

RECEIVED

Dec 14 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106

BRIEF OF PETITIONER

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED.....1

STATEMENT.....2

STANDARD OF REVIEW.....4

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State’s burden of proof.5

Facts5

Discussion.....7

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 10

Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30 (2008) 12

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 4

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)..... 4

Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)..... 13

Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) 10

Riser v. Southern Ry., 67 S.C. 419, 46 S.E. 47 (1903)..... 13

Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009)..... 11

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016)..... 4

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 4

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)..... 10

State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018)..... 10

State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013)..... 11

State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002)..... 12

State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) 11

State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017)..... 11

State v. Hill, 268 S.C. 390, 234 S.E.2d 219 (1977) 12

State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000)..... 11

State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978) 13

State v. Pruitt, 187 S.C. 58, 196 S.E. 371 (1938) 13

State v. Thompson, 374 S.C. 257, 647 S.E.2d 702, (Ct. App. 2007)..... 11

<u>State v. Thorne</u> , 237 S.C. 248, 116 S.E.2d 854 (1960).....	13
<u>State v. White</u> , 15 S.C. 381 (1881)	13
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	9
<u>Turner v. Lyles</u> , 68 S.C. 392, 48 S.E. 301 (1904).....	13
<u>Welch v. Epstein</u> , 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000)	13

Statutes

S.C. Code Ann. § 16-03-0029 (1976), as amended	7
--	---

Rules

Rule 243(1), SCACR	3
Rule 243(j), SCACR.....	3
Rule 59(e) SCRCPP	3

Constitutional Provisions

S.C. Const. art. V, § 17	14
S.C. Const. art. V, § 21	10
U.S. Const. amend. VI	9

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof?

STATEMENT

In August of 2011, the Colleton County Grand Jury indicted Petitioner, Maurio Daetrel Rivers, for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, indictments #2011-GS-15-00549, 00550, 00551. (App. pp. 230-231). On December 12, 2012, Petitioner proceeded to jury trial before the Honorable Diane S. Goodstein. John D. Bryan represented Petitioner at trial. Steven Knight prosecuted the case. The jury found Petitioner not guilty of one count of attempted murder and not guilty of the weapon charge. The jury found Petitioner guilty of one count of attempted murder. Judge Goodstein sentenced Petitioner to thirty (30) years. (App. p. 232). A timely notice of intent to appeal was filed and the direct appeal perfected. A three-judge panel of the South Carolina Court of Appeals heard argument in the case on November 5, 2014, and on December 3, 2014, affirmed the conviction in an unpublished opinion. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. Filed December 3, 2014). (App. pp. 269-270). Petitioner filed a petition for rehearing and filed a motion to relieve counsel and proceed *pro se*. The Court of Appeals granted the motion to relieve counsel and on April 16, 2015, denied the petition for rehearing. Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court that was denied on November 19, 2015.

On June 1, 2016, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 271-284). The State filed a return on April 17, 2017. (App. pp. 285 - 290). On November 15, 2017, Petitioner filed a motion to relieve PCR counsel and an amended PCR application. (App. pp. 291-298). An evidentiary hearing was held on April 1, 2019, and April 3, 2019, before the Honorable William H. Seals, Jr.. Leslie T. Sarji represented Petitioner at the PCR hearing. Benjamin Limbaugh represented the State. In a written order signed December 21, 2019, Judge

Seals denied relief and dismissed the application. (App. pp. 411-420). On January 10, 2020, Petitioner filed a motion to alter or amend pursuant to Rule 59(e) SCRCR. (App. pp. 421-424). Judge Seals denied the motion on July 23, 2020. (App. pp. 425-426). A timely notice of intent to appeal was filed on August 7, 2020.

On February 22, 2021, the petition for writ of certiorari was filed with the South Carolina Supreme Court. The return was filed on June 10, 2021. The reply brief was filed on June 21, 2021. On June 29, 2021, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On November 28, 2023, the South Carolina Court of Appeals denied the petition for writ of certiorari as to questions one and three but granted the petition for writ of certiorari as to question two and ordered briefing as provided by Rule 243(j), SCACR. This brief of petitioner follows.

STANDARD OF REVIEW

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).” Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof.

