IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPPEAL FROM DORCHESTER COUNTY
Court of General Sessions

Appellate Case No. 2021-000569

The Honorable Diane S. Goodstein, Circuit Court Judge

The State of South Carolina……Respondent,

v.

Muanah A. Fortune, Jr. ……Appellant.

APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court judge erred when she denied the request to have Fortune's family physically present inside the courtroom because it denied Fortune his right to a public trial?

II. Whether the trial court judge erred when she failed to grant defense counsel's motion for a mistrial when prejudicial evidence was admitted to the jury without establishing proper chain?

III. Whether the trial court judge erred when she allowed the charge of "hand of one is the hand of all" because the State's evidence to support the jury charge was insufficient?

STATEMENT OF THE CASE

Muanah A. Fortune was indicted for one count each of murder, attempted murder, burglary in the first degree, possession of a firearm during the commission of a violent crime, and the ill-treatment of animals, indictments 2019-GS-18-0416, 0417, 0418, 0420, 0421. Fortune and co-defendant Polo K. Salazar were tried before the Honorable Diane S. Goodstein and a jury between Tuesday, May 11, 2021, and Wednesday, May 19, 2021. Fortune was represented by Michelle R. Hubrich and Pierce L. Wehman. The State was represented by David L. Osborne and Chelsea A. Glover. A unanimous jury found Fortune guilty of all charges. Fortune was sentenced to forty (40) years for murder, thirty (30) years for attempted murder, forty (40) years for burglary in the first degree and five (5) years for the ill-treatment of animals. Each sentence was ordered to run concurrently. Additionally, Fortune was ordered to serve a five (5) year consecutive sentence for the possession of a firearm during the commission of a violent crime.

This appeal timely follows.

Relevant facts

Muanah A. Fortune was tried along with his co-defendant Polo Salazar for the murder of Joe Weaver, the attempted murder of Marcus Porter, burglary in the first degree, possession of a firearm during the commission of a violent crime, and the ill-treatment of animals. The week-long trial beginning on Tuesday, May 11, 2021, was vigorously contested.

As discussed in significant detail below, the admissibility of critical pieces of prejudicial evidence was admitted to the jury and a motion for mistrial was not granted.

At trial, the only evidence connecting Fortune to the scene of the crime was as a passenger in a car with Polo Salazar, Elijah Green, and Devonte Major; as well as an inconsistent, inadmissible statement to police, which is discussed in greater detail *infra*. ROA 631; 1067-1106.

Instead, the overwhelming evidence presented at trial firmly established that Fortune did not fire a weapon that night, did not kill a dog, did not shoot Joe Weaver or Marcus Porter, did not drive a getaway car. ROA 1107. Eyewitness testimony did not place Fortune inside the home of Porter and Swibaker. ROA 835. Furthermore, neither Fortune's DNA nor his fingerprints were found inside the home, or on any of the weapons used to commit the crimes. ROA 835, 908, 1107. Likewise, Fortune's footprint did not match the shoeprint on the backdoor. ROA 937. Yet, the trial court judge charged the jury with the "hand of one, is the hand of all." ROA 1257.

During deliberations, the jury struggled with this instruction and requested a re-charge. ROA 1275. After further deliberations, the jury having not reached a unanimous verdict was given an *Allen* charge by the trial court judge. ROA 1283. Only after the *Allen* charge did the jury reach a verdict. ROA 1286. Fortune was found guilty to all charges.

Impactfully, enclosed with their verdict of guilty on all charges was a note addressed to the court as follows:

> Judge the jury, made a decision on this trial, some wish we did not have the law of hand of one is hand of all, because we know this decision will hurt the suspects and their families, but also know the victims' family are getting the justice their loved one deserves. Our hearts go out to all involved, so please take this into consideration when sentencing. And it is signed by the presiding juror and dated this date.

ROA 1295-1296, lines 20-4.

A motion to set aside the verdict was denied and Fortune was subsequently sentenced to forty years. ROA 1299, 1322.

ARGUMENTS

I. The trial court erred when it denied defense counsel's request to have Fortune's family physically present inside the courtroom because it denied Fortune his right to a public trial.

