

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

OCT 02 2014

Appeal from Williamsburg County
William Jeffrey Young, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TOSHONDA MONIQUE MICKENS

APPELLANT.

APPELLATE CASE # 2013-002014

ANDERS BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

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STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in failing to grant Appellant's motion for a directed verdict on the charge of murder where: (1) there was no evidence that Appellant fired any gunshots or even entered the residence where the decedent was killed; (2) the State failed to present any evidence of a common plan or design between Appellant and her alleged co-conspirators to murder the decedent; and (3) the murder of the decedent was not a natural and foreseeable consequence of the plan to rob the decedent.

STATEMENT OF THE CASE

On July 25, 2013, Appellant Toshonda Monique Mickens was indicted by the Williamsburg County Grand Jury for (1) murder; (2) first degree burglary; (3) armed robbery; and (4) criminal conspiracy. R. 1190-1192. Appellant's co-defendant, Laquincy Manuel Williams, was also indicted for these offenses in addition to the count of possession of a firearm during the commission of a violent crime. Id.

Appellant was tried along with Laquincy Williams before the Honorable W. Jeffrey Young and a jury on September 9-13, 2013. R. 1. Appellant was represented by Timothy L. Griffith. Williams was represented by Cezar E. McKnight. The State was represented by Assistant Solicitors Kimberly V. Barr and Tyler B. Brown. Id.

On September 13, 2013, the jury found Appellant guilty of (1) murder; (2) first degree burglary; (3) armed robbery; and (4) criminal conspiracy. Williams was found guilty of (1) murder; (2) first degree burglary; (3) armed robbery; (4) criminal conspiracy; and (5) possession of a firearm during the commission of a violent crime. R. 1159, l. 12 – 1160, l. 14.

Judge Young sentenced Appellant to thirty years each for the offenses of murder, first degree burglary, and armed robbery. He sentenced her to five years for criminal conspiracy. The sentences were ordered to run concurrently. R. 1187, ll. 6-18; 1193-1196. Williams was sentenced to life in prison for murder and first degree burglary, thirty years for armed robbery, five years for criminal conspiracy, and five years for possession of a firearm during the commission of a violent crime. R. 1186, l. 24 – 1187, l. 5; 1188, ll. 1-9.

Appellant timely filed and served her notice of appeal on September 18, 2013.

ARGUMENT

The Trial Court erred in failing to grant Appellant's motion for a directed verdict on the charge of murder where: (1) there was no evidence that Appellant fired any gunshots or even entered the residence where the decedent was killed; (2) the State failed to present any evidence of a common plan or design between Appellant and her alleged co-conspirators to murder the decedent; and (3) the murder of the decedent was not a natural and foreseeable consequence of the plan to rob the decedent.

Relevant Facts:

Latisha Bell was the girlfriend of James McNeal. They both resided in Williamsburg County. R. 669, ll. 8-20. She acknowledged that McNeal was involved with illegal drugs and kept drugs in a shed at his father's house. R. 679, ll. 3-10.

On the evening of Thursday, November 1, 2007, leading up to the morning hours of Friday, November 2, 2007, Latisha spent the night at McNeal's mobile home in Hemingway. R. 673, ll. 11-12; 678, l. 17 – 679, l. 2. She got off work at about 11:00 p.m., first went to her mother's house, and then headed to McNeal's house about ten or fifteen minutes later. R. 682, ll. 6 – 25.

When Latisha arrived around 11:40 p.m. at McNeal's house, she said that three of McNeal's friends were there and they were drinking and smoking. She took a shower and eventually went to bed. R. 685, l. 5 – 686, l. 9; 745, l. – 746, l. 7. McNeal later joined her in bed around 2:00 or 3:00 in the morning. R. 687, ll. 12-20.

Around 8:00 in the morning, McNeal woke up to use the bathroom and brush his teeth. He then got back in the bed with Latisha. Not even five minutes after that, Latisha claimed that someone kicked in the door of the mobile home yelling, "police, police." The individuals came running straight to the back bedroom where Latisha and McNeal were located. R. 689, l. 1 – 690, l. 21.

