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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MONTRELLE LAMONT CAMPBELL,

APPELLANT

APPELLATE CASE NO. 2018-000115

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT

1.

The trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon as to the offense of attempted murder, a specific intent crime, where implied malice is inconsistent with a specific intent crime and, as our Supreme Court held in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), there must be evidence that one charged with attempted murder had both express malice and a specific intent to kill. 7

2.

The trial judge erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability when there was no evidence to support the charge, specifically there was no evidence Appellant was acting with another during the shooting or that the murder was committed pursuant to a common design or plan, particularly where the state's theory of the case was that Appellant was the shooter and acted alone. 13

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011) 16, 19

Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988) 10, 11

Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004) 16

State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) 17

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 7

State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011) 9

State v. Dickman, 341 S.C. 293, 341 S.E.2d 268 (2000) 18, 19

State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) 9

State v. Hill, 268 S.C. 390, 234 S.E.2d 219 (1977) 17

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) .... passim

State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) 16

State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) 17

State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) 17

State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) 9

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 16, 17

State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct.App.2005) 17

Wilson v. Wilson, 319 S.C. 370, 461 S.E.2d 816 (1995) 17

Statutes

S.C. Code Ann. § 16-3-29 .... 9, 11

S.C. Code Ann. § 16-3-600 11

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon as to the offense of attempted murder, a specific intent crime, where implied malice is inconsistent with a specific intent crime and, as our Supreme Court held in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), there must be evidence that one charged with attempted murder had both express malice and a specific intent to kill?

2.

Did the trial judge err by instructing the jury on the hand of one is the hand of all theory of accomplice liability when there was no evidence to support the charge, specifically there was no evidence Appellant was acting with another during the shooting or that the murder was committed pursuant to a common design or plan, particularly where the state's theory of the case was that Appellant was the shooter and acted alone?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant on April 11, 2016 for murder and two counts of attempted murder. R. *. His case was called to trial on January 8, 2018 before the Honorable Deadra L. Jefferson, and a jury. Tr. 1. Assistant Solicitors Chad Simpson and Alex Ginsberg represented the state. Tr. 1. Mary Ford and Michael Williams represented Appellant. Tr. 1. On January 12, 2018, the jury found Appellant guilty as indicted. Tr. 708, l. 9 – 709, l. 14. He was sentenced to life without parole for murder and thirty years concurrent for each count of attempted murder. Tr. 724, ll. 7-14.

This appeal follows.

STATEMENT OF FACTS

On Friday, September 18, 2015, Katrina Brown hosted a party that carried over into the early morning hours. Numerous friends and family members were in and out throughout the night. Tr. 76, l. 3 – 79, l. 9. Katrina lived in Gadsden Green, a government housing community in Charleston. Tr. 157, ll. 19-25. Around 6:30 in the morning on September 19, 2015, at least fourteen bullets were fired in rapid succession into Katrina's apartment. Tr. 81, l. 7 – 82, l. 7; Tr. 126, ll. 3-19; Tr. 146, l. 10 – 147, l. 9; Tr. 188, ll. 5-7; Tr. 194, l. 4 – 195, l. 3. No one saw the shooter. Antwan Frost, an old friend who arrived at the apartment sometime between 5:30 and 6:00 a.m., was fatally wounded. Tr. 78, l. 6 – 79, l. 23; Tr. 268, l. 22 – 269, l. 19. Kerri Brown, Katrina's sister, was shot in the head. Tr. 127, l. 23 – 128, l. 1. Tierra Brown, a cousin, was shot in the arm. Tr. 148, ll. 3-13. Both women survived.

During the early stages of the investigation, law enforcement asked Katrina if she "[knew] of anybody who would want to hurt [her]" and whether she had any "enemies in the neighborhood." Tr. 85, ll. 9-20. Katrina remembered an incident that occurred on Thursday night, September 17, 2015, and told the police about it. That evening, Katrina was at her apartment with her sister, Kerri. They were sitting in the kitchen around midnight when an old friend named Kadeshia, who turned out to be Appellant's sister, walked inside. Tr. 66, l. 10 – 69, l. 2. While they were talking to Kadeshia, someone knocked on the door and told Kadeshia that her brother was outside. Kadeshia told the person to tell her brother "she was coming." Tr. 69, ll. 3-11. However, Kadeshia continued talking to the women inside.