At a pretrial conference held on May 7, 2021 defense counsel requested that the defendants' families be allowed to sit in the courtroom. ROA 354-355. The trial court denied the request and the case proceeded to trial on May 11, 2021. During opening statements, the State introduced the jury to, "Mr. Joe Weaver's family, Mr. Marcus Porter and Mr. David Swibaker" all of whom were sitting behind the jury.

ROA 376, lines 15-17. Additionally, he informed the jury that "it is also Joe Weaver's day to seek justice, and his family appreciates you being here." ROA 377, lines 1-2. Outside the presence of the jury, defense counsel renewed their pre-trial request that the court allow Fortune's family to be physically present inside the courtroom. ROA 492-493. After hearing arguments, the court denied the motion. The court reasoned as follows:

> THE COURT: So, here's what we have done specifically for the benefit of many of the defendants' family. We had a live feed that is being sent down to the jury assembly room, and that way we do not have to limit, in any regard, the numbers of folks from the defendants' family. Tr. 314, lines 20-25.
>
> THE COURT: Now, obviously there are other folks. Counsel for the case next week wanted to be present. But I certainly accommodated the one lawyer that wanted to be present, up here. ROA 493, line 3-5.
>
> THE COURT: But we certainly, the primary concern was to allow the defendant's family the opportunity to hear the proceedings. We've got a camera on the witness stand so that they can hear the witness. ROA 494, lines 6-9.
>
> THE COURT: I've asked for any authority, there is no authority, for requiring that the defendants' families be present in the courtroom. ROA 494, lines 18-20.
>
> THE COURT: I wish that we had sufficient space to accommodate these defendants' family member being present. It's just simply not practical. And, yes, there are statutory definitions that do differentiate between the family of defendants and the family of alleged victims, without a doubt, and so I am certainly mindful of that. ROA 495, lines 2-8.
>
> The COURT: It is simply the reality that, with COVID, we have to make accommodations. And I reached out to the fire marshal for Dorchester County so that we could put more folks in the courtroom. But I am satisfied that we have as many people in this room as we can accommodate appropriately and safely. So I am really sorry for that. ROA 495, lines 11-16.

A defendant's right to a public trial is guaranteed by the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. The central aim of a criminal proceeding must be to try the accused fairly, and the public trial guarantee is one created for the benefit of the defendant. *Waller v. Geo*rgia, 467 U.S. 39, 46 (1984). The requirement of a public trial "ensures that the public may see he is fairly dealt with and not unjustly condemned." *Id*. The requirement of a public trial encourages the presence of interested spectators to "keep his triers keenly alive to a sense of their responsibility and to the importance of their functions…" *Id.*

The right to a public trial is not absolute and may give way in certain instances to other rights or interests such as a defendant's right to a fair trial, or the government's interest in inhibiting disclosure of sensitive information. *Id.* at 45. However,

> those instances are rare, and the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 45 (citing *Presley* v. Georgia, 558 U.S. 209, 215 -16 (2010).

The United States Supreme Court in *Waller* set out a four-part test to determine whether a closure complies with the Sixth Amendment and is a test the courts must apply before excluding the public from any stage of a criminal trial. A closure is appropriate when: 1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; 2) the closure must be no broader than necessary to protect that interest; 3) the trial court must consider reasonable

alternatives to closing the proceeding; and 4) it must make findings adequate to support the closure. *Id.* (citing *Press-Enterprise Co., v. Superior Court,* 464 U.S. 501, 511-12 (1984) (establishing a test for a courtroom closure case arising under the First Amendment)). Moreover, it is well-settled that a defendant whose right to a public trial has been violated need not show that he suffered any prejudice, and the doctrine of harmless error does not apply. See *Waller*, *supra*, 467 U.S. at 49, 104 S.Ct. at 2217.

In the instant case, the trial court's partial closure of the courtroom was not accomplished in conformity with *Waller*. As to prong one, it is undisputed that the trial court's overriding interest is protecting the public from the spread of COVID-19. The second and third prong of the test invite the court to craft a narrowly tailored closure and consider alternatives to the closures. A public health closure is likely no broader than necessary and the only reasonable alternative to protecting the overriding interest. However, with a partial closure alternative such as the case here, the trial court judge decided who was allowed to fill the allotted seats in her courtroom; but she did so at the expense of excluding others. Inexcusably, the trial court excluded every member of Fortune's family from the courtroom citing no reasonable reason for doing so.

