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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANGEL MISAEL IBARRA,

APPELLANT

APPELLATE CASE NO. 2022-000774

INITIAL BRIEF OF APPELLANT

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The trial judge erred in charging the jury on the law of accomplice liability because the facts of the case did not support such a charge as there was insufficient evidence offered to connect any individual to the state's fictitious assertion that a drug enterprise existed in the case.

STATEMENT OF THE CASE

Appellant Angel M. Ibarra was found guilty of possession of methamphetamine, unlawful carrying of a pistol, trafficking in heroin, and possession of a weapon during the commission of a violent crime during a jury trial held during the May 2022 term of the Lexington County General Sessions Court before Judge Debra R. McCaslin. Appellant was sentenced to imprisonment for an aggregate twenty-five-year term.

Appellant appealed his convictions and sentences. This brief follows.

STANDARD OF REVIEW

In Criminal cases an appellate court sits to review errors of law only. State v. Baccus, 367 S.C.41, 625 S.E.2d 216 (2006). An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. Clarks v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (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.

ARGUMENT

The trial judge erred in charging the jury on the law of accomplice liability because the facts of the case did not support such a charge as there was insufficient evidence offered to connect any individual to the state's fictitious assertion that a drug enterprise existed in the case.

After receiving information from Richland County law enforcement about appellant's residence in West Columbia, the Lexington County police department conducted surveillance and then executed a search warrant at the address on October 24, 2018. Police found methamphetamine inside the house and heroin and guns in a shed located near the house. Appellant was stopped while driving on that same date and was charged with possession of a pistol. Tr. 97, l.15 – p.103, l. 14.

Investigator Meghan Dabkowski worked on the case involving appellant and believed that narcotic activities were occurring at appellant's residence. Officer Dabkowski stated that appellant was seen entering the shed near the house, and that appellant and Israel Mendoza Cervantes were seen together as well. Also, Officer Dabkowski was present when the search warrant was executed at appellant's residence and the shed nearby. During the search, Cervantes was found in the shed and arrested. Appellant's fifteen-year-old brother found inside the house was released later. Appellant was neither in the house nor in the shed during the search of the properties. Guns were located in the shed and a gun was found inside the residence. A box containing a powdery substance was found in the shed, along with balloons, and a plastic bag containing a crystal-like substance. Money and scales were found inside the shed as well. Appellant was arrested shortly after the search per a traffic stop during which time a firearm was found inside the vehicle. Tr. 108, l.1- p. 209, l.5; Tr. 248, l.2 -p. 249, l.16.

The chemist's analysis of the drugs seized at the crime scene revealed the existence of heroin in an amount up to 28 grams and methamphetamine at a weight of 1.28 grams. Tr. 278, l. 4 – p. 294, l. 15.

During the jury charge conference, defense counsel objected to the state's request for an accomplice liability jury charge on the ground that Cervantes' presence in the shed did not establish that he and appellant were working together as accomplices in a drug enterprise, and hence there was no evidence to support an accomplice liability charge. Tr. 354, l. 10 – p. 357, l. 23. The trial judge ruled against the defense and gave the following accomplice liability charge to the jury:

> The principal in a crime is one who either in person perpetrates a crime or aids, abets and assists. When one acts in the presence of and with the assistance of another, the act is done by both. Where two or more act with a common design or common intent and are present at the commission of a crime, it does not matter whose immediate agency commits that crime because all would be guilty of that crime.
>
> Intent however is a necessary element. There must be a common design or intent to commit the crime and the crime must have been committed with the Defendant aiding and abetting by some overt act. Mere presence at a scene is insufficient to prove someone guilty of a crime. The burden is on the State to prove every element of the crime charge.
>
> If you find after reviewing all of the evidence that the state has proven that the Defendant was merely present at the scene of the crime and that they have not proven beyond a reasonable doubt any other participation in the crime then you must find the Defendant not guilty. The law says that proof of mere presence at the scene of the crime is not sufficient to find someone guilty. Of course the law also says that the hand of one is the hand of all. The law states that a crime committed by two or more persons acting together in the commission of a crime is the act of both. Tr. 418, l.13- p. 419, l.17.

There was no proof of any accomplice liability in this case. The state's case was about the defendant only and any reference to Cervantes was always incidental as if his existence was seemingly happenstance and barely rose to the level of a by-stander according to the evidence presented. Cervantes did not testify at trial and the jury was offered no information about him.

In State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020), the Court found that the trial judge erred in charging accomplice liability where there was no proof of the existence of an accomplice and held as follows:

> 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 the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In this case, there was evidence petitioner was the shooter. There was also evidence petitioner was not the shooter. The question becomes whether there was equivocal evidence the shooter, if not petitioner, was an accomplice of petitioner. Based on the evidence presented in this case, Kinloch is the only possible person who could fall into the category of petitioner's accomplice. Therefore, if the record contains no evidence Kinloch was the shooter, then the accomplice liability instruction should not have been given.

In the case at bar, the state repeatedly and constantly excluded and minimized Cervantes' involvement in the case against appellant. For example, note the following law enforcement officer's responses that indicated a marginal or diminished, and bordering on nonexistent role assigned to Cervantes in the case:

> Solicitor: And there's been a lot of talk about Mr. Cervantes. Did you have evidence that he lived with the defendant [appellant]...?
>
> Officer: No we did not. Tr. 230, lines 10-13
>
> Solicitor: And did you find where [Cervantes] lived?
>
> Officer: It was somewhere else.