Facts

The jury found Petitioner guilty of the attempted murder of Lieutenant Joseph Burnette with the Dorchester County Sheriff's Office. On July 12, 2011, at 7:00 PM Deputy Justin Eaches with the Dorchester County Sheriff's Office attempted to stop a black car on Interstate 95 for failure to use a turn signal. (App. p. 63, lines 10 – p. 64, lines 1-2). The deputy testified that he saw two black males in the car and he identified Petitioner as the driver. (App. p. 64, lines 13-25). A chase ensued and the deputy asked for assistance from Lt. Burnette. (App. p. 67, line 3 – p. 68, lines 1-9). Lt. Burnette took over the pursuit of the car because of the condition of Deputy Eaches' patrol car and the high rate of speed of the chase. (App. p. 68, lines 1-6). Lt. Burnette testified that he heard gunshots after the car exited the interstate onto Highway 61. (App. p. 87, lines 15-16). Lt. Burnette testified that these first set of shots were fired by the passenger. (App. p. 85, lines 4-7). Lt. Burnette confirmed that the passenger, Bronson Shelley, stuck his head out of the sunroof, looked at the officer and shot at him. (App. p. 92, line. 19 – p. 93, lines 1. 7; p. 96, line 22 – p. 97, lines 1-7).

The black car was eventually struck by Lt. Burnette's patrol vehicle. (App. p. 84, lines 13-15). According to Lt. Burnette, as the black car was traveling backwards out of control before flipping over, he heard a second set of what he later determined to be gunshots. (App. p. 97, line 8 – p. 98, lines 1-20). Lt. Burnette testified that while there were two different sets of shootings, he only saw one person, the passenger and co-defendant, Bronson Shelley, shoot during the first set. (App. p. 97, lines. 4-15). Lt. Burnette did not testify as to who was shooting the second time. According to Lt. Burnette, both the driver and passenger fled from the vehicle after it wrecked. (App. p. 85,

lines. 19-24. Lt. Burnette released his K-9 and Petitioner was apprehended¹. (App. p. 85, line 12 – p. 86, lines 1- 11). Deputy Eaches assisted in the apprehension of the passenger, Bronson Shelley. Shelley had a holster in his pocket when he was apprehended. (App. p. 73, lines 4 – 17).

There were three guns recovered from the wreck scene. One gun, a .38 special, was found on the ground after the car was rolled upright. (App. p. 105, line 21 – p. 106, lines 1-18, p. 107, line 19 – p. 108, lines 1-4). Another gun, a Bursa Firestone .380, was found lying in plain view while the car was still upside down. (App. p. 109, lines 1-4; p. 133, lines). This gun was found with the slide back indicating all bullets had been fired from the weapon. (App. p. 109, lines 1-20; p. 133, lines 11-16). A third gun, a Colt .45, was found inside the glove box of the black car. (App. p. 111, line 11 – p. 112, lines 1-3).

Five shell casings were recovered on Highway 61. (App. p. 116, line 11- p. 117, lines 1-4). These casings matched the Bursa Firestone .380. (App. p. 145, lines 11-12). Bullet fragments were collected at the scene of the wreck. (App. p. 116, lines 19-23; p. 117, lines 6-11). One of the fragments was fired by the .38 special. (App. p. 146, lines 2-3). There were four holes in the windshield of the black car where shots had been fired outward. (Tr. p. 124, line 1 – p. 127, line 1; p. 129, lines 11-12).

Petitioner was charged with the attempted murder of both Lt. Burnette and Deputy Eaches and charged with possession of a weapon during the commission of a violent offense. The jury found Petitioner not guilty of the attempted murder of Deputy Eaches and not guilty of the weapon charge. The indictment for the attempted murder of Lt. Burnette reads, “That in Colleton County, South Carolina, on or about July 12, 2011, the defendant, Maurio Daetrel Rivers, with malice

¹ Petitioner testified at the PCR hearing that he filed a federal civil suit against the officers for allowing the dog to continue to bite him in the groin. (App. p. 333, line 23 – p. 334, lines 1-4). Petitioner testified that he received a settlement of ten thousand dollars (\$10,000). (App. p. 326, lines 15-25).

aforethought accompanied by a present ability to complete the act and the intent to kill, either express or implied, did attempt to kill the victim, Deputy J. Burnette with the Dorchester County Sheriff's Office, while on Augusta Highway, by shooting at the victim; in violation of S.C. Code of Laws Section 16-03-0029 of the South Carolina Code of Laws (1976), as amended." (App. p. 231). The indictment does not contain accomplice liability language.

In his closing argument the prosecutor discussed the principle of "the hand of one is the hand of all." (App. p. 169, line 20 - p. 170, lines 1-17). The prosecutor gave the examples of a get away driver and a look out as examples of the hand of one is the hand of all. (App. p. 169, line 25 – p. 170, lines 1-11). The prosecutor emphasized the high speed chase and fleeing from the car to show intent. (App. p. 170, line 18 – p. 171, lines 1-8). The prosecutor also argued that the second round of shots came from inside the car on the driver's side. (App. p. 172, lines 6-11).