Indeed, she rightfully acknowledged that with COVID-19 she was required to make accommodations safely. ROA 495. However, in a proceeding for the benefit of the accused, the trial court judge argued that she had a statutory duty to fill the allotted seats from the victim's family and even made a seat available to counsel for the following week's trial citing no authority to do so. ROA 494. The trial judge made

no effort to ensure that even a single member of Fortune's family could be in the courtroom; or that the jury could see the family or know of their virtual presence. The trial court judge stated that her primary concern was to ensure the defendant's family could view the feed in their room downstairs arguing that there exists "no authority for requiring that the defendants' families be present in the courtroom." ROA 494, lines 18-20.

The trial court judge not only failed to comply with the *Waller* test, but she also overlooked several instructive cases on the issue. The Supreme Court of the United States has specifically noted a special concern for ensuring the attendance of family members of the accused:

> In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial. […] And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.

In re Oliver, 333 U.S. 257, 271-72 (1948).

In *United States v. Rivera*, 682 F.3d 1223 (2012), the court concluded that the exclusion of the defendant's family members from a sentencing hearing "implicated important values served by the Sixth Amendment." Other circuits agree that the "exclusion of a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly." *Guzman v. Scully*, 80 F.3d 772, 776 (1996); see also *State v. Beckstead*, 96 Utah 528, 88 P.2d 461 (it was error to exclude friends and relatives of the accused). Each of these cases are instructive on the issue that when a trial court is faced with the choice of who to exclude from the courtroom, priority

should be given to the defendant's family and loved ones. Anything less deprives the defendant of his right to a public trial guaranteed by the Sixth Amendment.

In the instant case, the trial court judge simply failed to undertake what the United States Supreme Court demands. The trial court judge was required to balance a public safety crisis with Fortune's constitutional rights. She simply failed to do so when she excluded his entire family from the courtroom. Other choices could have and should have been made. Even though she allowed them to view the proceedings, it does not have the same effect as being inside the courtroom. The jury, witnesses, and other members of the public were unaware of their presence; and as a result, Fortune was deprived of his rights.

While Fortune is not required to demonstrate specific prejudice to obtain relief for a violation of his right to a public trial, the potential for prejudice to Fortune existed in this case. *Waller*, 467 U.S. at 49, 104 S.Ct. at 2217. During opening arguments, the Solicitor capitalized on an opportunity. Having such a large presence sitting behind them, he calculatingly introduced the jury to the grieving victim's family; and subsequently thanked the jury for seeking justice on their behalf. ROA 376-377. Fortune was not afforded that same opportunity. In not allowing the family in the courtroom or at the very least apprising the jury and others of their significant presence downstairs on the video feed, the trial judge appears to not have considered the *Waller* factors or any potential prejudice to Fortune. Nonetheless, the remedy "must be appropriate to the violation." *Waller*, 467 U.S. at 50, 104 S.Ct. at 2217.

Respectfully, this Court should reverse Fortune's convictions and sentence remand for a new trial.

II. The trial court erred when it failed to grant defense counsel's motion for a mistrial when prejudicial evidence was admitted to the jury without establishing proper chain.

The evidence presented in this case, especially the contents of "container G" and Fortune's clothing the night of his arrest were highly contested. During the trial, the State presented several chain witnesses, however, the chain was filled with inconsistencies, discrepancies, and missing links. This was made abundantly clear when Detective Matthew Brooks with the Summerville Police Department testified.

