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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DONOVAN TIRRELL BRANNON,

APPELLANT.

Appellate Case No. 2022-000015

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

I. Whether the court erred by instructing the jury on accomplice liability, "the hand of one is the hand of all," since there was no evidence of any tacit or other agreement or plan to shoot at the decedent or the other man in the parking lot of the nightclub and the instruction on accomplice liability was therefore improper and prejudicial?

II. Whether the court erred by allowing O'Brien Gilliam to testify that appellant was "making signs" with his hands on the dance floor on the night of the shooting since this was inadmissible evidence of gang activity in derogation of this Court's holding in Johnson v. State 433 S.C. 550, 860 S.E.2d 896 (Ct. App. 2021), since there was no evidence gang activity was probative of the motive or the intent for the shooting having occurred?

STATEMENT OF THE CASE

On June 16, 2012, in Lexington County, Donovan Tirrell Brannon ("appellant"), Shantrez Robertson, and Tyrese White murdered William *Tyrone Gant* ("Victim") and attempted to murder Brandon Jeffrey. Appellant was indicted by the Lexington County grand jury for Victim's murder and the attempted murder of Jeffrey (2016-GS-32-492 & 493). Appellant and Robertson were tried jointly beginning on November 15, 2021, before the Honorable Walton J. McLeod IV, and a jury. [1] Theo and Hannah Williams represented appellant. (R. 1). On November 19, 2021, the jury found appellant and Robertson guilty of murder and attempted murder. (R. 1274). Appellant was sentenced to 34 years for murder and 30 years concurrent for attempted murder. Robertson was sentenced to 32 years for murder and 30 years concurrent for attempted murder. (R. 1284, l. 23-1285, l. 17). This direct appeal of Appellant Brannon follows raising 2 issues.

RESPONDENT'S STATEMENT OF FACTS

Brief Summary of the Crimes

On June 16, 2012, appellant Donovan Tirrell Brannon ("Brannon"), co-defendant Shantrez Robertson ("Robertson"), and another co-defendant Tyrese White ("White"), murdered Tyrone Gant ("Victim") and attempted to murder Brandon Jeffrey ("Jeffrey"). The crimes occurred at approximately 3:15 a.m. in the upper parking lot of "*The Spot*", a rural night club in the Batesburg/Leesville area of Lexington County. All 3 perpetrators, Brannon, Robertson, and White were each carrying firearms and used them in the shooting of Victim and Jeffrey. Victim died at the scene. Jeffrey was carried to the hospital and eventually recovered from his injuries and testified at trial. (R. 94-106; 115-17; 256-92; 297-359; 360-75; 381-489; 493-514; 520-568; 570-96; 599-612; 615-757; 758-855; 856-88; 894-1052; 1053-1099; 1105-1168).

[1] White was not arrested for these crimes until shortly before Brannon and Robertson's joint trial. As a result, he was not tried with his co-defendants.

What Brought About the Crimes

The evening before the crimes, Friday June 15, 2012, Victim, Jeffrey, O'Brien Gilliam, Andy Barnes, and Dominique Williamson [a female and Jeffrey's cousin] were at a friend's home in Ridge Spring-Monetta playing *All Madden football* on *Play Station*. Dominique (known as "Dee Dee") talked the others into going to a party later that night at *the Spot*, located in western Lexington County. Dee Dee wanted to go to the party because a friend from Saluda was having a birthday party there, and there was a man from Batesburg she wanted to see who was going to be there.[2] Victim, Jeffrey, Gilliam, Barnes, and Dee Dee drove to *the Spot* in 2 different cars, a Dodge Charger and a Dodge Stratus, arriving after midnight at approximately 1:00 to 1:30 a.m. on June 16th and parked in the upper parking lot which sits on a hill above the nightclub. When parking, the group backed their cars into their parking spaces next to a Kia. Dee Dee's Dodge Charger was closest to the night club. Next in line was Barnes' Dodge Stratus. The furthest car from the club was the Kia that belonged to an unknown person. Victim's group then walked down to the club and eventually all of them entered the club. (R. 256-92; 297-359; 599-612; 615-664; 800-839).[3]

Already at the club was appellant Brannon and his co-defendants Robertson and White. With these 3 men was Antonio Stroman ("Stroman") who drove the men to the club in his burgundy Mercury Grand Marquis.[4] Stroman's burgundy Grand Marquis played an integral part in the crimes and is also described as a Crown Vic because the vehicles are similar makes and

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[2] Each of the 4 men with Dee Dee, including Victim, had nicknames: Victim was known as "Shine"; Jeffrey, the surviving victim, was known as "Pedro"; O'Brien Gilliam was known as "O.B."; and, Andy Barnes was known as "Teddy P."

[3] Victim was initially stopped by security because he had a pistol on him and made to return to Barnes' car and place the gun there. Victim was then allowed to enter the club.

[4] The co-defendants and Stroman also had nicknames. Brannon was known as "Fresh." Robertson is known as "Red Nose." White is known as "Boosie" or "Little Boosie." Stroman is also known by the nickname "Boosie."

models. These 4 men stopped at a truck stop about 1 mile from *The Spot* before arriving at the club. They were captured on surveillance video both in and outside the store, as was the car. Once they arrived at the night club, Stroman parked in the lower parking lot closest to the club. This fact will become important later. Brannon and Stroman were from Batesburg. Robertson and White were from Great Falls. Brannon, Robertson, and White were all carrying firearms **and** cell phones. These 3 men and Stroman entered the club before Victim's group arrived at the club. (R. 256-92; 297-359; 599-612; 615-664; 800-839; 876-969; 1119-1167; 996-1052; 1086-87; 1092)

After Victim and his group entered the club, 1 of their group, O'Brien Gilliam ("O.B.") went out on the dance floor and ended up wandering into a group of men in a circle jumping around and flashing signs with their hands. Brannon and Robertson were part of this group. Another member of Victims' group, Jeffrey [the surviving victim] saw the hand signs, became concerned something was about to happen to his friend O.B., and went out on the floor and pulled O.B. out of that group of men which included Brannon and Robertson. After removing O.B. from the group, Jeffrey briefly spoke to Brannon cordially, but Robertson bumped Jeffrey with his shoulder and seemed upset or angry that Jeffrey had pulled O.B. out of the group of men making signs when he did. Jeffrey then saw Robertson and Brannon together talking to each other and looking at him. Jeffrey testified he got "a bad vibe" about what was occurring. Jeffrey went in the bathroom and saw Brannon again this time talking to a friend of Jeffrey. Jeffrey indicated to the 2 men that O.B. did not mean any disrespect to Brannon and his group on the dance floor. Based on what had occurred on the dance floor, what Jeffrey's friend said and did in the bathroom, and Brannon showing Jeffrey a gun in the bathroom, Jeffrey decided it was time for all of Victim's group to leave the club. Barnes decided to leave when he saw Brannon and Robertson's group making signs with their hands. When Jeffrey and O.B. got outside, Victim was already outside with Barnes

talking to some men from Batesburg. Dee Dee also left the club shortly behind the men. Jeffrey convinced Victim to leave the club including the parking area. Victim's group then walked up the hill to where they parked their cars earlier. (R. 256-92; 297-359; 599-612; 615-664; 800-839)