Eventually, a man who Katrina did not know or recognize walked into the apartment without permission and sat down. He never said a word. After a few minutes, Katrina asked the man, who she later learned was Appellant, to leave. Tr. 69, l. 9 – 70, l. 2. After Appellant left,

Katrina had a "verbal altercation" with Kadeshia because she was upset Kadeshia did not apologize for her brother. After this dispute, Kadeshia also left the apartment. Tr. 93, ll. 3-22.

Later when Katrina went outside to smoke a cigarette, she saw Kadeshia standing by a car. Katrina claimed that all of a sudden Appellant knocked her to the ground. He was about to "knock" her again when her sister came outside. Appellant ultimately walked away never having said a word. Tr. 70, l. 16 – 72, l. 25; Tr. 93, ll. 3-22. Katrina did not report this incident to the police because "where [she is] from, it's not something that you do." Tr. 74, ll. 9-16.

After the shooting on Saturday morning, Appellant immediately became a suspect due to this prior altercation. The police focused its investigation on him.

Law enforcement obtained surveillance footage from five security cameras operated by the City of Charleston that were spread throughout Gadsden Green as well as from three security cameras outside Lee Lee's Hot Kitchen, a nearby restaurant. Tr. 240, l. 11 – 242, l. 20; Tr. 253, l. 1 – 258, l. 15. They also obtained footage from a private residence, which had a camera that captured what occurred outside its front door and the street immediately in front of the house. Tr. 244, l. 7 – 247, l. 5.

The footage from the private residence showed a gold Buick park on nearby Nunan Street shortly before the shooting. Two men left this vehicle and began walking towards Gadsden Green, where Katrina lived. The cameras in front of Lee Lee's Kitchen as well as several of the city cameras captured the men walking. Eventually one of the men is seen running back to the car parked on Nunan Street. A third man is also seen walking toward the car carrying a rifle. Tr. 429, l. 20 – 444, l. 21; See State's Exhibit No. 95.

Law enforcement determined the gold Buick in the surveillance footage was registered to Tomeka President. When interviewed, President claimed Appellant was at her apartment that

night when she went to bed but was gone when she woke up the next morning. She testified that she discovered her car was also gone when she went to leave for work shortly before 7:00 a.m. Tr. 323, l. 10 – 329, l. 9.

Law enforcement were able to identify the two men originally walking from the car on Nunan Street as Trivell Richardson and Andrew "Ace" Rivers. Tr. 432, ll. 1-9. Richardson was the driver who was seen running back to the car after the shooting. Law enforcement interviewed Richardson. He was ultimately charged with murder and two counts of attempted murder related to this case. Tr. 342, ll. 10-25.

Richardson testified against Appellant at trial. He claimed he ran into Appellant, who was driving Tomeka President's car, in North Charleston during the early morning hours of Saturday, September 19, 2015. Appellant asked Richardson to accompany him to the store to buy cigarettes. However, Richardson claimed instead of stopping at a nearby store Appellant drove downtown and parked near Gadsden Green. Tr. 351, l. 1 – 355, l. 4. According to Richardson, Appellant got out of the car and asked Richardson to park the car on Nunan Street, which was around the corner. Andrew "Ace" Rivers was there and got into the car with Richardson before he moved it. Tr. 356, l. 13 – 359, l. 4. After parking the car on Nunan Street as instructed, Richardson testified he began to walk towards Gadsden Green with Rivers to find Appellant and give him the keys to the vehicle. Tr. 361, l. 20 – 362, l. 11. While they were walking, he heard gunshots and ran back to the car. Rivers ran in a different direction. Tr. 363, l. 2 – 364, l. 7. As Richardson was about to leave, he claimed Appellant opened the passenger door and got into the car. Appellant was carrying an AR-15 "assault" rifle. Richardson claimed the rifle was still "smoking." Tr. 364, l. 8 – 366, l. 20. Appellant allegedly told him to "go" and Richardson drove back to North Charleston. Tr. 366, l. 24 – 367, l. 9.