On direct examination, Detective Brooks testified that Corporal Cramer turned over to him a blue jumpsuit[1], a wallet, and ski mask. ROA 893, line 16-17. Detective Brooks identified State's exhibit 10 as "the original packaging for the jumpsuit and the ski mask that were turned over by Officer Cramer." ROA 896, lines 1-2. Detective Brooks further testified that he recognized State's Exhibit 10 because he personally packaged and transported the evidence. ROA 896, lines 10-13. Based on this testimony, the State sought to admit State's Exhibit 10 into evidence. ROA 898. Defense counsel promptly objected based on improper chain of custody and the fact that State's Exhibit 10 pertained to "container G" which had not been admitted

[1] Throughout the duration of the trial, this jumpsuit is referred to a "navy" jumpsuit, "black" jumpsuit, "blue" jumpsuit, and jumpsuit interchangeably.

or seen during the trial. ROA 898. Over defense counsel's objection regarding improper chain, the trial court admitted State's Exhibit 10. ROA 898.

Detective Brooks then testified that State's Exhibit 11 was the navy jumpsuit which contained a broken lighter and a knife allegedly belonging to the victim inside the pocket of the jumpsuit. ROA 898. He testified that he properly sealed the jumpsuit, leaving the knife and lighter in their original state so as to not disrupt the evidence. ROA 898-899. According to Detective Brooks, State's Exhibit 11 was the paper commonly used by SLED and was not the original packaging when Corporal Cramer first gave him the jumpsuit for processing. ROA 899. In response, the State showed him Exhibit 302 which he identified as the original packaging for the jumpsuit and ski mask. ROA 900. The State sought to admit State's Exhibit 11 and State's Ex. 302 into evidence. ROA 901. Defense counsel objected citing improper chain, but the trial court admitted both items over the objection. ROA 901.

Then, the State introduced State's Exhibits 123 through 155. State's Exhibits 143-150 were photographs of the individual items of clothing worn by Fortune on the night of his arrest. ROA 918. Detective Brooks testified that he was the individual who packaged the clothing. ROA 919. However, he testified that he was not the individual who took the clothing from Fortune and transported it back for processing. ROA 919. Instead, "it was collected at the jail when they were transported and then brought back to the Summerville Police Department and placed in the evidence locker. And then I collected it there for packaging purposes." ROA 919, lines 19-22.

Based solely on this testimony, the State sought to admit the photographs of Fortune's clothing. ROA 920. Defense counsel objected based on improper chain. ROA 920. The trial court admitted the evidence over defense counsel's objection. ROA 920. Detective Brooks then testified that State's Exhibits 109, 110, 160, 162, 163 were additional items collected that night by someone other than Detective Brooks, including Fortune's shoes. ROA 924. Yet again, over defense counsel's objection regarding improper chain, the court admitted the evidence. ROA 924.

On cross examination, when questioned about Fortune's clothing, Detective Brooks testified that while he collected Fortune's clothing from the evidence locker, he did not recall the name of the patrol officer who collected the items from Fortune. ROA 928, lines 9-16. Despite being a chain witness for Fortune's clothing, Detective Brooks testified that he had no idea how the clothing was handled, packaged, or transported back to the station. ROA 928-929. This is evidenced in the following critical exchange:

> Q: So someone other than you took the clothing from Mr. Fortune when he was arrested?
>
> A: Yes, ma'am.
>
> Q: Somehow packaged it up like this, because this is not your official packaging. Correct?
>
> A: No, ma'am.
>
> Q: And brought it to the police station, I guess?
>
> A: Yes, ma'am.
>
> Q: Do we know anything about how it was transported?

A: It was transported in the officer's vehicle.

Q: Ok. Do we know anything about how it was collected?

A: It was collected when they were changed out from their clothes that they were in to the jail's attire.

Q: And so you say, they. I'm assuming you mean all four defendants

A: Yes, Ma'am.

Q: Were they all in a room together?

A: That, I don't know. I wasn't present.

Q: what did they do with the clothes once they took them off of them? Did they put them in a pile?

A: Again, I wasn't present. I do not know.

Q: Okay. All you know is that it was brought to you in this packaging, and you don't know how, when or where it was collected?

A: Yes, ma'am.

ROA 928-929, lines 1-16.

