and that White had not yet been arrested. Tr. 925, l. 15 - 967, l. 22.

Objection to the accomplice liability instruction

Counsel Williams moved for a directed verdict on behalf of appellant. Williams noted that the state had provided evidence that decedent Gantt was shot five times and that the bullet recovered from his shoulder "was ultimately determined **not** to have come from any of the guns in evidence." The only gun that could be associated with appellant was a nine-millimeter Ruger and it was not that weapon either. Tr. 1048, l. 14 – 1050, l. 18. (emphasis added).

As for the "hand of one hand of all" or accomplice liability theory, Williams argued there was no evidence of any prearranged plan or common scheme in this case. Williams acknowledged there was evidence appellant communicated earlier in the day with co-defendant Robertson, "and even the alleged third shooter, Tyrese White." Tr. 1051, ll. 8-11. However, there was evidence they were acting together at The Spot to commit a crime. Tr. 1052 l. 2- 1054 l. 16.

Williams stressed there was no evidence of any "intent or plan or scheme or even an exclamation from my client's mouth or any of them that could indicate a common plan or intent to do anything period, and therefore, he can't be charged under hand of one hand of all theory if he [was] not joining [in] with the perpetrator of the crime – the perpetrator, the person who committed the crime." Tr. 1052, l. 2 – 1054, l. 16.

There was no evidence, even in passing, that appellant joined with anyone else in committing a crime by shooting at Gantt and Jeffrey. Defense counsel Williams also added there was no evidence of any intent to kill victim Brandon Jeffrey under an accomplice liability theory.

Tr. 1052, l. 2 – 1054, l. 16. Co-counsel Mauldin joined in the motion as to there being no viable theory of guilt under the accomplice liability concept, and he cited the Supreme Court's opinion in State v. Smith, 430 S.C. 226, 845 S.E.2d 495 (2020), the case out of Five Points in the city of Columbia in Richland County where an unintended victim was hit by a gunshot while waiting for a ride. Tr. 1054, l. 19 – 1055, l. 19

Defense Counsel Williams also noted that even the state's evidence of appellant walking up the hill looking for somebody that led decedent Gantt to ask appellant "who they were looking for" and appellant replying "not you" was not evidence of accomplice liability in the murder of Gantt and the attempted murder of Jeffrey. Tr. 1056, l. 6 – 1057, l. 12.

The judge denied the directed verdict motion. Tr. 1058, l. 18 – 1059, l. 10. The defense then objected to the judge's intention to charge accomplice liability. Tr. 1065, l. 20 – 1068, l. 8. Defense counsel again noted that accomplice liability or the "hand of one is the hand of all" instruction would not be proper given the facts in this case. Tr. 1065, l. 20 – 1068, l. 6.

State's closing argument

The solicitor stressed the alleged simplicity of convicting appellant and Robertson under accomplice liability to the jury:

> The hand of one is the hand of all. The Judge will charge you on this law. If a crime is committed by two or more people, I submit to you we have that in this case. We have, at least, three – acting together to commit a crime, we have that; the act of one is the act of all. Everyone involved is equally responsible. Everyone involved is equally responsible.
>
> So what does that mean? The hand of one is the hand of all. Even if someone else shot, the hand of one is the hand of all. The act of one is the act of all.

Tr. 1093, l. 17 – 1094, l. 3.

Charge on accomplice liability

The judge instructed the jury:

> If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable and natural consequence of the acts done in carrying out the common plan and purpose.
>
> For example, two people can be guilty of killing another person when only one of the two had a gun and there was only one bullet and only one of the two fired the shot that caused the death. If two or more people are together, acting together, assisting each other with committing the offense, the act of one is the act of all. It is sometimes said the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that a person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal. Guilt as a principal is shown by an actual or constructive presence at the scene as a result of a prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt, by competent evidence, the theory of the hand of one is the hand of all.
>
> A principal in a crime is one who either actually commits the crime or who is present, aiding, abetting, or assisting in committing the crime. When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present at the commission of a crime means to be sufficiently near to aid, abet, and assist in the commission of a crime. However, mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs, not accidently or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally reasonably infer

intent. The State must prove these elements beyond a reasonable doubt.

Tr. 1148, l. 22 - 1151, l. 3.

ARGUMENT

1.

The court erred by instructing the jury on accomplice liability, "the hand of one is the hand of all," since there was no evidence of any tacit or other agreement or plan to shoot at the decedent or the other man in the parking lot of the nightclub and the instruction on accomplice liability was therefore improper and prejudicial

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for anything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d. 320, 324. (Ct. App. 2002).

