

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LESTER DEVARIA MOSELY JR,

APPELLANT

APPELLATE CASE NO. 2014-002064

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in instructing the jury on accomplice liability in response to the jury's questions during deliberations?

STATEMENT OF THE CASE

On July 22, 2014, the Pickens County Grand Jury indicted Appellant Mosley for murder, two counts of attempted armed robbery, burglary first degree and possession of a weapon during the commission of a violent crime, indictments #2014-GS-39-1545, 1546, 1547 1548, 1597. On September 15, 2014, Appellant proceeded to jury trial before the Honorable Edward W. Miller. Scott Robinson represented Appellant at trial. Walt Wilkins and William Timmons prosecuted the case. The jury returned verdicts of guilty. Judge Miller sentenced Appellant to fifty (50) years for murder, fifty (50) years for burglary first, twenty (20) years for each of the attempted armed robberies and five (5) years for the weapons charge. A timely notice of intent to appeal was served on September 26, 2014. On September 10, 2015, counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), raising the issue of whether the trial judge erred in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony. On December 2, 2016, this Court directed the parties to brief the issue of whether the trial court erred in instructing the jury on accomplice liability in response to the jury's questions during deliberations. This brief of Appellant follows.

ARGUMENT

The trial court erred in instructing the jury on accomplice liability in response to the jury's questions during deliberations.

The jury found Appellant guilty in the shooting death of Steven Grich. On the evening of December 8, 2012, Grich was at his apartment at the Chimney Ridge Apartment complex located on Smoke Rise Drive in Clemson with friends Kevin Keck, Jonathan "JT" Riordan and a roommate, Daniel Persson, when three men charged in the back door and began demanding money and dope. (R. p. 103, line 17 – p. 104, 105, lines 1-17). Keck testified that one of the men who entered was black and the other two were white. (R. p. 105, lines 13-17). According to Keck, the black male began hitting people with a gun. (R. p. 107, lines 2-11). Keck testified that Grich was taking the brunt of the pistol whipping by the black male when the gun went off. (R. p. 108, lines 4-25). Persson testified, "And then all of a sudden, it just ended. They ran out. Turns out, gun went off and Steve's dead." (R. p. 128, lines 10-11).

One of Grich's other roommates, Robert McKinley, admitted that during the time of the shooting he was selling marijuana. (R. pp. 144-145). McKinley testified that prior to the shooting he smoked marijuana with Appellant at Winton Botchway's apartment. (R. p. 146, line 5 – p. 147, lines 1-24). According to McKinley, on the day of the shooting he called Botchway to let him know he had received a shipment of marijuana. (R. p. 148, line 14 – p. 149, lines 1-12). McKinley testified that on the evening of December 8, 2012, he was in his bedroom with friends Martin and Laura when he heard the commotion in the den and realized they were being robbed. (R. p. 137, line 2 – p. 138, lines 1-25). McKinley admitted that he and Martin were getting high. (R. p. 137, line 25 – p. 138, lines 1-5). An

officer who responded to the apartment after the shooting testified that there was a heavy odor of marijuana coming from the back bedroom. (R. p. 60, lines 17-19).

McKinley testified that upon hearing the commotion in the living room, he put two pounds of marijuana in a backpack and he, Laura and Martin climbed out a bathroom window. (R. p. 139, lines 1-23). McKinley hid the backpack in the woods and upon returning saw three shadows take off and jump in a Dodge Durango where another individual was waiting. (R. p. 140, line 15 – p. 141, lines 1-9). Surveillance video from the apartment complex showed the vehicle leaving at a high rate of speed. (R. p. 64, line 14 – p. 65, 66, 67, lines 1-6).

Police developed Kadeem Ramsey as a suspect. (R. p. 77, lines 4-20). After the police questioned Ramsey, he was arrested and charged with the murder of Grich as well as burglary first degree, attempted robbery and possession of a weapon during the commission of a violent crime. (R. p. 77, line 17 – p. 78, lines 1-24). While officers were questioning Ramsey, Jaron Dalton arrived at the Pickens County Sheriff's Office driving a black Dodge Durango. (R. p. 80, lines 5-13). A short time later Jaron's younger brother also arrived at the sheriff's office. (R. p. 81, lines 3-4). The Dalton brothers were interviewed and they led police to an area on their grandparents' property where they had buried two guns and some other items. (R. pp. 81-83). One of the guns found, a 9 mm, was determined to be the gun that fired the bullet killing Grich. (R. pp. 285-287). The Dalton brothers were arrested and charged in connection with the shooting. Records from the South Carolina Department of Corrections indicate that the Dalton brothers are white.

