STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lancaster County

Honorable William Jeffrey Young, Circuit Court Judge

RECEIVED
DEC 21 2017
S.C. SUPREME COURT

ANTHONY RODRIEKUS CARTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001265

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the post-conviction relief judge err by finding trial counsel was not deficient when he failed to challenge the sufficiency of the evidence during his motion for a directed verdict concerning whether Petitioner fired the fatal shot or could be guilty under an accomplice liability theory where the state failed to introduce any evidence that Petitioner and his codefendant joined to accomplish an illegal purpose, and that Petitioner failed to prove prejudice, where if counsel had raised these additional grounds at trial, the trial judge would have directed a verdict of acquittal or, in the alternative, the appellate court would have directed a verdict if the arguments had been preserved for appellate review?

STATEMENT OF THE CASE

On May 3, 2010, gunfire erupted at the Countryside Mobile Home Park in Lancaster, South Carolina. Three year old Jaylen was fatally shot as she sat in the backseat of a car parked in the neighborhood. Immediately before the shooting, Petitioner and Marico Stevens drove Emmie Amanda Coats to her home in the mobile home park. Stevens was the driver, Petitioner was the front seat passenger, and Coats and Jaylen sat in the backseat. App. 221, l. 1 – App. 222, l. 5. Petitioner and Coats were romantically involved. App. 208, ll. 4-20. Stevens dated Jaylen's mother, Rodriana Lanisha Cunningham. App. 155, ll. 16-19.

There was an ongoing dispute between Petitioner and Beneco Ganson, J.D. Hemphill, and John Jarrod Hill that started months before the shooting. App. 222, l. 19 – 223, l. 23. Hill claimed at trial that he gave Petitioner four hundred and fifty dollars to buy cocaine and Petitioner "jumped the fence" with his money. App. 281, ll. 2-23. A few days before the shooting, Ganson, Hemphill, and Hill chased Petitioner out of Countryside Mobile Home Park as he was leaving Coats' trailer. App. 223, l. 24 – 224, l. 16. Ganson told Petitioner during this encounter that if he ever came back to the neighborhood, he better have a gun. App. 253, ll. 2-9. Ganson admitted at trial that he, Hill and Hemphill tried to "get" Petitioner after Petitioner took the money from Hill. App. 329, l. 5 – 333, l. 7. Ganson also admitted they beat up Petitioner's brother as a result of the dispute. App. 333, l. 14 – 334, l. 12.

According to Coats, on the way to her trailer that evening, Petitioner told Stevens about the earlier encounter where Ganson, Hemphill, and Hill chased Petitioner, and Stevens handed Petitioner a gun. App. 223, l. 24 – 225, l. 12. When Stevens pulled into the mobile home park, Coats saw Hemphill and Ganson. App. 229, ll. 12-24. Stevens parked in front of Coats' trailer. Petitioner got out of the car with the gun and met Hemphill in the middle of the road. Petitioner

allegedly had the gun concealed on his side. App. 233, l. 3 – 235, l. 21. The men briefly argued, and then Petitioner turned around and walked back to the rear passenger side of Stevens' car. App. 235, l. 22 – 236, l. 12. Stevens was standing at the front of the car on the passenger side. App. 236, ll. 18-22. When Petitioner got back to the car, Coats heard gunshots and saw a flash from across the street. App. 237, ll. 6-11. According to Coats, Petitioner turned like he was going to shoot back, but Coats immediately went inside her trailer and did not see what happened. While she was inside, Coats heard shooting back and forth. App. 237, ll. 17-22.

Kayla Estes, Petitioner's girlfriend, testified that he told her he met Hemphill in the roadway and "they both said the whole thing was quashed." App. 350, ll. 11-22. Petitioner then turned and walked away. After he walked away, Petitioner heard Ganson say, "Fuck that, I'll get him." App. 350, l. 23 – 351, l. 2. Petitioner told Estes he heard gunshots and Stevens "ended up with the gun" and returned fire. App. 351, ll. 1-10.

