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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The evidence supported a jury charge regarding the "hand of one is the hand of all" theory of accomplice liability.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

On May 3, 2013, the Spartanburg County Grand Jury indicted Appellant Bryan M. Holder, on three counts of attempted murder, and one count of possession of a weapon during a crime of violence, arising from a shooting on July 2, 2012. The case was called for a jury trial on May 6, 2013, before the Honorable J. Derham Cole, Circuit Court Judge.

The State presented evidence Appellant stole rifles, shotguns and ammunition from a home in Spartanburg County on June 29, 2012.[1] The guns included a Marlin 30-30 lever action rifle, and a Remington 30-06 bolt action rifle, both with mounted scopes. (Trial Transcript [TT], pp. 77-101; Record on Appeal [R.], pp. 17-41).

That night, Appellant and a co-defendant, Tyler Schomer ["Schomer"), took the 30-30 and 30-06 rifles out to a field to shoot at targets. The field was located across from a Raceway convenience store and an Ingles store. They shot the rifles toward the woods and in the opposition direction from the stores, and took the rifles to Schomer's house after they finished. (TT, pp. 108-111; R., pp. 48-51).

Schomer testified he and Appellant went back to the field the next night. Appellant used the 30-06 rifle to shoot at a road sign, and then aiming with the rifle's scope, fired shots toward the Raceway and Ingles stores. (State's Exhibits 47-50 [Photographs]; R., pp. _____).[2] Appellant told Schomer he thought he hit someone in a car at the Raceway, so they listened to a police scanner to see if a call went out about a shooting there. When they heard the call go out, they returned to Schomer's house and

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[1]Prior to trial, Appellant pled guilty to grand larceny and malicious injury to property in connection with the stolen property, and those convictions are not at issue in this appeal.

[2]State's Exhibits 47-50 have been transported to the Court for consideration.

put the rifles on Schomer's front porch.[3] After Appellant's arrest, Schomer sold the 30-06 to a man in exchange for drugs. (TT, pp. 111-118, 122; R., pp. 51-58, 62).

Bonnie Raines was shot that night while sitting in the passenger seat of a car parked outside the Raceway store. The bullet entered through the car door, passed through Ms. Raines and went into the car's center console, which kept it from striking the driver, Bobby Swigert. In addition, two bullets hit concrete outside the Ingles store, bounced up and struck the front windows of two stores next to Ingles. Forensic evidence established all the bullets were fired from the 30-06 rifle Appellant stole two days before the shootings occurred. (TT, pp. 222-277; R., pp. 162-167).

Mark Swanger testified he was pressure washing the gas pumps in front of Ingles early on the morning of July 2, 2012, when he heard what sounded like a gunshot very close to him. A few seconds later he heard another shot go by him, and he hid until police arrived. He stated he heard a total of four to five shots, and saw a girl lying in the Raceway parking lot holding her side. (TT, pp. 284-290; R., pp. 224-230).

Appellant testified he only went to shoot the rifles once, both he and Schomer shot the 30-06 rifle, they shot at the lid of a five gallon bucket, and he never shot toward the Raceway and Ingles stores. He stated he never said anything to Schomer about shooting anyone. (TT, pp. 344-385; R., pp. 274-325).

The State requested a jury charge on the "hand of one is the hand of all." Appellant objected, arguing there was no evidence he and Schomer acted in concert in the attempted murders. Appellant then requested a mere presence charge in the event the

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[3] Schomer eventually told law enforcement what happened, and prior to Appellant's trial, he pled guilty to three counts of attempted murder, but had not been sentenced at the time he testified. (TT, pp. 118-122; R., pp. 58-62).

court gave a "hand of one is the hand of all" charge. After a recess, and without ruling on the accomplice liability charge issues, the circuit court indicated it would charge the lesser included offenses of assault and battery of a high and aggravated nature as to Ms. Raines, and assault and battery first degree as to Mr. Swigert and Mr. Swanger. (TT, pp. 407-411; R., pp. 347-351).

During closing argument, Appellant asserted Schomer was the shooter. The State argued Appellant and Schomer essentially pointed the finger at the other as the shooter, but even if the jury believed Schomer was the shooter, Appellant testified they did everything together and Appellant supplied the stolen guns and ammunition, so at a minimum, Appellant was guilty as an accomplice. (TT, pp. 412-436; R., pp. 352-376).

The circuit court charged the jury on "hand of one is the hand of all," mere presence, and the lesser included offenses. After the charge, the court asked the State and Appellant if there were any exceptions or additions, and Appellant stated: "None from the defense, Your Honor." (TT, pp. 436-466; R., pp. 376-406).

