STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TORREN MARQUIZE EADY,

APPELLANT

APPELLATE CASE NO. 2014-000375

INITIAL BRIEF OF APPELLANT

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1.

Whether the court erred by refusing to charge "mere presence" and "mere association" are insufficient to convict where there were allegedly two men present at the time of the shooting, it was undisputed several eyewitnesses were unable to identify which one was the shooter, and where there was also evidence the shooter acted spontaneously since this instruction was necessary given the facts of this case?

2.

Whether the court erred by allowing witness Teresa Jenkins to speculate that something "bad had happened" based on the way the appellant and the other man "were acting" when she dropped them off in Charleston on the day of the incident, since it was improper for the solicitor to elicit such improper speculation?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston County Grand Jury for the offenses of murder, three counts of attempted murder, and possession of a firearm during a violent crime. R. *. His case was called to trial on February 18, 2014 before the Honorable J.C. Nicholson, Jr., and a jury. Benjamin Lewis and Christina Parnell represented appellant. Timothy Finch and Gregory Voigt were the assistant solicitors. Tr. 1.

On February 20, 2014 the jury found appellant guilty on all counts. Tr. 366, l. 9 – 367, l. 7. Judge Nicholson sentenced appellant to forty-five years imprisonment for murder, and concurrent ten year sentences for each count of attempted murder. Judge Nicholson also imposed a five-year concurrent sentence for possession of a firearm during a violent crime. Tr. 384, l. 16 – 385, l. 2.

This appeal follows.

ARGUMENTS

1.

The court erred by refusing to charge "mere presence" and "mere association" are insufficient to convict where there were allegedly two men present at the time of the shooting, it was undisputed several eyewitnesses were unable to identify which one was the shooter, and where there was also evidence the shooter acted spontaneously since this instruction was necessary given the facts of this case.

Relevant Facts

The identity of the shooter was the key issue in this case. Gabrielle McCulley testified she was on the front porch smoking marijuana with several other people at the time the shooting occurred. "Everyone was just playing around, rapping, listening to music. People were getting their hair done." Tr. 114, l. 2 – 115, l. 12. Gabrielle remembered "two individuals came up . . . they came from around the corner; that's all I know." "They had on all black and one of them had on a black fisherman's hat." Tr. 115, l. 18 – 116, l. 5.

Gabrielle remembered: "One [man] asked if we knew something about somebody trying to gang them. I asked what they were talking about. He said, I know it wasn't none of y'all. Everything was good. And we thought he was about to leave and that's when somebody started shooting." Tr. 116, l. 6 – 117, l. 14.

Gabrielle was not sure which one of the two men was the shooter. "One out of the two. I'm not sure which one." Gabrielle remembered "I heard gunshots and I seen an orange ball of fire . . . Antoine [Foster] pulled me to the ground . . . he pulled me into the house." Tr. 116, l. 6 – 117, l. 14.

Detective Sean Reiter investigated the April 6, 2012 shooting. Tr. 197, l. 20 – 199, l. 15. Reiter recalled: "I briefly spoke with the eyewitness and determined that he needed to be interviewed further and moved him to my vehicle." Tr. 199, ll. 16-20. That witness was Antoine Foster. Tr. 200, ll. 1-2.

Reiter admitted that Antoine Foster would be the only witness who claimed he could identify appellant as the shooter. Reiter acknowledged that other people could not identify the shooter, and that there were three surviving eyewitnesses on the porch where the shooting occurred that night. Tr. 217, ll. 5-18.

Teresa Jenkins was dating appellant on the day of the incident. She was working as a supervisor at the Wyndham Resort on Edisto Island, and she went by the house where appellant and his mother lived in Charleston after work. Tr. 76, l. 1 – 79, l. 18.

Teresa remembered that day that appellant's ex-girlfriend, Rochelle Grant, came to appellant's door, and she "was banging on the door and then he [appellant] really didn't want to open the door because I guess she was coming inside to try to come after me. I know her voice because before we had an argument before too. So I know her voice." Tr. 81, ll. 3-11.

Teresa testified that appellant asked Rochelle why she brought people over to his mother's house to try to cause trouble, and Rochelle slapped appellant's cell phone out of his hands. Tr. 82, ll. 5-13. Teresa said appellant left after that, and she sent a text message to his phone. Tr. 83, ll. 2-12.

Given the identification problems in this case the state would try and make much of the fact that appellant apparently wore a hat at times. However, Jenkins could not remember

if appellant was wearing his hat that day. It was clear she could only speculate. Tr. 88, ll. 10-24.

At some point Teresa heard gunshots down the street. Appellant returned to the house, and he knocked on the door. After he came inside Teresa gave appellant and Da'Quan a ride. Tr. 88, l. 1 – 90, l. 14.

Teresa drove appellant and Da'Quan in her car to a part of Charleston she was not familiar with. Tr. 95, ll. 5-17. As seen in issue two, Teresa was asked to by the solicitor to speculate about what might have occurred, and she answered that she thought something bad had happened. Tr. 95, ll. 5-7.

As stated, Gabrielle McCulley remembered being on the porch smoking pot and listening to music but she and other witnesses were unable to identify the shooter. Tr. 115, l. 13 – 117, l. 14.

Antoine Foster was the man who claimed appellant was the shooter. Foster testified he remembered Rochelle Grant going to appellant's house and "fussing up there." Tr. 145, ll. 11-21. Foster claimed while they were sitting on the porch a short time later that appellant came to their house and he said: "Y'all know the people that tried to gang me or whatever. And I was like, I don't know what you're talking about. Then Adrian was like, I don't know. I ain't got nothing to do with it. And then one of my mom's customers had come outside and he was counting his money. He asked who -- he asked who Torren [appellant] was. Torren said, 'it don't matter, and he started shooting.' Okay. Her customer got shot in the leg and Adrian got shot in the head." Tr. 148, l. 2 – 149, l. 4. Foster said he was not aware of who the other man was with appellant. Tr. 150, l. 25 – 151, l. 2.

Foster said he was shown photographic lineups, and he identified appellant. Tr. 153, l. 9 – 156, l. 9. He said appellant's photograph was number five in the six man array. Tr. 156, ll. 8-17; 171, l. 19 – 173, l. 2.

Detective Reiter testified he interviewed appellant, and that appellant told him that his girlfriend Teresa dropped him off after the people "showed up at his porch." Appellant told Detective Reiter that he walked to the store and he received a call "or someone on the street stopped him and said, `oh, I heard you were shot.' And that's kind of where his story ended." Tr. 208, ll. 1-7. Reiter testified that appellant was arrested ten or eleven days later. Tr. 209, ll. 10-12.

The judge refused to charge mere presence based upon the evidence in this case and he made appellant's request to charge on mere presence and mere association an exhibit. Court's Exhibit 3. R. p. *. Tr. 362, l. 14 – 363, l. 14. The requested instruction was a correct instruction on the law that "mere presence at the scene is not sufficient to prove someone guilty of a crime. A defendant's presence where a crime is being committed or mere association with a person who commits a crime does not make the defendant an accomplice or an aider and abettor of the person committing the crime..." R. *. Court's Exhibit 3.

Discussion

In State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) the Supreme Court noted that mere presence at the scene is not sufficient to establish guilt as an aider or abettor. In State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987), the Court held that mere association is insufficient to establish guilt, and there must be presence at the scene of the crime by pre-arrangement to aid, encourage, or abet in perpetration of the crime to constitute

guilt as a principal. State v. Barroso, 328 S.C. 268, 272, 493, S.E.2d 854, 856 (1997); State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977). The Court in State v. Mattison held that, under the unusual facts of that case, Mattison received the "mere presence" and "mere association" jury charges that he was entitled to although not in the exact form he sought.

Here, conversely, the judge refused to charge mere presence and mere association. Court's Exhibit 3 was a correct charge on the law and the judge had an obligation to instruct it in this case. R. p. *. There was evidence two men were present and one of them was the shooter. Identification was the major issue in this case since only one witness, Antoine Foster, out of all the eyewitnesses claimed appellant could be identified as the shooter.

Further, accomplice liability or "the hand of one is the hand of all" was not a real issue in this case. The judge erred by refusing to give this "mere presence" and "mere association" jury instruction where it was undoubtedly called for by the facts of this case. The evidence, particularly the testimony of Gabrielle McCully showed that one of the two men may have acted impulsively in opening fire on the people on the porch without the prior knowledge of the other man present. Appellant should be granted a new trial.

2.

The court erred by allowing witness Teresa Jenkins to speculate that something bad had happened based on the way appellant and the other man "were acting" when she dropped them off in Charleston on the day of the incident, since it was improper for the solicitor to elicit such improper speculation.

Relevant facts

During the testimony of Teresa Jenkins she explained how she drove appellant and Da'Quan to another part of Charleston. The solicitor asked Teresa whether she thought something good or something bad had happened based upon the way the men were acting in the car. Over the defense objection that this question called for "speculation," Teresa answered she thought something bad had happened. Tr. 94, l. 23 – 95, l. 7. Teresa then said Da'Quan told her he hoped she did not think appellant had done anything wrong. Tr. 95, ll. 15-21.

Discussion

The Supreme Court has held that questions calling for speculation are improper. Statements that ask a witness to draw conclusions from events they did not see are equally improper questions calling for sheer speculation. See State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); South Carolina State Highway Department v. Westboro Weaving Company, 244 S.C. 516, 137 S.E.2d 776 (1964); Norman v. Stevenson Theaters, Inc., 159 S.C. 191, 156 S.E.2d 357 (1931).

In State v. Stokes the Court held in that State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), "other bad acts" case that even if there was a connection between the prior act, the trial judge erred in allowing the child to speculate concerning Stokes' intentions. The Court

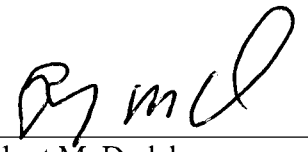
found her testimony that Stokes intended to rape her was obviously her own conclusion, rather than a fact within her personal knowledge.

Here, Teresa speculated that she thought something bad had happened by the way appellant and Da'Quan were acting. That speculation was particularly prejudicial when considered in light of her testimony that Da'Quan told her he hoped she did not think appellant "had done this." Teresa was able to testify as a fact witness about what she observed. Her speculation and her conclusions that she thought something bad had happened by the way the two men were acting was not admissible, and it was highly prejudicial. State v. Stokes, Supra. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of December, 2014.

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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 Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of December, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of December, 2014.

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