Investigator Jeff Steele with the Lancaster County Sheriff's Office testified that numerous cartridges casings were recovered from the scene that night, including multiple 7.65 millimeter casings, a .380 caliber casing, and multiple .22 caliber casings. App. 423, l. 3 – 424, l. 10. Additionally, three .40 caliber cartridge casings were collected from Coats the morning after the shooting. She allegedly found them in her yard. App. 424, ll. 18-24; App. 241, l. 7 – 244, l. 19; App. 267, l. 5 – 270, l. 2. The only gun recovered was a .40 caliber semiautomatic pistol. App. 550, l. 22 – 551, l. 2.

During the course of the investigation, officers spoke with Eric and Jackie Sanders, Stevens' father and stepmother, about recovering the firearm. Jackie testified that her husband called someone named Derrick about the gun. App. 388, ll. 5-15. As a result of this conversation, Jackie met Derrick at a convenience store and he gave her the gun. App. 389, l. 8 – 391, l. 21. Jackie then

turned the gun over to Investigator Mike Howell of the Lancaster County Sheriff's Office. App. 400, l. 11 – 403, l. 4.

Stevens could not be excluded as a possible contributor to a mixture of DNA found on the firearm. However, Petitioner was excluded as a possible contributor. App. 538, ll. 4-22.

Michelle Eichenmiller, a firearms examiner with the South Carolina Law Enforcement Division, testified that the three .40 caliber cartridge casings collected by Coats, a bullet jacket fragment found on the passenger side floorboard of Stevens' car, a copper fragment recovered from the cushion on the backseat headrest, and a bullet jacket fragment found in Coats' driveway were all fired by the recovered .40 caliber pistol. App. 550, l. 19 – 557, l. 17.

There were two defects found on the roof of the car driven by Stevens. They were both located toward the front of the vehicle on the passenger side near where Stevens was seen standing during the shooting. App. 456, l. 20 – 457, l. 1. Investigator Ken Taylor, who was qualified as an expert in shooting reconstruction, testified that both defects were entry holes caused by a fired bullet. App. 457, l. 8 – 459, l. 17. As to directionality, Taylor opined the bullets that entered the roof of the car "came from the front of the car toward the rear of the car" at a downward angle. App. 446, ll. 8-13; App. 459, ll. 18-23; App. 464, ll. 3-7. One of the bullets that entered the roof of the car exited through the rear windshield. App. 468, ll. 14-21. The other bullet that entered the roof struck the backseat cushion. App. 466, ll. 9-22. A small copper fragment from a bullet jacket was recovered from the headrest. App. 471, ll. 7-20.

After the shooting, Petitioner and Stevens left the mobile home park and went to Lawrence Alexander's apartment nearby. Stevens "burst" into the apartment and "started saying someone was trying to kill him." He "said they shot up his car." App. 357, l. 13 – 358, l. 20. Petitioner and Stevens did not realize the child had been shot until Alexander asked about the child. App. 359, l.

15 – 360, l. 18. Once they realized she was injured, they rushed her to Springs Memorial Hospital in Lancaster. App. 360, l. 19 – 361, l. 12; App. 124, l. 3 – 130, l. 7. The child was eventually airlifted to Carolina Medical Center in Charlotte where she was pronounced dead at 6:15 the following morning. App. 150, l. 18 – 151, l. 21. She died from a "through and through" gunshot wound to the head. App. 370, l. 18 – 373, l. 2.

A Lancaster County Grand Jury indicted Petitioner on August 19, 2010 for murder and possession of a weapon during the commission of a violent crime. App. 871-872. His case was called to trial on November 7, 2011 before the Honorable Ernest J. Kinard, and a jury. App. 1. Solicitor Doug Barfield represented the state, and Michael Lifsey represented Petitioner. App. 1. On November 10, 2011, the jury found Petitioner guilty as indicted. App. 689, ll. 10-20. He was sentenced to thirty two years for murder and five years concurrent for the weapons offense. App. 697, ll. 3-23.

