

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACOBY JAMAR GREGORY,

APPELLANT

APPELLATE CASE NO 2016-001533

ANDERS BRIEF OF APPELLANT

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AUG 18 2017

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in charging the jury on “the hand of one, is the hand of all” where the only theories of the case that were presented to the jury were either that Appellant was framed by his co-defendant and not involved in the decedent’s murder or that Appellant was the shooter who fired the fatal shot that killed the decedent?

STATEMENT OF THE CASE

On September 16, 2014, the Greenville County Grand Jury returned a two-count indictment for murder and possession and of a weapon during the commission of a violent crime against Appellant Jacoby Gregory. R. 713 – 714.

On July 11-14, 2016, Gregory appeared for trial before the Honorable Edward W. Miller and a jury. Gregory was represented by Randall Chamber and Christopher Maddox, and the State was represented by assistant solicitors Leigh Paoletti and Bryna Seay. R. 1.

The jury convicted Gregory of both offenses. R. 700. Judge Miller sentenced Gregory to consecutive terms of forty years for murder and five years for the weapons offense. R. 707 – 708.

This appeal follows.

ARGUMENT

The trial court erred in charging the jury on “the hand of one, is the hand of all” where the only theories of the case that were presented to the jury were either that Appellant was framed by his co-defendant and not involved in the decedent’s murder or that Appellant was the shooter who fired the fatal shot that killed the decedent.

Relevant Facts

When his cousin, Shawndell Clemmons (aka “Vegas”) got into an escalating altercation with the decedent, Barry Norman, on October 1, 2013, Appellant Jacoby Gregory tried to mediate a resolution between the two young men. R. 45, l. 12 – 49, l. 1; R. 504, l. 24 – 505, l. 10; R. 580, l. 22 – 582, l. 11. Barry Norman was ultimately fired upon by two gunman at approximately 10:48 p.m. that night and died from a single gunshot wound to the head. R. 121, l. 7 – 122, l. 2; R. 277, ll. 6-7. The forensic technician collected a total of three 9mm shells and four .45 caliber shells from the incident location, all approximately three-quarters of a block up from the decedent’s body. R. 136, l. 18 – 138, l. 12. A dark hooded sweatshirt and a Springfield XE .45 GAP handgun were both located along the path that the assailants used to retreat. R. 138, l. 13 – 140, l. 24; R. 187, ll. 11-14. Though the ballistics examiner could not definitively determine whether the fatal bullet was fired by the Springfield .45 that Gregory identified as being registered to him, Gregory suspected that his gun was taken by Vegas or another friend and used in the shooting. R. 222, l. 25 – 223, l. 9; R. 254, ll. 17-25; R. 282, l. 25 – 283, l. 4; R. 379, ll. 2-5; R. 561, l. 12 – 567, l. 17; R. 600, ll. 12-19.

During the weekend prior to the Tuesday shooting, several young men were involved in a “hotel party” in Greenville to celebrate Bobby Louis Thomas, Jr.’s (aka “Bop”) twenty-first birthday. Though many more people were there throughout the weekend, attendees at the party included Gregory, Vegas, Barry Norman, Stacy Sullivan (aka “Smitty”), Landis Franklin, Shamar Luster, and Jarell (aka Jerell or “Hood”) [last name not specified]. R. 188, ll. 2-10; R. 286, l. 7 –

289, l. 17; R. 552, l. 17 – 555, l. 14. Smitty and Norman got into an altercation on Saturday night but seemed to resolve it. R. 290, l. 1 – 291, l. 13; R. 555, ll. 14-24; R. 559, ll. 2-8. However, Norman began spreading rumors that Tijuana, who was pregnant with Smitty's child, had a sexual relationship with Clemmons during the party. R. 427, l. 18 – 428, l. 6; R. 570, l. 24 – 571, l. 5.

Bop lived with his mother and other family members in Section Eight housing located on Bates Street in Fountain Inn. On October 1, 2013, he had several friends over to the residence, including Tijuana and Vegas. R. 293, ll. 14-23; R. 331, l. 11 – 332, l. 14; R. 571, ll. 6-8. When Smitty and Norman drove up to Bop's that day, Norman was approached by Tijuana and some other women, who were upset about the rumor Norman spread. Norman laid his hands on Tijuana and she fell to the ground. In light of the fact that she was eight months pregnant, Smitty, Vegas, and Bop jumped to her defense and threw several punches at Norman. Norman kicked Vegas' car as he walked away, prompting Vegas to pick up a tire iron and smash the windows out of Norman's car. R. 55, l. 7 – 60, l. 21; R. 293, l. 14 – 297, l. 18; R. 332, l. 15 – 334, l. 23; R. 428, l. 23 – 431, l. 14.

