ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO LEE DODD,

APPELLANT

Appellate Case No. 2012-209187

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The Trial Court erred in charging the jury on the "hand of one is the hand of all" theory of accomplice liability because:

A. the doctrine should not apply where the State neither charged an alleged accomplice, established positive identification of an alleged accomplice, nor proved that an alleged accomplice was guilty of the crimes for which Appellant was tried; and

B. the State did not present any evidence of a common plan or scheme between Appellant and his alleged accomplice to commit second degree burglary and grand larceny.

STATEMENT OF THE CASE

On March 16, 2010, Antonio Lee Dodd was indicted by the Greenville County Grand Jury for (1) burglary in the second degree; and (2) grand larceny. R.*.

A trial was held before the Honorable Edward W. Miller and a jury on February 14-15, 2012. Tr. 1, 164. Dodd was represented by Alex Stalvey, and the State was represented by Assistant Solicitor Jennifer A.R. Tessitore. Tr. 1.

On February 15, 2012, the jury found Dodd guilty of both second degree burglary and grand larceny. Tr. 208, ll. 19-25. Judge Miller sentenced Dodd to ten years imprisonment for the second degree burglary charge and five years consecutive for grand larceny suspended with probation for three years. Tr. 215, ll. 10-14.

Dodd timely served and filed his Notice of Appeal on February 21, 2012.

STATEMENT OF FACTS

On September 2, 2009, Samuel Jordan left for work in the morning and returned home around 6:30 in the evening. Tr. 40, ll. 5-17; 43, ll. 7-10. When he returned home, he noticed that the front door to his double-wide home was not all the way shut and it was unlocked. He noticed some things lying on the floor and also observed that the 26 inch flat screen television in his bedroom was missing. Tr. 41, ll. 9-13; 43, ll. 16-25.

Jordan walked back outside to call police and additionally noticed that the back door glass was broken. Tr. 44, ll. 1-10. Deputy Azzara arrived shortly, and he asked Jordan for an inventory of the items missing. Jordan said he was missing the television, a PlayStation 3, an X-Box, and some games. Tr. 44, l. 17 – 45, l. 9; 62, l. 24 – 63, l. 1. Jordan also later determined that a camera, some jewelry, a blue gym bag, and a padlock were missing. Tr. 50, l. 16 – 53, l. 25.

Deputy Azzara spoke with a neighbor, Ms. Freddie Booker, around 8:15 that evening. Tr. 70, ll. 10-19. She testified that on the morning of September 2, 2009 between 8:30 and 9:30 a.m., she was looking out her kitchen window and "noticed two black men coming down the road." Tr. 95, ll. 15-21; 98, ll. 15-19. She said as the two men got closer, she recognized one as Antonio Dodd and he was carrying something with a lot of cords dangling that she later determined was a television. Tr. 95, l. 21 – 96, l. 1; 107, ll. 17-18. Ms. Booker testified that the other man was carrying a bag, although she could not determine what kind. Tr. 104, l. 23 – 105, l. 5.

She was familiar with Antonio Dodd, and Dodd had been to Ms. Booker's home before at her invitation. Tr. 96, ll. 6-22.

Ms. Booker said the two men stopped to talk to another man who was mowing his lawn, and at one point, Dodd turned and came halfway down her driveway but she told him to not come to her house through her open kitchen window, so he turned around and went back up the driveway. Tr. 102, l. 19 – 103, l. 7. The other black male, whom Ms. Booker did not recognize, stayed with the man that got off his lawn mower while Dodd tried to come see Ms. Booker. Tr. 102, ll. 19-20; 103, ll. 19-24.

Ms. Booker spoke with Deputy Azzara about what she observed, and she informed Deputy Azzara where one of the men she believed she saw lived. Tr. 72, ll. 2-14; 108, l. 24 – 109, l. 9. Deputy Azzara testified that based on what Ms. Booker told him, he was looking for Antonio Dodd. Tr. 72, ll. 9-11. Although Ms. Booker said she did not recognize the second male, she informed Deputy Azzara that she believed the second male may have been Antonio Dodd's brother, Timothy. Tr. 115, ll. 7-15; 118, ll. 12-13. Ms. Booker was the only neighbor Deputy Azzara spoke with during his investigation. Tr. 87, ll. 14-18.