Appellant presented the testimony of Peggy Blake, who lived across the street from Katrina Brown in September 2015. Blake testified that immediately after the shooting, she looked out her window and saw a black man wearing a "hoodie" with a rifle in his hand. She saw this man get into a lime green car, which proceeded to drive away. Tr. 583, l. 2 – 603, l. 8.

ARGUMENT

1.

<u>The trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon as to the offense of attempted murder, a specific intent crime, where implied malice is inconsistent with a specific intent crime and, as our Supreme Court held in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), there must be evidence that one charged with attempted murder had express malice and a specific intent to kill.</u>

How the Issue was Presented Below

During the charge conference, the trial judge indicated that she intended to charge malice may be inferred from the use of a deadly weapon as to both murder and attempted murder since "there has been no mitigation presented or raised." Tr. 622, l. 21 – 623, l. 3. Defense counsel objected to this implied malice instruction as to the offense of attempted murder pursuant to <u>State v. Belcher</u>, 385 S.C. 597, 685 S.E.2d 802 (2009).[1] However, in support of her objection, counsel argued attempted murder has a different, "higher" burden than murder. She asserted, "I think having that [inferred malice] instruction basically is counter somewhat to that different burden." Tr. 626, l. 11 – 627, l. 1. The assistant solicitor made no argument besides agreeing with the trial judge that the instruction was proper. Tr. 628, ll. 22-24.

The trial judge found the holding in <u>Belcher</u> is "only applicable when there is some mitigation" such as self-defense. She concluded, "<u>Belcher</u> very clearly articulates that where there's no mitigation, the inference is still appropriate." Tr. 626, ll. 16-20. In overruling

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[1] In <u>State v. Belcher</u>, our Supreme Court held "where evidence is presented that would reduce, mitigate, excuse, or justify a homicide caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

Appellant's objection, the trial judge asserted, "I'm not aware of any recent cases that [have] come out that have said anything differently other than what has been articulated by the Supreme Court regarding that precedent [Belcher]. . . . *I'm not aware of . . . any case law that has come out recently or within the period of* Belcher ***and* King**[2] *that has inferred malice is not appropriately instructed on an attempted murder charge.* Because *attempted murder and murder basically are the same with the exception of the murder . . . actually being accomplished.*" Tr. 629, l. 24 – 630, l. 20 (emphasis added). Therefore, the trial judge overruled Appellant's objection. Tr. 630, ll. 14-20.

Jury Charge

During her jury instructions, the trial judge charged in part:

> The defendant is charged with attempted murder. In order to prove this crime the State must prove the defendant attempted to kill another person *with malice aforethought either expressed or implied.* Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of [a] wrongful act [without] just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exist for any [particular] time before the act is committed. [But] malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> *Malice aforethought may be expressed or inferred* by as I've explained. These terms express and inferred do not mean different kinds of malice. But merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proven. Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for [a] person or any other acts or preparation going to show that the deed was within the defendant's mind would be expressed malice. *Malice may be inferred from conduct showing a total disregard for human life.* **Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which [is] likely to cause death or greatly bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and**

[2] State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

> **circumstances of each case. [As] I've instructed, the following are examples of instruments which may be deadly weapons: [a] pistol[,] a shotgun, a rifle, dirk, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, a firebomb or Molotov cocktail, and lighter fluid. A gun may be a deadly weapon even if it is not operating.** If the facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction this inference would simply - - would simply be an evidentiary fact to be considered by you the jury along with the other evidence in the case. And you may give it the weight, value, and effect[,] if any[,] you decide it should receive.

Tr. 689, l. 25 – 691, l. 16 (emphasis added).