Both Dalton brothers and Ramsey testified against Appellant at trial. Jaron Dalton testified that he, his brother, Ramsey and the Appellant went to the Chimney Ridge

Apartment Complex to steal marijuana. (R. pp. 186-193). Jaron admitted that he brought two guns with him, a 9 mm gun and a 380. (R. p. 190, lines 6-11). According to Jaron, when they went into the apartment, his brother had the 380 and Appellant had the 9mm. Jaron testified that Appellant was hitting people with the gun. "When he was coming up from hitting him, he come up and the gun just fired about halfway up." (App. p. 196, lines 22-23). Jordan Dalton testified, "I went back downstairs. And by the time I got right there, to the corner of the love seat right there, he [Appellant] came down and hit Mr. Grich one more time and the gun went off." (R. p. 233, lines 1-5).

Appellant testified that he was not with Ramsey and the Dalton brothers on the night of the shooting. (R. p. 315, lines 2-23). The judge instructed the jury with the law on alibi, accident, accomplice liability, "hand of one is the hand of all" and felony murder. During deliberations the jury sent a note asking, "What means murder? Does the defendant have to pull the trigger to consider it murder? May we have a copy of the law?" (R. p. 393, lines 3-5). The State requested that, in addition to the murder charge, the judge reinstruct the jury on accomplice liability, "hand of one is the hand of all." (R. p. 393, lines 7-8). Counsel for Appellant replied, "I do think I would ask for the definition of murder, Your Honor, just the definition of murder." (R. p. 393, lines 10-12). When the judge asked counsel if he objected to hand of one is the hand of all recharge, counsel answered, "I do, just based on the question, Your Honor." (R. p. 393, lines 15-16). The judge overruled the objection and recharged the jury with the law on murder and accomplice liability by submitting written charges to the jury. (Supplemental Record). The trial judge erred.

In State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996), the South Carolina Supreme court wrote:

It is well established in South Carolina that “[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.” State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct.App.1993); accord Corbin v. Prioleau, 260 S.C. 171, 194 S.E.2d 875 (1973); Rauch v. Zayas, 284 S.C. 594, 327 S.E.2d 377 (Ct.App.1985).

In the present case the judge’s recharge was not limited to the jury’s question about the definition of murder. The judge initially instructed the jury on accomplice liability. In asking for the recharge, the jury did not ask for additional instruction on accomplice liability, “hand of one is the hand of all.” Instead, the jury asked, “Does the defendant have to pull the trigger to consider it murder?” (R. p. 393, lines 4-5). There is evidence in the record from which the jury could conclude that Appellant did not pull the trigger but rather the gun accidentally discharged while Appellant was striking the deceased. Rather than asking about accomplice liability, the jury was asking if the accidental discharge of the weapon during a robbery met the elements required for murder. The judge erred in recharging the jury with the law on accomplice liability.

In Wilds v. State, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), reh'g denied (Apr. 24, 2014), cert. granted (Nov. 20, 2014), cert. dismissed as improvidently granted, 414 S.C. 341, 778 S.E.2d 112 (2015), this Court found that because there was no evidence that indicated anyone other than Wilds was the shooter, the PCR court correctly determined the trial court erred in charging the jury on accomplice liability. Wilds presented an alibi defense at trial. In Wilds this Court distinguished Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) 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. at 438–39, 756 S.E.2d at 390. Like Wilds, the facts of the present case are distinguished from Barber. While the State’s evidence indicated that two of the men who entered the apartment were armed, no evidence indicates that anyone other than Appellant, armed with a 9 mm, was the shooter. While there was no objection to the initial charge on accomplice liability¹ (R. p. 392, lines 16-18), the trial court erred in **recharging** the jury on accomplice liability

The error in recharging the jury with the law on accomplice liability was not harmless. Appellant presented an alibi defense and testified that he was not with Kadeem Ramsey and the Dalton brothers on the night of the shooting at the Chimney Ridge Apartments. (R. p. 315, lines 2-23). Appellant, however, testified that he told Kadeem Ramsey that he could buy marijuana from the apartment where the deceased was shot. (R. p. 320, line 5 – p. 321, lines 1-11). By recharging accomplice liability when the jury did not ask for a recharge on accomplice liability, the jury may have erroneously inferred that

¹ Trial counsel’s failure to object to the initial charge on accomplice liability may need to be raised in post-conviction relief.

Appellant was guilty of murder, burglary and attempted armed robbery as an accomplice by telling Kadeem Ramsey where he could purchase marijuana.

CONCLUSION

Based on the above argument this Court should reverse the convictions and remand the case for a new trial.

Respectfully submitted,



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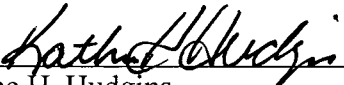
ATTORNEY FOR APPELLANT

This 19th day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this 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."

December 19, 2016



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