Further, "under accomplice liability theory, '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.'" State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d. 90, 101 (1999) *quoting* State v. Austin, 299 S.C. 266, 385 S.E.2d. 830, 832 (1989).

In order to be guilty as an aider or abettor, "the participant must be chargeable with knowledge of the principle's criminal conduct." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d. 272 (1987); see Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1985) ("prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime."). State v. Mattison, 288 S.C. 469, 479-80, 697 S.E.2d. 578, 584 (2010).

Here, as seen above, defense counsel correctly argued that there was no evidence appellant acted in a common design or plan or with the intent to aid, abet, and assist co-defendant Robertson

or anyone else in a plan to shoot decedent Gantt or victim Jeffrey. Tr. 1051 l. 8 - 1054 l. 16. There was no evidence of any "intent or plan or scheme or even an exclamation from my client's mouth or any of them that could indicate a common plan or intent to do anything period, and therefore, he can't be charged under hand of one hand of all theory if he has not joining [in] with the perpetrator of the crime – the perpetrator, the person who committed the crime." Tr. 1052, l. 2 – 1054, l. 16.

His defense counsel also noted when decedent Gantt asked appellant who he was looking for, the record discloses appellant said "not you." Tr. 1056, l. 6 – 1057, l. 12. No one claimed to have seen appellant raise his gun and shoot at decedent Gantt or anyone else. The only evidence was that gunshots began to ring out at about this time. There was also evidence that the Grand Marquis pulled up at this time, and a "light-skinned' man wearing a white shirt stepped out and began shooting. There was speculation this man was Tyrese White but there was nothing but these very vague allegations against White, who apparently had not even been arrested at the time of appellant's trial.

In State v. Washington , 431 S.C. 394, 407, 838 S.E.2d. 779, 786 (2020), our Supreme Court held for an accomplice liability instruction to be warranted, the evidence must be "equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find existence or non-existence of that fact." *citing* Barber v. State, 393 S.C. 232, 236, 712 S.E.2d. 436, 439 (2011). The Court in Washington noted if the record in that case contained no evidence that accomplice Kinloch was the shooter, then the accomplice liability instruction should not have been given. The Court in Washington held that the accomplice liability instruction should not have been given and that Washington was entitled to a new trial.

In this case, there was no evidence that appellant had joined with anyone so that he was aiding and abetting whoever was the shooting when the decedent Gantt and wounded victim Jeffrey were shot. There was also no evidence anyone in this case was shot as a result of a crime – such as a robbery or drug deal – being involved. This was an unusual case since there was no evidence the shooting was gang related, and no evidence was aiding and abetting anyone in the shooting of the victims in this case. Accomplice liability here was based on pure speculation, not evidence, and the accomplice liability jury instruction was therefore erroneously given.

Similarly, in State v. Johnson, Op. No. 5950, Howard Advance Sheet #40, at 23 (filed November 9, 2022), this Court held that an accomplice liability instruction, the "hand of one is the hand of all" instruction should not have been given because there was no evidence Johnson acted in concert with another person.

The same is true in this case. This Court noted in Johnson under the accomplice liability instruction that "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* State v. Reid, 408 S.C. 461, 472, 758 S.E.2d. 904, 910 (2014). "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 be guilty under the theory of accomplice liability." State v. Reid, 408 S.C. 461, 472-73, 758 S.E.2d. 904, 910 (2014). Further, it is elementary that mere presence is insufficient,[6] as this Court held in State v. Johnson, Op. No. 5980, Howard Advance Sheet #40 at pp. 12-29 filed November 9, 2022 to constitute guilt.

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6 Citing State v. Reid, 408 S.C. 461, 473, 758 S.E.2d. 904, 910 (2014).

There was no evidence of any plan or common scheme or any evidence appellant aided and abetted Robertson in the shooting of Gantt and the attempted murder of Jeffrey. Further, the error was not harmless because there is no direct or substantial circumstantial evidence that appellant shot the decedent Gantt or attempted to murder victim Jeffrey by shooting him. Therefore, charging this inapplicable alternative theory of guilt, accomplice liability, allowed the jury to speculate about appellant acting in concert with some other person in some scheme to shoot the victims and it was consequently very prejudicial. Appellant should be granted a new trial.

2.

