

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Richland County
J. Michelle Childs, Circuit Court Judge
Certiorari to the Court of Appeals

Appellate Case No. 2014-001191

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S.C. Supreme Court

ISRAEL WILDS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. The Circuit Court, and the South Carolina Court of Appeals, properly ruled that appellate counsel was ineffective in failing to argue on appeal that there was no evidence to support a jury charge on accomplice liability.
- II. The Circuit Court properly ruled that appellate counsel was ineffective in failing to argue on appeal that the trial court erred in refusing to instruct the jury on mere presence.

STATEMENT OF THE CASE

Israel Wilds (Wilds), Respondent herein, was indicted for murder and armed robbery at the September 1999 term of the Court of General Sessions in Richland County. A trial held March 26-29, 2001, before the late Honorable Marc H. Westbrook, presiding judge, resulted in conviction. Wilds was sentenced to life imprisonment for murder and 30 years for armed robbery. On direct appeal this Court affirmed. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003).

Wilds filed an Application for Post-Conviction Relief (PCR) on December 15, 2003. In his application for relief, and at his evidentiary hearing, Respondent argued that his right to effective assistance of counsel on appeal, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, had been violated on direct appeal. An evidentiary hearing was convened on June 8, 2007 before the Honorable J. Michelle Childs, presiding circuit judge. By written order filed May 14, 2008, the circuit court granted relief in part and denied relief in part. The State, Petitioner/Respondent herein, served notice of appeal on May 29, 2008. Wilds instituted a cross-appeal by serving notice of appeal on June 5, 2008.

The Court of Appeals granted both parties' petitions on May 7, 2012. Following briefing and oral arguments, the Court of Appeals affirmed the grant of relief as to the issues raised by the State. Relief was denied on the issues put forth by Respondent. Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014). The State filed a Petition for Rehearing which was denied by Order dated April 24, 2014. The State next filed a Petition for Writ of Certiorari to the Court of Appeals. This Honorable Court granted that petition by order filed November 20, 2014. Respondent was served with the Brief of Petitioner on November 26, 2014. Respondent was granted subsequent extensions of time in which to file this Brief of Respondent.

STATEMENT OF FACTS

Anthony Rumph (Rumph) was fatally shot on Rhett Street in the City of Columbia around nine o'clock at night. Although the shooting took place out in the open on a city street, there were no eyewitnesses. Rumph was found lying on the road, unable to speak or identify any perpetrator before his death. App. p.81, line 8-p.84, line 13; App. p.111, line 20-p.112, line 24; App. p.116, line 12-p.120, line 19; App. p.139, lines 2-8.¹

A. Evidence Adduced at Trial

Codefendants Isom Simmons (Simmons) and Joseph Dante Dungee (Dungee) testified that Israel Antwan Wilds (Wilds), the Respondent/Petitioner herein, committed armed robbery and murder. Both Simmons and Dungee were age 15 at the time of the incident, considerably younger than Wilds. Both were also charged with armed robbery and murder, Simmons as a juvenile and Dungee as an adult. Their charges were pending when Wilds went to trial. App. p.215, lines 9-14; App. p.234, line 20-p.238, line 3; App. p.258, lines 2-6; App. p.285, lines 6-8; App. p.313, line22-p.314, line 12; App. p.317, lines 16-21.

1. Simmons's Testimony.

On the night in question, Simmons was under a curfew. He and Dungee were walking home when they encountered Wilds, and the trio walked together down Rhett Street. Walking in

¹ Petitioner correctly notes that in his Return to the State's Petitioner for Writ of Certiorari, Respondent asserted that Simmons and Dungee both claimed to have been merely present while Respondent robbed and murdered the victim. See, Brief of Petitioner Pg. 3, fn. 1 and pg. 4, fn. 2 ; Return to Petition, Pg. 3. Respondent's detailed summary of the testimony of both co-defendants however, made it quite clear that these two young men claimed that they were merely present with Respondent when he suddenly, and without their advance knowledge or plan, initiated a robbery of the victim and shot him. The slight involvement they admitted having in this crime was covered by the predictable claim that Respondent made them do it and/or that they were acting under the duress of having just seen Respondent shoot a man in cold blood. Therefore, Respondent's initial summary should more accurately have read that both Simmons and Dungee claimed to have been *merely present* when Respondent initiated the robbery without their advance knowledge and when he shot the victim.

the opposite direction was a man Simmons did not know. The man spoke as they passed and asked if they had anything for him. Simmons and Dungee walked on, but Wilds stopped to talk to the man—Anthony Rumph. Seeing that Wilds had stopped, Simmons and Dungee waited off to the side. Wilds had his back to the boys, and Simmons did not know what was said in the conversation. App. p.218, line 22-p.224, line 7; App. p.247, line 3-p.249, line 23.

