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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILENZA PRITCHETT,

APPELLANT

APPELLATE CASE NO. 2014-001920

INITIAL BRIEF OF APPELLANT

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2.

Whether the court erred by refusing to charge mere presence in reference to the unlawful carrying of a pistol charge when the hand of one is the hand of all theory of accomplice liability was charged to the jury and the evidence presented supported giving a mere presence charge?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant at the May 20, 2010 term of General Sessions for armed robbery, kidnapping, conspiracy, unlawful carrying of a pistol, and possession of a weapon during the commission of a violent crime. R. *. His case was called to trial on August 25, 2014 before the Honorable Brooks P. Goldsmith, and a jury. Tr. 1. Assistant Solicitor Lynorr Musser represented the state, and Jessica Saxon represented Appellant. Tr. 2.

At the conclusion of the trial on August 28, 2014, the jury found Appellant guilty. Tr. 156, l. 11 – 157, l. 6. Judge Goldsmith sentenced him to fifteen years imprisonment for armed robbery, fifteen years concurrent for kidnapping, five years concurrent for conspiracy, one year concurrent for unlawful carrying of a pistol, and five years concurrent for possession of a weapon during the commission of a violent crime. Tr. 168, ll. 5-23.

This appeal follows.

STATEMENT OF FACTS

Around 2:45 am on the morning of April 1, 2010, two armed men entered the Kangaroo Express located at 1610 Fording Island Road in Bluffton, forced the clerk, Makia Fulton, to empty the registers of all cash, and fled not only with the cash, but also with several cartons of Newport cigarettes and Swisher Sweets cigarillos.[1] Before leaving the store, the men forced Fulton into the bathroom. After waiting a few minutes, Fulton left the bathroom, locked the door to the store, and called 911. Officers arrived several minutes later. See Tr. 186, l. 21 – 206, l. 17.

Fulton told the officers that both robbers were wearing dark pants, dark hooded sweatshirts with the hoods raised, and blue bandanas covering their faces with only their eyes visible. She claimed that one of the males was white and approximately six feet tall, while the other was black and shorter than five feet, seven inches tall. Tr. 141, l. 25 – 144, l. 3; Tr. 157, ll. 7-21. Moreover, Fulton allegedly told the officers that she recognized the black male's voice. Tr. 144, ll. 13 – 145, l. 3; Tr. 157, l. 24 – 158, l. 3; Tr. 207, ll. 17-24.

Sergeant Trey Simmons of the Beaufort County Sheriff's Office immediately conveyed the description of the two suspects Fulton had given him to other officers over his "hand-held radio." He also called Corporal William Murphy, who was a uniformed patrol officer, and asked him to check other convenience stores on Hilton Head Island that were open twenty-four hours for the suspects. Tr. 93, l. 11 – 94, l. 18.

Corporal Murphy travelled to the closest convenience store that was opened to the one that was robbed. It was also a Kangaroo Express, but was commonly referred to in the

[1] This Kangaroo Express is located in Bluffton at the base of the bridge leading to Hilton Head Island. The store was also referred to in the record as the "Buckingham Pantry," which is a local name for the convenience store.

record as the "Gum Tree Pantry," which is a local name for the store.[2] Tr. 103, l. 17 – 104, l. 3. Upon arriving at the Gum Tree Pantry, Murphy noticed a dark blue Volkswagen Jetta parked at one of the gas pumps, but no one was pumping gas. As he drove by the car, he noticed the driver was a white male and the front seat passenger was a black male. There was also a black male and a black female sitting in the back of the car. Murphy eventually approached the car and briefly spoke to the driver. As he was speaking to the driver, he noticed "the butt of a pistol wedged in between the driver's seat and the center console." Murphy immediately drew his service weapon and demanded everyone put their hands up. Everyone in the car complied. Tr. 104, l. 18 – 111, l. 4.

Eventually back up officers arrived and each occupant of the car was removed and placed in the back of a separate patrol car. Brandon Holt was identified as the white male driver, Harry Lockett was identified as the black male front passenger, and Appellant was identified as the black male back passenger. The black female passenger was identified as Tiffany Major. Tr. 111, l. 15 – 113, l. 13; Tr. 117, ll. 11-24. In addition to the pistol located in between the driver's seat and the center console, the officers also discovered a second pistol under the front passenger seat located directly in front of Appellant's feet while they were removing the occupants of the car. Tr. 118, ll. 4-25; Tr. 131, l. 9 – 135, l. 14.

