RECEIVED
Mar 13 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL CHRISTIAN BARCLAY,

APPELLANT.

APPELLATE CASE NO. 2021-000976

INITIAL REPLY BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ARGUMENT IN REPLY

II. The trial judge erred by instructing the jury regarding accomplice liability where the evidence presented was Appellant alone fired the fatal shot.

Respondent has picked up a mantle only recently paraded about by the Attorney General's Office. Respondent argued that "[m]uch of the confusion and misdirected legal arguments regarding accomplice liability stem from dicta in Barber v. State, 393 S.C. 232, 236-237, 712 S.E.2d 436, 438-439 (2011)." BOR at 36. Respondent argued that referring to accomplice liability as an alternate theory of liability is error and "should not be perpetuated further." Respondent is wrong.

First, accomplice liability *is* an alternate theory of liability; thus, the language is absolutely accurate. An alternate theory of liability is just that – an alternate theory of why one person is just as liable as another (accomplice liability) or an alternate theory of why one person is just as liable for a crime that was the natural and probable cause of the person's intent (transferred intent). It is *not* a way of showing someone is guilty of an alternate offense.

Put another way, accomplice liability is an alternate way of showing a defendant had the requisite *mens rea* to engage in the criminal conduct albeit through an accomplice. See Holmes v. State, 972 P.2d 337, 341 (Nev. 1998) (explaining that "the commission of a felony and premeditation are merely alternative means of establishing the single *mens rea* element of first degree murder, rather than constituting independent elements of the crime" for statutory murder); State v. Van Harris, 502 A.2d 880, 883 (Conn. 1985) (explaining that a defendant was charged properly in a single count with robbery in the second degree under two alternate theories of liability, including whether he intentionally aided another person in committing robbery in the second degree); State v. Kelley, 716 P.2d 1052, 1053 (Ariz. Ct. App. 1986) (explaining that

"[t]he nature of the crime of first-degree murder explains why it is proper to charge both premeditated and felony murder alternatively in one count. If a person is charged with first-degree murder which can be committed by either of the two ways outlined above, the result is the same in each case: a dead person. It is irrelevant to the result whether the person committed it with premeditation or it occurred during the commission of a felony.").

The state asks this Court to "endeavor to set straight the application of accomplice liability ... and not construe it as an alternate theory of liability." See BOR at 39. The state has had multiple opportunities since Barber to make the request it has made here, but the state has failed to do so. See State v. Washington, 431 S.C. 394, 409, 848 S.E.2d 779, 787 (2020) (calling accomplice liability an "alternate theory of liability" and the state failing to ask for rehearing to change this language when it could have done so even though it had referred to accomplice liability as an alternate theory of liability in its brief); State v. Campbell, 435 S.C. 528, 539, 868 S.E.2d 414, 420 (Ct. App. 2021) (calling accomplice liability an "alternate theory of liability" and the state failing to ask for rehearing to change this language and or ask for certiorari to be granted in the case to address the label); State v. Sellers, 2021-UP-254 (S.C. Ct. App. filed July 7, 2021) (state's brief of respondent filed after this Court granted certiorari calling accomplice liability an "alternate theory of liability"). The state's prior repeated failures to make the request at issue here belies its current contention that the matter requires setting straight. See BOR at 39.

IV. The trial judge erred by failing to instruct the jury that it may draw an adverse inference against the state where it was undisputed that the state destroyed video footage of the crime scene captured by the first responding officer in this weak circumstantial evidence case.

The State mistakenly focuses much of its argument applying Cheeseboro to the facts of this case. The decision to charge the jury on spoliation of evidence did not predicate upon a due process violation finding as in Cheeseboro. When viewed in the proper legal setting, as provided in the brief of appellant and supplemented, here, the propriety of a jury instruction on the spoliation of evidence becomes clear.

As Respondent highlights, precedent providing for spoliation of evidence charges in South Carolina criminal cases is scant. Incredulously, Respondent posits this absence of precedent must mean that such charges in criminal cases are conclusively foreclosed. However, in State v. Clark, this Court implicitly recognized the propriety of a spoliation instruction in criminal cases. Op. No. 6 (S.C. Ct. App. filed Feb. 8, 2023) (Howard Adv. Sh. No. 6 at 45, 54) (noting the circuit court's offer to give a spoliation instruction in a criminal sexual conduct case evinced the circuit court's careful consideration of whether a Brady violation occurred). What is more, although Respondent cites it for the proposition that such charges have been limited to civil cases, in the same footnote of State v. Reaves, our Supreme Court explicitly stated the issue presented on appeal was *not* the propriety of such a charge under state evidence law. 414 S.C. 118, 128, n.5, 777 S.E.2d 213, 218, n.5 (2015); see also State v. Breeze, 379 S.C. 538, 548, 665 S.E.2d at 247, 252 (Ct. App. 2008) (noting that South Carolina case law has not addressed the fitness of spoliation of evidence charges in criminal cases). Stating the usual propriety of such a charge in civil cases and the caution of using such instructions in criminal cases does not conclusively foreclose its appropriacy in the criminal context.