Defense counsel argued that mere presence is not sufficient for accomplice liability. (App. p. 173, line 25 – p. 174, lines 1-13). Defense counsel also argued that it was impractical to believe that Petitioner, the driver, fired the second round of shots at the same time as he was trying to regain control of the car as it spun out of control and flipped over. (App. p. 176, line 13 – p. 177, lines 1-5). The jury found Petitioner not guilty of the weapon charge.

Discussion

During the instruction on accomplice liability/hand of one is the hand of all the trial judge gave the following example:

For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

(App. p. 193, line 25 – p. 124, lines 1-8). In the PCR application Petitioner alleged that trial counsel was ineffective for failing to object to the example given by the trial judge. (App. pp. 283-284). In the amended application Petitioner also alleged that trial counsel was ineffective in failing to object to the example given. (App. p. 295).

During the PCR hearing Petitioner testified, “And the jury basically inferred from another – she gave an example of a burglary and a getaway driver as the example of the hand of one is the hand of all in her jury instruction.” (App. p. 328, lines 12-15). Petitioner testified that trial counsel did not object to the example and then testified, “And I think that was pretty much what prejudiced me the most because it made the jury think that they only thing I had to do to be guilty of attempting to harm the officers was trying to get away driving. And I think that was the most prejudicial thing in the instruction was that.” (App. p. 328, lines 17-22). Trial counsel did not recall objecting to the example. (App. p. 369, lines 9-14). When asked about the burglary/getaway driver example trial counsel testified that he believed the jury would have made the distinction. (App. p. 378, line 25 – p. 379, lines 1-2). The judge’s instruction, however, repeated what the prosecutor argued in closing argument. (App. p. 169, line 25 – p. 170, lines 1-11). While the prosecutor was free to argue the examples in closing argument, the trial judge should not have included the examples in her instruction to the jury. Unlike a get away driver or look out example where there is a prior agreement, the high speed chase and fleeing from the car fail to establish a prior agreement between Petitioner and the passenger to shoot at the officers.

In the order of dismissal the PCR judge wrote, “Applicant alleges counsel was deficient for failing to object to the Solicitor giving an illustration of a burglary and a getaway car as an example of accomplice liability.” (App. p. 417). The PCR judge discussed the law in regard to comments made by a prosecutor and then wrote:

Applicant testified that counsel should have objected to the example being used by the Solicitor. Counsel testified he did not object to the example and did not feel the need to do so. This Court finds that counsel is given latitude in remarks made during closing argument and that the court corrected any potential error by charging on the law of accomplice liability. This Court also finds that even if counsel did err in failing to object, the error would have been harmless and would not have prejudiced Applicant. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

(App. p. 418).

While the prosecutor provided examples of accomplice liability/ the hand of one is the hand of all in his closing argument, (App. p. 169, line 23 – p. 170, lines 1-11), the allegation during the PCR hearing involved the **judge's** example provided during her jury instruction. In the motion to alter or amend pursuant to Rule 59(e), Petitioner wrote, “The PCR Courts order also states it was the solicitor (S. Knight) who used the example of the getaway car driver and the burglary defining Accomplice Liability when it was in fact the judge (D. Goodstein). Her example shifted the burden of proof to the applicant inferring that to be guilty of the murder attempt, only the evidence of Rivers’ flight was necessary.” (App. p. 422). The PCR judge denied the motion to alter or amend despite the factual error. The PCR judge erred.

The PCR judge should have corrected the factual error in the order, found trial counsel ineffective for failing to object to the example given by the judge and granted relief. Petitioner was prejudiced by the deficient performance. The evidence at trial showed that Petitioner was the driver, making the charge given an improper charge on the facts that unconstitutionally diluted the State’s burden of proof.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117,

386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in failing to object to the jury instruction that included a getaway driver example that became an improper charge on the facts. “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21. See also Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (“The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence.”); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (stating “the trial court shall not provide a limiting instruction or otherwise comment to the jury on” suicide-attempt evidence because such a charge may be an improper charge on the facts).

In State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019), the South Carolina Supreme Court wrote:

We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. See, e.g., State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171

(1980) (holding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt); State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use).

Like the examples above, the getaway drive example given in the instruction in this case was improper. Under the facts of this case, where the evidence shows that Petitioner was the driver and the passenger shot at the police, the getaway driver example given by the trial judge became an improper charge on the facts. Petitioner was prejudiced by the deficient performance because the charge additionally diluted the State's burden of proof by omitting the requirement that in order for the jury to find Petitioner guilty of attempted murder, the State had to prove that the passenger and Petitioner had an agreement, a pre-arranged plan to attempt to murder the police officer. Based on the example included in this charge, the jury could have found liability based solely on Petitioner driving the car and failing to stop for police. In finding Petitioner not guilty of the weapon charge, the jury appears to have rejected the State's argument that Petitioner was the shooter of the second round of shots. The jury's verdict reflects that the jury found Petitioner guilty based on accomplice liability, "the hand of one is the hand of all."

In State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276-77 (2017), the South Carolina Supreme Court wrote:

" 'Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.' " State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349

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

The getaway driver example diluted the State’s burden of presenting evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable consequence.² This case is different from most other cases dealing with the hand of one hand of all accomplice liability charge where the parties pre-arrange to meet for some illegal act, usually a burglary or a robbery, and in the process someone is shot or killed. Petitioner was the driver of the car that failed to stop for a minor traffic violation. The co-defendant was a passenger in Petitioner’s car who shot at police. There was no evidence of a pre-arranged plan. Even if the driver, with control of the car, and the passenger could have developed a plan to flee from the police, the shooting is not incidental or a natural or probable consequence of any assumed plan to evade law enforcement.

There is a reasonable probability that, but for trial counsel’s failure to object to the improper example in the jury instruction, the result of the proceeding would have been different. In reviewing an alleged error in jury instructions, an appellate court will not reverse the circuit court’s decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court’s jury charge as a whole in light of the evidence and issues presented at trial. Welch

² There is mention of a stolen car during the PCR hearing but this was not discussed at trial. (App. p. 304, lines 8-9; p. 355, lines 3-8).

v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). Viewing the charge as a whole in light of the evidence presented, the charge was an improper charge on the facts that diluted that State's burden of proof.

Respondent argues that the judge's example was not an improper comment on the facts and even if it is, Petitioner was not prejudiced by the error because it is undisputed that Petitioner was the driver of the car. (Return to Petition for Writ of Certiorari p. 9). The example constitutes an improper comment on the facts because Petitioner was the driver. While it is undisputed that Petitioner was the driver, his role in the attempted murder as the driver is disputed. Based on the example given by the judge, the jury could have found liability for the attempted murder based solely on Petitioner driving the car and failing to stop for police.

Respondent's reliance on State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978), is misplaced. In Norris the South Carolina Supreme Court wrote:

In his instructions on assault and battery of a high and aggravated nature, the judge noted several of the facts in the case such as the disparate weights and ages of the appellant and the victim. Appellant asserts this violated Article V, Section 17 of the South Carolina Constitution which prohibits a judge from charging juries on matters of fact. We disagree.

The constitutional provision was designed to preserve inviolate the jury's fact finding function. All questions of fact are to be decided exclusively by the jury, uninfluenced by any expressions of opinion by the judge. State v. White, 15 S.C. 381 (1881); State v. Pruitt, 187 S.C. 58, 196 S.E. 371 (1938); State v. Thorne, 237 S.C. 248, 116 S.E.2d 854 (1960).

However, where the facts stated in a charge are not in dispute, the instruction is not erroneous. Turner v. Lyles, 68 S.C. 392, 48 S.E. 301 (1904); Riser v. Southern Ry., 67 S.C. 419, 46 S.E. 47 (1903).

The weights and ages of the appellant and the victim were not questions of fact for the jury. Appellant admitted his age and weight on cross-examination.

Accordingly, we affirm, concluding the trial judge's reference to undisputed facts did not violate Article V, Section 17 of the South Carolina Constitution.

270 S.C. at 552–53, 243 S.E.2d at 440. In contrast, in the present case Petitioner never admitted to being a getaway driver. Petitioner was fleeing from the police when the passenger in his car started shooting. Petitioner's role in the attempted murder as a driver was in dispute. There was no evidence of a pre-arranged plan to attempt to murder the officer.

The PCR judge erred in failing to correct the factual error in the order of dismissal and refusing to find trial counsel ineffective for failing to object to the example given by the judge in her charge on accomplice liability. Petitioner was prejudiced by the deficient performance. The example allowed the jury to find Petitioner guilty of attempted murder solely for fleeing from the police and driving the car from which the co-defendant shot at police.

CONCLUSION

Based on the above argument this Court should reverse the conviction and remand the case for a new trial.


Kathrine H. Hudgins
Appellate Defender

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

ATTORNEY FOR PETITIONER

This 14th day of December, 2023.

RECEIVED

Dec 14 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.


STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Maurio D. Rivers, #232669, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of December, 2023.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

From: [Stock, Chris](#)
To: [Mark Farthing](#); [SC - COLLINS CAROLINE](#)
Cc: [Hudgins, Kathrine](#)
Subject: Rivers, M - Brief of Petitioner - 2020-001106
Date: Thursday, December 14, 2023 3:46:00 PM
Attachments: [Rivers, M - Brief of Petitioner - 2020-001106.pdf](#)
[Rivers, M - Brief of Petitioner - 2020-001106 - AG Cover Letter.pdf](#)

Mr. Farthing,

Please find attached for service the Brief of Petitioner for Maurio D. Rivers' 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