THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2013-001145

THE STATE,

Respondent,

v.

BRYAN M. HOLDER,

Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

Appellant contends the panel should reconsider its opinion affirming his convictions for assault and battery of a high and aggravated nature, assault and battery first degree, and possession of a weapon during a crime of violence, because the Court "overlooked" the lack of evidence Appellant "joined with another to accomplish an illegal purpose" for purposes of the accomplice liability jury charge. The argument set forth in the Petition for Rehearing is essentially the same argument made in the Brief of Appellant. Thus, the Court was well aware of Appellant's contention the State failed to present evidence indicating Appellant and his co-defendant had any type of agreement or discussion about shooting at people, and simply rejected it. (Brief of Appellant, pp. 9-11).

As a threshold matter, Appellant waived any objection to the accomplice liability

charge. *See* Brief of Respondent, pp. 6-7 (discussion of waiver). In spite of the clear waiver, the Court ruled on the merits, finding there was evidence to support the charge.

"There need not be a formally expressed agreement to establish the conspiracy; the conspiracy may be shown by the conduct of the parties and circumstantial evidence." State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002) (emph. Rather, if a person was present and aiding, abetting or assisting while another person performed **any act** necessary to constitute the offense, he can be charged as a principal even though that act did not constitute the entire offense. State v. Reid, 408 S.C. 461, 758 S.E.2d 904, 910 (2014). An alternate theory of liability may 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, 712 S.E.2d 436, 439 (2011); Wilds v. State, 407 S.C. 432, 756 S.E.2d 387, 391 (Ct. App. 2014) (same).

Appellant presents a highly selective version of the evidence present at trial, and relying primarily on the lack of an express verbal agreement to shoot at people, and his own denial he was present when the shots were fired on July 2nd, he asserts the evidence at trial did not support the accomplice liability charge. His sanitized view of the evidence ignores other vital evidence indicating: 1) both Appellant and Schomer were present when the shots were fired; 2) Appellant was the shooter; 3) Schomer knew Appellant wanted to shoot at people; 4) Schomer was present when Appellant was shooting at the stores, but did nothing to stop him; and 5) Schomer disposed of the gun after Appellant's arrest.

In addition to his guilty pleas on the three attempted murder charges, Schomer testified he was present on July 2nd when Appellant shot the 30-06 rifle, he knew Appellant was shooting toward the stores, he did not stop him, and he got rid of the 30-06 rifle after Appellant's arrest. He admitted originally denying any knowledge of the shooting, and then giving several different statements to law enforcement prior to trial.[1] (TT, pp. 101-166; R., pp. 41-106).

Schomer's cousin testified Schomer and Appellant came to his house on June 29th, and asked to put the stolen guns in his car trunk. He initially refused, but ultimately relented after Appellant "started just like, well, let me shoot them, let me shoot them, and started aiming [the guns] at the neighbors and the house and everywhere and was wanting to shoot them." (TT, pp. 174-178; R., pp. 114-118).

A couple of days later, Schomer called his cousin and told him about the shooting. The cousin heard Appellant in the background saying "30-06" and making "gunshot noises." After he heard news reports about the shooting, the cousin went to police and reported Appellant and Schomer "had shot somebody." (TT, pp. 181-184, 192-197, 201-203; R., pp. 121-124, 132-137, 141-143).

Appellant admitted he stole the weapons and ammunition, but claimed he only went out with Schomer one time to shoot the rifles because he "wanted to try them out." He also admitted shooting the 30-06 rifle, but stated they were shooting at a five gallon bucket lid, and he could not see the Raceway or Ingles stores from where they were shooting. (R., pp. 285-296). On cross-examination, however, Appellant conceded none of the photographs of the area showed a bucket or bucket lid, and ultimately admitted he

1Schomer's credibility, and what weight to give his testimony, was a matter for the jury.

shot the back of the traffic sign, which was in the direction of the stores. (State's Exhibits 47-50 [Photographs]). He also testified he and Schomer **"agreed on [shooting the guns] evenly."** (R., pp. 307-316) (emphasis added).

As discussed in the Brief of Respondent, the jury had to determine who was present when the shots were fired, who was the shooter, and whether Appellant and Schomer acted in concert. It is undisputed Appellant provided the weapon and ammunition used in the shooting. Schomer's testimony placed both of them at the scene on July 2nd, with Appellant firing the shots, and the evidence indicated Schomer knew Appellant wanted to shoot at people, but did nothing to stop him. Even if the jury believed Appellant's claim Schomer was the shooter, however, it could easily find from the evidence he and Schomer agreed to go shoot the guns, Appellant was present at the scene, and he knew Schomer was shooting at the stores.

At a minimum, the evidence was equivocal regarding who was present and who fired the shots, and there was evidence on which the jury could rely to make those determinations. Therefore, the circuit court did not abuse its discretion in charging the jury regarding accomplice liability.

Based on the foregoing, Respondent State of South Carolina respectfully submits this Court properly affirmed the circuit court's determination an accomplice liability jury charge was supported by the evidence. Accordingly, Appellant's Petition for Rehearing should be denied.

Respectfully Submitted,

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Senior Assistant Deputy Attorney General

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By: _____
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July 22, 2015

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THE STATE,

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Respondent's Return to Petition for Rehearing on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 22nd day of July, 2015.

Sally B. Ellison

SALLY B. ELLSION
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

July 22, 2015

Kathrine H. Hudgins
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589

Re: State v. Bryan M. Holder

Dear Ms. Hudgins:

Enclosed herewith and served upon you are two copies of the Respondent's Return to Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny Abbott Kitchings (original and 1 copy enclosed)
Victim Services (with enclosure)