As they reached their cars, the group heard someone talking behind them which they described as "chatter." One (1) witness testified Victim had reached the car door of the Dodge Stratus, the car he came in. When Victim's group turned to see what the "chatter" was all about, Brannon was walking up the hill in the direction of Victims' group swinging a handgun by his side. Robertson was with him also holding a pistol. One (1) witness also saw 2 additional men walking with Brannon and Robertson. Brannon stated out loud as he was walking and swinging his gun: "Where them pussy mother-fucker's [or pussy niggas] at?" Each eyewitness heard Brannon's question a little bit differently. As this was occurring, a burgundy Grand Marquis [Stroman's car] was following close behind Brannon and Robertson with its head lights on. This car pulled slowly past Brannon, Robertson, and Victim's group and stopped, blocking Victim in. Victim heard Brannon's question and turned and walked toward Brannon and asked who are you talking about? Brannon stated: "Not you" or "We ain't looking for you." At this point, members of Victim's group could no longer see Robertson's and Brannon's firearms because Victim was between them and Brannon and Robertson. As this was occurring, a third individual, Tyrese White, also carrying a pistol got out of the rear driver's side of the burgundy Grand Marquis. One (1) witness saw a fourth man get out of the back passenger side of the Grand Marquis. The first person to get out of the Grand Marquis [White] raised his arm with a gun in it. At this point, when Brannon stated: "not you" or "we ain't looking for you," to Victim, multiple gunshots were fired by Brannon, Robertson, and White at Victim, Jeffrey, and Victim's group. Victim was struck by

multiple gunshots killing him.[5] Jeffrey, who pulled O.B. out of the group of men inside the club, was hit 2 times in the legs by gunfire coming from Brannon and Robertson, and Jeffrey dropped to the ground and crawled under Dee Dee's Dodge Charger and hid. Barnes, crawled in his car, the Stratus, obtained his 9mm from the glove box, unholstered it, and returned fire. White was shooting at Barnes at this time. (R. 129-65; 170-232; 474-87; 490-539; 676-715; 608-31).

All 3 perpetrators, Brannon, Robertson, and White jumped in the burgundy Grand Marquis driven by Stroman and tried to flee from the crime scene, but their car was struck several times in the rear by bullets from Barnes' gun including 1 shot penetrating the back glass and striking Stroman in the neck. Stroman stopped the car and got Brannon to drive away from the scene.[6] The 3 perpetrators and Stroman then rode to an apartment complex, Creekview Apartments, in Batesburg where someone called for EMS for Stroman. An eyewitness there saw 4 men get out of the burgundy Grand Marquis and some of the men, Robertson and White, left the area in other vehicles. When police officers also arrived at this apartment complex, White and Robertson had left, but police body cameras captured Brannon nearby and Stroman there in the back of the

[5] The autopsy determined Victim had 5 gunshot wounds. The fatal shot went in the right arm while it was down; it then entered the chest and went across the chest and then entered the left arm where it was recovered. Another gunshot wound entered the right thigh and crossed that leg into the left leg where it was recovered. There were 3 different through and through gunshot wounds with no fired bullets recovered. All the shots appeared to have come in quick succession and as Victim was shot, he turned, leaned forward slightly, and attempted to run away, but collapsed. (R. 737-44).

[6] After the 3 perpetrators fled, Barnes found Victim on the ground. Victim lived for just a few seconds and expired. Victim had a Walther P-22 pistol on him. *Brannon's* cousin came up and asked Barnes to let him have the guns. Barnes testified he was concerned about Victim at the time and without thinking handed this person his 9mm and Victim's gun. Barnes stayed with Victim until police arrived. After police requested Barnes recover the guns, he did from *Brannon's* cousin; however, this was after Brannon's family posted a picture on-line of them displaying the guns. Barnes immediately turned the 2 guns into the Sheriff's Office. Victim's gun was fully loaded and no fired shell casings or bullets at the crime scene matched Victim's gun. Barnes admitted he fired the 7 9mm shell casings found near his car, in self-defense after the 3 perpetrators started firing at Victim and his group. Ballistics confirmed his testimony. (R. 623-629; 664-68; 493-514; 520-568; 570-96; 669-733; 1075-78; 1084-85; 1106-1110; 1114-15).

burgundy Grand Marquis wounded, and the car contained bullet holes and a shattered back glass and a bullet hole in the driver's headrest. Just as police and EMS arrived at the apartment complex, Brannon hid a firearm in some nearby bushes. It was a Ruger 9 mm semi-automatic pistol. Police found the weapon in the bushes near the front of the burgundy Grand Marquis. Brannon was taken into custody. Stroman was taken to the hospital. Ballistics later matched 5 fired shell casings and 2 fired bullets recovered at the crime scene, the upper parking lot at *the Stop,* to the Ruger 9mm Brannon discarded in the bushes at Creekview Apartments. (R. 256-92; 297-359; 599-612; 615-664; 800-839; 876-949; 1031-52; 996-1001; 360-75; 381-488; 493-514; 520-568; 570-96; 669-733).

Cell-site location information (CSLI) of phones carried by White and Robertson showed White and Robertson left the apartment complex and drove to another location, which was remote, where Robertson and White were picked up by Robertson's girlfriend after a phone call to her at approximately 4:30 a.m. the same morning using White's phone. She then took Robertson and White home with her where Robertson hid out the rest of the day in Columbia. White returned to Great Falls. White was later arrested when the fired .40 caliber shell casings found at this crime scene were matched to fired shell casings at another crime scene location in Great Falls in which White was identified as the shooter of a .40 caliber weapon. White's CSLI for June 15th and 16th also showed White was present at this crime scene at the time of the murder of Victim and shooting of Jeffrey. (R. 1119-1167; 996-1031; 950-969; 970-90; 990-95).

When police processed the crime scene at the club, they found a total of 41 fired shell casings. The perpetrators of the crimes, Brannon, Robertson, and White fired 34 of the 41 fired shell casings. Barnes fired the remaining 7 fired shell casings from behind his car. The holster for his gun was found in the Stratus. Victim was found by police face down in the upper parking lot

of the club where he had collapsed after walking or running a short distance. Cars at the crime scene were riddled with bullet holes and shattered windows. Two (2) bullets recovered at Victim's autopsy were determined to have come ***not*** from the 9mm Ruger but the fatal shot came from a weapon consistent with the Smith and Wesson 9mm caliber pistol believed to have been carried by Robertson and another bullet came from a bullet consistent with a .40 caliber believed to have been fired by White.[7] Victim had other through and through wounds from which bullets were not recovered. A fired bullet which struck 1 of the cars Victim and his group came in was determined to have been fired by the gun Brannon hid in the bushes at Creekview Apts., and still other fired bullets and shell casings would have come from Robertson's gun, a 9mm Smith and Wesson or White's gun, a .40 caliber. All of the .40 caliber fired shell casings found at the scene, 14 in all, came from the same gun, believed to be White's gun; 5 of the fired 9mm shell casings at the crime scene came from the Ruger believed to be Brannon's recovered in the bushes at the apartment complex with the burgundy Grand Marquis; and, 15 fired shell casings found at the scene were fired by the same gun, a gun consistent with a Smith and Wesson 9mm believed to have been fired by Robertson. (R. 423-488; 493-514; 520-568; 570-96; 669-756; 1106-08; 369-75; 381-422).