Norman made phone calls threatening Vegas and eventually did a "fake drive-by" with his cousins, James Wright (aka "Tiger") and Josh Kilgore at approximately 8:00 p.m. They drove down Bates Street slowly with their headlights off and Norman hung out of the back window with what appeared to some to be a gun. Norman returned to Wright's house briefly, left, and came back again at approximately 9:30 or 10:00 p.m. R. 60, l. 22 – 65, l. 11; R. 297, l. 19 – 300, l. 6; R. 334, l. 24 – 336, l. 22; R. 431, ll. 19-25. Sometime after the "fake drive by," Gregory arrived at Bop's house. Gregory had been at work but was apprised of the days' events. R. 300, ll. 7-17; R. 337, l. 14 – 338, l. 14; R. 433, l. 12 – 434, l. 16; R. 570, l. 21 – 580, l. 21. Some of the men decided to get away from the situation and go to "Club Cream" that night. R. 342, ll. 16-21; R. 434, l. 22 – 435, l. 3; R. 594, ll. 17-23.

Williams, Vegas, and Gregory drove from Bop's house to the nearby Exxon gas station. Eventually Landis drove up with Smitty in the passenger's seat, followed by Bop and his cousin Jarell in another car. Vegas and Gregory both got in the backseat of Landis' car. R. 340, l. 25 – 345, l. 20. While they were in the car, Gregory called Norman and invited him to join them at the club that night. Norman said that he did not want to go to the club "with them" or Gregory. Instead Norman said that he wanted to fight Vegas and was at Tiger's house. Gregory told Norman that they would be there in a minute and hung up, but Landis (who was driving) did not know where Tiger lived. R. 593, l. 20 – 595, 23.

As they went down Woodside Avenue, Smitty asked Landis to pull over. However, Gregory wanted to go to his truck, so Landis took him back to his truck on Bates Street first. Landis, Smitty, and Vegas then left, going back in the same direction from which they came. Gregory began smoking a cigarette and decided to call Landis about joining them at Club Cream. He asked Landis when they were leaving and Landis told him to "call me right back." R. 595, l. 24 – 597, l. 13. After a brief phone call with his sister, Gregory heard gun shots. He got a call from Landis who told him to "come over here right now" and said "we got to shooting." R. 597, l. 14 – 598, l. 24. Rather than going to pick them up like Landis requested, Gregory went home. R. 598, l. 25 – 599, l. 21. Vegas admitted to Gregory over the phone that he used Gregory's gun. Gregory met Vegas at another friend's house later that night. After seeing the news coverage about the shooting, Vegas decided to flee to Syracuse, New York. Before he left, Vegas showed Gregory where he had put the .45 caliber gun but refused to retrieve it. Gregory called the police department the next day to report his gun as stolen. R. 599, l. 22 – 608, l. 14.

Wright's neighbor, Lawrence Yatzeck, testified that he and his wife returned home just before the shooting incident. He was in the kitchen when he heard three to four shots, a brief pause,

and then more shots. Yatzeck went on his back deck and saw two black men running toward the field. One was wearing dark clothing and the other wore dark pants and an orange or red shirt. R. 86, l. 17 – 94, l. 15.

Vegas gave a much different account of events after they left the Exxon. In addition to being a convicted felon, Vegas had motive to lie about Gregory's involvement because Vegas' plea to the lesser offense of voluntary manslaughter, subjecting him to a sentence of only between two and thirty years, was in exchange for his testimony at Gregory's trial. R. 420, ll. 10-17; R. 481, l. 8 – 482, l. 2; R. 483, l. 1- 484, l. 22. Vegas claimed that he and Gregory got out of Franklin's car at the Woodside Apartments on Woodside Avenue. R. 445, ll. 6-13. Initially Vegas vividly recalled that Gregory pulled a 9mm pistol that belonged to Jarell out of his hoodie and gave it to Vegas "just in case." R. 446, ll. 13-18; R. 447, l. 2 – 448, l. 25. However, Vegas later admitted that he was the individual on the surveillance footage who was wearing Gregory's black hoodie sweatshirt. R. 448, l. 1 – 449, l. 25. Recognizing the inconsistency in his testimony, Vegas said that he "made a mistake" and that the gun was in Gregory's pants when he pulled it out. R. 521, l. 25 – 522, l. 8; R. 530, l. 13 – 531, l. 16. According to Vegas, the two men made their way toward Third Street, where Norman was standing outside. As they got close a large man, presumably James Wright, pointed toward them. R. 450, l. 6 – 451, l. 18; see R. 65, l. 12 – 72, l. 15. Vegas alleged that Gregory began shooting his .45 at the decedent. He said that he "just reacted" and began shooting the 9mm gun at a downward angle, continuing to shoot as he ran away. R. 451, l. 19 – 452, l. 24.

Vegas identified himself as the individual in surveillance footage who takes off a black hoodie jacket and lays a .45 caliber gun on the ground. R. 457, l. 6 – 459, l. 5; see R. 97 – 100; R. 101, l. 3 – 106, l. 9; R. 106 – 108. He claimed that he took the .45 from Gregory because, despite

having an empty gun holster on his hip, Gregory was having difficulty carrying the weapon. R. 454, l. 2 – 456, l. 6; R. 446, l. 20 – 447, l. 1; R. 520, l. 15 – 521, l. 6; R. 535, l. 13 – 536, l. 16.