On direct appeal, Petitioner argued the trial judge erred by refusing to direct a verdict for the offense of murder when the state failed to prove who fired the fatal shot or introduce any evidence that Petitioner and his codefendant Stevens joined to accomplish an illegal purpose. App. 702. However, the Court of Appeals held the argument was not preserved for appellate review. App. 748-749. Specifically, the court found "any issue regarding the sufficiency of evidence that [Petitioner] fired the fatal shot or could be guilty under an accomplice liability theory is not preserved because he only presented a self-defense argument to the trial judge in support of his directed verdict motion." App. 748-749. Consequently, the court affirmed Petitioner's conviction and sentence. App. 748-749.

Petitioner filed a petition for rehearing on May 15, 2014. App. 750-759. The Court of Appeals denied the petition for rehearing by order dated June 25, 2014. App. 760-761. On July

24, 2014, Petitioner filed a petition for writ of certiorari to the Court of Appeals with this Court arguing the Court of Appeals erred by holding the claim was procedurally barred. App. 762-777. The state filed a return to this petition on August 19, 2014. App. 778-808. This Court ultimately denied certiorari by order dated December 4, 2014. App. 809.

On January 13, 2015, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 810-816. The state filed a return to this application dated July 7, 2015. App. 817-821. An evidentiary hearing was convened on January 10, 2017 before the Honorable William Jeffrey Young. App. 822. Assistant Attorney General Patrick Schmeckpeper represented the state, and Nathan Sheldon represented Petitioner. App. 822.

Michael Lifsey, Petitioner's trial counsel, admitted it was highly disputed who fired the fatal shot, Petitioner or Stevens. However, he explained that "the state's theory was the hand of one is the hand of all and it really didn't matter" who actually fired the bullet that struck the child. App. 826, ll. 4-13; App. 827, ll. 6-18. According to Lifsey, the state tried Petitioner and Stevens separately due to concerns related to Bruton v. United States 391 U.S. 123 (1968).[1] Petitioner was tried first during the week of November 7, 2011. Stevens was tried the following week.[2] App. 826, l. 17 – 827, l. 5.

As to the directed verdict motion, Lifsey testified, "I think I made a directed verdict motion because I always make a directed verdict motion on the general sufficiency of the evidence. [But] I don't remember anything particular about it." App. 828, ll. 1-5. Lifsey

[1] The United States Supreme Court held in Burton that the Confrontation Clause of the Sixth Amendment bars the admission of a nontestifying codefendant's confession that incriminates another defendant.

[2] A jury acquitted Stevens of murder.

acknowledged that he did not "make any specific argument [during the motion for a directed verdict] as to the State's theory of the case." He admitted he failed to argue there was no evidence Petitioner and Stevens acted in concert as required for a conviction under the accomplice liability theory. Lifsey maintained that there was evidence Petitioner and Stevens "went there [the mobile home park] together" and "that both of them had handled the gun" so he did not believe accomplice liability was "an issue" and he "certainly didn't raise it." App. 828, l. 20 – 829, l. 4.

Lifsey also testified that there was no evidence Petitioner fired the fatal shot. Petitioner never admitted in his recorded statement to the police that he fired the weapon that evening. Instead, Petitioner merely admitted to handling the gun at some point before the shooting when he armed himself in self defense. App. 829, l. 11 – 830, l. Lifsey emphasized that the physical evidence established the bullet that struck the child was fired from the front of Stevens' car on the passenger side. App. 830, ll. 2-7. Notably, the evidence presented at trial showed that Stevens was standing at the front passenger side of the car when the shots were first fired from across the street, and that Petitioner was standing near the rear of the vehicle.

Importantly, Lifsey admitted that he only made a general motion for a directed verdict and, consequently, he acknowledged he failed to preserve other specific grounds for appellate review. App. 831, ll. 16-22. Moreover, it was his understanding that the appellate court held certain grounds for the directed verdict motion were not preserved. App. 831, ll. 16-22.