As stated, police obtained surveillance video from a truck stop about 5 minutes from the crime scene. It showed Brannon, Robertson, White, and Stroman arriving at the nearby truck stop. Each man was captured in the store and the men were captured outside with Stroman's burgundy

[7] It cannot be categorically stated who was carrying which weapon at the time of the crime because the perpetrators could have switched weapons before or after the crimes, or both. Brannon admitted to police the 9mm Ruger was his, he fired it from inside the Grand Marquis, and hid it at Creekview Apts., but the State did not introduce his statement at trial. (Nov. 12, Pre-trial hearing). The State instead relied on Brannon's hiding the Ruger 9mm at Creekview Apts. and a photo posted online to establish it was probable the Ruger was Brannon's gun. The State relied on texts of Robertson to establish the Smith and Wesson was probably his since he was offering it for sale the day before the crime. The Ruger contained no fingerprints or DNA. The other 2 guns were never recovered.

Grand Marquis filling up the car with gas. This was as the perpetrators were heading to *The Spot* but before the crimes. Surveillance from the truck stop was between 12:30 a.m. and 1:30 a.m., and Robertson was wearing distinctive white sweatpants with blue stars on them identified by eyewitnesses at the crime scene. Brannon was also wearing a distinctive red shirt identified by eyewitnesses. After the shootings, Dee Dee drove the wounded Jeffrey to the same truck stop to obtain medical assistance for Jeffrey and to call 911. She had to drive on flat tires as 2 of her tires were shot out. First responders arrived at the truck stop within minutes and testified to Jeffrey's excited utterances that he and Victim were shot by Brannon and Robertson. [Jeffrey never saw White]. (R. 1031-52; 256-92; 297-359; 599-612; 615-664; 800-839; 94-105; 115-16).

Robertson was interviewed by police. He stated he was present at the club prior to the shooting but denied shooting anyone. He claimed he was present at the club with Brannon and Stroman, but claimed he and Brannon had some type of argument and he left the club around 2:00 to 2:30 a.m. and was picked up by his girlfriend, arriving at her home at 2:45 to 3:15 a.m. His phone records and CSLI, and those of his girlfriend, did not match up with his story. He did not leave the club until the time of the shootings. The time he called his girlfriend and the time he arrived at her home did not match up either. It was around 5:00 a.m. when she picked him up and around 6:00 a.m. when they arrived at her home. He also incriminated himself when he admitted he was at the crime scene shortly before the shootings and he was with Brannon and Stroman.

Police also interviewed Stroman. Stroman gave 3 different versions of events. He admitted he was present at the club and was shot in the back of the neck as he was leaving the parking lot. Stroman testified as a hostile witness to the State and repeatedly claimed he remembered nothing, but he admitted in his final statement to police he was at the club with Brannon and Robertson, and they got in his car after the shooting started, which placed Brannon and Robertson at the crime

scene at the time of the shootings and getting in the getaway car as described by eyewitnesses after the crimes were committed. Further, Stroman testified he was shot in the back of the neck, and he let someone else drive, Brannon, to the Creekview Apt. complex in Batesburg, where he was treated by EMS and then taken to the hospital, thus corroborating the finding of the Ruger 9mm at Creekview Apts. matched to the crime scene. (R. 996-1001; 876-931; 932-949).

Police also introduced CSLI from the perpetrators cell phones showing they were together on the night of the crimes and rode to the crime scene at approximately the same time and arrived at approximately the same time. The CSLI also showed they fled from the crime scene at the same time and where they went to, the apartment complex where the Grand Marquis was recovered by police along with the Ruger 9mm. As previously stated, the CSLI also showed Robertson and White left and went to a remote location where Robertson's girlfriend picked him and White up and took them to her home. The girlfriend and her roommate also testified. Robertson, White, and Robertson's girlfriend would have arrived at the girlfriend's apartment at approximately 6:00 a.m. to 6:30 a.m. on June 16th. (R. 950-69; 1119-1167; 996-1031; 970-90; 990-95).

Police also introduced text messages, posts, and phone calls between the 3 perpetrators. Prior to the crimes, there were 2 text messages about 1 of the perpetrators, Robertson, trying to sell a 9mm Smith and Wesson handgun. One (1) of these text messages is from just hours before the crime in which Robertson asked for $250 for the 9mm Smith and Wesson. There was a picture of Brannon posted online in which he is holding a Ruger 9mm pistol at party earlier in the night before the crimes. The phone call records and text messages also showed the 3 perpetrators were interacting with each other over their phones until the time they left for the club. The 3 perpetrators then stopped texting or phoning anyone while at the club and during the shootings. They did not start making phone calls or texting anyone or each other again until shortly after the crimes when

they resumed communications. Several of the texts were incriminating, including Stroman telling the perpetrators they needed to lay low for a while and that police had the Grand Marquis or the 9mm Ruger and asking the perpetrators did they shoot their guns while in the Grand Marquis. He was told they did not shoot the guns while inside the Grand Marquis. There are also discussions about the 9mm pistol. (R. 950-69; 1119-1167; 996-1031).

Finally, each of the 3 eyewitnesses with Victim identified Brannon as 1 of the shooters and they collectively identified Robertson and/or the 3rd man [White] as the other 2 shooters. All of the men testified Victim did not pull his gun or fire a gun before the 3 perpetrators started shooting. No fired .22 shell casings were found at the scene. The eyewitnesses all testified they left the club before being followed by Brannon and his group after seeing Brannon's group on the dance floor making signs with their hands and O.B. being pulled out of that group. (R. 256-92; 297-359; 599-612; 615-664; 800-839; 423-488; 493-514; 520-568; 570-96; 669-733).

APPELLATE ISSUE I.

Whether the trial judge appropriately instructed the jury on accomplice liability?

What occurred below

At the close of the case, Brannon objected to the trial judge charging accomplice liability for the reasons set forth in the directed verdict motion. (R. 1182-85). Judge McCleod overruled the objection based on all of the evidence in the case. (R. 1182-85). Thereafter, Judge McCleod charged the jury on accomplice liability. (R. 1265-68). Counsel renewed the objection to the charge after the instruction preserving the issue for appeal. (R. 1271).

