

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Benjamin H. Culbertson, Circuit Court Judge

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SEP 10 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARCUS DANIEL ALLISON,

APPELLANT

APPELLATE CASE NO. 2012-211981

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The State argues that the Trial Court did not commit reversible legal error in charging the jury on the “hand of one is the hand of all” theory of accomplice liability because there is evidence to support the charge.

The key element the State must prove to use the “hand of one, hand of all” theory is a common scheme or plan. “To admit evidence under [the accomplice liability] theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown.” State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999).

There was absolutely no evidence of any common scheme or plan between Appellant Marcus Allison and Donald Gentile, and the solicitor agreed with this point at trial multiple times before the court and the jury that there was no evidence pointing to two people committing the alleged crime. R. 139, ll. 4-9; 152, ll. 3-5; 211, ll. 7-12; 160, ll. 4-5.

On appeal, the State now alleges that that the “hand of one, hand of all” charge was appropriate because Allison and Gentile were friends and had partied together the night of the alleged burglary. The State also points to the victim, Bruce Kelley, observing Appellant and Gentile carrying two bags out to Gentile’s truck. Kelley apparently saw Gentile carrying a bag containing one of Kelley’s missing DVDs. This does not rise to the level of evidence required to establish that Allison and Gentile had worked together through a common design to commit a burglary.

Being friends and partying together does not mean that the two planned or committed any crime together. That both individuals were seen carrying two bags out to Gentile’s truck also does not establish that the two were working together to have committed a crime. Gentile claimed he was just carrying the bags out for Allison, while Allison claimed that Gentile must have committed

the burglary while Allison was asleep, implying that Gentile would have put any stolen items in the bags while Allison was asleep. R. 78, ll. 11-12; 93, ll. 16-25. This scant evidence is not sufficient to demonstrate that Allison and Gentile intended to join together in a common design to achieve an illegal purpose, namely committing first degree burglary and grand larceny by entering the camper of the Kelley without consent and taking and carrying away Kelley's property.

In comparison, in State v. Thompson, the Court of Appeals held that there was sufficient evidence under the "hand of one is the hand of all" theory of accomplice liability to impute acts committed by a co-defendant to the defendant making the defendant guilty of any acts done incidental to the execution of the common design or scheme of the crime. 374 S.C. 257, 263-64, 647 S.E.2d 702, 706 (2007).

The two co-defendants in the Thompson case were both charged with first degree burglary and attempted armed robbery. Id. at 261, 647 S.E.2d at 704. The court found sufficient evidence of defendant Thompson's guilt under the theory of accomplice liability where Thompson had discussed the robbery with others prior to it occurring, had appeared at the crime scene with his co-defendant, and may have viewed the attempted robbery. Id. at 263, 647 S.E.2d at 705. The court also found that at a minimum, Thompson aided the commission of the crime by driving his co-defendant to the scene and encouraged the crime by setting the events in motion earlier that day through his meetings with others about a potential target for a robbery. Id. at 260, 263, 647 S.E.2d at 704-706.

Unlike the facts in Thompson, there is no evidence that Allison discussed or planned this alleged burglary with Gentile or encouraged or aided the alleged burglary in any way. The State indisputably failed to present any evidence of a common scheme or design warranting a jury charge on the "hand of one, hand of all" theory.

The Trial Court, in allowing the jury instruction on the “hand of one is the hand of all,” did not rule that there was evidence in the record indicating that Gentile and Allison had worked together to commit the crimes as the State suggests. Instead, the Trial Court only permitted this charge because it erroneously believed that if the defense was going to argue third-party guilt, of which the Trial Court found sufficient evidence in the record, the State had to be allowed the “hand of one, hand of all” charge even though the solicitor agreed there was no evidence that two people together committed the crime. R. 139, ll. 3-13; 147, l. 14 – 148, l. 6.

Accordingly, the Trial Court’s charging the jury with the “hand of one if the hand of all” was based upon the incorrect legal presumption that the charge had to be given if the evidence warranted a third-party guilt charge. As set forth in the Appellant’s Brief, the Trial Court committed a reversible error of law in giving the jury this instruction and the error was not harmless. This Court should therefore reverse the Trial Court’s decision to instruct the jury as to the “hand of one is the hand of all” and remand for a new trial.

CONCLUSION

Based upon the arguments set forth in the Appellant's Brief and herein, Appellant Marcus Daniel Allison respectfully requests this Court to reverse his conviction and remand for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 10th, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of September, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.