Standard of Review

"In reviewing jury charges for error, this Court considers the trial courts jury charge as a whole and in light of the evidence and issues presented at trial." State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (quoting State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011)) (internal quotation marks omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." Id. at 90-91, 747 S.E.2d at 448 (citing Brant, 393 S.C. at 549, 713 S.E.2d at 604) (internal quotation marks omitted). "A jury charge that is substantially correct and covers the law does not require reversal." Id. (quoting Brant, 393 S.C. at 549, 713 S.E.2d at 604); See State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

Discussion

The offense of attempted murder is codified in S.C. Code Ann. § 16-3-29. This statute states in relevant part, "A person who, *with intent to kill*, attempts to kill another person *with malice aforethought, either expressed or implied*, commits the offense of attempted murder." (emphasis added).

In State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), which was published three months before this trial and referenced by the trial judge,[3] our Supreme Court held attempted murder requires a specific intent to kill as opposed to a general intent. The Court found our legislature "created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either expressed or implied' to require a higher level of *mens rea* for attempted murder than that of murder." Id. at 61, 810 S.E.2d at 25. The Court concluded "the additional language of 'with intent to kill' clearly elevates the required mental state above a general-intent crime." Id.

In reaching this conclusion, the Supreme Court cited favorably to Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988). In Keys, the Supreme Court of Nevada held it was error for the trial court to refuse to instruct the jury that the specific intent to kill is an essential element of attempted murder. In support of its holding, the court distinguished the crimes of murder and attempted murder by analogizing express malice to a specific intent to kill. The court explained:

> Attempted murder can be committed only when the accused's acts are accompanied by *express malice,* malice in fact. One cannot *attempt* to kill another with implied malice because there "'is no such criminal offense as an attempt to achieve an unintended result.'" An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice." One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
>
> An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which

[3] During her ruling, the trial judge asserted, "I'm not aware of . . . any case law that has come out recently or within the period of Belcher and King that has inferred malice is not appropriately instructed on an attempted murder charge." Tr. 630, l. 7-13. By citing to King, it is obvious the trial judge was aware of the opinion.

> tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

King, 422 S.C. at 57, 810 S.E.2d at 23 (quoting Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)).

While our Supreme Court in King refused to address the issue raised in this brief because it affirmed the Court of Appeals' decision reversing King's conviction based on its holding regarding the requisite *mens rea* for attempted murder, in a footnote, the Supreme Court stated:

> While we find it unnecessary to address King's additional sustaining ground, **we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of** ***the word "implied" in section 16-3-29 is arguably inconsistent with a specific-intent crime.*** See Keys v. State, 104 Nev. 736, 766 P.2d 270, 273 (1988) (stating, "[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result.") Moreover, **if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses** codified in section 16-3-600. See S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

King, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5 (emphasis added).

The dissent in King agreed with the majority that, after its holding, the notion of implied malice for specific intent crimes, such as attempted murder, would be problematic. Id. at 74, n.13, 810 S.E.2d at 32, n.13. Specifically, the dissent asserted, "For the reasons pointed out by the majority, it seems to me that **the concept of implied malice has no place in a prosecution for a specific intent crime**. The majority has wisely suggested that the General Assembly reevaluate the implied malice language in the statute in light of the Court's holding that attempted murder requires a specific intent to kill." Id. (emphasis added).

Based on our Supreme Court's holding in King that attempted murder is a specific intent crime and that both express malice and a specific intent to kill are required for attempted murder,

it is clear that the implied malice instruction given in this case over Appellant's objection was erroneous. Defense counsel properly asserted that the offenses of murder and attempted murder have "a different burden," i.e. a different required *mens rea*, and given the "higher burden" required for attempted murder the instruction that malice may be inferred from the use of a deadly weapon was improper. See Tr. 626, l. 21 – 627, l. 1. Moreover, in light of our Supreme Court's holding in King, the trial judge's assertion that "attempted murder and murder basically are the same with the exception of the murder . . . actually being accomplished" was also erroneous. See Tr. 630, ll. 11-13. Murder is a general intent crime while attempted murder is a specific intent crime. See King, 422 S.C. at 61, 810 S.E.2d at 25 ([T]he General Assembly created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either express or implied' to require a higher level of *mens rea* for attempted murder than that of murder."). Consequently, while the inferred malice instruction was proper as to the offense of murder, as the trial judge correctly noted there was no evidence presented to reduce, mitigate, excuse, or justify the homicide, it was error for the trial judge to instruct the jury that malice may be inferred from the use of a deadly weapon as to attempted murder.