> Solicitor: Okay. And did your investigation ever move to the area where Mr. Cervantes lived?
>
> Officer: The investigation stayed focused on [appellant's address]. Tr. 312, lines 14-20.

Also note below the cross examination of the investigator in the case:

> Defense Counsel: Okay. All right. And when – when SWAT came in and executed the search warrant, there was an adult male on the scene; correct?
>
> INV: Located in the shed, yes, sir.
>
> Defense Counsel: In the shed amongst all of the evidence that you collected; right?
>
> INV: Yes, sir.
>
> Defense Counsel: Okay. Who was that?
>
> INV: That was Mr. Cervantes. Israel Cervantes.
>
> Defense Counsel: Okay. All right. And [appellant] was not there at the time; right?
>
> INV: At the time, no. Tr. 218, lines 4-15.

Additionally, note the solicitor's closing comments regarding the characterization of Cervantes' role as a non-entity in the case:

> Solicitor's Closing: You heard law enforcement. They had absolutely no information as to the 15-year-old brother being a part of this drug enterprise. Who was the target of that investigation? Ace, the Defendant. He was the target. He was the one who was involved in this drug enterprise operated out of his home. Guns, money, drugs, and ammo.Now, I imagine that the Defense is going to try and distract you. That's his job. The Defense is going to shift all of this blame onto Israel Mendoza Cervantes. But, remember, Israel didn't live there. He lived out in Gaston. Nowhere near the Defendant. They were associated together, yes. But law enforcement never shifted their investigation or their surveillance to Israel Cervantes's home. Who was the target? Ace, the Defendant. Tr. 383, lines 9-25.

> Defendant knows all about this. It's his enterprise that's being run out of his home...the Defendant knew about this drug enterprise in his home using his vehicles. Tr. 382, lines 14-18. Appellant was the target of that investigation and through that investigation they got to Israel Cervantes. Tr. 375, lines 15-17.

Again, per the rationale in Washington, there must be evidence of an accomplice to warrant an accomplice liability instruction. Here, the state clearly recognized appellant as their sole target with respect to the drugs and the assignment of Cervantes' role as a nonplayer, which meant there was no accomplice liability. Cervantes was merely present at the scene. The state cannot hide Cervantes a non-entity, but on the other hand utilize him as insurance as a catch-all to gain a conviction base on the wording of the drug statute.[1] Under the statute, the state attempted to insert Cervantes as a participant in this alleged drug enterprise to ensure a conviction in the event there was a reasonable doubt of appellant' guilt, or if appellant established no actual or constructive possession over contents of the shed since he was not present at the crime scene when the search warrant was executed. It was error to charge accomplice liability to close loopholes in the state's case and bootstrap convictions against appellant via use of Cervantes' mere presence at the scene, particularly where appellant was not present at the scene, and where there was no proof that appellant had knowledge of any activities inside the shed.

In Washington, supra, there was evidence that the defendant shot the deceased, but insufficient evidence that Kinloch was armed on that night and could have shot the deceased also, which meant accomplice liability was not applicable in the case. Compare similar facts in

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[1] S.C. Code Ann. § 44-53-370 (e)(3)(c) (1986) states that any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this state, or who provides financial assistance, or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this state, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of four or more grams of heroin is guilty of trafficking in illegal drugs.

Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014), where an accomplice liability charge was not proper because Wilds was the only shooter of the victim, and there was no evidence that his two associates at the time joined in with any activity (robbery) until after Wilds fired the weapon. The rule is that an alternate theory of liability may not be charged merely on the theory that the jury may believe some of the evidence or disbelieve other evidence. State v. Washington, supra.

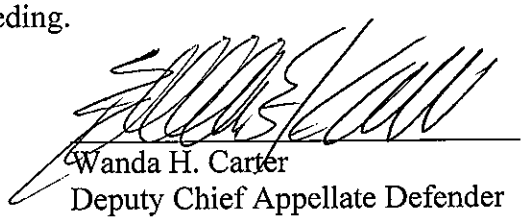
Also, mere presence at the crime scenes is not sufficient evidence of guilt. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010). Also, mere knowledge of a crime is insufficient evidence of guilt. State v. Mattison, supra. Moreover mere association is insufficient evidence of guilt. State v. Mattison, supra. Therefore, Cervantes' mere presence at the crime scene on the day the search warrant was executed did not render him an accomplice in support of an accomplice liability charge. Again, Cervantes did not testify at trial and there was no evidence offered in reference to the identity of Cervantes.

The Court in Washington stated that the accomplice liability charge was not merely error, but prejudicial error because it invited the jury to speculate as to whether an accomplice existed and then return a guilty verdict on aiding and abetting when there was a lack of evidence on the same. The same prejudice resulted here in appellant's case.

The trial judge erred in denying a request from the defense to exclude an accomplice liability jury charge because the facts of the case did not warrant such a charge, and because such a charge was erroneously used by the state in an attempt to include an individual proven to be nonessential to the case to support its theory of the existence of a drug enterprise (which was not proved) to guarantee a convictions against appellant at trial.

CONCLUSION

Based on the foregoing argument, counsel for appellant would request that the case be reversed and remanded for a new legal proceeding.



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This 24th day of March, 2023.