According to Simmons, Wilds pulled out a gun and pointed it at Rumph's chest. Rumph reached for his back pocket with one hand and grabbed for the gun with the other. They struggled. Rumph pulled his wallet out of his back pocket. According to Simmons, Wilds *ordered* Simmons and Dungee to hit Rumph. Simmons hit him in the back of the head and took his cigarettes out of his pocket. Dungee hit Rumph and took his key chain. Rumph was clutching his wallet to his chest. Wilds shot him in the chest at point blank range. App. p.224, line 3-p.230, line 14.

Immediately afterwards, Simmons and Dungee went to Timothy Myers's house. Simmons was nervous and upset. Myers was a close friend who tried to keep Simmons out of trouble. Myers had told Simmons to let him know if anything went wrong, so Simmons confided to him that "my cousin had just shot somebody." App. p.228, line 21-p.232, line 10; App. p.245, lines 9-19.² Myers gave the boys some marijuana and they left. App. p.232, line 16-p.233, line 9; App. p.274, line 5-p.279, line 3.

2. Dungee's Testimony.

² It was this excited utterance that led investigators to Simmons. The police focused first on Myers because he and Rumph both appeared in the surveillance video of a neighborhood store shortly before Rumph was shot. Simmons was then questioned. He gave a statement implicating himself and Wilds, though he did not mention Dungee. As a result of that statement, Simmons was charged with armed robbery and with assault and battery with intent to kill, which became murder when Rumph later died. App. p.140, line 2-p.153, line 22; App. p.252, lines 11-21. Myers was not charged in connection with the shooting.

Dungee had heard Simmons call Wilds "Twan" and say that he was a cousin. According to Dungee, earlier on the day of the incident, Wilds said something about robbing somebody and Simmons seemed to be party to the idea. Dungee saw a gun. They walked around the neighborhood. Then Wilds split off, and Dungee and Simmons went to their friend's house. App. p.291, line 3-p.295, line 7.

Later, walking near Rhett Street, Dungee and Simmons met up with Wilds again. They walked single file down Rhett Street as a man with a cup was walking in the opposite direction. The man asked Dungee if he knew the bus schedule, but Dungee did not. The man passed Dungee and Simmons. Wilds, last in the file, stopped and asked the man (Rumph) about crack cocaine. Dungee and Simmons stopped a few feet away. App. 295, line 8-p.302, line 20.

Dungee testified that Wilds pointed a gun and appeared to be robbing Rumph. Dungee and Simmons grabbed Rumph, who tried to jerk away. Dungee hit him in the face; Simmons hit him in the back of the head. Wilds hit him in the back of the head with the gun. Dungee took a cigarette lighter and some coins from Rumph's pockets. Simmons took a pack of cigarettes. When Rumph refused to surrender his wallet, Wilds shot him. App. p.320, line 13-p.307, line 22.

3. Other Evidence.

Tiny spots of blood were subsequently found on a shoe owned by Wilds. The mitochondrial DNA extracted from this blood was profiled and compared to DNA extracted from blood on fabric cut from Rumph's shirt. They were found to match. App. p.351, line 22-p.354, line 7; App. p.359, line 10-p.360, line 16; App. p.366, lines 13-15; App. p.369, line 17-p.375, line 22; App. p.376, line 22-p.380, line 5; App. p.387, line 20-p.395, line 25; App. p.402, line 24-p.405, line 13; App. p.419, lines 14-15; App. p.427, line 21-p.451, line 3.

Items of Wilds' clothing were also examined for the presence of blood. Significantly, the results of those tests were negative: no blood was found. App. p.376, lines 1-16.

4. Alibi Defense.

Wilds lived in the neighborhood where the crime occurred. However, his cousin, his aunt and her fiancé all testified that Wilds was in his room watching a particular basketball game on the night in question. App. p.481, line 2-p.535, line 24; App. p.557, line 2-p.558, line 12.