Fulton gave a written statement at the scene. Tr. 143, ll. 6-11. After she completed her statement, Corporal William Polites drove Fulton to the Gum Tree Pantry to see if she could identify the suspects. Tr. 146, ll. 4-22; Tr. 210, ll. 8-18. Fulton remained in the backseat of Polites' patrol car during the show up and each of the three males discovered in

[2] The "Gum Tree Pantry" is located on Gumtree Road in Hilton Head Island. Tr. 104, ll. 11-17.

the dark blue Jetta was removed from the back of a patrol car in handcuffs and shown to Fulton one by one. Brandon Rolt, the white male, was shown to Fulton first. She did not identify him as one of the robbers who entered the store. Harry Lockett, the black male who was sitting in the front seat, was shown to Fulton next. She also did not identify Lockett. Appellant was shown to Fulton last. She identified him as the man she knew as "Lenny" and claimed it was his voice she recognized during the robbery. Tr. 147, l. 4 – 150, l. 5; Tr. 211, l. 1 – 212, l. 12.

Appellant, Rolt, Lockett, and Major were subsequently arrested and transported to the sheriff's office on Hilton Head where they were photographed and interviewed. They were then booked at the Beaufort County Detention Center where their clothes were seized. Tr. 241, ll. 16-25; Tr. 23, l. 18 – 26, l. 5. Law enforcement had the dark blue Jetta towed to a secure impound lot owned by the sheriff's office and obtained a search warrant for the car. Tr. 244, ll. 10-17. During a search of the car, investigators found an unopened pack of Newport cigarettes on the front passenger seat floorboard, a pack of Swisher Sweets cigarillos in the front passenger seat door pocket, and three blue bandanas on the backseat. In the trunk, officers found four cartons of Newport cigarettes in a plastic bag, a black backpack with cash inside, a royal blue hooded sweatshirt with a black t-shirt over it, and a black hooded sweatshirt. See Tr. 245, l. 1 – 272, l. 20.

Based on information provided by the store manager, Jennifer Sesmas, four or five cartons of Newport cigarettes were stolen from the Kangaroo Express as well as approximately six packs of Swisher Sweets cigarillos, and a little over one hundred eighty one dollars. Tr. 232, l. 11 – 234, l. 13. Sesmas also provided the police with a copy of the store's video surveillance footage. Tr. 230, l. 14 – 232, l. 10.

The clothing and firearms recovered from the dark blue Jetta were analyzed for touch DNA. Appellant's DNA was not found on either of the weapons or on any of the clothing with the exception of the royal blue sweatshirt where a mixture of four individuals' DNA was found and neither Appellant *nor* Rolt could be excluded as possible contributors to the mixture. Tr. 71, l. 7 – 74, l. 15.

The jury convicted Appellant of all charges including armed robbery, kidnapping, conspiracy, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. Tr. 156, l. 12 – 157, l.6.

ARGUMENT

1.

The court erred by admitting a witness's out-of-court and in-court identification of Appellant in violation of his due process rights since the show up procedure used by law enforcement was unduly suggestive and the identification was so unreliable that a substantial likelihood of misidentification existed.

Relevant Facts

Makia Fulton testified during the Neil v. Biggers[3] hearing that two individuals entered the store during the robbery and that each was armed with a gun. She explained that the only identifying features of the individuals she observed were their gender and race because they were dressed in all black with hooded sweatshirts covering their heads, blue bandanas covering their faces except for their eyes, and gloves covering their hands. She claimed that both of the individuals were males and that one was black and the other was white. Fulton further maintained that both men were in close proximity to her throughout the robbery, that both spoke to her, and that the store was well lit. Tr. 25, l. 3 – 27, l. 20; Tr. 33, l. 20 – 34, l. 8.

Fulton testified that she told the responding officers she recognized the black male's voice during the robbery. She claimed she recognized the voice as belonging to a man she knew as "Lenny." She said she met "Lenny" in 2007 through his mother. She used to go to his house every other month to braid his mother's hair and would occasionally engage in "small talk" with him. It is unclear from Fulton's direct testimony whether she provided the

[3] 409 U.S. 188 (1992)

officers with the name "Lenny" before the show up or after she identified Appellant at the Gum Tree Pantry. Tr. 28, l. 25 – 30, l. 16.

