STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS LEE GEDDIE

APPELLANT

Appellate Case No. 2012-212226

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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ATTORNEY FOR APPELLANT

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The court erred by forcing appellant to agree that in order to get the jury instruction on "mere presence" he had to agree to an instruction on the "hand of one is the hand of all" since appellant was entitled to a "mere presence" charge based upon the facts of this case, and appellant should not have been forced to accept the highly prejudicial "hand of one" instruction to receive it 5

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by forcing appellant to agree that in order to receive a jury instruction on "mere presence" counsel had to agree to a charge on the "hand of one is the hand of all" since appellant was entitled to a "mere presence" charge based upon the facts of this case, and appellant should not have been forced to accept the highly prejudicial "hand of one" instruction to receive it?

STATEMENT OF THE CASE

Appellant was indicted by the Sumter County Grand Jury for the offense of murder. His case was called to trial on June 4, 2012 before the Honorable W. Jeffrey Young, and a jury. Timothy Ward Murphy represented appellant. John P. Meadors was the assistant solicitor. R. 1.

On June 7, 2012, the jury found appellant guilty of murder after previously informing the court that they were deadlocked and could not reach a verdict. R. 294, ll. 3-12. Judge Young sentenced appellant to life imprisonment. R. 304, ll. 2-8.

This appeal follows.

ARGUMENT

The court erred by forcing appellant to agree that in order to receive a jury instruction on "mere presence" counsel had to agree to a charge on the "hand of one is the hand of all" since appellant was entitled to a "mere presence" charge based upon the facts of this case, and appellant should not have been forced to accept the highly prejudicial "hand of one" instruction to receive it.

Relevant facts

The state's case against appellant was the testimony of Kelvin Green who was a schizophrenic man on crack cocaine. Green dreamed up the plan to purchase more crack cocaine from the decedent at a prearranged place in the woods, and to rob him. R. 138, l. 15 – 146, l. 16.

Green would later claim that appellant was in on the robbery with him. Green maintained that he dropped appellant off in the woods before he met the decedent nearby. When Green approached the decedent's vehicle he claimed appellant unexpectedly jumped out of the woods and shot the decedent. R. 145, l. 5 – 154, l. 25.

Cedric Hilton was riding with the decedent on the night of the drug deal. Hilton remembered Kelvin Green met them in the woods, and told them to follow his Toyota truck further into the woods. When Green stopped, he walked over to the decedent's vehicle and told him to turn off the lights. Hilton was nervous about the situation, and he told the decedent to leave the lights on. Hilton testified as soon as the decedent turned off the lights that shots were fired. As will be seen infra, the decedent was shot five times, and he died at the scene. R. 41, l.21 – 47, l. 23.

Hilton acknowledged that afterwards he thought Green had shot and killed the decedent. Hilton said he changed his mind upon learning "more about the case," and hearing that another man – appellant -- had been arrested after Green. R. 63, l. 23 – 65, l. 14. Hilton admitted that Kelvin Green was the only person he saw on the night the decedent was shot. R. 62, ll. 12-24.

Green claimed when the shooting started that he ran to his truck and that was when "I lost my phone." Green also maintained that prior to the shooting he dropped appellant off in the woods with a bottle of Budweiser and a cigar. R. 154, l. 15 – 155, l. 13.

The state presented the expert opinion of Marie Hodge that appellant's fingerprint were on the Budweiser bottle collected from the crime scene. R. 126, l. 4 – 132, l. 13. Hodge admitted there was no way to "date" fingerprints, and it was possible the bottle had been in the woods for some time. R. 132, l. 19 – 133, l. 10.

The decedent's body was found in the woods that night by the police -- after a "shots fired" call -- with his pants down, his shirt up, and gunshot wounds. R. 82, l. 18 – 83, l. 20.

The pathologist, Dr. Janice Ross, testified the victim had been shot five times. He had shrapnel in his body consistent with the bullets having gone through a car door. R. 192, l. 10 – 194, l. 21.

Request to charge

Defense counsel Murphy requested a charge on mere presence. The following then occurred between the Court and Defense Counsel Murphy:

> Q. [B]ut, Mr. Murphy, you understand that under that theory if I charge mere presence, then I also because there is testimony that they conspired to commit an armed robbery that the hand of one, hand of all, now *gets attached to the mere presence charge.*

Mr. Murphy: Yes, Your Honor, I understand that. I think it is a more accurate reflection of allowing the jury the opportunity, the more full opportunity to discern whether or not to believe Mr. Green's testimony. The evidence of the hand of one hand of all, the evidence that my client was the shooter, all come from Mr. Green.

The Court: Yeah, you understand if they believe Mr. Green - - -

Mr. Murphy: Right.

The Court: - - - that your guy - -

Mr. Murphy: There is two theories.