The jury convicted Appellant of assault and battery of a high and aggravated nature as to Ms. Raines, assault and battery first degree as to Mr. Swigert and Mr. Swanger, and possession of a weapon during a crime of violence. The circuit court sentenced him to an aggregate term of incarceration of forty-five years. (TT, pp. 472-486; R., pp. 412-426). This appeal followed.

ARGUMENT

I. The evidence supported a jury charge on the "hand of one is the hand of all" theory of accomplice liability.

Appellant asserts the circuit court erred in charging the jury on the "hand of one is the hand of all" theory of accomplice liability. As a threshold matter, Appellant waived his objection to the charge. Even if the issue is properly before this Court, however, the evidence supported the charge.

A. Waiver

When given an opportunity to do so, failure to object to the jury charge as given, or to request an additional charge, constitutes a waiver of the right to complain on appeal. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, 688 (1996); State v. Hartley, 307 S.C. 239, 414 S.E.2d 182 (Ct.App.1992) (same); *see also* State v. Avery, 333 S.C. 284, 509 S.E.2d 476, 483 (1998) (jury charge issue not preserved when defendant raised issue of inconsistent verdicts prior to the charge, but failed to object to initial or supplemental charges); Rule 20(b) SCRCrimP (failure to object to the giving of, or failure to give, an instruction constitutes waiver of the objection).

Appellant objected to the "hand of one is the hand of all" charge, but requested a mere presence charge if the circuit court gave the accomplice liability charge. Immediately thereafter, the circuit court recessed and asked to speak with the attorneys in chambers. When court reconvened, the State put an issue regarding certain exhibits on the record, and Appellant requested jury charges on the lesser included offenses. There was no discussion about the accomplice liability charge, and the court did not issue a ruling on the issue. (TT, pp. 407-411; R., pp. 347-351).

During closing arguments, the State referenced the "hand of one is the hand of all" several times **without objection**. After the formal jury charge, which included the accomplice liability and mere presence charges, the court gave the State and Appellant an opportunity to raise any objections or additions, and Appellant stated there were "[n]one from the defense." (TT, pp. 424-466; R., pp. 364-406). Accordingly, Appellant waived any appellate issue regarding the accomplice liability charge.[4]

B. Evidentiary Support

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 472-73 (2004); State v. Ward, 374 S.C. 606, 649 S.E.2d 145, 149 (Ct. App. 2007). The law to be charged is determined by the evidence presented at trial, and if any evidence supports a requested jury charge, the trial court should grant the request. State v. Knoten, 347 S.C. 296, 555 S.E.2d 391, 394 (2001); State v. Brown, 362 S.C. 258, 607 S.E.2d 93, 95 (Ct. App .2004) (same). "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 584 (2010).

The doctrine of accomplice liability arises from the theory that "the hand of one is the hand of all," and 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." Mattison, 697 S.E.2d at 584. "There

[4]Further, there is no record of what was discussed in chambers, or a specific ruling from the circuit court on the accomplice liability charge. Appellant may well have agreed the charge was warranted by the evidence, and he clearly prevailed in his request for a mere presence charge. Without a record and a specific ruling, this Court cannot determine the circuit court abused its discretion in giving the charge. (See discussion below).

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).

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).

Relying primarily on the lack of an express verbal agreement to shoot at people, and his own denial that he was present when the shots were fired on July 2nd, Appellant 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; and 4) Schomer was present when Appellant was shooting at the stores, but did nothing to stop him.

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 Appellant from shooting, 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.[5] (TT, pp. 101-166; R., pp. 41-106).

Schomer's cousin, Kevin Denton ("Denton"), 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." Denton told Appellant to put the guns in the trunk and calm down. (TT, pp. 174-178; R., pp. 114-118).

A couple of days later, Schomer called Denton and told him about the shooting. Denton heard Appellant in the background saying "30-06" and making "gunshot noises." After he heard news reports about the shooting, Denton 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 testified he stole the weapons and ammunition, and he went out with Schomer one time to shoot the rifles because he "wanted to try them out." He 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. (TT, pp. 345-356; R., pp. 285-296).

On cross-examination, however, Appellant conceded none of the photographs of the area showed a bucket or bucket lid, and admitted he shot the back of the traffic sign, which was in the direction of the stores. (State's Exhibits 47-50 [Photographs]). He also

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

stated he and Schomer "agreed on [shooting the guns] evenly." (TT, pp. 367-376; R., pp. 307-316).

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. Even if the jury believed Appellant's claim that Schomer was the shooter, however, it could easily find from the evidence that 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. Accordingly, the circuit court did not abuse its discretion in charging the jury regarding accomplice liability.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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December 5, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing 2 copies in the United States mail, postage prepaid, addressed to:

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

This 5th day of December, 2014.

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