Fulton maintained that about twenty minutes after the robbery, one of the responding officers told her "they think that they may have somebody" and she agreed to travel with the officer to the Gum Tree Pantry to attempt to identify the individuals. Tr. 28, ll. 6-15; Tr. 30, ll. 22-25. She maintained that it took about seven minutes to drive from the store where she worked in Bluffton to the Gum Tree Pantry on Hilton Head. Tr. 31, ll. 4-11. She further explained that the officers first showed her a white male who she did not identify, then a black male who she also did not identify, and then lastly a black male who she recognized as "Lenny." Tr. 28, ll. 15-21; Tr. 31, ll. 12-17. Fulton identified Appellant in the courtroom as the man she knew as "Lenny." Tr. 32, ll. 14-23.

On cross-examination, Fulton admitted that while she had initially testified that the robbery lasted about ten minutes, it really only took about two minutes. Tr. 35, ll. 18-25. Fulton also explained that when the officer told her that "they might have somebody" and asked her whether she would travel with him to attempt to make an identification, he also told her several individuals who were "looking kind of suspicious" were detained at another gas station. Tr. 36, ll. 1-7.

While her testimony was still slightly confusing on cross-examination, it appears Fulton admitted that she did not provide the officers with the name "Lenny" until after viewing Appellant at the Gum Tree Pantry. She acknowledged she did not write in her written statement (that was completed before the show up) that she recognized the black male's voice and that she knew him as "Lenny." She also agreed that in his incident report, Corporal Polites did not write that she identified the black male as "Lenny" until after the

show up. Rather, Polites wrote that before the show up, Fulton simply indicated she thought she recognized the black male's voice. Tr. 36, l. 8 – 38, l. 6.

Additionally, Fulton testified that when she arrived at the Gum Tree Pantry, there were several other marked police cars there and that "all of the guys were in different cars." While she could not remember whether any blue lights were flashing, she did recall that all of the "suspects" were in handcuffs and that each was removed from the back of a separate police car and shown to her individually while she remained in the back of Corporal Polites' patrol car. Tr. 39, ll. 9 – 40, l. 11. Fulton claimed she had a clear view of each man because she was "looking out the window" and they were each about five feet from her. She also explained that the officers "shined the light in their eyes so I could see who everybody was." Tr. 40, l. 12 – 41, l. 6.

Corporal Polites testified that he was working the "night shift" on the morning of April 1, 2010 and that he responded to the Kangaroo Express after dispatch received a call at 2:48 am in reference to an armed robbery. He met with Makia Fulton upon arrival. Fulton told him that two males, one black and one white, robbed the store and that each was wearing a black hooded sweatshirt and a blue bandana over his face. Tr. 48, l. 2 – 51, l. 9.

Polites testified that Fulton gave a written statement detailing her account of the robbery and, after she completed her statement, he received notice that possible "suspects" were detained at the Gum Tree Panty. He drove Fulton to the Gum Tree Pantry in his patrol car to conduct a show up. Polites maintained that he parked his vehicle in the area where the gas pumps were located and that it was well lit. Tr. 52, l. 4 – 54, l. 5. He also said there were several other patrol vehicles on scene and that these vehicles, along with his own, provided additional lighting. Tr. 58, ll. 5-9.

After they arrived, each of the three males discovered in the dark blue Jetta were shown to Fulton individually. Polites maintained that Fulton had a clear view of each man. Tr. 57, l. 20 – 58, l. 4. She did not identify Rolt, the white male, or Lockett, one of the black males. However, Polites maintained that Fulton identified Appellant as one of the individuals who robbed the store and claimed it was his voice she recognized. She further identified him as the person she knew as "Lenny." Tr. 54, l. 6 – 57, l. 19. Additionally, Polites claimed Fulton told him at the Kangaroo Express in Bluffton *before* the show up that she recognized the black male's voice as belonging to someone she knew as "Lenny." Tr. 49, ll. 17-22; Tr. 57, ll. 5-13.

On cross-examination, Polites admitted that he told Fulton law enforcement "might have somebody" and that he needed to take her to conduct a possible identification. Tr. 60, ll. 15-19. He testified that when they arrived at the Gum Tree Panty, there were at least four patrol cars on scene in addition to his own and that as soon as Fulton was shown Appellant, she said, "That's Lenny." Tr. 61, ll. 4-8. Polites claimed that Fulton had given him the name "Lenny" before the show up and he did not know why he did not reflect that fact in his incident report. Tr. 62, ll. 5-14.