Based on the trial judge's error, Appellant respectfully requests this Court reverse his convictions and sentence for attempted murder and remand for a new trial.

2.

The trial judge erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability when there was no evidence to support the charge, specifically there was no evidence Appellant was acting with another during the shooting or that the murder was committed pursuant to a common design or plan, particularly where the state's theory of the case was that Appellant was the shooter and acted alone.

How the Issue was Presented Below

During the charge conference, Appellant objected to the trial judge charging the jury with the hand of one is the hand of all theory of accomplice liability since there was no evidence to support the charge. Defense counsel emphasized that Trivell Richardson testified "that he had no involvement in anything, didn't know of anything beforehand. At most, accessory after the fact, if that. But he [Richardson] clearly said he had no knowledge of anything. He never saw anything. He never saw Montrelle [Appellant] leave with the gun. He didn't know anything. He actually was told to park the car around the corner. He clearly wasn't instructed to stay at the car to be a getaway driver since he left and was walking on the street with the other gentleman [Andrew "Ace" Rivers], Your Honor." Tr. 625, ll. 13-24.

Counsel continued, "- - from the evidence [at] the crime scene, there's no suggestion that a second party was involved. There's no witness to say they saw two parties shooting or that two people we're there. The only evidence is the second person, Trivell. And again, the State's own evidence says that he [Trivell Richardson] had no knowledge - - so he would not of been an accomplice to Mr. Campbell [Appellant] under his testimony. And so I think it would be inappropriate. It would be based merely on just speculating on, well, maybe this could've

happened. It would be inappropriate because there is no evidence [at] all of a second party, Your Honor." Tr. 625, l. 25 – 626, l. 10.

After emphasizing the "proper analysis" is an "any evidence standard," the assistant solicitor argued this was "a codefendant case where we have three individuals that some could infer were involved in this case: Mr. [Trivell] Richardson, Mr. [Andrew "Ace"] Rivers, and Mr. Campbell[3] [Appellant]." While the solicitor maintained the state presented substantial evidence that Appellant was the shooter, he argued the jurors "could assume otherwise" based on the evidence presented and the comments and argument by defense counsel in her opening statement and closing argument. Tr. 627, ll. 6-21. He continued, "[R]easonable jurors could be asking the question based on the defense['s] own arguments, no one saw Montrelle [Appellant] shoot, so couldn't have one of these other people have shot. And it's very, very crucially important that the jurors understand that does not necessarily relieve Mr. Campbell [Appellant] of the murder charges that he stands here. And the hand of one is how you accomplish that in the jury's mind." Tr. 627, l. 22 – 628, l. 4.

Lastly, the assistant solicitor argued that Appellant's presentation of Peggy Blake as a witness further supported a charge on accomplice liability. He asserted, "We now injected a hooded person carrying a sporty rifle away from the scene. So by their own case, we have two people fleeing the scene, both [carrying] rifles. Ms. Ford [defense counsel] just said to the Court there's been no evidence presented that there were two people shooting at the scene. To the contrary. There was a second person introduced into this case that could've also played a role by their own case. We have video of one individual carrying an assault rifle, Montrelle Campbell, [a] minute and a half after the shooting. And we have evidence now presented by the defense of a hooded individual getting into a lime green car with a sporty rifle minutes after the shooting. I

think under that presentation of evidence from both the State and the defense, certainly the hand of one charge is appropriate." Tr. 628, ll. 5-21.