Not only did this testimony on cross examination highlight the missing links pertaining to Fortune's clothing, but Detective Brooks' testimony regarding the blue jumpsuit shifted drastically. When pressed on cross examination, Detective Brooks admitted that Wade Rollings formerly of the Summerville Police Department, who was fired for misconduct and tampering with evidence, assisted him on the scene. ROA 940, 951. Even though he testified on direct examination that Corporal Cramer gave him the jumpsuit, on cross examination Detective Brooks testified that it was Wade Rollings that gave him the jumpsuit. ROA 893, 896, 899, 951. Further, despite

testifying on direct examination that he packaged and transported the evidence to SLED, on cross examination Detective Brooks testified that Wade Rollings transported the jumpsuit and turned it over to SLED. ROA 896, 898, 899, 951.

Outside the presence of the jury, defense counsel moved for a mistrial based on improper chain evidence submitted to the jury. ROA 985-989. In support of her motion, defense counsel made three critical arguments. First, she argued that Detective Brooks made inconsistent statements on the stand that called into question who handled the evidence. She argued that the trial court admitted the evidence after Detective Brooks testified that he was the person who packaged, transported, and submitted the jumpsuit. ROA 986-987. However, after it was admitted he testified that Wade Rollings was the responsible party. Accordingly, the chain of custody was incomplete because Wade Rollings had not testified, and the defense was not provided an opportunity to cross examine him about tampering. ROA 986-987.

Second, defense counsel argued that the person who made container G was unaccounted for, and certain individuals listed on the chain for items inside the container had not testified. Specifically, Chad Smith was listed on the chain of custody and had certain pieces of evidence for three to five months; however, the State did not present Chad Smith for cross examination on the treatment of that evidence. ROA 988-989.

Lastly, defense counsel pointed to the admission of Fortune's clothing into evidence. ROA 989. Defense counsel argued that Detective Brooks testified that he was not the person who collected Fortune's clothing and he did not know how the

items were treated, and if the clothing was intermingled. ROA 989. Defense counsel argued that while the article of clothing may be irrelevant at the current stage of the trial, she anticipated the State would attempt to introduce gunshot residue and analysis from Fortune's sweatshirt. ROA 989. She argued that the future analysis from the clothing would be prejudicial without establishing a proper chain from the beginning. ROA 989.

The State responded that it was Summerville's policy to transport the individuals to the jail and the transporting officer was charged with bagging up the clothing and putting them in the locker. ROA 990. He further argued that while they did not offer everyone in the chain of custody, such as Wade Rollings, "it is unnecessary that the police account for every hand transfer of the evidence in order to establish a chain of custody." ROA 990.

The case continued and Rachel Nguyen, forensic serologist testified that the jumpsuit was submitted by Wade Rollings. ROA 982.

Then, Nicole Hardin was qualified as an expert in the field of gunshot primer residue. ROA 1034. A photograph of Fortune's black American Eagle hoodie was conditionally admitted over defense counsel's chain objection. ROA 1039. Ms. Hardin testified that gunshot primer residue was found on Fortune's sweatshirt, but she was unable to provide information as to when the particles were deposited on the hoodie. ROA 1039. On cross examination, the following exchange occurred between Ms. Hardin and defense counsel:

> Q: "Similarly, it's important that these pieces of clothing don't come in contact with each other. Is that correct?
>
> A: Yes, Sir.
>
> Q: Because theoretically, if one piece of clothing has gunshot residue on it and it's dropped on another piece of clothing, that clothing could then be contaminated?
>
> A: That is a possibility."

ROA 1044, lines 9-15.

> Q: So, for example, it would have been a problem if all of these clothes were put together, say, at some facility before they came to SLED, that would be a problem; right? If they were all in a pile, that would be a problem?
>
> A: There's a potential for transfer.

ROA 1045, lines 8-12

The trial continued, and at no point did the State provide Wade Rollings for cross examination, nor did they provide the first link in chain for Fortune's clothing the night of his arrest. Fortune was subsequently found guilty on all four counts. ROA 1286. The trial court abused its discretion when it admitted this prejudicial evidence to the jury without establishing a proper chain. The motion for mistrial was the appropriate remedy, and it should have been granted.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in

no other way. *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

"A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is given to the final custodian by whom it is analyzed." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001); *State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992). "Where the substance analyzed has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Benton v. Pellum*, 232 S.C. 26. 33-34, 100 S.E.2d 534, 537 (1957). In applying this rule, the Supreme Court of South Carolina has found evidence inadmissible where there is a missing link in the chain of possession because the identity of those who handled the specimen was not established at least as far as practicable. *Carter*, 344 S.C. at 424, 544 S.E.2d at 837.