Defense counsel also questioned Polites about the Beaufort County Sheriff's Office standard operating procedures contained in the "general orders manual." Polites testified the manual provides officers with "guidelines to go by, you know, what is allowed and what is disallowed according to State and federal law." Tr. 63, l. 15 – 64, l. 2. There is a specific section in the manual regarding eye witness identification. The manual states, "Show-ups are typically justified when other means of identification are either impractical or unavailable and no other evidence exists to hold the suspect." Tr. 63, ll. 4-24.

Polites admitted that Corporal Murphy observed a pistol in plain view in the dark blue Jetta and that this was sufficient evidence to hold all of the occupants of the car. However, he maintained that conducting a show up was better in this case due to the timing rather than waiting to later conduct a photographic line up or a vocal line up even though the officers had other evidence to hold the "suspects." Tr. 64, l. 3 – 65, l. 6.

Defense counsel also pointed out that the manual indicates what officers should and should not say when transporting a witness to view a suspect. Specifically, an officer should not use words that suggest a person may "be involved in the incident at hand." Tr. 65, ll. 7-20. Polites disagreed that his statement to Fulton that law enforcement "might have somebody" was against policy. He testified, "[I]t's not like I said, I think that we have your suspect." Tr. 65, l. 21 – 66, l. 5.

Arguments of Counsel

At the conclusion of the testimony, the assistant solicitor argued that Fulton's out-of-court identification of Appellant should be admissible despite law enforcement's use of a show up. She maintained that Fulton had a sufficient opportunity to view the two robbers, that the convenience store was well lit during the robbery, that Fulton was focused on the men because they were brandishing weapons, and that each man was in close proximity to Fulton while they were in the store. Additionally, the solicitor stressed the fact that Fulton recognized the black male's voice and testified that she knew Appellant through his mother. Moreover, the solicitor emphasized the length of time between when the robbery occurred and the identification arguing that only twenty to twenty-five minutes had passed between the two events and maintained that Fulton did not hesitate when she identified Appellant as "Lenny" at the Gum Tree Pantry. Tr. 69, l. 6 – 72, l. 3.

Defense counsel argued that the show up procedure used by law enforcement was "extremely suggestive." She stressed the number of marked patrol cars and police officers on scene during the identification and the fact that each of the suspects was in handcuffs and removed from the back of a patrol car before being shown to Fulton. Defense counsel also discussed the Beaufort County Sheriff's Office manual and argued that since law enforcement in this case had other evidence to hold the occupants of the car, namely the unlawfully carried firearm found in plain view, they should have simply detained the individuals and later used a less suggestive identification procedure.

Counsel argued there could be no visual identification of the suspects in this case because Fulton was unable to observe any identifiable characteristics besides gender and race. She argued, "So, the only way to do a proper ID would be to do some sort of blind voice line up where Ms. Fulton could have picked out the voice of her assailants." Tr. 72, l. 5 – 73, l. 21.

Moreover, defense counsel argued that under Neil v. Biggers, "reliability is the linchpin in admitting any sort of ID." She said, "As far as the opportunity to view the suspects, I disagree with the State. Sure she [Fulton] saw them, but she saw masked intruders. She was also on her cell phone at the time, Your Honor." Counsel also stressed that Fulton was "never really face to face" with either of the robbers and that the men were "either always to the side and behind her, so there's not much view there." Also, she pointed out that Fulton's height description of the black male robber did not match Appellant's height.

Defense counsel also stressed the fact that Fulton did not write in her written statement that she recognized the voice of the black male who robbed the store or identify

the voice as belonging to the person she knew as "Lenny." She concluded that to admit the unreliable out-of-court identification of Appellant would violate his due process rights and thus requested both the out-of-court identification and any in court identification be suppressed. Tr. 73, l. 22 – 76, l. 13.

Court's Ruling

The court denied Appellant's motion to suppress. Judge Goldsmith found the show up procedure used in this case was not "unduly suggestive." He stated that Fulton had a "good opportunity" not only to view the black male robber at the Kangaroo Express, but also to hear him. The court further emphasized that Fulton indicated she recognized the black male's voice before the show up, that she did not identify the first black male that she was shown, and that she was confident in her identification of Appellant. Tr. 77, ll. 4-20.