Despite recognizing that the Court of Appeals held the grounds raised by appellate counsel on appeal concerning the directed verdict motion were not preserved for appellate review because trial counsel only raised a self defense argument at trial, the PCR judge found Petitioner "failed to show actual deficiency." App. 867. The judge maintained, "The fact that

counsel did not make an argument he did not believe was meritorious does not constitute ineffective assistance of counsel." App. 867. Moreover, the judge found Petitioner failed to "show prejudice, or a reasonable likelihood that had counsel preserved the issue to the Court of Appeals' satisfaction, the outcome of the proceeding would have been different." App. 867. Specifically, the judge found Petitioner would not have been entitled to a directed verdict on the claims raised on appeal. App. 867-869.

As to principal liability, the PCR judge found "it was reasonably inferable [from the evidence presented] that [Petitioner] walked into an already heated situation armed, was pointing a gun at people—thereby bringing on the difficulty—and ultimately fired the fatal shot that killed the victim." App. 868. As to accomplice liability, the judge noted, "The evidence presented at trial was that [Petitioner] and his co-defendant went to the location of the intended victims. They talked about the dispute prior to arriving. Under these circumstances, the jury could have clearly interpreted that the gun changing hands signified a common design, from which the victim's death resulted. In any event, whether [Petitioner] or the co-defendant fired the shot that ultimately killed the victim, a motion for a directed verdict would have been appropriately denied." App. 869.

Because the PCR judge erred by finding Petitioner failed to prove trial counsel was deficient for failing to challenge the sufficiency of the evidence concerning whether Petitioner fired the fatal shot or could be guilty under an accomplice liability theory, and that Petitioner failed to prove prejudice since Petitioner would not have been entitled to a directed verdict on these grounds, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief judge erred by finding trial counsel was not deficient when he failed to challenge the sufficiency of the evidence during his motion for a directed verdict concerning whether Petitioner fired the fatal shot or could be guilty under an accomplice liability theory where the state failed to introduce any evidence that Petitioner and his codefendant joined to accomplish an illegal purpose, and that Petitioner failed to prove prejudice, where if counsel had raised these additional grounds at trial, the trial judge would have directed a verdict of acquittal or, in the alternative, the appellate court would have directed a verdict if the arguments had been preserved for appellate review.

Trial counsel, while he did move for a directed verdict, was deficient in omitting several grounds for the motion, including the argument that Petitioner was entitled to a directed verdict because the state failed to prove Petitioner fired the fatal shot or could be guilty under an accomplice liability theory because the state failed to introduce any evidence that Petitioner and Stevens joined to accomplish an illegal purpose. Petitioner raised these additional grounds on direct appeal, and, after the Court of Appeals held the argument was not preserved for appellate review, this Court denied the petition for writ of Certiorari to the Court of Appeals. Petitioner was prejudiced by counsel's deficient performance because if counsel had properly raised these grounds, the trial judge, or in the alternative, the appellate court, would have directed a verdict of acquittal for murder.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient"

and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). Here, trial counsel was deficient for omitting grounds that would have entitled Petitioner to a directed verdict. See generally Stone v. State, 419 S.C. 370, 389-390, 798 S.E.2d 561, 571-572 (2017) (holding trial counsel was deficient because, while he did object, he omitted several grounds for the objection). Specifically, trial counsel was ineffective for failing to challenge the sufficiency of the evidence that Petitioner fired the fatal shot or could be guilty under an accomplice liability theory since the state failed to introduce evidence that Petitioner and Stevens joined to accomplish an illegal purpose. Instead, counsel merely made a general challenge to the sufficiency of the evidence based on a self defense argument. See App. 615, l. 22 – 616, l. 3; App. 749.