In *State v. Joseph*, 328 S.C. 352, 356, 491 S.E.2d 275, 279 (1997), a SLED chemist was identified as the party who first retrieved and analyzed the evidence. The State informed the trial court that the analyst would not testify because she moved to Michigan and was "beyond reach of the State's subpoena power." *Id.* The defense counsel objected reasoning that cross examination of the chemist was necessary to highlight deficiencies in the chain. *Id.* The trial court overruled the objection. *Id*. On appeal, this Court held that the chemist was a critical link in the

chain; and therefore, the State's chain of custody was fatally deficient, and the trial court erred by admitting the evidence. *Id.* at 365-67, 491 S.E.2d at 288. This Court further concluded that the fact the chemist was living in another state at the time of the hearing does not render her unavailable or make it impracticable for the State to produce her for trial. *Id*.

In *State v. Williams*, 301 S.C. 369, 371, 392 S.E.2d 181 (1990), when no one in the emergency room could identify the party who sealed and labeled the defendant's blood, and the individual who transported the blood was unidentified, the Supreme Court of South Carolina held that the "breakdowns, cumulatively, render the chain of custody fatally defective." *Id.* Similarly, in *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 310 (1992), the Supreme Court of South Carolina held that the trial court abused its discretion when it admitted a blood alcohol test with a fatal chain of custody.

In the instant case, critical links in the chain of custody were also missing. The State misapplied the law when it stated that it was unnecessary for police to account for every hand transfer of evidence. ROA 990. The State simply failed to meet its burden of providing a complete, continuous chain of custody of all persons who had control and possession of the evidence. Like *Joseph*, a key person known by the State to have handled evidence, Wade Rollings, was not produced for trial. ROA 990. This is inexcusable. Wade Rollings was fired from Summerville Police Department for misconduct, tampering with evidence. ROA 940, 951. Wade Rollings should have been produced for trial and be subject to cross examination regarding tampering. *Joseph,*

at 365-67, 491 S.E.2d at 288. Without Wade Rollings, the chain of custody is fatally deficient.

Moreover, similar to the cases cited above, Fortune's clothing was admitted into evidence without establishing the first link in the chain of custody. The State argued that it was Summerville's policy to transport the individuals to the jail and the transporting officer was charged with bagging up the clothing and putting it in the locker. ROA 990. However, the State yet again overlooked the fact that they were required to produce a complete chain. *Carter*, 344 S.C. at 424, 544 S.E.2d at 837; *Cribb*, 310 S.C. at 518, 426 S.E.2d at 306. In this instance, the State failed to produce the identity of the officer that took Fortune's clothing from him and transported it to the police station. While the State provided Detective Brooks, he testified that he did not know the name of the officer who transported the clothing, nor did he know how the items were handled prior to coming into his possession. ROA 928-929, lines 1-16.

The identity of the person handling Fortune's clothing was critical. Ms. Hardin testified that gunshot primer residue was found on Fortune's sweatshirt, but she was unable to provide information as to when the particles were deposited on the hoodie. ROA 1039. She also testified that it was extremely important that the items of clothing did not come in contact with each other because the residue could transfer. ROA 1044, lines 9-15. In this instance, the law is clear, "[w]here the substance analyzed has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Benton v. Pellum*, 232 S.C. 26. 33-34, 100 S.E.2d 534, 537 (1957). Evidence

is inadmissible where there is a missing link in the chain of possession because the identity of those who handled the specimen was not established at least as far as practicable. *Carter*, 344 S.C. at 424, 544 S.E.2d at 837. Here, the identity of the person who took the Fortune's clothing and transported it to the police station is missing. Thus, the chain was fatally deficient, and Fortune was prejudiced as a result.

Accordingly, the trial court abused its discretion when it admitted this prejudicial evidence to the jury without establishing a proper chain. The motion for mistrial was the appropriate remedy, and it should have been granted. Respectfully, this Court should reverse Fortune's convictions and sentence and remand for a new trial.