Discussion

The trial court erred by failing to suppress Fulton's out-of-court and in-court identification of Appellant in violation of his due process rights because the show up procedure used by law enforcement in this case was unduly suggestive and Fulton's identification was so unreliable that a substantial likelihood of misidentification existed.

"A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000) (citing Stovall v. Denno, 388 U.S. 293 (1967)). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Moore, 343 S.C. at 286, 540 S.E.2d at 447 (Manson v. Brathwaite, 432 U.S. 98 (1977)).

In Neil v. Biggers, 409 U.S. 188 (1992), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. at 198. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. Id.

The following factors should be considered when evaluating the totality of the circumstances: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. Id. at 199; see also State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

Our courts have found some identification procedures patently suggestive. For example, in State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each other, while observing photographic line-ups was "blatantly unacceptable." Id. at 81-82, 600 S.E.2d at 527. Nevertheless, the Court found the identification was admissible based upon the totality of the circumstances. Those circumstances included the victims not conversing while viewing the photographic line-up and not being aware of whom the other victims selected, if anyone. The victims testified they observed the assailant from one minute to ten minutes and their prior descriptions generally matched that of the person

identified. Additionally, all testified they were certain of their identifications, which were made two days after the incident. Id. at 83, 600 S.E.2d at 527.

Our Supreme Court held a show up identification was unduly suggestive in Moore, supra. A witness observed two people exiting her neighbor's home when she knew the neighbor was not home. She called the police and provided a general description of the men, primarily focused on their clothing. Id. at 285, 540 S.E.2d at 447. Ninety minutes later, officers took the witness to an area where the defendants were being detained. The witness positively identified the two men as the perpetrators. Her identification was based upon the clothing she observed. She admitted she had not really seen their faces. Id. at 285-286, 540 S.E.2d at 447.

As explained by the Court, "[s]ingle person show-ups are particularly disfavored in the law." Id. at 287, 540 S.E.2d at 448 (citing Stovall, 388 U.S. at 302 and State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993)). The Court found the show up procedure in Moore was unduly suggestive and the witness's identification unreliable as a matter of law. Id. Specifically, the Court found the only factor with any reliability was the amount of time between the crime and the confrontation, which was ninety minutes. The other factors clearly outweighed that one where the witness observed the two perpetrators for a brief time at a significant distance, the degree of attention was not great, and the accuracy of her description was tenuous. Id. at 290, 540 S.E.2d at 449.

Here, it is clear that the show up procedure used by law enforcement in this case was unduly suggestive. Fulton was brought to a location where at least five patrol vehicles were parked and numerous uniformed police officers were present. Appellant and his co-defendants were detained in the back of separate marked patrol cars and shown to Fulton

one by one in handcuffs. Moreover, Corporal Polites told Fulton "they might have somebody" and explained that officers had detained several individuals who were "looking kind of suspicious" at another gas station. See Tr. 36, ll. 1-7.

Additionally, Fulton's identification of Appellant was unreliable as a matter of law. As defense counsel argued below, the only factor that established any degree of reliability in this case was the amount of time between the robbery and Fulton's identification, which was approximately twenty-five minutes. This factor, however, is outweighed by the other factors. See Moore, 343 S.C. at 289, 540 S.E.2d at 449. Fulton's opportunity to view the robbers was minimal due to their clothing. Both were wearing long pants, long sleeve sweatshirts with the hoods raised covering their heads, gloves, and a bandana covering their faces except for their eyes. The only identifiable characteristics Fulton was able to observe were the men's gender, race, and height. Moreover, her description of the black male's height did not match Appellant's height. Fulton maintained that the black male was shorter than she was and that she was 5'7". However, it was undisputed that Appellant was 5'9".

Also significant is the fact that Fulton did not say she recognized the black male's voice in her written statement given before the show up nor did she indicate that she recognized the voice as belonging to a man she knew as "Lenny." Moreover, while Polites claimed during his testimony that Fulton told him she recognized the black male's voice and identified him as "Lenny" before the show up, he did not record this information in his incident report, which he relied on heavily during his in camera testimony because he had little recollection of the incident that occurred over four years before trial. Based on the evidence presented, it appears Fulton did not provide the name "Lenny" until after she viewed Appellant during the show up.

Because of the unduly suggestive identification procedure used by law enforcement in this case and the unreliability of Fulton's identification of Appellant, the trial court erred by failing to suppress both Fulton's out-of-court and in-court identification of Appellant. Based on this error, this Court respectfully should reverse his convictions and sentence and remand for a new trial.