Deputy Azzara and another officer went to the home where Antonio Dodd lived and questioned Dodd. Tr. 72, l. 21 – 73, l. 10. Dodd informed the officers that he had been home all day. Tr. 73, ll. 6-9. After initially consenting to a search, Dodd changed his mind and said he would not allow a search without a warrant. Tr. 73, ll. 8-16.

Deputy Azzara called for additional officers to keep the house under surveillance while he drew up the search warrant. Tr. 73, ll. 18-25. At that time, two women named Christina and Sandy Martinez were also at the house with several children, along with Antonio Dodd. Tr. 74, ll. 3-6. There were no other male occupants at the home at that time. Tr. 74, ll. 17-19.

Deputy Azzara had a judge sign the search warrant and he returned to the house to execute the warrant. Tr. 74, l. 20 – 75, l. 5. When he returned to the home to execute the warrant, Dodd and Christina Martinez had left, and the only people there during the search were Sandy Martinez and the children. Tr. 75, ll. 2-5.

When Deputy Azzara searched the home, he found an Olivia brand television in Sandy Martinez's room, and in the dryer he found a camera charger, some Blu-ray DVDS and some X-Box games. He also found a padlock in a doorway. Tr. 75, l. 20 – 76, l. 2; 77, ll. 11-13. These were the only items ever found in the home. Tr. 80, ll. 6-12. One of the bracelets was later recovered when Christina Martinez wore it to a court hearing. Tr. 55, l. 15 – 56, l. 11; 80, ll. 15-17, 83, l. 15 – 84, l. 2.

Within twenty-four hours of Deputy Azzara beginning his investigation, Christina and Sandy Martinez were arrested and charged with receiving stolen property, and Dodd was charged with second degree burglary and grand larceny. Tr. 80, l. 20 – 81, l. 25; 86, ll. 8-13. Christina and Sandy Martinez both pled guilty to receiving stolen property, and Dodd proceeded to trial. Tr. 82, ll. 2-13.

ARGUMENT

I. The Trial Court erred in charging the jury on the "hand of one is the hand of all" theory of accomplice liability because:

A. the doctrine should not apply where the State neither charged an alleged accomplice, established positive identification of an alleged accomplice, nor proved that an alleged accomplice was guilty of the crimes for which Appellant was tried; and

B. the State did not present any evidence of a common plan or scheme between Appellant and his alleged accomplice to commit second degree burglary and grand larceny.

At trial, Antonio Dodd never disputed that he was in possession of some of the items that had been taken from Jordan's home. Tr. 36, ll. 6-9. He was, however, not charged with receiving stolen property but was rather indicted by the State for second degree burglary and grand larceny. R.*. For second degree burglary, the State had to prove that Dodd "enter[ed] a dwelling without consent and with intent to commit a crime therein." S.C. CODE ANN. § 16-11-312(A). For the charge of grand larceny, the State was required to prove that Dodd "felonious[ly] [took and carried] away the goods of another against the owner's will or without his consent." State v. Condrey, 349 S.C. 184, 191, 562 S.E.2d 320, 323 (Ct. App. 2002).

Realizing the sparse evidence that it had presented at trial with respect to whether Dodd had actually entered Jordan's home and taken Jordan's property, the State requested the Trial Court to charge the "hand of one is the hand of all" theory of accomplice liability. Tr., 158, l. 23 – 159, l. 22. The State's position was that another individual carrying a bag was seen walking with Dodd down the street and that if Dodd had not actually entered the home but the other individual had, then Dodd could be found guilty under the "hand of one, hand of all" theory. Tr. 159, ll. 3-22; 166, l. 15 – 167, l. 11.

Dodd objected to that charge, arguing that the "hand of one, hand of all" jury instruction was not applicable in a case where the alleged accomplice had never been identified with certainty or was never charged with the crime. Tr. 167, l. 12 – 168, l. 16. The State continued to argue that there was evidence in the record to support the charge of accomplice liability and that if the jury believed "the other guy went in the house and that this guy [Antonio Dodd] was just carrying it down the street and then the hand of one and the hand of all and he [Dodd] should be held responsible." Tr. 171, l. 23 – 172, l. 9.