III. The trial court judge erred when she allowed the charge of "hand of one is the hand of all" because the State's evidence to support the jury charge was insufficient to warrant the charge.

On the night of January 27, 2019, two to four men entered the home of Marcus Porter and David Swibaker. ROA 415, 426, 767. According to Porter's testimony, four masked men kicked down the back door, carrying pistols screaming "where's the weed?". ROA 441-444. In contrast, David Swibaker testified that he only saw two, maybe three men enter the home, each wearing masks and least one had a gun. ROA 767-769.

According to Porter, his dog started barking and advanced towards the men. ROA 442. Resultantly, the dog was shot. ROA 442. According to Porter, his friend Joe Weaver (J.B.) tried to diffuse the situation, telling them that he could get them some weed. ROA 445. However, as J.B. was easing towards the men, he was kicked in the

face and was knocked out cold. ROA 445, 448. Porter was then taken to the back bedroom by two of the guys. ROA 448-449. Porter testified that the "take charge guy" was light skinned, and the other one was fat, had on purple shoes, and gloves. ROA 450. Porter further testified that the other two men stayed by the back door and never came past the kitchen table. ROA 568, 574.

Swibaker was unable to describe or identify any of the men. ROA 776. According to Swibaker, he saw only two people drag Porter to the hallway, and he then darted back to his bedroom. ROA 770. While he was in his room, he was hit over the head by two guys; but he was unable to describe them. ROA 773.

According to Porter, when the men did not get what they want, one of the men shot J.B. and started ransacking the place. ROA 453. Porter testified that he tried to make his way to the front door and was shot in the chest. ROA 455. He ran to a neighbor's house and had them call 911. ROA 456.

Porter testified that when he saw the men who had been arrested on television, he recognized Devonte Major and Elijah Green as two of the men. ROA 475. According to Porter, those were the only two he recognized; Elijah was the light skinned guy and Major was the "fat" guy. ROA 476. Detective Phillip Moy testified that a photo lineup was not performed in this case, and Fortune was never identified. ROA 817.

In pursuit of the men connected with this crime, Deputy Joshua Scarborough, Berkley County Sherriff's officer, testified that as he was trying to figure out how to get to incident location, he passed a black Honda CR-V at approximately 12:07 that

night. ROA 609, 615. He stated that there appeared to be four black males inside. Tr. 431. As a result, he put it over the radio. ROA 611-616.

Corporal Jacob Cramer testified that he attempted to pull the black Honda CR-V over, but it would not stop. ROA 626. According to his testimony, there was a car chase for thirty minutes with speeds in excess of 100 miles per hour. ROA 628. According to his testimony, blue and orange clothing items were thrown out into the roadway during the chase. ROA 631.

When the vehicle was stopped, the driver was identified as Polo Salazar, the front passenger was Muanah Fortune and Devonte Major and Elijah Green were in the backseat. ROA 631. He testified that they retrieved the discarded clothing items from the road – an orange ski mask and pair of navy-blue coveralls. ROA 635. Inside the wallet was Joe Weaver's driver's license, money, and cards. ROA 640. He testified that they located four firearms on the shoulder of the road in an area where they had temporarily lost sight of the vehicle during the chase. ROA 644.

The remaining overwhelming evidence presented at trial firmly established that Fortune did not fire a weapon that night, did not kill a dog, did not shoot Joe Weaver or Marcus Porter, did not drive a getaway car, and his DNA was not inside the home. ROA 1107. Likewise, Fortune's fingerprints were not found inside home, or on any of the weapons used to commit the crimes. ROA 835, 908. Lastly, Fortune's footprint did not match the print on the backdoor. ROA 937.

Yet, the trial court judge charged the jury with the hand of one is the hand of all. ROA 1257. The trial court judge abused her discretion when she instructed the

jury on the hand of one is the hand of all theory because the State failed to meet its burden; and thus, the charge lacked evidentiary support.

"An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

"The doctrine of accomplice liability arises from the theory that the hand of one is the hand of all." *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (internal quotation marks omitted). Under this 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. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (2002) (quoting *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). The State must prove beyond a reasonable doubt that the parties agreed to "achieve an illegal purpose, thereby establishing presence by pre-arrangement." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (2010). While the State is not required to show a formal express agreement, they must prove the same by circumstantial evidence and the conduct of the parties. *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (2010).