Issue Raised on Appeal

Brannon argues on appeal that Judge McCleod erred in charging accomplice liability because the jury charge was not supported by the record. Specifically, he argues there was no

evidence of an agreement or concert of action between the 3 perpetrators to commit a crime. His argument is; because the State did not produce any evidence of an express agreement from 1 of the co-defendants or an eyewitness, the jury instruction should not have been given. His argument fails because pursuant to his theory the jury could only infer all 3 shooters showed up at the same time and acted independently, which is not supported by the record. As shown in Respondent's statement of facts, there was overwhelming evidence of an agreement and concerted action between at least 3 different perpetrators at the time of the crime. The physical evidence and phone evidence also shows the 3 different perpetrators were acting together aiding and abetting each other in the commission of the crimes including committing overt acts in furtherance of the crime. The 3 perpetrators fired 34 shots between the 3 of them at the time of the crime. And, the 3 perpetrators came to the scene together in the same car, acted together in going up the hill to confront and shoot Victim and Jeffrey, acted together in firing their 3 guns at Victim's group at the same time, and fled the scene together after the crime. They also spoke with each other after the crime and coordinated their getaway and attempted concealment of evidence.

STANDARD OF REVIEW

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. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). "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).

Analysis

"A trial court is required to charge the current and correct law in South Carolina." State v. Cottrell, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017). "The law to be charged must be

determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001). This Court "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, 577 S.E.2d 460, 463 (Ct. App. 2003). "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). "If there is any evidence to support a charge, the trial judge should grant the request." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). However, "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has 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); *See also* State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020); Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014). So long as there is evidence from which the jury could conclude that Brannon acted with another person to effectuate the shootings, the charge is appropriate. Barber, 393 S.C. at 239, 712 S.E.2d at 440 ("testimony offered at trial indicating there may have been two robbers armed with handguns is sufficient to warrant the jury charge").

The Law of Accomplice Liability

Brannon argues the State presented insufficient evidence that he is responsible for the Victim's murder or Jeffrey's attempted murder under an accomplice theory; therefore, the trial judge should not have charged this alternative theory of liability. Specifically, he alleges there is no evidence of an agreement to commit a crime between himself, Robertson, and White; therefore, Judge McCleod abused his discretion in giving the jury charge. Brannon is wrong.

> 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. A defendant may be convicted on a theory of accomplice

> liability pursuant to an indictment charging him only with the principal offense. Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. 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 [principal].

State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007)(internal quotations and citations omitted); *See also* State v. Harry, 420 S.C 290, 803 S.E.2d 272 (2017); State v. Larmand, 415 S.C. 23, 780 S.E.2d 892 (2015). "Under an 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.'" *See* State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002)(*quoting* State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. Condrey, 349 S.C. at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime); Langley, 334 S.C. at 648-49, 515 S.E.2d at 101.

ARGUMENT I.

Judge McCleod correctly charged accomplice liability where there was overwhelming evidence in the record from which the jury could find Brannon committed the crime with Robertson and White, all 3 had agreed to commit the crime together, were acting together, and were aiding and abetting each other including committing overt acts in furtherance of the common design.

Here, competent evidence existed from which the jury could conclude Brannon did not act alone. Here there was overwhelming evidence, both direct and circumstantial, from which the jury could find Brannon, Robertson, and White agreed to and did act together and in concert in the

murder of Victim and the attempted murder of Jeffrey. Condrey, 349 S.C. 184, 193-94, 562 S.E.2d 320, 324-25 (In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties.); Langley, 334 S.C. at 648-49, 515 S.E.2d at 101.

The evidence at trial showed Brannon and Robertson were talking privately in the club after O.B. interrupted their circle when they were making signs with their hands and after Jeffrey pulled O.B. out of that circle. Brannon and Robertson were looking at Jeffrey as they were speaking privately. Robertson bumped Jeffrey with his shoulder. The look from Brannon and Robertson gave Jeffrey concern, and he entered the club bathroom where another friend was talking with Brannon. Jeffrey tried to apologize for O.B.s actions but the 2 men in the bathroom both confronted Jeffrey with a similar look. Brannon then showed Jeffrey a firearm. Jeffrey decided it was time for his group to leave the premises. The other members of Victim's group testified similarly. When they saw Brannon and his group making signs with their hands, they became concerned and decided it was time to leave the club. Victim's group walked up the hill to where they had parked their 2 cars. Brannon and Robertson followed Victims' group up the hill to where Victim's group parked their cars. Brannon and Robertson had ridden to the club with Stroman and White, and Stroman had parked their vehicle, the burgundy Grand Marquis, **in the bottom parking lot next to the club.** It was unnecessary for any of their group to go up the hill to where Victim's group was located and parked. Both Brannon and Robertson were carrying firearms as they walked up the hill following Victim's group. The Grand Marquis followed Brannon and Robertson slowly up the hill right behind the 2 men, pulled past them as they stopped walking, and then stopped. This basically trapped Victim between the Grand Marquis and Brannon

and Robertson. White got out of the back passenger seat of the Grand Marquis also armed with a pistol. When Brannon and Robertson reached Victim's group, **Brannon stated** out loud: "Where them pussy mother-fuckers at? or something similar. Further, the 3 men, Brannon, Robertson, and White, all fired their guns in the direction of all of Victims 's group at the same time striking 2 victims and numerous vehicles. This was an overt act in furtherance of the crime. State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2020). Victim was shot 5 times. And, the fatal gunshot to Victim was not fired by the gun Brannon hid in the bushes at Creekview Apartments, the Ruger 9mm, assuming that is the gun he was carrying and using, not another of his group's guns, but Victim was definitely shot by weapons consistent with those believed to be carried by Robertson and White.[8] The fatal gunshot was fired by a gun consistent with one believed to be carried by Robertson based on circumstantial evidence. And, the other bullet recovered from Victim's body at autopsy did not come from Brannon's 9mm Ruger, if the gun discarded at Creekview Apts. is believed to be Brannon's. That bullet was fired by a bullet consistent with one coming from White's gun. Victim also had 3 through and through gunshot wounds, and it is unknown which of the 3 perpetrators fired those bullets. Brannon could have fired 1 or more of those shots that struck Victim. As a result, the evidence was clearly equivocal whether Brannon fired the fatal shot or 1 of the other perpetrators, and it is more probable Brannon did not fire the fatal shot. But it is clear, from the direct and circumstantial evidence, that all 3 perpetrators had agreed to confront at least 2 of the men that offended them in the night club, and they aided and

[8] The only gun of the 3 perpetrators that was recovered was the Ruger 9mm found in the bushes at Creekview Apartments. This gun had no fingerprints or DNA on it. It was the State's theory this was Brannon's gun because of the picture posted on-line the same night as the crimes at another party where Brannon is holding a 9mm Ruger *and* Brannon hid the gun after the crimes in the bushes at Creekview Apartments. Brannon's pre-trial statement admitting the gun was his was not admitted in evidence at trial, so it is irrelevant to the analysis here. It is also possible the 3 perpetrators switched guns before or after the crimes or both.

abetted each other at the time of the shooting including overt acts. They were acting in concert. They fired a total of 34 shots between them and left 3 different groupings of shell casings according to the State's firearms expert, and the remainder of the evidence shows the 3 perpetrators fled the scene together in Stroman's car. Each man committed an overt act in furtherance of the crime. Mattison, 388 S.C. at 479-80, 697 S.E.2d at 584. They then acted in concert after the crimes, fleeing the scene, disposing of evidence, and communicating by phone. The charge of accomplice liability and the hand of one is the hand of all was appropriate. Washington; Barber; Wilds.

Brannon argues there is no evidence of an express agreement, i.e. none of the members of the conspiracy or agreement to assault the victims testified to the agreement. That is unnecessary. Condrey, 349 S.C. at 193, 562 S.E.2d at 324-25; Langley, 334 S.C. at 648-49, 515 S.E.2d, at 101. This is especially true here where no co-defendant is cooperating with the State and willing to testify. It would be impossible to prove an express agreement in a case such as this. South Carolina law recognizes the agreement can be proved by the direct and circumstantial evidence in the case, such as the defendants' actions in this case. Id.

Detailed Evidence Supporting the Accomplice Liability Charge

Brandon Jeffrey, the surviving victim, testified to what occurred inside the nightclub. Brandon's friend O.B. wandered into a crowd of individuals dancing in a circle and making signs with their hands. Those individuals, which included Brannon and Robertson, took offense to O.B.'s actions and to Jeffrey pulling O.B. out of that group or crowd of people. Both Brannon and Robertson were talking to each other privately and looking at Jeffrey in such a way that Jeffrey became apprehensive. Jeffrey then entered the bathroom and Brannon again looked at Jeffrey in such a fashion that Jeffrey was apprehensive, *and* Brannon showed Jeffrey a handgun. Another individual in the bathroom also looked at Jeffrey in such a fashion that Jeffrey was apprehensive.

Jeffrey decided based on what had occurred in the club it was time to leave the club altogether. Barnes also testified, when he saw the group of people making signs with their hands that it was time to leave the club. O.B. testified similarly. Jeffrey and O.B. left the club and met up with Victim and Barnes outside, and they all started walking up the hill to their cars along with Dee Dee. Once they reached the cars, Jeffrey witnessed Brannon walking toward them up the hill swinging a gun. There was a group of men with Brannon. Robertson was with Brannon. The witnesses and the physical and circumstantial evidence established Robertson had a gun as well. Barnes had gotten to his car, and he also witnessed Brannon and other men walking together toward them. One (1) of the eyewitnesses saw a burgundy Grand Marquis slowly following Brannon, Robertson, and the other men as they walked up the hill toward Victim's group, and the burgundy Grand Marquis pulled just past where Victim's group had parked their 2 cars boxing Victim in as Brannon and Robertson came to a stop on foot near the front of Victim's group's 2 cars. A man got out of the driver's side rear of the burgundy Grand Marquis. That individual was Tyrese White. White had a gun in his hand and raised his arm with the gun in it. One (1) witness also saw another man get out of the back of the Grand Marquis but did not see a gun in this man's hand. All of the witnesses heard Brannon state as he was walking toward Victim's group carrying a gun, and as Robertson was beside him with a gun: "Where them pussy mother-fuckers at?" or something similar. It is clear Brannon and his co-defendants were angry about what had occurred in the club. Victim had reached the door of the Stratus and turned, walked toward Brannon, and asked Brannon: "who are you looking for" or "who are you talking about?" Brannon stated: "not you" or "it's not about you." At that point, according to the eyewitnesses and the physical evidence found at the scene, gunshots were fired by Brannon, Robertson, and White at the same time. Victim was shot 5 times and fled and collapsed nearby. Some of the shots to Victim were through

and through gunshots. Victim died and never fired his weapon, a semi-automatic Walther P. .22. Jeffrey, who pulled O.B. off the dance floor, was shot 2 times in the legs and crawled up under Dee Dee's car. As more shots were being fired, Barnes crawled in his car and retrieved a 9mm pistol from the glove box and returned fire. The 3 perpetrators, Brannon, Robertson, and White fired a total of 34 times at Victim's group at the same time and in addition to killing Victim and wounding Jeffrey, flattened the tires on Dee Dee's car and struck other vehicles. Mattison, 388 S.C. at 479-80, 697 S.E.2d at 584. The 3 perpetrators left 3 separate groupings of fired shell casings. Brannon, Robertson, and White then got in the burgundy Grand Marquis with Stroman, the driver, and tried to flee the crime scene, but Stroman was struck in the back of the neck by a bullet fired by Barnes. The 3 perpetrators had to switch drivers. The perpetrators then fled to Creekview Apartments in Batesburg; and, once they arrived there, they were seen arriving at the apartment complex with other vehicles.[9] An eyewitness saw 4 of the men get out of the burgundy Grand Marquis and some left the scene in other vehicles, i.e. Robertson and White fled showing a consciousness of guilt. Beckham, *supra*; Al Amin, *supra*. Brannon stayed with his friend Stroman who was shot, but Brannon had the wherewithal to hide a 9mm handgun in bushes nearby before police arrived. Police recovered the 9mm pistol, a Ruger, that Brannon hid in the bushes.[10]

When police processed the crime scene at the nightclub, they found 4 separate groupings of fired shell casings, 1 of which belonged to Barnes who had returned fire. There were 3 different groupings of fired shell casings fired by the 3 perpetrators, 34 fired casings in all. Brannon fired 5 shots with the 9mm Ruger resulting in 5 fired shell casings being found near where he was

[9] Flight is evidence of guilt when sufficiently connected to the murder, as it was in this case. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Al Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

[10] Beckham, 334 S.C. 302, 513 S.E.2d 606 (the destruction of attempted destruction of evidence is evidence of consciousness of guilt).

standing at the time of the crimes, all matched to the Ruger 9mm Brannon hid in the bushes at Creekview Apts. Robertson fired 15 shots with his Smith and Wesson 9mm resulting in 15 fired shell casings being found located near where he was standing which all came from the same gun. And, White fired 14 shots with the .40 caliber semi-automatic pistol resulting in 14 fired shell casings being found near where he was standing when he got out of the burgundy Grand Marquis and started shooting. These were all fired by the same gun.[11]

In addition to this evidence, additional evidence tied all 3 perpetrators together. Stroman testified reluctantly as a hostile witness but admitted he, Brannon, and Robertson came to the club together in his burgundy Grand Marquis. CSLI also showed the men came to the club together, and surveillance video from a local truck stop about 1 mile from the club showed Stroman and the 3 perpetrators together minutes before they went to the club. Of course, evidence established that Stroman was shot as he left the club, and he admitted to police 2 of the perpetrators, Brannon and Robertson, got in his car as they fled the shooting. CSLI established the 4 men fled to Creekview Apartments. An eyewitness saw the perpetrators arriving at Creekview Apartments in Batesburg and saw some of the men [White and Robertson] fleeing from there in other vehicles. Batesburg police responded and captured a wounded Stroman, his bullet riddled burgundy Grand Marquis, and Brannon nearby. Police recovered Brannon's 9mm Ruger pistol, if the perpetrators did not switch guns, in bushes near the front of the Grand Marquis where Brannon had been standing.

Police used text messages and internet posts to also establish who possessed what weapon and to tie the 3 perpetrators together in addition to their actions. The State introduced posts by Robertson trying to sell a 9mm Smith and Wesson hours before the crimes. Police also tied the

[11] The identification of who was shooting which gun is based on the evidence at trial and the assumption that the defendants did not switch weapons before or after the crimes, or both.

.40 caliber shell casings to White through another crime in Great Falls where he fired the same .40 caliber pistol. The 3 perpetrators texted each other or friends or received texts from friends discussing the shooting after the crime. One (1) text asked a friend if they knew of a place where they could lay low after the crimes. Phone records showed Robertson called his girlfriend on White's phone to come and pick him up at an isolated location at around 5:00 a.m. Another text asked if the men fired a gun in the Grand Marquis because police had seized it or the Ruger 9mm.

The pathologist recovered 2 fired bullets at autopsy, but Victim was shot 5 times. The fatal shot went through the victim's right arm, through his chest, and lodged in his left arm. It was determined this bullet was not fired by the 9mm Ruger Brannon hid at Creekview Apts. The other bullet recovered from Victim's body was also not fired by the Ruger. The fatal bullet was consistent with having been fired by a Smith and Wesson 9mm like Robertson was trying to sell. The other bullet recovered was consistent with being fired by a .40 caliber.

Brannon argues there is no evidence of an agreement between the perpetrators to commit a crime, therefore, accomplice liability should not have to be charged. Brannon is wrong. First, an indictment for conspiracy or of a co-defendant is not a requirement for a jury instruction on accomplice liability, and this proposition falls flat given the evidence. Barber, *supra; See* Butler v. State, 435 S.C. 96, 866 S.E.2d 347 (2021) (it matters not that a co-defendant or co-defendants were acquitted in a separate trial or trials, what matters is what evidence was presented at this defendant's trial whether accomplice liability applies). The testimony, physical evidence, video surveillance, text messages, and phone records make State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020), which Brannon argues, inapplicable.

Brannon erroneously relies on Wilds v. State, 407 S.C. 432, 439, 756 S.E.2d 387, 391 (Ct. App. 2014). This case is distinguishable from Wilds. In Wilds the identity of the shooter was

known in that case. 407 S.C. at 439, 756 S.E.2d at 390. As a result, accomplice liability was not a fact in dispute. In contrast, Brannon's case meets the standard enunciated in Barber, where "the sum of the evidence presented at trial . . . was equivocal" as to who shot the 2 victims, Brannon alone or Brannon and another, or White and/or Robertson. 393 S.C. at 236, 712 S.E.2d at 439. The 2 victims were shot multiple times in the hail of bullets from 3 men. But there was plenty of evidence Brannon, Robertson, and White all fired their guns because of what occurred in the nightclub minutes earlier. The 3 perpetrators arrived at the club in Stroman's car and parked at the bottom of the hill near the club. After they took offense to what O.B. and Jeffrey did in the club, Brannon and Robertson walked up the hill together both following Victims' group with both Brannon and Robertson armed with pistols and White followed slowly in the back of Stroman's car. It was unnecessary for Brannon's group to walk or drive up to the upper parking lot from where they had originally parked. The only reason they went up the hill was to confront and shoot Victim and his group. When Brannon and Robertson reached the top of the hill where Victim and his group were located, the Grand Marquis containing White slowly pulled past Brannon and Robertson and Victim's group's cars and stopped blocking Victim in. White then got out of the back of the Grand Marquis armed with a pistol and raised it. The 3 perpetrators fired a total of 34 shots **at the same time** at the same victims **after Brannon asked where certain persons were,** and Victim made a minor statement to Brannon. Mattison, 388 S.C. at 479-80, 697 S.E.2d at 584. The 3 perpetrators left 3 different groupings of fired shell casings in the relative location where they were standing when each fired shooting 2 victims, threatening the lives of several other individuals, and damaging numerous vehicles. The 3 perpetrators then left the scene together with Stroman in his burgundy car until Stroman was shot. Brannon then had to drive the getaway vehicle, and they proceeded to Creekview Apts. where 4 men were seen getting out of the car.

Brannon stayed with Stroman who was wounded and discarded the Ruger 9mm. Robertson and White fled from that scene taking their guns with them. They then began communicating again by phone or text coordinating their escape. Given the totality of the evidence, the accomplice liability instruction was not charged in error. Washington, 431 S.C. at 407, 848 S.E.2d at 786, *quoting* Barber v. State, 393 S.C. at 236, 712 S.E.2d at 439. *See generally* Butler v. State, 435 S.C. 96, 866 S.E.2d 347 (2021)(discussing accomplice liability). Based on the actions of the perpetrators and the direct and circumstantial evidence, there was clear evidence of an agreement between the 3 perpetrators to follow Victim's group up the hill and shoot those they believed had angered them inside the club. Langley, 334 S.C. at 648-49, 515 S.E2d at 101; Condrey, 349 S.C. at 193-94, 562 S.E.2d at 324-25 (In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State can prove an agreement by circumstantial evidence and the conduct of the parties).

Judge McCleod must be affirmed. There was more than sufficient direct and/or substantial circumstantial evidence Brannon was guilty of murder under South Carolina's law of parties to a criminal offense. *See* Harry, 420 S.C 290, 803 S.E.2d 272; Larmand, 415 S.C. 23, 780 S.E.2d 892; State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2012); State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007)(evidence the defendant and co-defendant together chased after 2 men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion); *see also* Langley, 334 S.C. at 649, 515 S.E.2d at 101 (evidence the defendant and co-defendant were seen together, circumstantial evidence placing defendant at the crime scene, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on any theory of liability, including the hand of one is the hand of all theory).

Additionally, this case is distinguishable from State v. Johnson, 438 S.C. 110, 882 S.E.2d 190 (Ct. App. 2022), *cert. granted* April 20, 2023, and State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert granted* September 8, 2022. The evidence is overwhelming Brannon, Robertson, and White were all acting together, and all fired their weapons at the same time, and there was an agreement between them to go up the hill and shoot those who had offended them in the club.[12] Langley; Condrey. The evidence, and all its inferences viewed in the light most favorable to the State, especially the actions of Brannon and his co-defendants, proves there was an agreement to shoot some of Victim's group and Victim was murdered and Jeffrey shot. Judge McCleod did not abuse his discretion charging accomplice liability.

APPELLATE ISSUE II.

Whether the trial judge erred in admitting alleged gang references?

What occurred below

A pre-trial hearing was held before Judge McCleod on the Friday before trial, November 12, 2021. (R, 1-127). At that hearing, among numerous other pre-trial issues and topics, Brannon objected to the admission of any evidence of gangs or gang activity. (R. 13; 18-19). The Solicitor responded by explaining to the Court exactly what happened in this case:

> Your Honor, in terms of gang reference, the way the facts naturally present, so this obviously was a shooting that occurred at 1150 Parrish Road in Leesville area of our county. Around 3:14 [a.m.] was when the 9-1-1 call was placed. There were approximately 41 gunshots that happened outside of that club that day. Present in the club, the State alleges that both defendants were in the club along with Antonio Stroman, along with Tyrese White, along with other people. While they were in the club, our victim - - deceased victim as well as our surviving victim was in the club along with friends and cousin.

[12] As noted, the South Carolina Supreme Court has granted certiorari in Johnson and granted motion to argue against precedent, and the Court has also granted certiorari to review the decision in Campbell. But that is of no moment here, because even under Barber and other precedent, Appellant, Robertson, and White all fired their weapons at same time.

> While they [the victims and the victims' group] were in the club, the defendants were in there, and they were throwing up gang signs and jumping around. At one point someone from the victim's side goes into the crowd, they're jumping around, the surviving victim pulls him [O.B.] out. Shortly thereafter, they leave the club and the shooting happens. And so in the natural, factual presentation, no matter how we cut and slice it, that's the facts of the case.

(R. 18, ln. 17 – 19, ln. 11). The Solicitor then stated that the State would abide any instruction from the Court because the latest case, Johnson v. State, 433 S.C. 550, 860 S.E.2d 696 (Ct. App. 2021), provides if there's a motive or intent that's connected to gang activity, the State does have some latitude in presenting that evidence. However, the State was not going to get into potential character evidence *per se*, i.e. characterizing the gang, describing it, and so forth. The Solicitor stated the State would only offer a brief factual presentation limiting it as much as possible to what triggered the shootings. But, the Solicitor made clear it was almost impossible to present a narrative to the jury of what actually happened inside the club without presenting evidence of what actually occurred and why the victims left the club and were eventually shot. (R. 18-19). Judge McCleod stated he had just dealt with the issue in another trial and his inclination was to certainly limit the testimony and perhaps eliminate it all together. (R. 19-20). The State agreed with the Court and stated it would limit any testimony in this regard and follow any instructions by the Court. (R. 20). The Court agreed it would review the most recent case law and determine over the weekend what evidence, if any, it would admit and inform counsel on Monday after jury selection. (R. 20-22). The Court then moved onto other pre-trial motions and matters. (R. 22). Later the Solicitor asked the Court for a ruling on this issue before opening arguments and calling witnesses. (R. 104-05). The Court indicated it would e-mail counsel a ruling that afternoon if possible. (R. 105). The Court then indicated it wanted to carefully look over this issue and review Johnson v. State, 433 S.C. 550, 860 S.E.2d 696. The Solicitor informed the Court it was relying on Johnson v. State, *supra*, as well. (R. 111). Robertson's counsel also indicated to the Court that

Johnson v. State was the most recent case on the issue, and it could be argued both ways in this case. The key according to defense co-counsel was motive and intent. He claimed the Solicitor had misinterpreted the case. (R. 114, ll. 15-22). Judge McCleod stated he was going to look at the admissibility of this evidence that afternoon pursuant to Johnson v. State, which all agreed was controlling. (R. 124).

The trial began on Monday and the record does not indicate what Judge McCleod's specific ruling was, if any. No e-mail from the Court was included in the Transcript or put on the record, and there is no mention of the Court's ruling, if any, before or after jury selection or before opening statements. (R. 128-200). The only mention of the issue is in an *in camera* argument on another issue, an objection to a diagram offered by the State. (R. 249, ln. 19 – 256, ln. 15). There, counsel objected to a diagram depicting who came to the scene in each car, both Victim's group and their cars, and Brannon's group and their car, in colored rectangles/boxes. (R. 249 – 56; Court's Ex. 3 for I.D.). During this argument, counsel complained that Stroman's car, represented by a box or rectangle, containing the names of Stroman, Brannon, Robertson, and White, was red. (R. 249-256). Counsel complained the State was trying to imply a possible gang relationship and red also means danger, like a stop sign. (R. 251). Co-counsel also objected that red is the color of blood. (R. 251). The Solicitor explained she had previously used the diagram in another trial, she also used primary colors here, and she would change the color to burgundy, like Stroman's car, if the court and counsel wished, but she was not trying to imply any gang relationship or danger or blood. (R. 252, ll. 1-15). The Court asked the Solicitor to change the color of Brannon's car to burgundy and asked: "Was this the color of the gangs we're not mentioning in trial." (R. 253, ll. 6-7). The Solicitor explained she did not even think about that, but only 2 of the defendants were Bloods, but that was not the State's intent. (R. 253, ll. 6-19). The State agreed to change the color to

burgundy. Defense counsel stated it still objected to the color burgundy and stated it objected to any color in the diagram for the victims' cars or defendants' cars. Judge McCleod held he was fine with the diagram as changed and overruled the objection to the changed diagram. (R. 255). The trial then proceeded. (R. 256). All this is stated to show it is unclear if Judge McCleod ruled on the pre-trial objection *or* the parties simply agreed in chambers to not mention any gangs' names during the trial and that resolved the issue. ["Was this the color of the gangs we're not mentioning in trial?" A. "I didn't even think that."] (R. 253, ll. 6-8). This will become apparent as Respondent discusses what occurred next.

Opening Statements / No Objection

The Solicitor [Mr. McNair] then gave his opening statement to the jury and first explained who the Victim was and the individuals in Victim's group. (R. 200-873). The Solicitor explained how Victim and his group came to be at the club before the crimes occurred. The Solicitor then explained to the jury what the evidence would show happened inside the club **that caused Victim and Victim's group to flee the club and return to their cars and led to Brannon and his co-defendants to follow Victim and his group out of the club and up the hill where they surrounded Victim and his group and committed the crimes.** The Solicitor stated as follows:

> Why would somebody do this? Why would somebody do something so wicked, so senseless, so depraved? The facts are that on June 6th of 2015, at a place call The Spot, a club in Batesburg, OB, who I just mentioned, was in the club having a good time on the dance floor. He happened to get in the middle of these defendants' group with their associates as they were jumping around flashing signs. He crossed a line he didn't know he had crossed.
>
> Brandon Jeffrey saw what was going on. He went and pulled OB out of the circle. They didn't mean any disrespect, but that almost cost them their lives.
>
> Shortly after that, Brandon Jeffrey gets a bad feeling for being in the club, sees these defendants looking at him. He and all his friends, O'Brian Gilliam, William Gant, Andy Barnes, Dominque Williamson, they all leave the club.

> They go to where their vehicles are parked. Next thing they know, these two are walking up, guns in hands, [“] Where they at? [“]
>
> Shine stands up and says, Who you talking about? And they open fire 34 times. William Gant is hit 5 times with multiple bullets. Brandon Jeffrey hit twice in the leg. Dominque Williamson is just sitting in her car putting on makeup as its’s shredded with bullets. By the grace of God, O’Brien Gilliam didn’t get hit, Andy Barnes didn’t get hit. They were standing by the vehicles as well. As he’s taking fire, Andy Barnes is able to get into the driver’s seat of his vehicle, crawl to the glove box, get his gun, and return fire, which is probably the only thing that saved him.
>
> Most of his shots hit the vehicle he was crouched behind, but a couple of shots hit the Grand Marquis, the burgundy Grand Marquis that you’re going to hear about in this case that the defendant’s came to the club in.
>
> That vehicle belonged to Antonio Stroman and he was hit in the back of the neck as they were leaving. These two defendants were in that vehicle so was a guy named Tyrese White, who is charged as the third shooter in this case.