B. How the Issues Arose at Trial

After deliberating approximately two hours, the jury sent a note asking "*if we say [Wilds is] guilty of murder, are we saying he of the three actually pulled the trigger?*" App. p.615, line 22-p.616, line 6. Understanding the note to suggest that the jury did not believe that Wilds was the shooter, the solicitor changed his theory of the case.

The solicitor submitted that a defendant indicted for murder as a principal could nevertheless be convicted on a theory of accomplice liability—the hand of one is the hand of all. App. p.616, lines 10-15; App. 617, line 9-p.618, line 9. Defense Counsel countered,

The theory of hand of one, hand of all, has to have some basis in fact, and Your Honor is required to charge the law applicable to the evidence. ...[F]or Your Honor to go ahead and answer the question in the negative, you would have to charge [the jury] on the law that is not applicable to the facts of this case.

App. p.616, line 17-p.617, line 7.

The trial judge initially observed that there had been no testimony that anyone else pulled the trigger:

It seems to me the only way the jury could have gotten to this is to speculate. ...[T]he proper way to answer this is to advise this jury that they've got to base their verdict on the evidence, and they can't—the verdict can't be the result of any sort of speculation on their part.

App. p.618, lines 13-23.

The solicitor then pointed out that the evidence regarding the stain on Wilds' shoe suggested that it was Rumph's blood, "deposited after [he] was bleeding at the location where the crime occurred, that would certainly be inconsistent with the alibi defense, and consistent under the law of South Carolina with [Wilds] being guilty of murder." App. p.620, lines 4-11.

Against defense counsel's staunch position that the facts of the case did not warrant an accomplice liability instruction, the trial judge determined that he would deliver it. In the trial judge's view, the jury's approach to the facts had made accomplice liability an issue, and the trial judge considered that he had no choice but to instruct the jury accordingly. Defense counsel's motion for a mistrial based upon that ruling was denied. In making this argument, Defense Counsel noted that giving a jury charge on accomplice liability at that stage of the trial, would render him *per se* ineffective. As correctly noted by Defense Counsel at trial, not bringing the concept of accomplice liability into play until during the jury deliberations irreparably hampered his ability to effectively represent his client at trial and would result in a *per se* violation of Petitioner's right to effective representation as guaranteed by the Sixth Amendment to the United States Constitution. Giving the charge at issue at that stage in the trial deprived Respondent of the opportunity to have his Defense Counsel present closing arguments in opposition to the application of that theory of liability to Petitioner based upon the evidence adduced at trial. App. p.620, line 12-p.623, line 1. Respondent maintains, as did his Defense Counsel at trial, that there was no evidence introduced at his trial which supported a charge on accomplice liability.

The record reflects that the presiding judge gave counsel for both sides a copy of his intended jury instructions prior to the charge conference held before the closing arguments in this case. During that charge conference, the State was given ample opportunity to make objections to the proposed charge and to request additions thereto. App. p. 560, l. 14 – p. 561, l. 7. The

Court expressly stated that, “*What I’m asking is if you have any requests to alter the charge in any fashion.*” App. p. 560, ll. 16 – 17. While the prosecution made some other comments about the instructions as proposed, they *did not* request a charge on accomplice liability or objection to the omission of an instruction on that theory of liability. Had the State requested a charge on accomplice liability at that point, Defense Counsel would at least have been on notice of their intent to advance that as an alternate theory of guilt. Respondent maintains that the evidence would not have supported such a charge even if requested in a timely manner. Nevertheless, had the State requested the charge at the close of the evidence, and the request been granted, at least Defense Counsel could have structured his closing arguments to the jury accordingly. If, as the State asserts, the evidence warranted such a charge, the time to request it was before closing arguments, not after. Petitioner would also note that following the trial court’s initial jury charge the presiding judge once again gave both sides the opportunity to raise objections to the jury instructions given by the court. At that point, neither the State, nor the Defense, made any objections or requested any additional charges. App. p. 615, ll. 9 – 18.

When the jury returned to the courtroom, the trial judge delivered this supplemental instruction:

I further charge you that the law in South Carolina is that if a crime is committed by two or more persons who are acting together in the commission of a crime, the act of one is the act of all.

Two people or more can be guilty of the same offense at the same time if they are together, acting together, assisting each other, in commission of the offense.

The law says that under those circumstances, the act of one is the act of all. In other words, the hand of one is the hand of all.

