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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable William Seals, Trial Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

FANOTTI N. NEAL

APPELLANT.

Appellate Case No. 2023-001791

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Did the trial judge abuse his discretion by denying Appellant's motion for a new trial, since the state failed to present substantial circumstantial evidence of Appellant's guilt of murder under the hand of one hand of all theory of accomplice liability?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

Did the trial court properly charge the jury on accomplice liability because the State presented circumstantial evidence supporting the charge, and it follows that the trial court properly denied the new trial motion because evidence existed to support the jury's verdict?

STATEMENT OF THE CASE

On January 25, 2023, a Horry County Grand Jury indicted Fanotti Nacier Neal, hereinafter "Appellant," for Burglary 1st degree and the murder of Joshua McPherson. Appellant's case was called to trial on November 6, 2023, and proceeded until November 9, 2023, with the Honorable William Seals presiding. Assistant Solicitors Nancy Livesay and Adam Harrelson of the 15th Circuit Solicitor's Office prosecuted the case and David Rigney, Esq., represented Appellant. Appellant was tried jointly with his co-defendant Micah Pressley. Ralph Wilson, Sr., Esq., represented Pressley.

After the close of the State's case, Appellant moved for a directed verdict as to the Burglary 1st charge, which Judge Seals granted. Appellant moved for a judgment notwithstanding the verdict and in the alternative for a new trial, based on the insufficiency of the evidence. Judge Seals denied Appellant's motion.

At the conclusion of trial, the jury found Appellant and his co-defendant guilty of murder and Judge Seals sentenced Appellant to 40 years' imprisonment.

RESPONDENT'S STATEMENT OF FACTS

Marion Robinson, Josh McPherson, hereinafter "the victim," and Jalen McPherson, the victim's brother, were visiting their friends in Conway to celebrate Jalen's birthday. (R. pp. 26-27). Robinson, the victim, and Jalen planned to stay the night at their friends' - Cameron and Shakira's – apartment while they were visiting. (R. p. 26). Robinson, Jalen and the victim went out to celebrate Jalen's birthday and returned home around 3:00 AM. (Trial Tr. p. 316). Robinson proceeded to go to bed on a chair in the living room and the victim went to sleep on the couch in the living room. (R. p. 111).

Around 5:30 AM, after everyone at the apartment was asleep, Appellant and his co-defendant along with three other individuals arrived at the apartment. (R. p. 111; State's Exhibit 50). Robinson testified that he knew Appellant from working together at Blue Beacon, a truck wash in Florence. (R. p. 21). Robinson met co-defendant Pressley at a video shoot about a month prior to the shooting. (R. p. 21). Jalen and the victim also participated in the video shoot with co-defendant Pressley, and Robinson visited with them after the video shoot ended. (R. pp. 22 and 25).

After Appellant and the others had gained entry into the apartment, Robinson was woken up by Appellant, and he fist bumped Appellant and fell back asleep. (R. p. 31). Robinson testified that he didn't think too much about Appellant being there, but he did not think anyone had invited him there or that anyone had been invited over after they went to bed. (R. pp. 32-33). Robinson then woke up to the sound of "two people tussling" and when he looked, he saw that someone wearing a black hoodie, and a beanie had shot the victim and ran out the door. (R. p. 27). He testified that the victim looked like he was about to get up, but the person in the black hoodie shot him, and Robinson pulled the covers over his head and felt the shooter run out the door. (R. 27). After the shooter ran out the door, Robinson went to check on the victim, saw he

was bleeding, and started banging on the bedroom doors to wake up their friends. (R. p. 29). Robinson testified that he did not find a gun on or around the victim. (R. pp. 65-66). Someone called the police, and the paramedics instructed them to give the victim CPR. (R. p. 29; State's Exhibit 13). Robinson identified the voices on the 911 call to be that of Cameron and Shakira – their friends who lived in the apartment, and Jalen who was trying to get the victim to respond. (R. pp. 37-38, State's Exhibit 13). He testified no one in his friend group whose voice was on the 911 call left the apartment, fired a gun, or pointed a gun at anybody. (R. pp. 38-39).