The trial judge ultimately overruled the objection. She found the instruction was "clearly, factually supported as the case has been presented to the jury." Her ruling mostly restated the law of accomplice liability. However, the trial judge also found, "While it is correct regarding the testimony of Mr. [Trivell] Richardson, the jury doesn't have to believe his testimony. They can believe the truth lies somewhere between. They can believe he is being dishonest and [that] he [and] Mr. Campbell [Appellant] equally participated in this crime." Tr. 628, l. 1 – 629, l. 23.

Jury Charge

Over Appellant's objection, during her jury instructions, the trial judge charged in part:

> I further instruct[], ladies and gentlemen, that if a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act 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 is only one bullet, and only one of the two fired the shot that caused the death. If two or more people are acting together, assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arrange[ment ,] plan or common scheme is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt by confident evidence the theory of the hand of one is the hand of all. Principle [sic] of a crime is one who either actually commits a crime or who was present aiding and abetting or assisting in committing the crime. When a person [does an] act in the presence of and with the assistance of another, the act is done by both. Where two or more people acting with the common plan or intent to present at the commission of a crime,

> does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all.
>
> Present at the commission of a crime means to be sufficiently near to aid [and abet] and assist in the commission of the crime. However, mere presence at the scene of the crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element, but there must be a common design or intent to commit the crime. And the crime must've been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

Tr. 693, l. 15 – 695, l. 13.

Standard of Review

"The trial court is required to charge only the current and correct law of South Carolina." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (citing Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged must be determined from the evidence presented at trial." Id. (quoting State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)) (internal quotation marks omitted). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." Id. (quoting State v. Mattison, 388 S.C. 469, 478-479, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted).

Discussion

The trial judge erred by charging the jury with the hand of one is the hand of all theory of accomplice liability because there was no evidence to support the charge.

"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." Barber, 393 S.C. at 236-237,

712 S.E.2d at 439 (quoting Mattison, 388 S.C. at 479, 697 S.E.2d at 584). Under the 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." Mattison, 388 S.C. at 479-480, 697 S.E.2d at 584 (quoting State v. Langley, 334 S.C. 643, 648-649, 515 S.E.2d 98, 101 (1999)); See State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." Id. at 480, 697 S.E.2d at 584 (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) (internal quotation marks omitted); See Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("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. (quoting Leonard, 292 S.C. at 137, 355 S.E.2d at 272). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." Id. (quoting State v. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977)).

"Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." Id. (quoting State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct.App.2005)).

Because there was no evidence Appellant was acting together with the shooter at the time of the murder, the trial judge erred in instructing the jury on accomplice liability. The critical determination for the jury was the identity of the shooter. The physical evidence at the scene showed there was only one shooter. There was no evidence that any one else was involved or

that there was a common design or plan agreed upon by two parties. Even if the jury were to believe the state's theory of the case that Appellant was the shooter, there was no evidence that Appellant acted with anyone else under a common design to support the instruction on accomplice liability.

In State v. Dickman, 341 S.C. 293, 341 S.E.2d 268 (2000), our Supreme Court held the trial court properly instructed the jury with accomplice liability where there was some evidence Dickman and John Seals were acting pursuant to a plan to kill the decedent at the time of the murder. Id. at 296, 341 S.E.2d at 269. Seals testified that Dickman shot the decedent while the three of them where in Dickman's car and then directed Seals to drive to a remote area where they removed the body from the car and dragged it into the woods. Id. at 295, 341 S.E.2d at 268. Seals admitted he emptied the decedent's pockets and threw his wallet into the river on their way home. Id. Dickman, on the other hand, testified that Seals was the shooter. Id.