2.

The court erred by refusing to charge mere presence in reference to the unlawful carrying of a pistol charge when the hand of one is the hand of all theory of accomplice liability was charged to the jury and the evidence presented supported giving a mere presence charge.

Relevant Facts

After the court charged the jury, defense counsel took exception to the charge and argued the court should have instructed the jury on mere presence since the court charged the hand of one is the hand of all principle of accomplice liability. She argued that mere presence "makes up the second half of that charge" and requested the court bring the jury back out and charge mere presence. She explained, "Your Honor, it is the position of the defense that Mr. Pritchett [Appellant] was merely present at the time of the arrest when the goods were found in the car. That you charged the jury that . . . the goods . . . can be evidence of the fact that he committed the crime. You also charged the jury that hand of one is hand of all, but part of that charge - - inherent I believe in that charge is that mere presence to a . . . crime, whether it is in a car or at a store or wherever it is, is not enough to place a conviction." Tr. 141, ll. 3-23.

The solicitor argued that mere presence does not apply because "[i]t's not a situation where the only evidence is found at the time he's arrested in the car because of the identification." Tr. 142, ll. 1-5.

Defense counsel later clarified that she was only requesting a mere presence charge as it relates to the charge of unlawful carrying of a pistol. She argued, "[H]is mere presence

near that gun [found in the car] does not make him guilty of carrying that gun at that time." Tr. 142, ll. 13-17.

For further clarification, the court said, "I think the defense is saying that the jury could find him [Appellant] not guilty of kidnapping, not guilty of armed robbery . . . not guilty of conspiracy, . . . and not guilty of possession of a weapon during the commission of a violent crime, and being left with having to decide whether he's guilty of unlawful carrying a the second store." Defense counsel agreed that this was her position. Tr. 144, ll. 12-20.

The court ultimately denied Appellant's request to charge mere presence as it relates to the unlawful carrying of a pistol offense. Judge Goldsmith found that the charge on unlawful carrying of a pistol "covers that because it says - - unlawful carrying says that he doesn't have . . . to have it in his hand. It is - - he carried the pistol about him or about his person, readily accessible, convenient for immediate use. And that's what the State is saying is that the pistol was there and it was convenient for immediate use." Tr. 146, l. 20 – 147, l. 3. Thus, the court denied the motion.

Discussion

The court erred by refusing to charge mere presence in reference to the unlawful carrying of a pistol charge when the hand of one is the hand of all theory of accomplice liability was charged to the jury and the jury could have found that Appellant was merely present in the dark blue Jetta when it was stopped by law enforcement.

"In reviewing jury charges for error, [an appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Adkins, 353 S.C.

312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. (citing Adkins, 353 S.C. at 318, 577 S.E.2d at 464 and State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989)).

"The trial court is required to charge only the current and correct law of South Carolina." Id. at 479, 698 S.E.2d at 583 (citing Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged must be determined from the evidence presented at trial." Id. (citing State v. Kroten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." Id. (citing State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. (citing State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)).

"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." Id. at 479, 697 S.E.2d at 584 (citing State v. Langley, 334 S.C. 643, 648-649, 515 S.E.2d 98, 101 (1999) and Austin, 299 S.C. at 459, 385 S.E.2d at 832)) (internal quotation marks omitted). "In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." Id. at 480, 697 S.E.2d at 584 (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) (internal quotations marks omitted). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Id. (citing Leonard, 292 S.C. at 137, 355 S.E.2d at 272) (internal quotation marks omitted).

The court in this case should have charged the jury on mere presence as it relates to the unlawful carrying of a pistol offense because the jury could have found Appellant not guilty of the offenses related to the robbery of the Kangaroo Express (specifically, armed robbery, kidnapping, conspiracy, and possession of a weapon during the commission of a violent crime) and simply found he was present in the car where the firearms and stolen goods were located. If the jury found Appellant was merely present in the car with the unlawfully carried firearms, then they could have found him not guilty of that specific charge. Because there was evidence presented at trial that supported the mere present charge, the trial court erred by refusing to charge it. As a result, this Court respectfully should reverse Appellant conviction for unlawful carrying of a pistol and his related sentence.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILENZA PRITCHETT,

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, this 14th day of July, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 14th day of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.