The Court: - - - is the shooter. If they don't believe Mr. Green, but they find your guy is part of the armed robbery, he still gets convicted.

Mr. Murphy: I understand. But there is also the point - - I think the point is important is, there is independent evidence that my client was at the scene.

The Court: No question about that based upon that one fingerprint.

Mr. Murphy: And the jury could absolutely reject everything Mr. Green said, but be convinced beyond a reasonable doubt that my client was there. And I think it is important for them to know that his presence alone is an insufficient basis for conviction.

The Court: Right, but again, you get hooked a second time with a possibility of the hand of one.

Mr. Murphy: I appreciate that, Your Honor.

R. 234, l. 6 – 235, l. 19. (emphasis added).

The judge then read his proposed charge on the "hand of one is the hand of all," and "mere presence." Defense counsel responded: "That's agreeable." R. 236, ll. 5-25. Counsel also did not take exception to the instruction. R. 287, ll. 2-6.

The jury later sent out a note asking: "If Geddie gets off does Kelvin Green get charged. And the answer to that is, that is not for your consideration." The jury also wanted to know: "Can you just convict someone for being present, or do you have to show intent that they were planning a crime." Now I am going to give them a copy of the charge." Defense counsel agreed that sending the jury the written charge was a proper way to answer the question. R. 287, l. 15 – 289, l. 20.

An hour and a half later, the jury sent in a note stating they were deadlocked. The judge gave an Allen charge without objection. R. 289, l. 21 – 292, l. 10. The jury then requested a copy of the transcript, and was told one was no available but they could request that certain testimony be read back. Four minutes later the jury returned with its guilty verdict. R. 292, l. 15 – 293, l. 16.

Discussion

The law being charged is determined by the evidence presented at trial. State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct. App. 1996). If the law supports it a defendant is entitled to a mere presence charge. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989).

In this case, defense counsel correctly argued the jury could find that appellant was merely present at the crime scene. Meaning, that appellant was only at the crime scene when Kelvin Green shot and murdered the decedent. This is what eyewitness Hilton thought occurred until he apparently became tainted by the fact appellant also was arrested, and the state's theory of the case that appellant was the shooter.

Appellant recognizes that a mere presence charge is usually proper under two circumstances. First, if there is any doubt whether the defendant is guilty as an accomplice to a crime, the court may be required to instruct the jury that mere presence at the scene of a

crime is insufficient to find the defendant is an aider and abettor. State v. Dennis, 321 S.C. at 413, 468 S.E.2d at 674. The second, and not applicable here, is in a drug case where possession of the contraband is at issue.

Appellant submits these are not the only situations where a "mere presence" instruction may be required. Here, the judge **forced** appellant to agree to an instruction on the "hand of one is the hand of all" if the judge were to agree to charge "mere presence." The solicitor argued he may be entitled to the "hand of one instruction anyway. The judge told the solicitor he might be right, but the judge was basing his decision to charge the "hand of one is the hand of all" on defense counsel agreeing to that instruction in order to get a "mere presence" instruction.

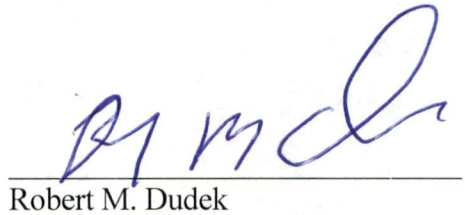
In State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010), the Court found that the defendant was entitled to a mere presence instruction. The Court also held that an instruction that "mere association" with the principal was not sufficient to establish guilt was covered in the trial court's alternative instruction. Further, the legal concept that "mere knowledge" that a crime was going to be committed is not enough to establish guilt was also adequately covered by his charge.

The right to a jury instruction - - here "mere presence" - - must fall or rise on its own merits. Forcing appellant to accept the dynamite "hand of one is the hand of all" instruction in order to receive a "mere presence" instruction he was entitled to anyway was legal error on the part of the judge.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of October, 2013.

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Geddie states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held June 4-7, 2012, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, he asks the Court to relieve him as counsel for Thomas Geddie.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of October, 2013.

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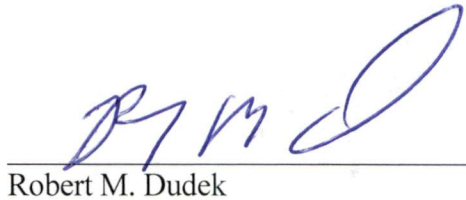
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictment;
(2) Entire Trial Transcript.

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

October 25th, 2013



Robert M. Dudek
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Attorney for Appellant

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 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."

October 25, 2013

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney 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; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Thomas Geddie, #351166 at Lieber Correctional Institution, this 25th day of October, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of October, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023 .