STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2012-209187

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTONIO LEE DODD,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Notwithstanding error preservation concerns, the trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and a co-participant acted together to burglarize the victim's home and steal from him.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in March 2010 for second-degree burglary and grand larceny in an amount over $1,000. On February 14, 2012, Appellant proceeded to trial before the Honorable Edward W. Miller and a jury. The jury found Appellant guilty as indicted, and Judge Miller sentenced Appellant to ten years for second-degree burglary and five years, consecutive, for grand larceny, with the sentence suspended to probation for three years. A timely notice of appeal was served and filed.

ARGUMENT

Notwithstanding error preservation concerns, the trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and a co-participant acted together to burglarize the victim's home and steal from him.

Relevant Facts

On September 2, 2009, the victim left his home to go to work around 7:30 to 8:00 am. (R. p. 5, lines 5-8). When the victim returned around 6:30 pm, he discovered that his home had been burglarized and that several items had been stolen, including a 26-inch "Olivia" flat screen television, two game consoles, video games, a digital camera and its charger, a Spiderman Blu-ray movie, a Star Trek movie, two bracelets (belonging to the victim's daughter), a military ring, a large blue gym bag, and a padlock that had two distinctive stickers on it. (R. p. 8-23).

Earlier that day, between 8:30 am and 9:30 am, Ms. Booker, who lived en route between the victim's home and Appellant's home, observed Appellant and another black male walking down her street coming from the direction of the victim's home.[1] (R. p. 63-77). Appellant was carrying what appeared to be a television with the "cords dangling." (R. p. 61, line 1; see p. 68-72). Appellant's confederate, whom Ms. Booker could not identify but thought might be Appellant's brother Timothy, was carrying a dark-colored duffel-type bag similar to the bag stolen from the victim. (R. p. 57, lines 7-11; p. 69-70; p. 77-80; see also p. 136, lines 3-9). A little while later, around noon, Appellant and his brother Timothy arrived at the home they shared with Appellant's girlfriend and her sister. (R. p. 90-91; p. 98; p. 112). Appellant and Timothy had with them the victim's stolen television, which they set up in one of the bedrooms. (R. p. 13-14; p. 85-86; p. 98; p. 112). Appellant told his housemates that he purchased the

[1] Ms. Booker knew Appellant because he hung out with her son. (R. p. 61).

television from someone off the streets. (See R. p. 86; p. 98). Notably, Appellant did not have a job at that time, and the only person in the house who was working was Appellant's girlfriend's sister, who worked nights at a strip club. (R. p. 84; p. 94).

After the victim called 911 to report the burglary, Deputy Azzara responded to the victim's house and took an inventory of the items stolen. (R. p. 27-30). While Deputy Azzara was there, Ms. Booker stopped by on her way back from the store and reported what she had seen that morning. (R. p. 35; p. 73-74). She also provided Appellant's address. (R. p. 74, lines 7-9). Deputy Azzara and his partner then proceeded to Appellant's house to investigate. (R. p. 37). When they arrived they split up so that Deputy Azzara could watch the back door of the residence. (R. p. 37-38). After Deputy Azzara's partner knocked on the front door, Appellant was observed trying to sneak out the back. (See R. p. 37-38). Deputy Azzara then had a brief discussion with Appellant about his investigation of the burglary and Appellant told him he had been at home all day long. (R. p. 38). Initially, Appellant gave consent for the police to search his home, but then changed his mind and said police would have to get a warrant. (R. p. 38). Thereafter, while keeping the house under surveillance, police procured a search warrant. (R. p. 38-39). During that time, Appellant and his girlfriend left the residence, leaving only the girlfriend's sister and some children at the house.[2] (R. p. 39-40).

Upon executing the search warrant, police found several items of the victim's stolen property. (See R. p. 40-44). The victim's "Olivia" brand television was located in one of the bedrooms, and the victim's camera and charger, Blu-ray DVDs, and video games were found hidden in the dryer. (R. p. 40-41). In addition, the victim's distinctive

[2] Although Appellant's brother Timothy also lived at the house and had been present earlier when he and Appellant brought home the stolen television, he was not present that evening when the police were there. (See R. p. 90, lines 16-17).

padlock was found sitting in a doorway inside the home. (R. p. 40-41). Some of the stolen items were not recovered, including the victim's gym bag and his video game consoles. (R. p. 45; p. 119-20). However, sometime later, one of the missing bracelets was returned to the victim after the victim discovered Appellant's girlfriend wearing it at a court hearing.[3] (R. p. 20-21; p. 45, lines 13-17). Notably, both Appellant's girlfriend and her sister pled guilty to receiving stolen property. (R. p. 47, lines 2-13).