Robinson testified that he told police he saw Appellant in the apartment, but did not tell police about another man with a black hoodie in the apartment because he only saw one person and assumed them to be the same individual - Appellant. (R. p. 50). He testified that he did not know that five people had entered the apartment while he was asleep. (R. p. 51). He testified that there was no doubt that Appellant was the man he saw in the apartment and the man wearing the beanie in the video. (R. p. 51). He testified that he had no doubt that Appellant's co-defendant was the man with a black hoodie on the video. (R. p. 53). He testified that he had no reason to make anything up and had no ill will towards Appellant or his co-defendant. (R. p. 53).

Detective Allan Huggins of the City of Conway Police Department, responded to the apartment and talked to Robinson for 30-45 minutes. (R. p. 111). Detective Huggins confirmed that Robinson did not tell the jury anything different than what Appellant relayed to Detective Huggins that night. (R. p. 113). He also testified that mention of a man in a black hoodie was made, however it may not have been at that first encounter. (R. pp. 114-115).

Nicholas Contino, a former detective of Conway Police Department, testified that he spoke with Appellant in May of 2022 when he was in custody. (R. pp. 121-122). Initially, Appellant denied being at the apartment in Conway on the night of the shooting. (R. pp. 127-

128). Contino testified that he confronted him with evidence they had discovered, including the surveillance footage, and Appellant then conceded that he entered the apartment and saw the victim sleeping on the couch and Robinson sleeping in the chair. (R. pp. 127-131). Contino testified Appellant told him he was in the apartment for less than 30 minutes, and then drove back to Florence. (R. p. 133). Contino testified that they apprehended Appellant the same day of the shooting and identified the jeans and shirt he was wearing at that time. (R. p. 136). He also identified a hat he was wearing that folds down into a ski mask. (R. p. 137). Police were called to the apartment around 6:00 AM and surveillance footage shows Appellant leaving the apartment in Conway around 5:52 AM, putting Appellant's arrival time back in Florence around 7:30 AM. (R. pp. 138-139). Appellant was taken into custody the same evening, and by that time, Appellant had changed his clothes which were never recovered. (R. p. 139).

After further investigation, a search warrant was issued for Appellant's co-defendant's residence. A tan GLOCK 19X with a 25-round magazine, a backpack with a black GLOCK 19X and 32 live rounds and a magazine loader, a black Nike sweatshirt, and blue jeans were recovered from the residence. (R. pp. 153-154). SLED agent Paul Greer was qualified as an expert in firearms identification and testified as to his analysis of the fired bullets that were removed from Appellant's co-defendant and compared them to the guns. (R. p. 156-157). Greer testified that the fired bullet recovered from the victim's chest and the fired bullet recovered from the victim's spine are two different bullets and were fired through two separate firearm barrels. (R. pp. 157-158). Four guns were submitted to SLED for testing, two from the apartment, and two recovered from Appellant's co-defendant's residence. Greer testified that when he test fired the gun with serial number AFSG-329, it had parts missing causing a malfunction. (R. p. 164). Greer testified he was still able to fire the gun, but instead of automatically ejecting the cartridge,

manual removal of the cartridge was required to load another cartridge to fire again. (R. p. 164). Greer testified that the gun with serial number BRGD-733 had no malfunctions when test fired nor did the other guns. (R. pp. 166-167). Greer explained he classified the bullets and the firearm as an inconclusive match because the bullets could have been fired from a similar gun of a similar make and model. Greer testified that based on the configuration submitted to SLED, the malfunctioning gun was the only gun that could have fired the bullet in the victim's spine. (R. p. 172).

As to any DNA evidence, it was determined that such evidence was not of investigative value as to the firearms recovered in the co-defendant's residence because there were three other individuals in the residence when the search warrant was executed, and only the last person to touch the firearm would leave DNA. (R. pp. 204-205). There was no evidence to suggest that blood would be found on the gun considering the victim's blood was on the wall behind him. (R. pp. 212-213).

