

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CALHOUN COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Case No. 2013-001496

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DEC 29 2015

SC Court of Appeals

The State of South Carolina, Respondent,

v.

David Jamar Benjamin, Appellant/Petitioner.

APPELLANT/PETITIONER'S
PETITION FOR REHEARING

Appellant/Petitioner, David Jamar Benjamin (hereinafter "Benjamin") respectfully requests this Honorable Court rehear and reconsider its decision, filed December 16, 2015, in the above-captioned appeal.

On appeal, Benjamin raised two primary issues: (1) whether the circuit court erred in denying Benjamin's motion for directed verdict, particularly where Benjamin's liability for the charges was based on accomplice liability rather than his own actions; and (2) whether the circuit court erred in granting Benjamin a new trial following the jury's verdict. The Court's December 16 *per curiam* opinion correctly states the law on these two issues but failed to identify what evidence was presented by the State at trial to support the

jury verdict in this case. Without some description of the evidence the Court deemed sufficient it is difficult to understand the basis for the Court's decision here.

Indeed, the State's own witnesses admitted they did not know who shot the victim. (See. R. p. 362, lines 14-15.) And, indeed, the testimony was relatively consistent that no one present at the time of the crime saw Benjamin aim at or shoot at the deceased victim. Similarly, the State's witnesses also conceded that Benjamin did not fire at the two wounded victims. This case boils down to a shootout at a nightclub with no evidence Benjamin intended to or did fire shots at any of the victims for whose injuries and one death he now stands convicted.

Though the evidence pointed to the use of a .45 caliber weapon, no such weapon was found that was connected to Benjamin. The only thing the State demonstrated was that individuals with whom Benjamin socialized at the nightclub may have shot the victims. The Court of Appeals decision correctly recognizes that accomplice liability may exist under the theory that "the hand of one is the hand of all" but the opinion fails to explain a key element to this type of criminal liability.

In order for this accomplice theory to be a proper basis for criminal liability, there must be evidence that there was some agreement among the players to undertake the criminal activity. See State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010). Benjamin must have known of the other co-defendants' intended crimes. The State's case simply did not

present sufficient, if any, evidence – direct or circumstantial - on this key element.

Though the opinion cites to cases and summarizes this piece of accomplice liability, it does not identify how – in this case – such liability was properly imposed. As a matter of law, there simply was not sufficient evidence to convict Benjamin as an accomplice in these crimes.

Similarly, the Court of Appeals conclusion on the issue of whether Benjamin should have been granted a new trial (i.e., whether the trial court abused its discretion in denying the request for one), fails to explain on what evidence the jury could have based its guilty verdict where the only theory of liability available was that of accomplice liability and the State failed to provide evidence as to plan or agreement, however informal, by Benjamin.

For the foregoing reasons, Benjamin respectfully requests a rehearing in this matter to fully consider the lack of evidence presented by the State in this matter.

December 21, 2015



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David Jamar Benjamin, Appellant,

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State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served that Appellant/Petitioner's Petition for Rehearing on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2015, addressed to attorneys of record, William E. Salter, III and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211:

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December 21, 2015

Via UPS 2-Day

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, SC 29211

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SC Court of Appeals

Re: The State of South Carolina v. David Jamar Benjamin
Appellate Case No. 2013-001496

Dear Clerk:

Enclosed for filing please find an original and six copies of Appellant/Petitioner's Petition for Rehearing, along with Proof of Service of same, in the above-referenced case.

By copy of this letter I am serving same on counsel for the Respondent.

I would greatly appreciate your returning filed copies to me in the enclosed, stamped return envelope. Should you have any questions, please do not hesitate to contact me.

Sincerely,



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SC Court of Appeals

The Honorable Jennie Abbott Kitchings
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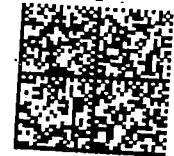


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