Discussion

Appellant first claims that the trial judge erred by giving the jury an instruction regarding "the hand of one is the hand of all" theory of accomplice liability because, he asserts, the doctrine should not apply where the State never charged an accomplice, identified an accomplice, or proved that an accomplice was guilty of the crimes. (See Brief of Appellant, p. 12). The only aspect of this argument that is preserved for review is the contention that the State never charged an accomplice as a co-defendant. (See R. p. 124, line 23 – p. 125, line 1; p. 132, line 18 – p. 133, line 13; p. 137, line 14 – p. 138, line 1). See , e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). However, this argument is plainly without merit. Appellant cites no case law requiring that a defendant's confederate under the "hand of one is the hand of all" theory be charged with the crime. Indeed, Appellant acknowledges that "there is analogous case law" stating that an accessory may be convicted even if the principal is never charged with the crime. (See Brief of Appellant, p. 12). See State v. Massey, 267 S.C. 432, 443-46, 229 S.E.2d 332, 338-39 (1976); see also State v. Blakely, 402 S.C. 650, 656-57, 742 S.E.2d 29, 32 (Ct. App. 2013). Appellant also acknowledges that in State v. Woomer, 276 S.C. 258, 277 S.E.2d 696

[3] The girlfriend testified that Appellant had given her the bracelet, although there was no special occasion for the gift. (R. p. 113-14).

(1981), the "hand of one is the hand of all" theory was appropriate even though the co-participant shot and killed himself before he could be captured. (See Brief of Appellant, p. 12). Therefore, the State submits that Appellant's argument on this issue is without merit.[4]

Appellant additionally asserts that the trial court should not have charged the jury with "the hand of one is the hand of all" where "there was no evidence of a common scheme or plan between [Appellant] and his alleged accomplice." (See Brief of Appellant, p. 13-15). This argument is not preserved for appellate review. Appellant's sole argument below was that the "hand of one is the hand of all" did not apply unless Appellant's co-participant was a charged co-defendant. (See R. p. 124, line 23 – p. 125, line 1; p. 132, line 18 – p. 133, line 13; p. 137, line 14 – p. 138, line 1). Appellant may not now raise a different argument on appeal. See Patterson at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal); State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (issue not preserved if party argues one ground for objection at trial and a different ground on appeal); see also Atl. Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (the appellate court should follow longstanding precedent and resolve an issue on preservation grounds when it is clearly unpreserved).

In any event, the trial judge did not err in giving the "hand of one is the hand of all" charge because there was evidence in the record supporting the charge. Under "the hand of one is the hand of all" theory, one who joins with another to accomplish an

[4] Notably, if an alleged co-participant need not even be *charged* with the crime, it follows that he also need not necessarily be positively identified and need not be proven guilty of the crime. See Massey, 267 S.C. at 443-46, 229 S.E.2d at 338-39.

illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). The evidence presented at trial, as described above, supported a reasonable inference that both Appellant and his confederate had been in possession of goods recently stolen from the victim. See State v. Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) (the State need not show a "formal expressed agreement" to prove that parties agreed and combined to achieve an illegal purpose, but may prove the agreement "by circumstantial evidence and the conduct of the parties"). Based upon their possession of recently stolen goods, the jury was entitled to infer that both men stole the goods. See, e.g., State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) (when one is found in possession of recently stolen property, the jury may infer circumstantially that he broke in and stole the property); see also State v. Irvin, 270 S.C. 539, 542-43, 243 S.E.2d 195, 196-97 (1978) (the trial judge properly denied a directed verdict as to both defendants where the State established the occurrence of a housebreaking and larceny and relied upon the defendants' possession of recently stolen items and the permissible inference that the defendants were the thieves). If the jury concluded that both men stole the goods, they could reasonably infer that the men stole those goods pursuant to a common plan to do so. Additionally, the testimony supported that the men were acting in concert when they carried away the stolen property and when they brought it back to Appellant's home.

The jurors were entitled to an instruction on "the hand of one is the hand of all" so that it would be clear that, even if the State could not definitively prove which one of the two men physically entered the victim's home and removed his property, Appellant was still guilty if they concluded that he and the other man acted pursuant to, and carried out,

a common plan to burglarize and rob the victim. (See R. p. 136-37). See Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011) (holding that a charge on the hand of one is the hand of all is appropriate where the evidence is equivocal as to which of several persons acting in concert physically committed the crime). Therefore, since there was evidence in the record from which the jury could infer that Appellant and his co-participant acted together to burglarize the victim's home and steal from him, the trial judge did not err in providing the jury with an instruction on "the hand of one is the hand of all." See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (if *any evidence* exists to support a charge, it should be given, and the trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 20, 2013

STATE OF SOUTH CAROLINA

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ANTONIO LEE DODD,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.**

CHRISTINA J. CATOE

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ATTORNEYS FOR RESPONDENT

September 26, 2013

STATE OF SOUTH CAROLINA

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THE STATE OF SOUTH CAROLINA,

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **CARMEN V. GANJEHSANI**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **20th day of September, 2013.**

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SWORN to before me this 20th day of September, 2013.

Notary Public for South Carolina.
My Commission Expires: 5/11/2014