Of course, the situation I’ve presented to you must be proven by the State beyond a reasonable doubt. They must prove again beyond a reasonable doubt that the Defendant and the others were acting together in the commission of the crime, assisting each other in the commission of a crime.

App. p.624, lines 2-16.

The record of this trial does not indicate that Defense Counsel had any opportunity to review the supplemental instruction before it was delivered. Immediately afterward, Defense Counsel specifically reserved his previous objection that the instruction was not warranted by the evidence, and further objected to the absence of a charge on mere presence in the supplemental instruction as given. App. p.625, line 1-p.627, line 10.

The trial judge initially agreed that a mere presence charge was appropriate. In the end, however, the trial judge declined to give a further charge because the supplemental instruction as given included the requirement that the State prove guilt beyond a reasonable doubt: “If the jury were to make the determine that [Wilds] was merely present, then based on my charge they would find the State had not proven he was assisting and acting together with the others, so I think the charge is appropriate and I decline to add to it.” App. p.625, lines 16-18; App. p.627, lines 11-25.

Less than an hour after receiving the supplemental charge on accomplice liability, the jury sent yet another note advising the Court that they were in agreement on one charge and not on the other. An Allen³ charge was given over Defense Counsel’s objection. The jury deliberated for another hour before sending a third note with a further question about accomplice liability. Over Defense Counsel’s objection, the trial judge gave a second supplemental instruction:

I’ve been over this with the attorneys. You have sent this and have underlined certain language, and the language you underlined is, and I quote, if both are together, acting together and assisting each other in the commission of the offense, and then the question after that is, are all three underlined conditions necessary by law in

³ Allen v. United States, 164 U.S. 492 (1896).

order for the jury to find the Defendant guilty of hand of one, hand of all, or does only one of the conditions need to exist[?]

Let me note that the gist of the law of hand of one is the hand of all means that all must be together, acting together, assisting each other, in the commission of the offense.

Now, these are not separate elements, each of which [has] to be proven. Rather, they refer to a continuous course of action by the participants. The gist of it is they must be present and aiding or abetting in the commission of the offense.

Obviously, aiding means to aid or assist, and abetting means to be inciting or agitating. A common term may be to egg on or something along those lines.

That's the gist of what it is. It refers to a continuous course of conduct, not simply elements which must be proven separately.

App. p.628, line 9-p.635, line 21. Defense Counsel entered his objection to the second supplemental charge on the record before and after the charge was given. App. p. 634, ll. 5-20 and App. p. 636, ll. 3 – 5. Shortly after receiving that charge, the jury returned a verdict of guilty on both counts.⁴

C. Direct Appeal

On direct appeal, appellate counsel did not raise any issue concerning the jury instruction on accomplice liability or the omission of a charge as to mere presence. Instead, appellate counsel argued that the trial judge improperly and unconstitutionally limited the cross-examination of Wilds' codefendants. See, Supp. App. pp.11-20. This Court affirmed on the ground that the issue raised was not preserved. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003), Supp. App. pp.9-10.

⁴ The trial record reflects that the jury sent their second note out at 7:49 PM. App. p. 632, ll. 5 – 8. Following the second supplemental charge, the record reflects that the Court announced that a verdict had been reached at 8:07 PM. App. p. 636, ll. 5 – 8. Thus, only eighteen (18) minutes passed between when the Court announced the second note from the jury until the jury returned with a verdict. During that short period of time the jury would have been ushered in and out of the courtroom and received the Court's second supplemental charge. It is therefore, apparent that the jury spent very little time on further deliberations after receiving the second supplemental charge before reaching their verdict.

D. Post-Conviction Relief

At the post-conviction relief (PCR) hearing, Wilds asserted that appellate counsel was ineffective in failing to raise the accomplice liability and mere presence issues on direct appeal. App. p.680, line 16-p.684, line 11. The PCR court ruled that appellate counsel was ineffective in failing to argue on appeal that (1) the evidence adduced at trial did not support an instruction on accomplice liability; (2) the accomplice liability instruction as given was insufficient in that it allowed a finding of guilt if Wilds and his codefendants were merely assisting each other without the requisite intention or common design; and (3) the trial judge erroneously refused to give a charge on mere presence. Finding that appellate counsel's performance in failing to raise these issues on appeal fell below an objective standard of reasonableness, the PCR court granted Wilds a new trial. App. pp. 732-757.