Not only was trial counsel ineffective, Petitioner was clearly prejudiced by counsel's deficient performance. Petitioner may satisfy the prejudice prong by proving there is a reasonable probability that either (1) the trial judge would have directed a verdict of acquittal for

murder if counsel had raised the additional grounds for the motion, including that the state could not prove Petitioner fired the fatal shot or could be guilty under an accomplice liability theory because the state failed to introduce any evidence Petitioner and Stevens joined to accomplish an illegal purpose, at trial, or (2) the appellate court would have considered the merits of the argument on appeal and ultimately directed a verdict if trial counsel had raised the additional grounds at trial thereby preserving them for appellate review. See generally Stone, 419 S.C. at 389-390, 798 S.E.2d at 571-572 (holding as to trial counsel's deficiency in failing to object to certain testimony, Stone would satisfy the second prong of Strickland if he proved there is a reasonable probability that either (1) the trial court would have sustained an objection, which would in turn have changed the outcome of the proceeding, or (2) the appellate court would have reversed on the basis of one of the preserved objections).

Since the grounds for the directed verdict motion raised on appeal were not considered by the appellate court because the court held Petitioner only presented a self defense argument to the trial judge in support of his directed verdict motion and, consequently, the grounds were not preserved for appellate review, an examination of the merits of the argument is necessary in analyzing the prejudice prong. See McHam, 404 S.C. at 475-476, 746 S.E.2d at 47 (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994)).

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Odems, 395 S.C 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000).

When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is *substantial* circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

Likewise, a directed verdict is proper when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

During his closing argument, the solicitor told the jury, "Nobody, I will tell you straight-up, I'm straight-up here, nobody involved in this case contends that anybody meant to shoot and kill Jaylen, that's clear and I'm not going to argue otherwise." App. 621, l. 25 – 622, l. 3. Instead, the state relied on a theory of transferred intent, arguing that both Stevens and Petitioner, under a theory of the hand of one is the hand of all, intended to kill Ganson and Hemphill and mistakenly struck Jaylen. App. 622, l. 3 – 623, 6. Significantly, the state was unable to prove who fired the fatal shot that killed Jaylen. The solicitor argued, "I submit to you it doesn't matter whether you conclude he [Petitioner] shot Jaylen or Marico Stevens shot Jaylen." App. 637, ll. 15-17. The state, however, failed to offer evidence that Stevens and Petitioner joined to accomplish an illegal purpose required under the hand of one is the hand of all theory of accomplice liability. Stevens' act of handing the gun to Petitioner, after learning of the prior threats made against Petitioner, without

more, does not constitute an illegal purpose. Instead, the act of Stevens handing the gun to Petitioner, demonstrates that Petitioner was lawfully arming himself in self defense. As the state failed to prove Petitioner fired the fatal shot, and, at the time shots were fired, Stevens had the right to act in self defense, the state failed to prove the element of malice required for murder, even under a theory of transferred intent.

After the state rested, Petitioner moved for a directed verdict of acquittal. App. 615, l. 22-25. The trial judge denied the motion for directed verdict stating, "In the light most favorable to the State, under the hand of one, hand of all situation he could be guilty of various crimes." App. 616, ll. 1-3. This was error. Based on the insufficiency of the evidence, the judge should have directed a verdict of acquittal for murder.

First, the state offered no evidence that Petitioner and Stevens joined to accomplish an illegal purpose. "Under the 'hand of one is the hand of all' 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." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)). The state failed to establish liability under the hand of one is the hand of all. The state presented evidence that after learning Petitioner had been threatened in the mobile home park and warned that if he returned he should be armed, Stevens provided Petitioner with a gun. The state did not present evidence that Petitioner and Stevens went to the mobile home park to seek retaliation. Instead, the evidence showed Petitioner and Stevens were merely taking Emmie Coats, with whom Petitioner was romantically involved, home to her residence. Petitioner did not join Stevens to accomplish an illegal purpose, but merely legally armed himself in self defense.

