STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-273 (S.C. Ct. App. filed 6/3/2015)
12-GS-42-05370, 05371, 05371A, 05372

THE STATE,

RESPONDENT,

V.

BRYAN HOLDER,

PETITIONER

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bryan M. Holder, Appellant.

Appellate Case No. 2013-001145

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2015-UP-273
Submitted March 1, 2015 – Filed June 3, 2015

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App.

2002) ("The law to be charged is determined from the evidence presented at trial."); *id.* ("A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence."); *State v. Ward*, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) ("If any evidence supports a requested jury charge, the trial court should grant the request."); *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (stating that under the "hand of one is the hand of all" theory of accomplice liability, "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"); *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) ("In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties."); *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) ("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."); *id.* (finding no error in the trial court's decision to give the accomplice liability jury instruction because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter").

AFFIRMED.[1]

SHORT, LOCKEMY, and McDONALD, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRYAN M. HOLDER,

APPELLANT

APPELLATE CASE NO. 2013-001145

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-273

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Bryan M. Holder petitions the Court for rehearing. Counsel respectfully submits that this Court overlooked the fact that, in finding no error with the trial judge instructing the jury on the law of accomplice liability, "hand of one is the hand of all," there was no evidence that Petitioner joined with another to accomplish an illegal purpose. The judge erred in instructing the jury on the law of accomplice liability, "hand of one is the hand of all" when the evidence did not support such a charge. Appellant was prejudiced by the erroneous charge.

The State's case against Petitioner relied heavily on the testimony of co-defendant Mattison Tyler Schomer. Schomer testified that he and Holder went out to a field to shoot two stolen guns. (R. pp. 48 – 51). The field was close to Schomer's house. Schomer testified that the next night he and Holder returned to the field to shoot the guns. According to Schomer, on the second night, Holder left the field area, went up an incline and shot at a sign and then shot in the direction of the Ingles grocery store and the Race Way convenience store. (R. p. 52, line 19 – pp. 53 -56). Schomer testified that he was standing ten feet behind Petitioner when the shooting took place. (R. p. 64, lines 10-15). Schomer did not testify that he and Petitioner planned together to shoot at people and there was no testimony about any discussions between Petitioner and the co-defendant about shooting at people..

Holder testified at trial and denied returning to the field a second night, denied shooting in the direction of the Ingles or the Race Way and denied shooting at anybody. (R. p. 294, lines 10-16). Holder admitted going to the field with Schomer one time to shoot guns. (R. p. 287, lines 12-23). Holder testified, however, that when he and Schomer shot the guns they shot at targets into the woods rather than towards businesses. (R. p. 288, lines 12-22).

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

> Second, under the "hand of one, the hand of all theory," appellant would be guilty of murder if he aided Derrick. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981). Third, appellant would be guilty of murder if the jury found he was an accomplice. Under accomplice liability theory, "a person must personally commit the crime or be

> present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989); see also State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) (to be liable as an aider or abetter, the participant must be chargeable with knowledge of the principal's criminal conduct; mere presence at the scene is not sufficient to establish guilt as an aider or abetter).

In State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002), the South Carolina Court of Appeals wrote, "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."

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

In Wilds v. State, 407 S.C. 432, 438-439, 756 S.E.2d 387, 390 (Ct.App. 2014) reh'g denied (Apr. 24, 2014), cert. granted (Nov. 20, 2014), this Court affirmed the PCR court's finding that appellate counsel was ineffective for failing to challenge the trial court's accomplice liability charge on appeal when there was no evidence that indicated anyone other than Wilds was the shooter. Wilds is similar to the present case where there was no evidence that Petitioner was acting with anyone when the shooting took place. Based on the evidence presented, the jury

was to determine if Petitioner was the shooter, as testified to by Schomer, or Petitioner was not the shooter and was not present at the time of the shooting, as testified to by Holder.

In Wilds, this Court addressed when a charge on accomplice liability, "hand of one is the hand of all" should be given writing:

> Our supreme court has noted that "[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In Barber, as in the instant case, four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. Id. at 234–35, 712 S.E.2d at 437–38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. Id. at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. Id. at 438. Our supreme court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." Id. at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." Id. at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. Id. at 237, 712 S.E.2d at 439.

407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014), reh'g denied (Apr. 24, 2014), cert. granted (Nov. 20, 2014).

This Court's reliance on Barber is misplaced because in Barber there was evidence presented that Barber was acting with another to commit an armed robbery when the shooting took place. The evidence in the present case only points to one person, acting alone, as the shooter. There was no evidence presented that Petitioner joined with another to accomplish an illegal purpose. The State presented no evidence that the co-defendant Schomer was the shooter and Petitioner was acting with him to shoot at people. There was no evidence presented by the

State that the co-defendant Schomer was acting with Petitioner to shoot at people. The State presented no evidence of an agreement, no evidence of a common design and no evidence of aiding and abetting. When asked why he didn't stop Holder from shooting in the direction of the Ingles and the Race Way, Schomer claimed, "Because if you had the gall to shoot in the direction of other people, what stops you from shooting in my direction at me?" (R. p. 65, lines 3-7). Schomer's testimony directly contradicts any argument that he was acting with Petitioner at the time of the shooting.