STANDARD OF REVIEW

A defendant is entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); U.S. Const. amend. VI. Under the two-pronged standard for establishing a claim of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, the defendant must show first that counsel's performance "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). Then, the defendant must show that, but for counsel's deficient representation, the outcome of the proceeding would have been different. *Id.* On appeal from an order denying post-conviction relief (PCR), the PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

I. The lower court properly ruled that appellate counsel was ineffective in failing to argue on appeal that there was no evidence to support a jury charge on accomplice liability.

At the time Israel Wilds was tried as a principal for murder and armed robbery, the law was settled that a jury charge on an alternative theory of accomplice liability could not be given if there was no evidence to support it. The evidence here is unequivocal: Wilds was either guilty as a principal or he was not guilty at all. The State's argument, that the accomplice liability instruction was proper because the jury could believe a portion of the State's evidence while disbelieving those Wilds was the shooter, is contrary to precedent. For these reasons, the lower court properly ruled that appellate counsel was ineffective in failing to challenge the accomplice liability instruction on direct appeal.

A. How the Issue Arose Below

The following is a summary of the evidence and procedural history, all of which are set forth in detail with specific citation to the record in the Statement of Facts, supra.

At Wilds' trial, the State presented a narrative of an armed robbery and murder in which Wilds was unequivocally the principal in the crimes and, specifically, the shooter. Wilds called witnesses to establish an alibi. After approximately two hours of deliberations, the jury sent a note asking "*if we say [Wilds is] guilty of murder, are we saying he of the three actually pulled the trigger?*" App. p.615, line 22-p.616, line 6.

The trial judge and counsel interpreted this note as suggesting that the jury did not believe Wilds was the shooter. After discussion, the trial judge delivered, for the first time, an instruction on accomplice liability. Defense Counsel objected that the evidence did not support this instruction. Appellate counsel did not raise this issue on direct appeal.

At the post-conviction relief (PCR) hearing, Wilds asserted that appellate counsel was ineffective in failing to raise the accomplice liability issue on direct appeal. App. p.680, line 16-p.684, line 11. The PCR court agreed. Finding that appellate counsel's performance in failing to raise this issue on appeal fell below an objective standard of reasonableness, the PCR court granted Wilds a new trial. App. pp. 732-757. Respondent's Appellate Counsel, Joseph L. Savitz, III, did not testify at the PCR hearing in this matter.

B. Discussion

Indictment as a principal does not in itself preclude a finding of guilt on an alternative theory of accomplice liability. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010). "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." Id. at 479, 697 S.E.2d at 584. However, an instruction on the alternative theory of accomplice liability must be supported by the evidence. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (accomplice liability charge was proper when there was evidence that the defendant and a second person planned the murder and the second person was the shooter). "Like 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) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) (lesser-included offense charge properly refused where no evidence supported it), and Dickman, supra). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Foxworth, 269 S.C. 496, 238 S.E.2d 172 (1977); State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003).

Taken in the light most favorable to the State, the evidence adduced at trial shows the following:

1. Dungee heard Wilds say something about robbing somebody earlier on the day of the incident and saw that Wilds had a gun. Simmons may have been in on a plan to rob someone, but Dungee did not join the plan.
2. There was no evidence adduced at trial which indicated any agreed plan to commit a robbery at a particular time or place. Likewise, the evidence did not indicate that an actual plan was formulated but rather, only indicated Dungee's claim that he heard Wilds say something about robbing somebody earlier in the day.
3. Shortly before the incident, before they met Wilds, before they encountered Rumph, Simmons and Dungee were walking home. Simmons's plan was to be home by his curfew.
4. When Wilds decided to rob Rumph, both Simmons and Dungee had passed Rumph and were walking down the street. The robbery was well underway before either Simmons or Dungee became a participant.
5. Simmons and Dungee only began to participate in the robbery after Wilds, wielding a gun, ordered them to join in.
6. Only Wilds shot Rumph.
7. There was no evidence that anyone but Wilds had a gun.

Thus, even if Wilds had planned a robbery in advance, the evidence in the case is unequivocal as to every integral fact of principal liability. The State, which at all times bears the burden of proving guilt beyond a reasonable doubt, had presented a case devoid of any evidence that Wilds was guilty as an accomplice.