Notably, Josh Kilgore said that prior to the shooting, he heard Norman say to the person on the other side of the call: “Man, I ain’t worried about y’all. I’m going to get y’all back. I’m going to get you back. I’m going to get you back.” R. 66, ll. 1-13. He saw Shamar Luster, who was present during the physical altercation with Norman and “fake drive by,” around Wright’s house earlier in the evening. Kilgore saw Luster again in the area shortly after the shooting, wearing a white T-shirt and gray sweatpants. R. 83, ll. 6-23. Two employees of Pike Electric also saw a man fitting the description of Luster in the area immediately after the shooting. R. 239, ll. 1-24.

During the charge conference, the prosecutor requested that trial court charge the law on “the hand of one, is the hand of all.” R. 623, ll. 23-25. She argued: “Based on the Defendant’s testimony yesterday about, even according to his testimony, his involvement in the shooting, we would request that you charge the jury on that.” R. 623, l. 25 – 624, l. 3. Trial counsel opposed the charge, stating: “I don’t remember any testimony that he was involved in the shooting, Your Honor. He said he went home.” R. 624, ll. 5-7. The prosecutor responded:

Well, Your Honor, first of all, the Defendant says that he heard the gunshot, so he was certainly not at home -- could not have been at home when the shooting occurred. Additionally, Your Honor, the evidence that was elicited on cross-examination by the Defense was that the co-defendant is trying to put the gun in this Defendant’s hands and say that this Defendant was the shooter. When the Defense’s position is certainly going to be that the co-defendant was the shooter.

Both of these men were charged with murder. The jury needs to understand why two people can be convicted of murder of one victim. And the State intends to inform them of the law on that in its closing. I think it fits the evidence in the case. There’s also testimony by the Defense that Landis Franklin was involved somehow, that Stacy Sullivan was involved somehow. Under the facts as the Defendant put them in front of the jury, the way that he articulated it, all of them would be guilty of murder under that theory, Your Honor.

R. 624, l. 10 – 625, l. 5. Judge Miller ruled: “I think that entitles to you a charge on the hand of one is the hand of all.” R. 625, ll. 6-8.

In her closing argument, the solicitor focused on a small portion of one of Gregory’s recorded jail calls, in which he discussed a plan not to incriminate his cousin and co-defendant, Vegas, if he were to be questioned by police. See R. 667, ll. 3-25. During the jury charge, the jury was given the following instruction:

Now, if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts done in carrying out the common plan and purpose. For example, two people can be guilty of killing another person when only one of the two had a gun, there was only one bullet and only one of the two fired the shot that caused the death. So if two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said, the hand of one is the hand of all.

R. 689, l. 20 – 690, l. 9.

Discussion

The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “Like 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).

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 support an accomplice liability charge . . . , the question is whether there is any evidence that another co-conspirator was the shooter and [the defendant] was acting with him when the [crime] took place.” Barber, 393 S.C. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000)). “[A]n alternate theory of liability, such as accomplice liability, may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.” Wilds v. State, 407 S.C. 432, 439, 756 S.E.2d 387, 390 (Ct. App. 2014) (internal quotations omitted).

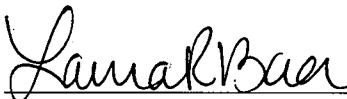
In the present case, the State’s theory was that Gregory and his co-defendant, Vegas, both fired shots at Barry Norman and that Gregory fired the fatal shot with a .45 caliber gun. The defense’s theory of the case was that some other third party was with Vegas when Norman was shot. Whether it was Vegas or his co-conspirator who wielded the .45 caliber weapon, the defense’s position was that neither of the assailants was Gregory such that he could not be found guilty through the theory of accomplice liability. Neither party ever asserted that it could have been Vegas who shot the .45 caliber gun and Gregory who shot the 9mm gun, which is the only circumstance under which Gregory could have been present at the scene of the crime but not the shooter.

Nonetheless, the State asserted that Gregory’s own testimony necessitated a “the hand of one, is the hand of all” charge because his testimony inculpated Landis Franklin and Stacey

Sullivan. The State may have been correct if it were Franklin or Sullivan who was on trial. In the trial of Jacoby Gregory, however, the jury was tasked with determining only whether he was the second assailant who fired the .45 caliber gun or not. The State also wanted to explain how more than one person can be criminally liable for the death of one person when only shot killed him. That is not the test for determining whether an accomplice liability charge is necessitated by the evidence. The improper introduction of the hand of one, hand of all charge into the charge on the law was confusing to the jury and rendered Gregory's trial fundamentally unfair. He is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Jacoby Gregory respectfully requests that this Court reverse his convictions and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of August, 2017.

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THE STATE,

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V.

JACOBY JAMAR GREGORY,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jacoby Jamar Gregory 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 Edward W. Miller, which was held on July 11 - 14, 2016, 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 Jacoby Jamar Gregory.

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Respectfully Submitted,

AUG 18 2017



Laura R. Baer

SC Court of Appeals

Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of August, 2017.

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."

August 18, 2017.



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CERTIFICATE OF SERVICE

The undersigned 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; upon Jacoby Jamar Gregory, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of August, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of August, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027

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AUG 18 2017

SC Court of Appeals