An additional distinction from the Barber case is that in Barber there was evidence that two of the robbers were armed with a .380 handgun, the type of gun used to shoot the victims. The State's evidence in the present case shows that the sole weapon used in the shootings was State's Exhibit #15, the 30-06 caliber rifle that the co-defendant sold to the drug dealer, Wesley, for marijuana. (R. pp. 204-212; p. 62, lines 2-16). The evidence presented at trial showed that the shooter, whoever the jury found that person to be, acted alone. The judge erred in instructing the jury with accomplice liability, the "hand of one is the hand of all."

This Court's reliance on State v. Reid, 408 S.C. 461, 473, 758 S.E.2d 904, 910 (2014), is misplaced because in Reid there was evidence that Reid acted together with others to commit an armed robbery. In Reid the South Carolina Supreme Court wrote:

> Just as Reid could be convicted of assault and battery of a high and aggravated nature and armed robbery under a theory of accomplice liability even though he did not wield the offending weapon, so could he be found guilty for possession of that firearm. Although there was no evidence presented Reid assisted Henson in possessing the firearm, the State presented evidence Reid helped orchestrate the robberies and reconnoitered the scene. Furthermore, Reid knew Henson had a rifle in his possession for use during the robberies. Reid then waited at the getaway vehicle for Henson to return with the proceeds.

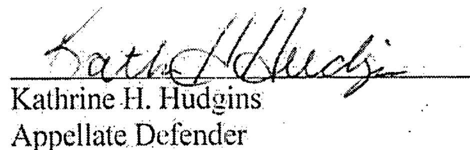
State v. Reid, 408 S.C. 461, 473, 758 S.E.2d 904, 910 (2014), reh'g denied (Aug. 6, 2014), cert. denied (Jan. 12, 2015), cert. denied, 135 S. Ct. 975, 190 L. Ed. 2d 859 (U.S.S.C. 2015). In

contrast, in the present case there was no evidence that Petitioner acted with Schomer or anyone else during the shooting. The judge erred in instructing the jury with the law on accomplice liability, "hand of one is the hand of all." There was no evidence that Petitioner joined with another to accomplish an illegal purpose.

Appellant was prejudiced by the erroneous jury instruction. In closing argument the prosecutor mentioned the words "hand of one is the hand of all" five times. (R. p. 365, lines 10-15; p. 369, line 2; p. 370, line 11; p. 373, line 6; p. 376, line 1). Because of the judge's decision to improperly charge "hand of one is the hand of all," the prosecutor was allowed to improperly argue "hand of one is the hand of all" when there was no evidence to support this theory. Based in the judge's erroneous instruction on accomplice liability, in closing argument the prosecutor was allowed to improperly argue that Appellant and the co-defendant acted in concert and aided and abetted one another when there was no evidence of accomplice liability. (R. p. 374, lines 15-17). The erroneous instruction, unsupported by the evidence, requires a new trial.

Petitioner seeks rehearing based on the above argument.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 18th day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

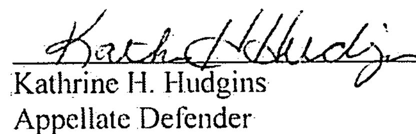
BRYAN M. HOLDER,

APPELLANT

APPELLATE CASE NO. 2013-001145

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 18th day of June, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 18th day
of June, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

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

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1 Schomer'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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Attorney General

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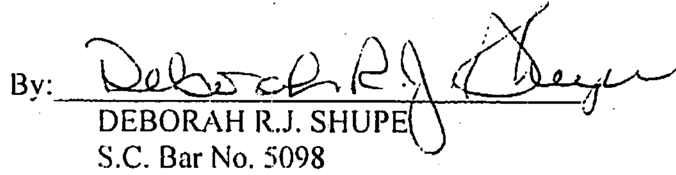
Senior Assistant Deputy Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

By: 
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July 22, 2015

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.

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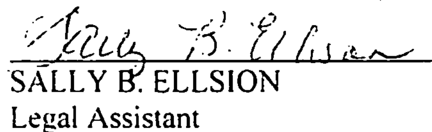
I further certify all parties required by Rule to be served have been served.

This 22nd day of July, 2015.



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The South Carolina Court of Appeals

The State, Respondent,

v.

Bryan M. Holder, Appellant.

Appellate Case No. 2013-001145

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

James E. Lockemy J.

Stephen P. McDonald J.

Columbia, South Carolina

FILED

August 20, 2015

cc:
Kathrine Haggard Hudgins, Esquire
Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Barry Joe Barnette, Esquire
The Honorable J. Derham Cole