In asserting that the accomplice liability instruction was not erroneous, the State offers a retreaded version of an argument that failed long ago in the context of lesser-included offenses: that the jury, disbelieving the State's evidence that Wilds was the shooter, was properly given the option to find him guilty as an accomplice because the evidence showed that all three men were

acting together and one of them must have been the shooter. *See, Brief of Petitioner at pg. 11.* This argument defies precedent. To warrant an alternative theory instruction, the “mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.” State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (citation and internal quotation marks omitted).

The State’s assertion that the alibi evidence supports the necessary inference, that one of the co-defendants was the shooter instead of Wilds, borders on the absurd. There is no evidence that Wilds was involved in the crime in any capacity other than as shooter. By contrast, in Barber v. State, *supra*, which also involved murder in the course of an armed robbery, the perpetrators’ faces were masked and more than one was armed with the type of weapon in question. Because the evidence as to the identity of the shooter was equivocal, the jury in Barber was properly charged on the alternative theory of accomplice liability. The Supreme Court’s decision in Barber v. State is controlling here. The equivocal evidence that was present in Barber is utterly missing in this case. Accordingly, applying the principles set forth in Barber, and in State v. Dickman, *supra*, Wilds would have prevailed on direct appeal but for appellate counsel’s unreasonable omission. Moreover, the unwarranted accomplice liability instruction effectively diluted the State’s burden of proof in violation of the Due Process Clause. U.S. Const. Amend. XIV. It allowed the jury to convict on the basis of sheer speculation.

The trial judge committed reversible error, and appellate counsel was ineffective in failing to raise the issue on direct appeal. For these reasons, the lower court’s ruling should be affirmed.

II. The lower court properly ruled that appellate counsel was ineffective in failing to argue on appeal that the trial court erred in refusing to instruct the jury on mere presence.

As argued in Issue I above, the evidence presented at trial did not support any instruction on accomplice liability. Assuming without conceding that giving the accomplice liability instruction was somehow not reversible error, the instruction as given was deficient because it failed to instruct the jury that Wilds could not be found guilty if he were merely present at the scene. Appellate Counsel's failure to raise either issue on direct appeal was objectively unreasonable and deprived Wilds of his Sixth Amendment right to effective assistance of counsel. For the reasons set forth below, the trial judge's erroneous refusal to give the requested charge on mere presence was prejudicial and would have resulted in reversal on direct appeal.

A. How the Issue Arose Below

Over Defense Counsel's objection that it was unwarranted, the trial judge delivered this supplemental instruction:

I further charge you that the law in South Carolina is that if a crime is committed by two or more persons who are acting together in the commission of a crime, the act of one is the act of all.

Two people or more can be guilty of the same offense at the same time if they are together, acting together, assisting each other, in commission of the offense.

The law says that under those circumstances, the act of one is the act of all. In other words, the hand of one is the hand of all.

Of course, the situation I've presented to you must be proven by the State beyond a reasonable doubt. They must prove again beyond a reasonable doubt that the Defendant and the others were acting together in the commission of the crime, assisting each other in the commission of a crime.

App. p.624, lines 2-16. Defense Counsel had no opportunity to review the supplemental instruction before it was delivered. Immediately afterward, Defense Counsel further objected to

the absence of a charge on mere presence in the supplemental instruction as given. App. p.625, line 1-p.627, line 10.

The trial judge initially agreed that a mere presence charge was appropriate. In the end, the trial judge declined to give a further charge because the supplemental instruction as given included the requirement that the State prove guilt beyond a reasonable doubt: “If the jury were to make the determine that [Wilds] was merely present, then based on my charge they would find the State had not proven he was assisting and acting together with the others, so I think the charge is appropriate and I decline to add to it.” App. p.625, lines 16-18; App. p.627, lines 11-25.

Less than an hour after receiving the supplemental charge on accomplice liability, the jury sent yet another note, in response to which an Allen⁵ charge was delivered over Defense Counsel’s objection. The jury deliberated for another hour before sending a third note with a further question about accomplice liability. Over Defense Counsel’s objection, the trial judge gave a second supplemental instruction:

I’ve been over this with the attorneys. You have sent this and have underlined certain language, and the language you underlined is, and I quote, if both are together, acting together and assisting each other in the commission of the offense, and then the question after that is, are all three underlined conditions necessary by law in order for the jury to find the Defendant guilty of hand of one, hand of all, or does only one of the conditions need to exist[?]