McNeal popped up and began tussling with one of the guys near the television. Latisha said she heard a gunshot and that the guy had shot McNeal. McNeal fell down. Latisha said she was in shock, but made her way to the foot of the bed. Latisha said the men kept saying, "where the money at, where the weed at, where the coke at?" The guy apparently shot McNeal again. Latisha said she was telling McNeal just to go ahead and give him some money and asked McNeal whether he had any money in his coat pocket. He told her he did, so she reached up from the bottom of the bed to pull the money out of the coat pocket. She said that guy told her to not look at him or he would kill her too. She gave him the money. 690, l. 21 – 692, l. 24.

Latisha testified that two people were in the house. She said she only got a glimpse at their faces and that the man asking for money was light skinned and wearing dark clothing. She said that after she gave the man the money, he shot McNeal again. R. 694, l. 24 – 695, l. 13. She believed he heard four gunshots in all. R. 711, ll. 20-22. She testified that it was dark in the room when the incident happened. R. 719, ll. 5-12.

Latisha did not realize the men had left until McNeal started talking to her. He asked her to go get help. She called 911 while she ran across the street to McNeal's father's house. When she got back to McNeal's house after getting his father, McNeal was already dead. R. 695, l. 13 – 696, l. 6. The 911 call was placed at 8:34 a.m. and law enforcement arrived at 8:44 a.m. R. 346, ll. 4-13.

According to statements Latisha had given to law enforcement, two individuals entered the house and one just stood in the hall. She could not tell what that individual was wearing. The individual that entered the bedroom was wearing dark colored clothing. R.

697, l. 24 – 698, l. 22. She also had told police that the person who entered the room was brown skinned. R. 702, ll. 2-11.

The pathologist who conducted the autopsy on McNeal's body determined that McNeal died from multiple gunshot wounds to his chest. He had also suffered wounds to his buttocks and abdomen which were not fatal. R. 309, ll. 4-22. The pathologist also collected two tubes of McNeal's chest cavity blood which he gave to Lieutenant Jeffrey Scott of the Williamsburg Sheriff's Office. R. 312, ll. 4-16.

The pathologist testified that he did not conduct any independent examination or investigation to determine the time of McNeal's death. His report merely stated that the time of death was November 2, 2007 in the morning, which could have been anywhere from 1:00 a.m. to 12:00 p.m. R. 318, l. 14 – 320, l. 5.

There were no obvious suspects in McNeal's murder. R. 881, ll. 2-5. Eventually, Latisha Bell was charged as an accessory after the fact of murder in the death of McNeal, but those charges were later dismissed. R. 711, ll. 2-12; 713, ll. 22-24; 884, l. 19 – 885, l. 2.

On the same day as McNeal's murder, November 2, 2007, Officer Joshua James of the Florence Police Department responded to a call at McLeod Regional Medical Center in Florence involving a shooting of James Gquan Henry. The dispatch call came in at 9:47 a.m. and Officer James arrived at 9:58 a.m. R. 157, l. 16 – 159, l. 4. Henry told Officer James that he was not sure where he was located when he was shot. R. 158, ll. 15-16. After some investigation, Officer James met with Appellant at about 2:20 that afternoon. She advised Officer James that she saw Henry lying down in the grass in the 900 block of June Lane in the City of Florence so she took him to the emergency room. R. 164, ll. 2-23.

Lieutenant Lee Davis of the Florence Police Department was also involved in the investigation of the shooting of Henry. He went to the June Lane scene where Appellant said she found Henry and picked him up to take him to the hospital. Lieutenant Davis claimed he could not find evidence of a shooting at that scene, although he admitted that it was possible Henry was shot somewhere else and dumped at that location. R. 202, l. 23 – 203, l. 21. Because the Florence Police Department was unable to determine a location of where the shooting occurred based on the statements given by Henry and Appellant, the Department closed the case. R. 197, ll. 2-13. Before the case was closed, the Florence Police Department took into evidence Henry's clothing, including a bloody jacket, a pair of jeans, a belt, a black tee shirt, a pair of boxer shorts, and a pair of socks. R. 225, l. 21 – 226, l. 9.

The two separate incidents that occurred in Williamsburg County and Florence County were not connected until approximately three years later in 2010. Investigator Pamela Wrenn of the Williamsburg County Sheriff's Office testified that she learned that Appellant, Laquincy Williams, and Henry may have been involved in the murder of McNeal through information received from the FBI and a federal inmate. R. 887, ll. 4-25. This federal inmate was P.J. Williams. R. 931, ll. 1-8. Henry was then picked up by the Williamsburg County Sheriff's Office where he gave a statement. R. 931, ll. 1-25. On September 2, 2010, the Williamsburg County Sheriff's Office also picked up the clothing evidence of Henry from his shooting back on November 2, 2007 from the Florence Police Department. R. 235, l. 2-23; 251, l. 10 – 253, l. 6.