Charrel Floyd was one of the individuals who rode with Appellant and his co-defendant from Conway to Florence. When presented with the surveillance video at trial, Floyd identifies the other individuals to be her cousin Ky'Lisha Mack, Appellant, and an individual named "Shi." (R. p. 210-212). The red impala that was identified as being the vehicle they drove to Florence and back to Conway in belonged to Floyd's sister. (R. p. 209-210). She testified that she did not remember the other individual's name but confirmed that he was Appellant's co-defendant. (R. p. 211-213). Floyd confirms that the five of them drove to Conway and entered the apartment. (R. p. 210-212). Floyd saw two people asleep in the living room and saw Appellant "dab" Robinson's hand. (R. p. 216). She testified that she did not see any guns in the apartment and that they left around 5:45 AM. (R. pp. 217-218).

The surveillance footage shows Floyd, her cousin Kim (Ky'lisha) and Shi leaving the apartment prior to Appellant and his co-defendant. (R. p. 219, State's Exhibit 50). She testified that they didn't want to be in the apartment if everyone was asleep. (R. p. 219). The surveillance footage shows the three of them walking out of the apartment making no attempt to hide their faces. (R. pp. 221-222, State's Exhibit 50). A few minutes later, the footage shows Appellant and his co-defendant running out of the apartment, and Floyd testified that she does not know why they were running. (R. p. 222, State's Exhibit 50). Floyd testified that she ended up dropping everyone off at Shi's house in Florence and then went to her sister's house to return the car. (R. p. 224).

Dr. Ellen Reimer performed the autopsy on the victim and confirmed that the cause of death was two gunshot wounds to the chest. (R. p. 291). She states that both shots were fatal, and both played a role in the victim's death. (R. p. 291).

Neither Appellant, nor his co-defendant testified at trial. Both were found guilty of murder and Appellant was sentenced to 40 years' imprisonment.

STANDARD OF REVIEW

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983).

ARGUMENT

The trial court did not err in charging the jury on accomplice liability because the State presented circumstantial evidence supporting the charge, and it follows that the trial court properly denied the new trial motion because evidence existed to support the jury's verdict.

"In considering a new trial motion based on insufficiency of the evidence, the trial court is concerned with the existence of evidence rather than its weight." *State v. Smith*, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005) (citing *State v. Pauling*, 264 S.C. 275, 278, 214 S.E.2d 326, 327 (1975)). "The weight of the evidence is a question for the jury." *Id*. "Where there is any evidence supporting the jury's verdict, the court commits no error in denying the motion." *Id*.

Appellant argues that the circumstantial evidence the State presented did not amount to the level required to obtain a conviction based on a theory accomplice liability. He argues that at most, the State showed that Appellant was merely present at the scene. Respondent submits that the State provided evidence to not only support an accomplice liability theory, but evidence to show that Appellant was the principal actor in the victim's murder.

"It is well-settled that a defendant may be convicted on the theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted); *see also State v. Leonard*, 292 S.C. 133, 355 S.E.2d 270 (1987). "A formally expressed agreement is not necessary to establish the conspiracy." *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) (citing *State v. Oliver*, 275 S.C. 79, 267 S.E.2d 529 (1980); *State v. Fleming*, 243 S.C. 265, 133 S.E.2d 800 (1963); *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct.App.1995)). "It may be shown by circumstantial evidence and the conduct of the parties." *State v. Condrey*, 349 S.C. 184, 562

S.E.2d 320 (Ct. App. 2002) (citing *Oliver*, 275 S.C. at 80, 267 S.E.2d at 530; *Fleming*, 243 S.C. at 274, 133 S.E.2d at 805; *Bultron*, 318 S.C. at 334, 457 S.E.2d at 622).

"The law to be charged is determined from the evidence presented at trial." *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) (citing *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct.App.2000), *cert. denied*.) "A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." *Id*. If any evidence exists to support a charge, it should be given. *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) (citing *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999)).

The evidence at trial supported an accomplice liability charge. The State presented circumstantial evidence showing the joint criminal activity of Appellant and his co-defendant. Testimony confirms that Appellant, his co-defendant, and three others drove from Conway to Florence in the middle of the night. Robinson's testimony identifies Appellant being inside the apartment around the time of the shooting. Surveillance footage facing the apartment provides a narrow timeline and insight into the events occurring in the apartment. Appellant appears to have been unaware of the footage considering he did not admit to being in Conway at the apartment until the footage was showed to him, undoubtedly hindering his credibility. (R. pp. 127-131). Further, forensics confirm that two different bullets were fired and shot by two different guns, suggesting the high likelihood that two shooters were present.

Robinson's testimony is corroborated by the surveillance footage of the apartment. (State's Exhibit 50). The footage shows Appellant's arrival time to the apartment around 5:30 AM. (R. p. 14; State's Exhibit 50). It appears Appellant has a tan gun in his waistband, similar to the once recovered at his co-defendant's residence. (R. p. 211). Robinson identifies Appellant

after being woken and falls back asleep. He only sees Appellant at this point, not the others who had also entered the apartment. The footage also shows that the three friends they traveled with, left the apartment without Appellant and his co-defendant. (State's Exhibit 50). Minutes later, footage shows Appellant and his co-defendant running out of the apartment at 5:42 AM. (R. p. 49-50; State's Exhibit 50). The 911 call was placed at approximately 6:00 AM.

As to the firearms, forensics show that two different guns were used in the shooting by two different shooters. (R. pp. 157-158). The State theorized that Appellant's codefendant shot his gun one time and it jammed, so Appellant then fired his gun, explaining why two different bullets were identified at the scene. Testimony supports the theory, as Greer testified that when he test fired the gun recovered from the co-defendant's residence, the gun malfunctioned. (R. p. 164). Appellant's co-defendant exited the apartment carefully holding the gun, assumedly concerned that the gun was jammed, and the two rushed back to their vehicle and drove back to Florence. (R. pp. 306-307, State's Exhibit 50).

The issues presented before the jury are determinations of fact as to what occurred inside the apartment resulting in the victim's death. The State's evidence placed Appellant at the scene in a time frame of a matter of minutes. It showed Appellant entering the residence with what appears to be a gun, showed Appellant fleeing the scene and a 911 call followed moments after Appellant and his co-defendant left the apartment. Further, Appellant was not truthful with police until shown the evidence against him.

Considering the evidence, the trial court properly instructed the jury as follows on accomplice liability:

> 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 committed 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 and abet, and assist the commission of the crime. However, mere presence at the scene of the crime is not sufficient to convict one as a principle on the theory of aiding and abetting. Intent is also a necessary element, where 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.

(R. p. 350).

Furthermore, the trial judge specifically charged the jury that "mere presence" is not sufficient to convict one as a principle on the theory of aiding and abetting and that "mere knowledge" that a crime was going to be committed, without more, was insufficient to constitute guilt. (R. pp. 357-358). With this charge, the trial court eliminated any danger the jury could be misled by the "hand of one is the hand of all" charge.

There is nothing to suggest the jury did not consider the evidence before them in a meaningful and intelligent manner. The weight of the evidence is a determination exclusively for the jury. The State presented sufficient evidence; thus, the jury is entitled to render a verdict. *See State v. Hayes*, 69 S.C. 295, 48 S.E. 251 (1904) ("It is too clear for discussion that a defendant is not, as a matter of law, entitled to a new trial because the evidence does not convince the presiding judge of his guilt beyond a reasonable doubt." "The jury, not the judge, try the facts, and are to be convinced beyond a reasonable doubt."). As such, the trial court did not err in denying Appellant's motion for a new trial based on insufficiency of the evidence in regard to the accomplice liability jury charge.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm Appellant's conviction and sentence.

Respectfully submitted,

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PROOF OF SERVICE

I, Kaylee C. Kemp, attorney for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent has been forwarded to Appellant's counsel, David E. Rigney Esq. via email today March 14, 2025 to dave@rigneylawfirm.us.

I further certify that all parties required by Rule to be served have been served.

This is the 14th day of March 2025.

s/Kaylee C. Kemp
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