The Court asserted, "The critical question is whether there is any evidence [Dickman] and Seals were acting together at the time of the killing if Seals was the shooter as [Dickman] claimed." Id. at 295-296, 341 S.E.2d at 269. The Court summarized the evidence as follows:

> [Dickman] testified Seals asked him to kill [the decedent] because [the decedent] was always behind on the rent. [Dickman] told another friend the murder would be on a Sunday and the murder did in fact occur on a Sunday. On the day of the murder, Seals tried to collect the rent from [the decedent] without success. When he subsequently saw [Dickman], Seals's first words to [Dickman] were "do it." [Dickman] testified, "I knew what he intended at that time." *Immediately thereafter,* Seals called [the decedent] on the telephone and arranged to pick him up for the fatal car ride.
>
> While they were driving, [Dickman] found the gun wrapped in a towel under the front seat where Seals had put it. He picked up the gun and held it up for Seals to see in the rear view mirror. [Dickman's] nerve failed him and he did not shoot. When [the decedent] briefly left the car, [Dickman] apologized for not shooting and gave Seals the gun. The two had no further communication between them before Seals allegedly shot [the decedent].

Id. at 296, 534 S.E.2d at 269 (emphasis in original).

Based on this evidence, the Supreme Court concluded there was sufficient evidence that Dickman and Seals were acting pursuant to a plan to kill the decedent at the time of the murder and, therefore, the charge on accomplice liability was proper. Id.

In Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011), our Supreme Court held there was sufficient evidence to support the trial court's accomplice liability instruction. The state alleged Barber and three others conspired to rob a minor drug dealer. Id. at 234, 712 S.E.2d at 437. The men gathered together and discussed the plans for the robbery, procured a semi-automatic handgun, and later a rifle, and drove to the dealer's house. Id. One of the men waited in the car, while Barber and two others allegedly entered the home to rob the dealer. The men demanded money and drugs. Id. One of the suspects armed with the handgun shot and killed the dealer and shot and wounded another occupant of the home. Id. at 234, 712 S.E.2d at 438. Barber's three codefendants implicated Barber in the planning and execution of the robbery, and said he was the gunman who shot the dealer. Id. at 234-235, 712 S.E.2d at 438.

The Court found there was evidence to support the conclusion that Barber was acting with the other men during the robbery. Id. at 237, 712 S.E.2d at 439. Barber's three codefendants "all testified to substantially the same version of the planning and execution of the robbery—that Barber was involved and was the shooter." Id. Accordingly, the Court held the trial court did not err by instructing the jury on the hand of one is the hand of all theory of accomplice liability. Id. at 239, 712 S.C. at 440.

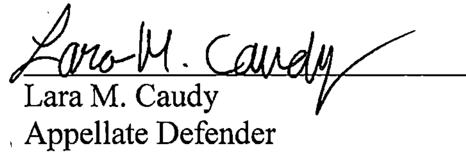
As seen, there was evidence in both Dickman and Barber of a prearranged plan and that the defendants were acting together with co-conspirators. Here, however, there is no evidence that Appellant acted together with another to support the instruction on accomplice liability.

Because the trial judge erred by instructing the jury with the hand of one is the hand of all theory of accomplice liability, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JAN 14 2019
SC Court of Appeals

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

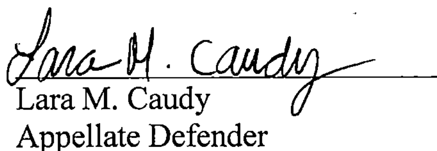
V.

MONTRELLE LAMONT CAMPBELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Montrelle Lamont Campbell, #276819, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 14th day of January, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 14th day of January, 2019.

(L.S)

Notary Public for South Carolina
My Commission Expires: September 27, 2028.

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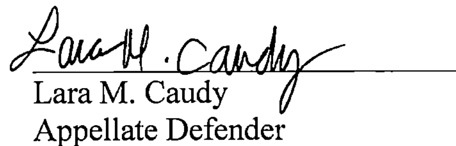
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True-Billed Indictments;
(2) Tr. 1; Tr. 48-99; Tr. 114-161; Tr. 168-202; Tr. 217-260; Tr. 265-285; Tr. 297-338; Tr. 341-404; Tr. 411-452; Tr. 479-500; Tr. 527-576; Tr. 582-618; Tr. 620; Tr. 622-630; Tr. 632-709; Tr. 724;
(3) State's Exhibit No. 95 (Surveillance Video Footage);
(4) State's Exhibit No. 118 (Home Surveillance Video Footage);.

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

January 14, 2019.



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