Henry, who had also been charged with murder, first degree burglary, armed robbery, criminal conspiracy, and possession of a firearm during the commission of a

violent crime, testified at trial against Appellant and Laquincy Williams. R. 1190-1192. He had moved from Anderson to Florence a couple of months before November 2007 and became friends with Laquincy Williams, Appellant, and P.J. Williams. R. 779, l. 22 – 781, l. 20.

Henry testified that he became involved in the shooting that resulted in the death of McNeal after P.J. told them – a conversation which allegedly included Laquincy Williams, Appellant, and a girl named Juandalyn Miller – that he knew somebody with a whole lot of money. This person was McNeal. P.J. said he needed someone else to commit the robbery because McNeal would know it was P.J. if P.J. did it himself. P.J.'s wife was the twin sister of McNeal's girlfriend, Latisha Bell. P.J. told them that they needed to wait to commit the robbery until he was sure McNeal would have the drugs and money. P.J. also told them that McNeal would not have a gun on him because he did not carry a gun. P.J. therefore thought it would be a safe robbery and no one would get hurt. R. 789, l. 9 – 792, l. 23.

A couple of days later, P.J. said that McNeal had a couple of pounds of reefer across the street in his father's barn. During this conversation, apparently Henry, Laquincy Williams, Appellant, and Juandalyn Miller were all present. R. 793, l. 1 – 794, l. 15.

The plan was to go in McNeal's house and walk him and his girlfriend across the street to the barn, get the drugs and money, and then leave. No one was supposed to get hurt. R. 795, l. 4 – 796, l. 4.

Henry, Appellant, Laquincy Williams, P.J. and Juandalyn Miller drove from Florence to McNeal's mobile home in Hemingway on the evening of November 1, 2007 to scope out the scene. Appellant allegedly drove the car. When they reached McNeal's home, Henry and Laquincy got out of the vehicle, and they both had weapons. They had

decided they wanted to go ahead and rob McNeal then, but Henry was just not up to it yet. They eventually drove back to Florence. Appellant allegedly agreed to drive them back to McNeal's house later. R. 796, l. 5 - 805, l. 18 - 20.

The second time they went back to McNeal's home, it was the early morning hours of November 2, 2007. This time only Henry, Laquincy, P.J., and Appellant went to Hemingway. When they arrived at McNeal's home, Henry and Laquincy got out of the vehicle with their guns on them. They pulled the screen door to McNeal's mobile home open, bumped open the interior door, and went to the back bedroom. According to Henry, he and Laquincy were running through the house yelling police. Henry cut the light on in the bedroom. He said McNeal got out of bed because he was scared. Henry testified Laquincy hit him in the head and McNeal fell to the floor. Henry also saw McNeal's girlfriend in the bed. Laquincy was asking the girl on the bed where the money was at. R. 806, l. 17 - 810, l. 4.

At some point, McNeal retrieved a gun from under the bed or somewhere. McNeal shot Henry two times in his chest. Then Laquincy started shooting McNeal. Laquincy was able to get McNeal's gun, and Laquincy accidentally shot Henry another time in the chest with McNeal's gun. R. 810, l. 4 - 811, l. 12.

Henry ran out of the room, and Laquincy was still shooting McNeal. Henry ran to a dirt road and laid down. Laquincy came out and called Appellant on the phone telling her to come pick them up. R. 811, ll. 13 - 24. Laquincy took McNeal's gun with him when he left the house. R. 818, ll. 3-8. Henry testified that Appellant then drove him to the hospital in Florence. Henry told the hospital staff that someone had just robbed and shot him. R. 822, ll. 15-22; 824, l. 23 - 826, l. 25.

During cross-examination of Henry, he refused to admit that any promises were made to him for his cooperation and testimony at trial against Appellant and Laquincy or that he was hoping for a light sentence for his testimony. R. 839, ll. 17-19; 850, l. 21 – 851, l. 5. Neither defense counsel for Appellant or Laquincy asked Henry how much time he was actually facing for his involvement in McNeal's murder.