Let me note that the gist of the law of hand of one is the hand of all means that all must be together, acting together, assisting each other, in the commission of the offense.

Now, these are not separate elements, each of which [has] to be proven. Rather, they refer to a continuous course of action by the participants. The gist of it is they must be present and aiding or abetting in the commission of the offense.

⁵ Allen v. United States, 164 U.S. 492 (1896).

Obviously, aiding means to aid or assist, and abetting means to be inciting or agitating. A common term may be to egg on or something along those lines.

That's the gist of what it is. It refers to a continuous course of conduct, not simply elements which must be proven separately.

App. p.628, line 9-p.635, line 21.

At the post-conviction relief (PCR) hearing, Wilds asserted that appellate counsel was ineffective in failing to argue on appeal that the trial judge erroneously refused to give a charge on mere presence. App. p.680, line 16-p.684, line 11. The PCR court agreed. Finding that appellate counsel's performance in failing to raise this issue on appeal fell below an objective standard of reasonableness, the PCR court granted Wilds a new trial. App. pp. 732-757.

B. Discussion

As a threshold matter, the State's assertion that the issue is not preserved is utterly without merit. Defense Counsel made his objection at the first possible moment. The record is clear that he had no advance notice that the trial judge would fail to include a mere presence charge, when even the trial judge acknowledged that such a charge is standard in an accomplice liability situation.

Turning to the merits, the State has failed to show why post-conviction relief should not be granted. Under a theory of accomplice liability, "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. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999), and State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). *An accomplice "must be chargeable with knowledge of the principal's criminal conduct."* Id. (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)).

Thus, there are three requirements to establish guilt under a theory of accomplice liability. An accomplice (1) must be present and (2) aid, abet or assist in the commission of the crime through some overt act (3) intentionally, or through a common design. The absence of any one requirement is fatal.

For example, assistance rendered unknowingly does not make a person guilty of a crime. It is possible for two or more persons to act together by accident, without a common design. On the other hand, prior knowledge that a crime is going to be committed, without more, is insufficient to establish guilt. State v. Collins, 6 S.C. 566, 225 S.E.2d 189 (1976). Likewise, mere presence at the scene of a crime is insufficient to convict. Leonard, 292 S.C. at 137, 355 S.E.2d at 272; State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).

In refusing Defense Counsel's request to give a mere presence charge, the trial judge committed reversible error. In arguing to the contrary, the State relies on State v. Austin, *supra*. In Austin, an outright refusal to give a mere presence charge was affirmed only because the jury was instructed clearly that the accomplice must have rendered assistance by acting with a common design or common intent. In other words, the instruction given in Austin was sufficient to forestall a conviction based on mere presence.

Here, however, the trial judge's supplemental instructions were silent as to the intention requirement. The State has not argued otherwise.⁶ The PCR court ruled that this silence constituted an infirmity in the instruction, one of three bases for its conclusion that appellate counsel was ineffective; however, the State failed to address this particular ruling in its original Petition for Writ of Certiorari. Therefore, it is now the law of the case. *See generally* State v. Gregorie, 339 S.C. 2, 528 S.E.2d 77 (2000); State v. Sampson, 317 S.C. 423, 454 S.E.2d 721

⁶ The State argues only that "the instructions were similar at pg. 15.

(Ct. App. 1995). The State asserts that there was sufficient evidence of an agreement to commit a crime, disregarding the fact that the charge as given was incomplete.⁷ *Brief of Petitioner at pgs. 11-12*. Thus, the State's challenge is not only procedurally barred, it crumbles on substantive grounds.

In sum, having failed to adequately charge the intention requirement, the trial judge erred in refusing altogether to give a charge on mere presence. *Cf. State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998) (*jury was expressly charged that mere presence at the scene is insufficient to prove someone guilty of a crime*). The Circuit Court ruled properly on this issue.

Finally, the State further argues that a mere presence charge was not warranted by the facts of this case. *Brief of Petitioner at pgs. 16 - 17*. The State correctly *cites* *State v. Dennis*, 321 S.C. 431, 486 S.E.2d 674 (Ct. App. 1996), for the proposition that mere presence generally applies when there is some doubt as to whether a person is guilty of a crime by virtue of accomplice liability. Contrary to the State's assertion, however, there is ample doubt in this case, arising not only from the alibi evidence, but from the prosecution's blood stain evidence.

Without a charge to clarify that more than presence was required, the jury was allowed to convict based solely on the blood stain evidence—and it is quite likely that it did so. The jury's note evidenced that it disbelieved evidence that Wilds was the shooter. If the jury did not find Simmons and Dungee to be credible and rejected the evidence that Wilds was the shooter, the

⁷ Indeed, the intention requirement was not even implied by the definition of abetting (meaning inciting or agitating) in the second supplemental instruction, because "aiding" and "abetting" were stated in the alternative:

[T]he law of hand of one is the hand of all means that all must be together, acting together, assisting each other, in the commission of the offense. ...[T]hey must be **present and aiding or abetting** in the commission of the offense.

App. p.635, lines 9-15 (emphasis added).

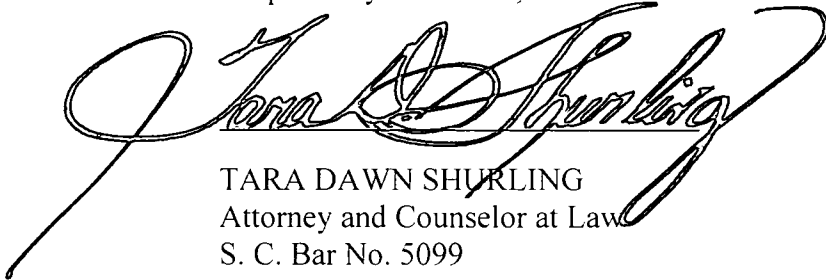
State's case was reduced to little more than a shoe with a tiny spot of blood tied to a crime on a Columbia street. The problem is that the tiny spot of blood alone does not prove guilt. At best, it tends to establish that Wilds was present at the street scene, either at the time Rumph was shot or thereafter. The jury could only speculate whether the shoe was stained at the time Rumph was shot or thereafter. And the jury could only speculate as to Wilds' actions—whether he participated in the robbery, or whether he stood nearby without participating and rushed over after either Simmons or Dungee shot the victim or whether he walked through the scene after the shooter had fled. Based solely on the blood stain, none of these scenarios is more plausible than another—yet, under two of the scenarios Wilds is innocent of any crime. As recognized by the lower court, while “a charge on mere presence ordinarily would not have been warranted” the unique facts of this case clearly necessitated the instruction. App. P. 747. Under these circumstances, the giving of an incomplete accomplice liability instruction, without a mere presence, charge effectively diluted the State's burden of proof in violation of the Due Process Clause. U.S. Const. Amend. XIV. The prejudice arising from the failure of the trial court to charge mere presence was exacerbated by the Court's failure to adequately charge the intention requirement for accomplice liability. The trial judge committed reversible error, and appellate counsel was ineffective in failing to raise the issue on direct appeal.

For these reasons, the lower court's ruling should be affirmed.

CONCLUSION

For the reasons stated, the PCR court's order should be affirmed. Wilds' convictions and sentences should be reversed and his case remanded for a new trial.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

January 8, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Richland County
J. Michelle Childs, Circuit Court Judge
Certiorari to the Court of Appeals

Appellate Case No. 2014-001191

ISRAEL WILDS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

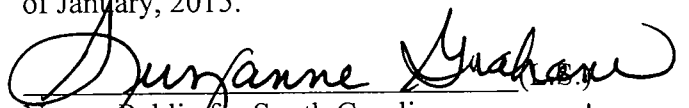
CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of Brief of Respondent by in the above-entitled case has been served upon opposing counsel, David Spencer, Senior Assistant Attorney General, Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 8th day of January, 2015.


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

Attorney for Respondent

SWORN TO BEFORE me this 8th day
of January, 2015.


Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF



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January 8, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JAN 13 2015

S.C. Supreme Court

Re: Israel Wilds v. State of South Carolina
Appellate Case No.: 2014-001191

Dear Ms. Kitchings:

Enclosed for filing please find the original and fifteen (15) copies of the Brief of Respondent as well as my Certificate of Service in the above captioned case. I would appreciate your office clocking and returning the extra copies in the envelope provided. I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is fluid and cursive, with a large initial "T".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures

cc: David Spencer, Senior Assistant Attorney General (w/enclosures)
Israel Wilds, 274010 (w/enclosures)
April Wilds Wright (w/out enclosures)

Package 1 of 2