The Trial Court gave the jury the following charge on accomplice liability:

> Now, if a crime is committed by two or more people acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsibility [sic] for anything done by the other person which occurs as a nature [sic] consequence of the acts done in carrying out the common plan or purpose.
>
> For example, two people can be guilty of killing another person when only one of the two had a gun, there was only one bullet and only one fired the shot that caused the death. When two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all or as it is sometimes said the hand of one is the hand of all.
>
> Prior knowledge of a crime sworn to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that a 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 of the crime as a result of a prior arrangement. Therefore, the finding of a prior arranged plan or common scheme is necessary for finding of guilt as a principal. The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.
>
> The principal of a crime is the one that actually commits the crime who is present in aiding or abetting or assisting in committing the crime. When the person does the act in the presence and assistance of another, the act is done by both. While 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.

Tr. 202, l. 10 – 203, l. 19.

"In criminal cases, appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the trial court abused its discretion." State v. Miller, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

"In general, the trial court is required to charge only the current and correct law of South Carolina." 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." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). "In reviewing jury charges for error, we must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003).

The evidence presented by the State at trial did not support a jury charge on the "hand of one is the hand of all" theory of accomplice liability. The State's evidence at trial consisted of the following:

On the morning of September 2, 2009, Ms. Booker testified that she saw two men, one she recognized as Antonio Dodd, walking down the road. Dodd was carrying a television and the other man carrying a bag. Tr. 95, l. 15-96, l. 18; 102, ll. 19-24; 105, ll. 1 – 15; 107, ll. 17-18. Ms. Booker testified that she did not recognize the man with Antonio Dodd, although she did testify on cross-examination that she informed Deputy Azzara that the other man might have been Antonio Dodd's brother. Tr. 102, ll. 19-24; 105, ll. 8-11; 115, ll. 12-15. She was nevertheless not able to make a positive identification of the other man with Antonio Dodd. Tr. 110, ll. 15-24.

The State also presented the testimony of Sandy Martinez who lived with Antonio Dodd at the time of the incident. She testified that she did not remember much about the day in question,

but remembered Antonio Dodd bringing in a television and that he was with his brother, Timothy. Antonio told her he bought the television from somebody off of the streets. Tr. 117, l. 21 – 121, l. 18. She said Antonio and Timothy must have come home in the afternoon because she did not wake up until after 12:00 p.m. Tr. 125, l. 23 – 126, l. 1.

Christina Martinez, who also lived at the home, testified that she remembered that around 12:30 p.m., Antonio and Timothy came home with a television. Tr. 133, l. 14; 147, ll. 10-18.

Deputy Azzara testified that he never spoke with Timothy Dodd and was not aware that any other investigating officers did so either. Tr. 87, l. 19 – 88, l. 7.

Under the "hand of one is the hand of all" theory of accomplice liability, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. . . . Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (internal citations omitted).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct. . . . Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. . . . Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Id. at 480, 697 S.E.2d at 584 (internal citations omitted).

"To 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).

The "hand of one is the hand of all" should not have been charged to the jury for two reasons. First, this theory of liability has not been used in South Carolina where the alleged accomplice has not been charged with the crime also or at a minimum has at least been identified. Cf. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), overruled on other grounds by, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (permitting use of theory where accomplice shot and killed himself during the arrest).

Here, an accomplice was never arrested, charged, or indicted, much less even positively identified. Ms. Booker, while she told Deputy Azzara that the man she saw with Antonio Dodd might be his brother Timothy, testified several times at trial that she did not know the identity of the man walking down the street with Antonio. Tr. 102, ll. 19-20; 105, ll. 14-22; 110, ll. 19-24; 115, ll. 7-15.

While there is analogous case law in South Carolina that an accessory may be convicted even if the principal is not charged, is acquitted, or is not yet prosecuted, the rule remains that "the jury in the trial of the accessory must find as a fact that the principal did actually commit the crime involved." If the State cannot prove at the trial of the accessory that the principal is guilty, the accessory cannot be convicted. State v. Massey, 267 S.C. 432, 443-46, 229 S.E.2d 332, 338-39 (1976).