The court erred by allowing O'Brien Gilliam to testify that appellant was "making signs" with his hands on the dance floor on the night of the shooting since this was inadmissible evidence of gang activity in derogation of this Court's holding in Johnson v. State 433 S.C. 550, 860 S.E.2d 896 (Ct. App. 2021), since there was no evidence gang activity was probative of the motive or the intent for the shooting having occurred

Relevant Facts

During the November 12, 2021, pretrial hearing, the judge noted that there were objections to gang activity or the "gang stuff" and the attorneys stipulated that Johnson v. State, 433 S.C. 550, 860 S.E.2d. 896 (Ct. App.2021) was the applicable case. The solicitor argued the gang evidence was admissible but promised to limit it. The judge expressed his concern about gang evidence given Johnson v. State, 433 S.C. 550, 860 S.E.2d. 896 (Ct. App.2021). Tr. 111, l. 1 – 126, l. 22.

As seen in the prior statement of facts, defense counsel objected to the state's repeated attempts to introduce gang testimony or gang evidence into this case. Defense counsel objected to exhibits which had red gang colors, and to testimony about appellant using signs on the dance floor. These items were meant to have the jury speculate or conclude that the shootings in this case were the result of gang activity. Defense counsel specifically objected to O'Brien Gilliam's testimony about seeing appellant moving and making signs with his hands on the dance floor at The Spot. Tr. 681, l. 14 – 682, l. 13.

Discussion

In Johnson v. State, 433 S.C. 550, 860 S.E.2d. 696 (Ct. App. 2021) this Court held, as a matter of first impression, that evidence of a defendant's gang affiliation was admissible in certain situations against a challenge that it was improper character evidence under Rule 404(B), SCRE,

and the inadmissible admission of prior bad acts evidence under State v. Lyle, 125 S.C. 406, 118 S.E.2d. 803 (1923). It has long been understood that a very real problem with "other bad acts" evidence -- as with gang evidence – is that the jury may conclude the defendant is simply a bad person who needs to be punished, incarcerated, regardless of his guilt in the case before it.

As seen, in this case it was stipulated during the pre-trial hearing that Johnson v. State was the applicable case under which to analyze whether gang affiliation evidence was admissible. The only question was the application of Johnson to the facts of this case. This Court in Johnson held that the gang affiliation evidence was essential to explain the motive and intent behind the otherwise senseless shooting of the innocent victim in that case:

> Much of the gang evidence admitted demonstrated Johnson's iron grip on his gang underlings, enforced by physical intimidation, and how Brandon, Bradley, and Stamps were beholden to him and 135 Piru. The trial court was well within its discretion in finding this evidence was logically relevant to prove criminal conspiracy and accessory before the fact of murder. The evidence of Johnson's leadership of the Sumter 135 Piru and his ordering of the random hit was probative—if not essential—to establish the reason why Brandon killed the victim and that he did so intentionally and maliciously. While murder is not an element of any of the crimes that Johnson was charged with, the gang evidence was probative to the conspiracy and accessory charges, both of which invite proof of planning and agreement.

Johnson v. State, 433 S.C. 550, 557, 860 S.E.2d. 696, 700 (Ct. App. 2021).

The hand movements and hand signs of appellant that O'Brien Gilliam was allowed to testify about over objection was the state's not so subtle tactic to have the jury conclude this shooting was the result of gang affiliation and that was improper.[7] The hand signs and the red

[7] Defense counsel's objection that Gilliam's testimony was inadmissible gang affiliation evidence was apparent from this record given the pre-trial hearing on gang evidence and the stipulation that Johnson v. State, supra, was the controlling case. Defense counsel had also previously objected to other attempts by the state to get gang colors evidence and speculation about hand movements testimony before the jury.

colors were meant to show gang activity. This case is almost the antithesis of Johnson since this gang evidence was not necessary, and it did not explain whatever happened or why it may have happened.

Defense counsel Williams told the jurors: "You don't make decisions based on colors, either. You don't color everything kind of gray, red, blue, because they say all that matches." Tr. 1108 ll. 3-9. Defense counsel for co-defendant Robertson also noted the "smoke and mirrors on the state's side. "And these colors, the red, and Shantrez's phone records were red, and the bullet from the death shot that they tie to a pistol is red. Well, guess what, I wore a red tie. I must be the shooter. I can play that game too. They're trying to subconsciously influence you. . ." Tr. 1115 ll. 12-22.

It is difficult to determine what happened in this case. There were forty-one shell casings left behind, and the forensic evidence was that there were four or possibly more weapons involved in the massive shooting that occurred in The Spot parking lot that early morning. Evidence of gang affiliation, specifically the hand movements and hand gestures that Gilliam testified about was evidence was offered in the hope that the jury would conclude that the shooting was somehow the result of gang activity, and that gang members would be convicted and punished regardless of their individual culpability in this case. That was why this inadmissible evidence of gang affiliation was so highly prejudicial, and appellant should be granted a new trial.

CONCLUSION

By the reasons of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2022.