The history of South Carolina case law concerning spoliation jury instructions does not foreclose the giving of such an instruction in criminal cases despite Respondent's suggestion otherwise. The first spoliation of evidence case Appellant found is Halyburton v. Kershaw, 3 S.C. Eq. 105 (1810). In that case, the Court explained it would "go very far in presuming against those who destroy papers and instructions necessary to the security or elucidation of the rights of others, *in odium spoliatoris*, as it is expressed." Halyburton v. Kershaw, 3 S.C. Eq. 105, 112 (1810). Almost a century later, the Court again explained that "the presumption is that, having it and not producing it, the information was to his detriment." Smith v. Southern Ry. Co., 121 S.C. 94, 94 113 S.E. 465, 466 (1922). Thirty years later, the Court maintained that if a party fails to produce available records, it may be inferred that the contents of the records would be adverse to the party who fails to present the records. Wisconsin Motor Corp. v. Green, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954).

Though South Carolina case law has not squarely addressed the propriety of spoliation instructions in criminal cases, a review of such case law in other jurisdictions reveals the frequency with which such charges are given. Indeed, two states—Arizona and Washington—with almost identical prohibitions judges commenting on facts[1] permit spoliation of evidence charges. For example, when addressing the propriety of spoliation of evidence jury instructions in criminal cases, the Washington Supreme Court has repeatedly held "The trial court is not forbidden to make reference to the evidence, but is only forbidden to comment thereon." State v. Roberts, 144 Wash. 381, 258 P. 32, 32 (1927). What is more, the Arizona Supreme Court further

[1] "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. 5 § 26; "Judge shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A.Z. Const. art., 6 § 27; "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." W.A. Const. art. 4, § 16.

explained that such charges may be formulated to avoid an unconstitutionally impermissible comment on the facts. See State v. Willits, 393 P.2d 274 (Ariz. 1964) (finding a proffered spoliation of evidence instruction did not offend its constitutional prohibition when the instruction did not "assume a fact" and rather used the conditional statement "if you find"). Thus, even in two jurisdictions with prohibitions on judges commenting on the facts, like ours, an instruction on spoliation of evidence is not verboten.

Other state courts have concluded that a jury instruction on spoliation of evidence is required where evidence is destroyed by the state. See Thorne v. Dep't of Pub. Safety, State of Alaska, 774 P.2d 1326, 1331 (Alaska 1989) (remanding an administrative license revocation to allow the hearing officer to presume the destroyed videotape of the field sobriety tests would have been favorable to Thorne); Cost v. State, 10 A.3d 184, 196 (Ct. App. Md. 2010) (holding that in a criminal case the judge should instruct the jury on "missing evidence" in a way that permits but does not demand that the jury draw an inference that the missing evidence would be unfavorable to the state); Deberry v. State, 457 A.2d 744 (Del. 1983) (discussing when a defendant is entitled to a missing evidence instruction); State v. Hartsfield, 681 N.W.2d 626, 629 (Iowa 2004) (holding that "a defendant can be entitled to a spoliation instruction without showing that a refusal to give the instruction would be an infringement of his right to due process).

Appellant implores this Court to hold the trial court erred here by failing to instruct the jury on spoliation of evidence.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court dismiss the charge against him based upon the state's repeated discovery violations, which culminated in the destruction of evidence. Regarding Issues II, III, and IV, Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of March, 2023.

RECEIVED
Mar 13 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL CHRISTIAN BARCLAY,

APPELLANT.

APPELLATE CASE NO. 2021-000976

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Initial Reply Brief of Appellant in the above-referenced case have been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is jmaye@scag.gov this 13th day of March, 2023.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - MAYE WILLIAM; SC - D"ALESSIO DONNA
Cc: Hackett, Susan
Subject: Barclay, M. - Initial Reply Brief of Appellant - 2021-000976
Date: Monday, March 13, 2023 3:22:00 PM
Attachments: Barclay, M. - Initial Reply Brief of Appellant - 2021-000976.pdf
Barclay, M. - Initial Reply Brief of Appellant - 2021-000976 - AG Cover Letter.pdf

---

Mr. Maye,

Please find attached for service the Initial Reply Brief of Appellant for Michael Christian Barclay's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330