However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (2007) (quoting *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (2002). The South Carolina Supreme court has explained that, in order for a defendant to have the requisite knowledge: "the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions." *Mattison*, 388 S.C. at 484, 697 S.E.2d at 586 (quoting 40 Am. Jur. 2d Homicide § 26 (2010) (emphasis added).

For an accomplice liability instruction to be warranted, the evidence must be "equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011); *State v. Washington*, 431 S.C. 394, 407, 848 S.E.2d 779 (2020).

In *Wilds v. State*, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (2014), this Court affirmed the post-conviction relief court's grant of relief on the issue of accomplice liability. In *Wilds*, this Court found the post-conviction relief court "correctly determined the trial court erred in charging accomplice liability because neither party presented evidence that anyone besides the defendant was the shooter." *Id.* at 440, 756 S.E.2d at 791.

In *State v. Washington*, 431 S.C. 394, 407, 848 S.E.2d 779 (2020), the South Carolina Supreme Court held that the trial court's accomplice liability instruction prejudiced Petitioner. The Court reasoned that the evidence that Petitioner shot the victim was underwhelming, as several witnesses testified that he was unarmed and was not in the immediate area where the shooting occurred. *Id.*

In *State v. Campbell*, 5885, at *10 (S.C. Ct. App. Dec. 22, 2021), this Court held that akin to *Washington* and *Wilds* the trial court erred by charging the jury on accomplice liability because neither party presented evidence that the defendants had joined together in a common plan or scheme to carry out the shooting.

In the instant case, similar to the aforementioned cases, the instruction was not warranted because the State failed to present evidence of a pre-arranged common design or purpose between Fortune and his co-defendants for some illegal purpose; that Fortune knowingly participated in the alleged crimes; that he manifested the requisite knowledge that a crime was being committed; and that what happened inside the home was a natural and probable consequence.

Indeed, there was no evidence placing Fortune inside the home. ROA 835, 908, 937, 1107. The only evidence connecting Fortune to the scene of the crime was being a passenger in a car with Polo Salazar, Devonte Major and Elijah Green and an inconsistent, inadmissible statement to police, discussed *supra*. ROA 631; 1067-1106.

Even assuming *arguendo* that Fortune was at the scene of the crime, he would have been one of the unidentified men in the home that remained by the back door and never came past the kitchen table. ROA 568, 574. However, being merely present

at the scene of the crime does not make Fortune guilty of the principal of any crime therein. *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (2007) (quoting *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (2002). The evidence presented at trial does not rise to the level of warranting an accomplice liability charge. The State was required to provide equivocal evidence that Fortune aided, abetted, conspired, and planned those actions with co-defendants. They failed.

Accordingly, the hand of one is the hand of all charge should not have been sent to the jury as this charge was prejudicial. The impact of this charge is evident when analyzing the events leading to the jury's verdict. During deliberations, the jury struggled with this instruction as they requested a re-charge on hand of one is the hand of all. ROA 1275. After further deliberations, the jury having not reached a unanimous verdict was given an *Allen* charge by the trial court judge. ROA 1283. Only after the *Allen* charge did the jury reach a verdict. ROA 1286. Significantly, enclosed with their verdict of guilty on all charges was a note addressed to the court as follows:

> Judge the jury, made a decision on this trial, some wish we did not have the law of hand of one is hand of all, because we know this decision will hurt the suspects and their families, but also know the victims' family are getting the justice their loved one deserves. Our hearts go out to all involved, so please take this into consideration when sentencing. And it is signed by the presiding juror and dated this date.

ROA 1295-1296, lines 20-4.

This note confirms that but for the accomplice liability charge, the outcome of the trial would have been different. The trial court judge abused her discretion when

she charged the jury with the hand of one is the hand of all because the State's evidence to support the jury charge was insufficient. Respectfully, this Court should reverse Fortune's convictions and sentence and remand for a new trial.

CONCLUSION

This Court should reverse Appellant's convictions and sentence and remand for a new trial.

Respectfully submitted,

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