In a similar manner, the State did not prove at trial that some alleged accomplice of Antonio Dodd was guilty of second degree burglary and grand larceny. The "hand of one is the hand of all" theory of accomplice liability therefore should have not been charged by the Trial Court where the State neither charged an alleged accomplice, established positive identification of an alleged accomplice, nor proved that an alleged accomplice was guilty of the crimes for which Antonio Dodd was tried.

Second, the Trial Court should have not charged the jury with the "hand of one is the hand of all" theory where there was no evidence of a common plan or scheme between Dodd and his alleged accomplice. The only evidence the State offered at trial with respect to the theory of accomplice liability is that Dodd was seen walking down the street between 8:30 and 9:30 a.m. with another unidentified man while Dodd was carrying a television and that later in the afternoon, the Martinez sisters saw Dodd with his brother Timothy and a television at their home. This scant evidence is not sufficient to demonstrate that Dodd and an accomplice intended to join together in a common design to achieve an illegal purpose, namely committing second degree burglary and grand larceny by entering the dwelling of Jordan without consent and taking and carrying away Jordan's property.

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 Dodd planned, discussed, or met with anyone about a potential burglary. There is no evidence that Dodd was ever at the scene of the burglary or witnessed the burglary. The State never even presented evidence that an alleged accomplice entered Jordan's dwelling without consent and took and carried away his property. Cf. State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007) (holding evidence that defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion that there was insufficient evidence to show that the two defendants were acting in concert).

In its closing statement, the State emphasized the "hand of one is the hand of all" theory:

> So at that point, there may be no other physical connection between this defendant and the crime scene. Maybe he wore gloves, maybe he didn't go in and maybe Mr. Dodd, the brother Timothy, maybe he's the guy who went in and you're going to hear the judge instruct you about the hand of one, the hand of all.
>
> So as far as the entry into the dwelling even if this Mr. Dodd didn't go in there, somebody did and he's there with the stuff walking on the street and the hand of one is the hand of all meaning even if he didn't go in, he was acting in concert with this other guy. They were walking in concert down Pine Drive. Ms. Booker saw them walking together with these items.

Tr. 186, l. 22 – 187, l. 9.

The Trial Court's charging the jury with "the hand of one is the hand of all" when there was no evidence of such and the State's accompanying closing statement to the jury is highly prejudicial because it suggests to the jury that because someone burglarized and took and carried away Jordan's property, then Dodd must be guilty because he was seen walking down the street with an unidentified person who may or may not have been the person who burglarized Jordan's home.

Dodd does not contest that the property found at his home was stolen, but he has maintained throughout the case that he was not the person who committed second degree burglary and grand larceny by entering into Jordan's home without consent and taking and carrying away the property

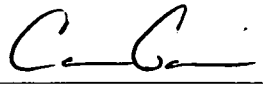
of Jordan. The State did not present overwhelming evidence of guilt that Dodd did enter Jordan's home without consent and took and carried away his property, and the "hand of one is the hand of all" charge prejudiced Dodd where it permitted the jury to find Dodd guilty on the speculation that perhaps someone he was seen with committed the crime.

The Trial Court committed a reversible error of law in giving the jury the "hand of one is the hand of all" instruction, and the error in giving this jury instruction was not harmless. This Court should 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

For the reasons set forth herein, Appellant Antonio Lee Dodd requests this Court to reverse the Trial Court, remand for a new trial, and exclude the Trial Court's erroneous jury charge on the "hand of one is the hand of all" theory of accomplice liability.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO LEE DODD,

APPELLANT

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 for second degree burglary and grand larceny, dated March 16, 2010; and

(2) Transcript of trial held February 14-15, 2012 (designated pages only): 1-2, 36,40-41, 43-45, 50-53, 55-56, 62-63, 70, 72-77, 80-84, 86-88, 95-96, 98, 102-05,107-10, 115, 117-21, 125-26, 133, 147, 158-60, 166-74, 186-87, 202-03, 208, and 215.

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

May 16th, 2013

Carmen V. Ganjehsani
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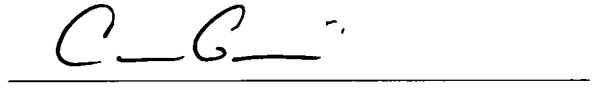
CERTIFICATE OF SERVICE

The undersigned attorney 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 Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2013.


(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .