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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRYAN M. HOLDER,

APPELLANT

APPELLATE CASE NO. 2013-001145

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in instructing the jury with the law on accomplice liability, "hand of one is the hand of all," when there was no evidence that Appellant and the co-defendant or anyone else acted together with a common purpose and plan to shoot at people and shooting at people is not a natural and probable consequence of agreeing to go target shooting in a vacant field with woods in the background?

STATEMENT OF THE CASE

In May of 2013, the Spartanburg County Grand Jury indicted Holder for grand larceny, malicious injury to real property, three counts of attempted murder and one count of possession of a firearm during the commission of a violent offense, indictments #12-GS-42-5761, 5761, 5370, 5371 and 5372.[1] On May 6, 2013, Holder appeared before the Honorable J. Derham Cole and pled guilty to grand larceny and malicious injury to real property but proceeded to jury trial on the three counts of attempted murder and one count of possession of a firearm during the commission of a violent offense. Christopher Paul Thompson represented Holder for the guilty pleas and at trial. Barry Joe Barnette and Prina C. Taylor prosecuted the case. The jury found Holder guilty of possession of a firearm during the commission of a violent offense and guilty of the lesser included offenses of assault and battery of a high and aggravated nature and two counts of assault and battery first degree. Judge Cole sentenced Holder to ten (10) years for one count of assault and battery first degree, twenty (20) years consecutive for assault and battery of a high and aggravated nature, five (5) years consecutive for possession of a firearm during the commission of a violent offense and ten (10) years consecutive for the remaining assault and battery first degree resulting in an aggregate sentence of forty five (45) years in prison. A timely notice of intent to appeal was served on May 24, 2013. This appeal follows.

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[1] It is unclear why the indictment number reflects 2012 when the grand jury convened in May of 2013.

STATEMENT OF FACTS

Appellant Bryan Holder pled guilty to stealing guns from the home of Wayne Lyda while Holder was at the Lyda house as a guest of Stacey Lawing who was house sitting for the Lydas. One of the guns stolen from the Lyda house was used to shoot Bonnie Raines as she sat in the passenger seat of a Mazda Miata parked at the Race Way convenience store. Bobby Swigert was in the driver's seat of the Miata. At the same time Bonnie Raines was shot, shots from the same gun were also fired at Mark Swanger as he was power washing the road by the gas pumps at the Ingles grocery store. A co-defendant, Mattison Tyler Schomer, testified against Holder at trial. At the time of trial Schomer had pleaded guilty to three counts of attempted murder connected to the shooting of Bonnie Raines and shots fired at Bobby Swigert and Mark Swanger. Schomer also pled guilty to receiving stolen goods. (Tr. p. 120, lines 13-24). At the time of trial Schomer had not yet been sentenced[2]. (Tr. p. 120, line 25 – p. 121, lines 1-16).

Schomer provided numerous conflicting statements to police. At trial Schomer testified that he and Holder went out to a field to shoot two stolen guns. (Tr. pp. 108 – 111). The field was close to Schomer's house. Schomer testified that the next night he and Holder returned to the field to shoot the guns. According to Schomer, on the second night, Holder left the field area, went up an incline and shot in the direction of the Ingles grocery store. (Tr. p. 112, line 19 – p. 113, lines 1-25). Schomer testified that Holder also shot in the direction of the Race Way convenience store. According to Schomer, after shooting toward

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[2] The South Carolina Department of Corrections website indicates that Schomer is serving a ten year sentence for attempted murder.

the Race Way Holder stated, "I believe I shot someone in the head in the car right there." (Tr. p. 116, lines 3-9).

At trial Schomer admitted implicating Holder and initially denying being in the field with Holder because he did not want to incriminate himself. (Tr. p. 118, line 22 – p. 119, lines 1-6). Schomer admitted selling the gun used in the shooting in exchange for marijuana. (Tr. p. 122, lines 2-16). Another gun was found under the porch at Schomer's house. (Tr. p. 122, lines 17-25). When asked why he didn't stop Holder from shooting in the direction of the Ingles and the Race Way, Schomer claimed, "Because if you had the gall to shoot in the direction of other people, what stops you from shooting in my direction at me?" (Tr. p. 125, lines 3-7). Schomer admitted making the statement to the press as he was leaving the police station to be transported to the detention center, "I'm sorry." (Tr. p. 343, lines 14-20).

Holder testified at trial and admitted going to the field with Schomer one time to shoot guns. (Tr. p. 347, lines 12-23). Holder testified that when he and Schomer shot the guns they shot at targets into the woods. (Tr. p. 348, lines 12-22). Holder denied shooting in the direction of the Ingles or the Race Way and denied shooting at anybody. (Tr. p. 354, lines 10-16). Holder testified that after shooting at targets they returned to Schomer's house. (Tr. p. 351, lines 2-20). Holder denied ever removing the guns from Schomer's house after the target practice. (Tr. p. 349, lines 19-22).

ARGUMENT

The trial judge erred in instructing the jury with the law on accomplice liability, "hand of one is the hand of all," when there was no evidence that Appellant and the co-defendant or anyone else acted together with a common purpose and plan to shoot at people and shooting at people is not a natural and probable consequence of agreeing to go target shooting in a vacant field with woods in the background.

At the close of testimony and prior to closing arguments and the jury instructions, the State requested a charge on the "hand of one is the hand of all." (Tr. p. 407, lines 15-16). Appellant objected the charge. (Tr. p. 408, line 6 – p. 409, lines 1-8). Counsel for appellant specifically stated, "Well, Your Honor, there's no testimony to support that these two co-defendants were acting in unison together. Mr. Schomer absolutely denies that he ever told – he was told anything. Mr. Holder testified they didn't have no discussion about an attempted murder." (Tr. p. 408, lies 6-11). The State's case against Appellant Holder relied heavily on the testimony of the co-defendant, Schomer, and statements allegedly made by the co-defendant indicating that Appellant shot at some people. Schomer did not testify that he and Appellant planned together to shoot at people and there was no testimony about any discussions between Appellant and the co-defendant about shooting at people. It is unclear from Schomer's testimony what formed the basis for his guilty plea to three counts of attempted murder. Appellant testified that when he and Schomer went to shoot the guns neither of them left the dugout area. (Tr. p. 353, lines 6-14). Appellant denied any conversation with Schomer about shooting anybody. (Tr. p. 355, lines 16-21).

The judge charged the jury with the law on accomplice liability, "hand of one is the hand of all." The judge told the jury:

> Now, one who is charged with the commission of a crime may be convicted as the actual perpetrator or as an accomplice. An accomplice is often referred to as an aider or an abettor in the commission of a crime. And you are instructed that where

> two or more people act together with a common intent and purpose and they combine or conspire or plan or otherwise agree to the commission of a crime, each person who is present and who is aiding, abetting and assisting and participating in the commission of a crime is equally guilty. The act of one is deemed to be the act of all.
>
> Any person who joins with another or others to accomplish an illegal purpose is held to be criminally responsible for everything done by any other person which occurs as a natural and probable consequence of the acts done pursuant to and in furtherance of the common plan and purpose. And therefore where two or more persons are acting together and they are aiding, abetting, assisting and participating with one another in committing a crime, the acts of one become the acts of all. The hand of one is deemed to be the hand of all. And all are equally guilty of any crime that is accomplished by those joint efforts.

(Tr. p. 456, line 20 – p. 457, lines 1-16). The judge erred in instructing the jury on the law of accomplice liability, "hand of one is the hand of all" when the evidence did not support such a charge. Appellant was prejudiced by the erroneous charge.

In State v. Langley 334 S.C. 643, 648-649, 515 S.E.2d 98, 101 (1999), the South Carolina Supreme Court addressed "hand of one, hand of all" liability and accomplice liability separately, writing:

> Second, under the "hand of one, the hand of all theory," appellant would be guilty of murder if he aided Derrick. Under this theory, 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. To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981). Third, appellant would be guilty of murder if the jury found he was an accomplice. Under accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989); see also State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) (to be liable as an aider or abetter, the participant must be chargeable with knowledge of the principal's criminal conduct; mere presence at the scene is not sufficient to establish guilt as an aider or abetter).

In State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002), the South Carolina Court of Appeals wrote, "Under the 'hand of one is the hand of all' theory, 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."

The evidence in the present case does not support liability under "hand of one, hand of all" liability or accomplice liability. Despite co-defendant Schomer's guilty pleas to three counts of attempted murder, the only evidence presented by the State, through the testimony of the co-defendant Schomer who had not yet been sentenced, was that Appellant acted alone in shooting at people. There was no evidence that Appellant and the co-defendant joined in a common design to shoot people. There was no evidence that there was any kind of agreement or even discussion about shooting at people. Appellant denied that on the one night he was shooting with the co-defendant that either one of them shot at anybody. Shooting at people is not a natural and probable consequence of shooting at targets in a field with woods in the background, even if the shooting was done with stolen guns.

In Wilds v. State, 407 S.C. 432, 438-439, 756 S.E.2d 387, 390 (Ct.App. 2014), a post conviction relief case, the South Carolina Court of Appeals addressed when a charge on accomplice liability, "hand of one is the hand of all" should be given writing:

> Our supreme court has noted that "[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has 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 Barber, as in the instant case, four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. Id. at 234–35, 712 S.E.2d at 437–38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the

> robbery. Id. at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. Id. at 438. Our supreme court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." Id. at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." Id. at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. Id. at 237, 712 S.E.2d at 439.

In contrast to Barber, and like Wilds, the State's evidence in the present case only points to Appellant as the shooter. The State presented no evidence that the co-defendant Schomer was the shooter and Appellant was acting with him to shoot at people. There was no evidence presented by the State that the co-defendant Schomer was acting with Appellant to shoot at people. The State presented no evidence of an agreement, no evidence of a common design and no evidence of aiding and abetting. The present case is distinguished from Barber where there was evidence that two of the robbers were armed with a .380 handgun, the type of gun used to shoot the victims. The State's evidence in the present case shows that the sole weapon used in the shootings was State's Exhibit #15, the 30-06 caliber rifle that the co-defendant sold to the drug dealer, Wesley, for marijuana. (Tr. pp. 264-272; p. 122, lines 2-16). The evidence presented at trial showed that the shooter, whoever the jury found that person to be, acted alone. The judge erred in instructing the jury with accomplice liability, the "hand of one is the hand of all."

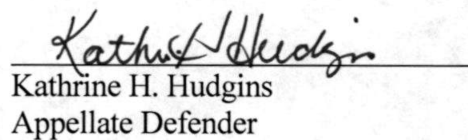
Appellant was prejudiced by the erroneous jury instruction. In closing argument the prosecutor mentioned the words "hand of one is the hand of all" five times. (Tr. p. 425, lines 10-15; p. 429, line 2; p. 430, line 11; p. 433, line 6; p. 436, line 1). Because of

the judge's decision to improperly charge "hand of one is the hand of all," the prosecutor was allowed to improperly argue "hand of one is the hand of all" when there was no evidence to support this theory. Based in the judge's erroneous instruction on accomplice liability, in closing argument the prosecutor was allowed to improperly argue that Appellant and the co-defendant acted in concert and aided and abetted one another when there was no evidence of accomplice liability. (Tr. p. 434, lines 15-17). The erroneous instruction, unsupported by the evidence, requires a new trial.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of July, 2014.

STATE OF SOUTH CAROLINA

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J. Derham Cole, Circuit Court Judge

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APPELLATE CASE NO. 2013-001145

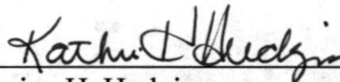
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments and sentencing sheets;
(2) Trial transcript pp. 72-486.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 7th, 2014



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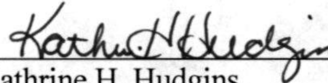
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Bryan M. Holder, #337574, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 7th day of July, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of July, 2014.

Rhonda Deniese Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021