Juandalyn Miller, the girl Henry said was with them when P.J. was discussing the plan and who was with them when they first drove out to McNeal's mobile home, testified at trial that she never heard Appellant planning any kind of robbery or discussing any plan to kill anyone. R. 141, l. 25 – 142, l. 11. Miller said that while she rode around with Appellant, Laquincy, Henry, and P.J. on the evening of November 1, 2007, she did not recognize a picture of McNeal's mobile home that the solicitor showed her. Miller testified that the mobile home the solicitor showed her did not look like the one they drove to that night. R. 92, l. 21 – 93, l. 11; 122, ll. 17-23. She was adamant that she did not recognize that trailer. R. 129, ll. 23-25.

A SLED agent employed in the forensic DNA serology department testified that DNA found on the clothing of Henry matched the DNA profile of McNeal. R. 411, ll. 6-23. No DNA of Appellant was connected to the McNeal crime scene. R. 420, ll. 1-9; 455, ll. 18-24.

Discussion

Appellant was entitled to a directed verdict on the charge of murder where there was no evidence that Appellant fired the shots that killed McNeal or even entered McNeal's residence. The State also presented no evidence of any common plan or design between Appellant and her alleged co-conspirators to murder McNeal. In addition, the murder of

McNeal was not a natural and foreseeable consequence of the plan to rob him of drugs and money. R. 1165, l. 24 – 1166, l. 5.

The testimony is undisputed that Appellant did not enter the home of McNeal and therefore did not shoot him. She was furthermore not charged with possession of a weapon during the commission of a violent crime. . . . Therefore, where the jury found Appellant guilty of murder, it had to have done so under the theory of accomplice liability.

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. . . . 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. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (internal citations omitted).

“In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct. . . . Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. . . . Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.” Id. at 480, 697 S.E.2d at 584 (internal citations omitted).

“To admit evidence under [the accomplice liability] 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. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999).

While there may have been evidence presented by the State at trial that Appellant participated in the planning of the burglary and robbery, there was no evidence presented by

the State that she knew or could have reasonably foreseen that her co-defendant Laquincy Williams was going to murder McNeal. The South Carolina Supreme Court has observed:

For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing. Also, the *courts have required that the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions.*

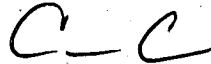
Mattison, 388 S.C. at 484, 697 S.E.2d at 586 (quoting 40 AM. JUR. 2d *Homicide* § 26 (2010) (emphasis added); see also 40 C.J.S. *Homicide* § 30 (2010) (“To be guilty as an accomplice to homicide, a defendant must have acted with the state of mind required for guilt.”); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972) (if two or more combine together to commit an unlawful act and a homicide is committed by one of the actors *as a probable or natural consequence* of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act).

At trial, Henry unequivocally testified that no one was supposed to be hurt in the robbery and that P.J. Williams had told them that McNeal would not have a gun. Juandalyn Miller confirmed that she never heard Appellant say anything about any plan to kill anyone. At the most, Appellant expected that Henry and Laquincy might rob McNeal of his money and drugs, but never once did she foresee that McNeal would be murdered. The homicide of McNeal was not committed as a probable or natural consequence in the furtherance of the plan of robbing McNeal. Accordingly, Appellant is entitled to a directed verdict on the charge of murder.

CONCLUSION

For the reasons set forth herein, Appellant Toshonda Mickens respectfully requests this Court to reverse her conviction for murder.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C-C', is written above a horizontal line.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of October, 2014.

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APPELLATE CASE # 2013-002014

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Toshonda Mickens states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on September 9-13, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Toshonda Mickens.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of October, 2014.

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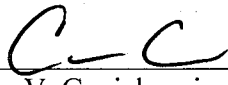
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Entire transcript of trial held September 9-13, 2013; and
- (3) Sentencing sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

October 2nd, 2014.


Carmen V. Ganjehsani
Appellate Defender

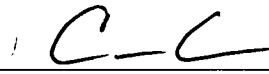
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 2, 2014.


Carmen V. Ganjehsani
Appellate Defender

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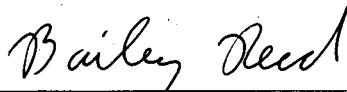
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Toshonda Mickens, #357123 at Graham Correctional Institution, this 2nd day of October, 2014.



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of October, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021