THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2015-001980
(Op. No. 2015-UP-273, S.C. Ct. App., filed June 3, 2015)

THE STATE,

Respondent,

v.

BRYAN M. HOLDER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTION ON APPEAL

Did the Court of Appeals properly determine the evidence supported an accomplice liability jury charge?

STATEMENT OF THE CASE

On May 3, 2013, the Spartanburg County Grand Jury indicted Petitioner 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 Petitioner 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. (Record on Appeal [R.], pp. 17-41).

That night, Petitioner 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. (R., pp. 48-51).

Schomer testified he and Petitioner went back to the field the next night. Petitioner 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] Petitioner 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

[1]Prior to trial, Petitioner 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 were transported to the Court of Appeals for consideration.

put the rifles on Schomer's front porch.[3] After Petitioner's arrest, Schomer sold the 30-06 to a man in exchange for drugs. (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 Petitioner stole two days before the shootings occurred. (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. (R., pp. 224-230).

Petitioner 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. (R., pp. 274-325).

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

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3 Schomer eventually told law enforcement what happened, and prior to Petitioner'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).

murders. Petitioner then requested a mere presence charge in the event the 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. (R., pp. 347-351).

During closing argument, Petitioner asserted Schomer was the shooter. The State argued Petitioner and Schomer essentially pointed the finger at each other as the shooter, but even if the jury believed Schomer was the shooter, Petitioner testified they did everything together and Petitioner supplied the stolen guns and ammunition, so at a minimum, Petitioner was guilty as an accomplice. (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 Petitioner if there were any exceptions or additions, and Petitioner stated: "None from the defense, Your Honor." (R., pp. 376-406).

The jury convicted Petitioner 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. (R., pp. 412-426). This appeal followed.

By unpublished opinion filed June 3, 2015, the South Carolina Court of Appeals affirmed Petitioner's convictions, finding the evidence supported the accomplice liability jury charge. (Appendix, pp. 1-3). The Court of Appeals denied Petitioner's Petition for Rehearing by Order filed August 26, 2015. (Appendix, p. 13). On September 21, 2015, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, seeking review of the Court of Appeals decision.

ARGUMENT

The evidence supported the circuit court's accomplice liability jury charge.

Petitioner 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, Petitioner 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).

Petitioner 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 Petitioner 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. (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 Petitioner an opportunity to

raise any objections or additions, and Petitioner stated there were "[n]one from the defense." (R., pp. 364-406). Accordingly, Petitioner 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 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).

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[4]Further, there is no record of the in chambers discussion, or a specific ruling from the circuit court on the accomplice liability charge. Petitioner 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).

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, Petitioner 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 Petitioner and Schomer were present when the shots were fired; 2) Petitioner was the shooter; 3) Schomer knew Petitioner wanted to shoot at people; and 4) Schomer was present when Petitioner 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 Petitioner shot the 30-06 rifle, he knew Petitioner was shooting toward the stores, he did not stop Petitioner from shooting, and he got rid of the 30-06 rifle after Petitioner's arrest. He admitted originally denying any knowledge of the shooting, and then giving several different statements to law enforcement prior to trial.[5] (R., pp. 41-106).

Schomer's cousin, Kevin Denton ("Denton"), testified Schomer and Petitioner 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 Petitioner "started just like, well, let me shoot them, let me shoot them,

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

and started aiming [the guns] at the neighbors and the house and everywhere and was wanting to shoot them." Denton told Petitioner to put the guns in the trunk and calm down. (R., pp. 114-118).

A couple of days later, Schomer called Denton and told him about the shooting. Denton heard Petitioner in the background saying "30-06" and making "gunshot noises." After he heard news reports about the shooting, Denton went to police and reported Petitioner and Schomer "had shot somebody." (R., pp. 121-124, 132-137, 141-143).

Petitioner 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. (R., pp. 285-296).

On cross-examination, however, Petitioner 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 stated he and Schomer "agreed on [shooting the guns] evenly." (R., pp. 307-316).

The jury had to determine who was present when the shots were fired, who was the shooter, and whether Petitioner and Schomer acted in concert. It is undisputed Petitioner provided the weapon and ammunition used in the shooting. Schomer's testimony placed both of them at the scene on July 2nd, with Petitioner firing the shots, and the evidence indicated Schomer knew Petitioner wanted to shoot at people. Even if the jury believed Petitioner'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, Petitioner was present at the scene, and he knew Schomer was shooting at the stores.

Petitioner argues the Court of Appeals' reliance on Barber and Reid in affirming his convictions was misplaced because those cases are factual distinguishable. His primary distinction is simply a continuing insistence the State presented no evidence Petitioner and Schomer acted together with a common purpose at the time of the shooting. As discussed above, the basis for Petitioner's argument is 1) there was no express **verbal** agreement to shoot at people, and 2) his own denial he was present when the shots were fired on July 2nd. In essence, Petitioner asks this Court to accept his version of events as fact, and ignore the evidence presented during trial that revealed a much different version of Petitioner's role in the shooting, as well as his and Schomer's conduct before and after the shooting indicating they acted together.

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, and the Court of Appeals properly affirmed Petitioner's convictions.

CONCLUSION

Based on the foregoing, Respondent submits the Court of Appeals properly affirmed Petitioner's conviction and sentence, and the Petition for Writ of Certiorari to the Court of Appeals should be denied.

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October 15, 2015

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner 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
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I further certify all parties required by Rule to be served have been served.

This 15th day of October, 2015.

Sally B. Ellison

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