Second, the state argued during closing that Petitioner was not entitled to self defense because he was not without fault in bringing on the difficulty. App. 636, ll. 2-19. The question of whether Petitioner was entitled to shoot in self defense after he turned his back and walked away, and Ganson and Hemphill fired the first shots, would have been a question for the jury if the state established that Petitioner fired the fatal shot. The state, however, cannot prove Petitioner fired the fatal shot. Stevens was clearly without fault in bringing on the difficulty and was entitled to fire back at Ganson and Hemphill in self defense. If Stevens had been on trial, based the evidence presented by the state at Petitioner's trial, the judge would have erred in refusing to direct a verdict of acquittal. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). As the state proceeded under the hand of one is the hand of all theory of accomplice liability, the judge erred in refusing to direct a verdict of acquittal for murder as to Petitioner.

During his closing argument, the solicitor argued, "Well, if Carter [Petitioner] didn't shoot the gun then how did Stevens get the gun? From Carter. One way or the other Stevens – if you believe Stevens shot, Stevens ended up with the gun from Carter during something that Carter started. They're both guilty of it, we're only trying Carter today but they're both guilty of the murder of Jaylen based on all of the facts and circumstances of what happened." App. 639, ll. 13-20. The state's theory ignores the absence of any evidence that Petitioner and Stevens joined to accomplish an illegal purpose. The evidence shows Stevens handed the gun to Petitioner and Petitioner legally armed himself in self defense before taking Coats home to the mobile home park where Petitioner had been threatened. Additionally, the state's theory ignores Stevens' right to act in self defense once Ganson and Hemphill started shooting.

In State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005), the Court of Appeals asserted:

> Where two or more acting with a common plan or intent [are] present at the commission of a crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present means to be sufficiently near to aid and abet and assist in the commission of the crime. Intent is also a necessary element, for there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant to that plan, with the person aiding and abetting by some overt act.

The only common intent between Petitioner and Stevens was the intent to defend themselves from earlier threats, and then when the parties made good on the threat, defending themselves from the shots being fired from across the street.

The state's theory of transferred intent fails because the state failed to establish that Petitioner fired the fatal shot. If Petitioner did not fire the fatal shot, no intent existed and no intent could be transferred. Additionally, the state's theory of transferred intent fails because the state failed to establish that Petitioner and Stevens joined to accomplish an illegal purpose required under the hand of one is the hand of all theory of accomplice liability argued by the state and ruled upon by the judge as the reason for denying the directed verdict motion.

In State v. Fennell, 340 S.C. 266, 272-273, 531 S.E.2d 512, 516-517 (2000), this Court, in addressing the theory of transferred intent, held:

> In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds by* State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and

> in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, Substantive Criminal Law, § 3.12(d) (1986) (discussing transferred intent); McAninch & Fairey, at 17-19 (same).

The theory of transferred intent does not apply in the present case. The state cannot prove Stevens acted with malice when he shot in self defense and the bullet mistakenly hit Jaylen. Moreover, the state failed to prove Petitioner fired the fatal shot and that Petitioner and Stevens joined to accomplish an illegal purpose under a theory of the hand of one is the hand of all. Consequently, the trial judge erred in refusing to direct a verdict of acquittal. Moreover, if these additional grounds had been preserved for appellate view, the Court of Appeals would have directed a verdict for murder.

Respectfully, this Court should hold the PCR court erred by finding trial counsel was not deficient for failing to challenge the sufficiency of the evidence during his motion for a directed verdict based on the grounds that the state's failed to prove who fired the fatal shot or introduce any evidence Petitioner and Stevens joined to accomplish an illegal purpose, which is required for a conviction under the hand of one is the hand of all theory of accomplice liability, and preserve these grounds for appellate review. Further, this Court should hold Petitioner was prejudiced by counsel's deficient performance because had counsel raised these additional grounds during his motion for a directed verdict, the trial judge would have directed a verdict of acquittal or, in the alternative, the Court of Appeals would have directed a verdict for murder.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable William Jeffrey Young, Circuit Court Judge

ANTHONY RODRIEKUS CARTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Anthony Rodriekus Carter, #292039, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 21st day of December, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of December, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.