(R. 202, ln. 4 – 203, ln. 21). As shown above, there was no objection when the Solicitor simply explained to the jury what happened inside the club that led to the shooting outside. (R. 202, ln. 4 – 203, ln. 21). The Solicitor continued explaining to the jury what the evidence would be and ended his closing argument. (R. 203 – 209). Again, there was no objection. (R. 203-209). The defense attorneys then gave their opening statements, and Brannon’s attorney told the jury **that what the jury would not hear is a motive for the shootings.** (R. 209, ln. 14 - 221, ln. 11; 217, ll. 9-11).

The Trial Testimony Begins

The trial then began with the first 2 responding officers. After they testified to Jeffrey’s excited utterances at the truck stop and hospital identifying Brannon and Robertson as the shooters, the trial recessed for the day. (R. 244-247). There was nothing placed on the record about the present issue. (R. 244-47). There was an overnight recess, and in the morning before Jeffrey testified there was the discussion about a body cam video from an officer and the objection to the

color of Stroman's car on the diagram previously discussed. (R. 247-256). Jeffrey, the surviving victim, then testified. (R. 256-forward). During his testimony, Jeffrey testified about what occurred inside the club that led to the shooting. (R. 266-68). He testified as follows:

> Q. Did you have an opportunity to see Donovan Tirrell Brannon in The Spot that night?
>
> A. Yes.
>
> Q. Tell me about that. When did you see him?
>
> A. When did I see him.
>
> Q. Yeah.
>
> A. I saw him – it was – that was just about as soon as I got in there.
>
> Q. Okay. All right. What, if anything – did you speak with him? Or what, if anything did you observe?
>
> A. I didn't speak to him until I pulled my cousin out the group on the dance floor?
>
> Q. Tell me about that. Your cousin, who's your cousin?
>
> A. Cousin OB.
>
> Q. And you pulled him out of the group on the dance floor?
>
> A. Because I was like – they was doing the jumping around or whatever, you know, throwing up those signs. And I was like, we ain't here for that, you know what I'm saying. So I pulled him out the crowd.
>
> Q. So you pulled OB out. And then what happened?
>
> A. That's when the dude, Red Nose [Robertson], I don't know if he's like trying to figure out why I pull him out the crowd or what. But that's when he went to Fresh [Brannon] you know what I'm saying; came by, [Robertson] kind of bumped me. Fresh [Brannon] like, oh, what's up, Pedro? We dapped up, what's up, you know, everything is everything. That's how that went. That's how I spoke to Fresh.

(R. 266, ln. 5 – 267, ln. 13). There was no objection to Jeffrey testifying Brannon and his group were on the dance floor "throwing up those signs." (R. 266-267). Jeffrey then explained who Robertson was, Shantrez Robertson, also known as Red Nose. (R. 267-68). Jeffrey then explained

that after he and Brannon "dapped" each other, that Brannon and Robertson were talking and looking at him. He could not hear them, but he got the impression Robertson was not happy with him. (R. 268, ll. 5-21). Jeffrey then explained he left the club because of what happened on the dance floor and when he went in the bathroom a friend also looked at him in a similar fashion and Brannon showed him a gun. (R. 269, ll. 9-19; 270 ll. 1-3; 266-68). Jeffrey explained that is when he left the club and met Victim and Barnes outside. The rest of Victim's group came out of the club, and they walked up the hill to their cars. Brannon and Robertson then followed them with guns and Brannon stated as he was coming up behind them: "Where them pussy niggas at?" After Victim asked Brannon who he was talking to, Brannon and Robertson opened fire. (R. 269-74).

The next eyewitness to testify was Andy Barnes. Barnes nickname is Teddy P. Barnes testified similar to Jeffrey that Victim's group went to the club that night because Dee Dee wanted to go. There were 5 of them who went, and Victim rode with Barnes in his Dodge Stratus. The other 3 rode in Dee Dee's Dodge Charger. When they reached the club, they parked side by side in the upper parking lot. They all walked down the hill, and 3 went in the club together. Barnes and Victim remained outside. Victim was stopped by security and was made to return to Barnes' car and place his gun in the car. When Victim returned, Barnes and Victim entered the club. Once they got inside, Barnes and Victim walked to the edge of the dance floor where Jeffrey and O.B. already were. Barnes then testified as follows:

> Q. Now, while you were standing there by the floor, did you see anything that concerned you?
>
> A. Yeah.
>
> Q. Okay. Do you know – or prior to that night, did you know a guy named Fresh [Brannon]?
>
> A. Yes, sir.

Q. Do you see him in the courtroom today?

A. Yes, sir.

(R. 607, ln. 10-15). After confirming Fresh was the defendant Brannon, Barnes continued to testify as follows:

Q. When you're standing there by the [dance] floor, did you see Fresh?

A. Yes, sir.

Q. Was he with other people?

A. Yes, sir.

Q. What did you observe him doing?

A. Um –

Q. Let me ask very specific questions. Did you observe him, for lack of a better word, jumping around?

MR. WILLIAMS: Objection to leading, Your Honor.

THE COURT: Real quick, y'all come up.

(Sidebar conference.)

BY MR. MCNAIR

Q. Did you observe him jumping around?

A. Yes, sir.

Q. Did you observe him doing things with his hands?

A. Yes, sir.

Q. And did that concern you?

A. Very.

Q. And was he with other people?

A. Yes, sir.

Q. After you saw that, what did you and the others with you do?

A. Oh, man, I throw my beer away and walked out the door. Time to go then.

Q. Okay. Who left the club with you at that time?

A. Me and Shine [Victim] had walked out first.

Q. Y'all walked out first?

A. Yes, sir.

Q. Where were the others?

A. Brandon and them were still in there.

Q. All right. Did they leave shortly after y'all?

A. Shortly after, uh-huh.

Q. Do you remember – well, did you see Brandon Jeffrey after you left the club prior to getting up the hill?

A. Yes, sir. He had came up to us and stopped us and said them boys got them guns up in the club and - -

MR. WILLIAMS: Objection, Your Honor.

A. - - they going to start - -

THE COURT: Please stop talking, because an objection is made.

(R. 607, ln. 22 - 609, ln. 17). The Court sustained the objection to the hearsay statement of Jeffrey to Barnes outside the club and struck the hearsay statement. The State sought to admit the hearsay through an exception. (R. 609-15). The Court allowed Barnes to testify that when he saw Jeffrey immediately outside the club, something had startled Jeffrey inside the club. (R. 609-15). And, as a result of talking with Jeffrey, Barnes made a decision to leave the club property as well, and the group started up the hill toward their cars with O.B. straggling behind. (R. 615-16). When they got to the top of the hill, Brannon came walking up the hill swinging a gun and asking: "Where

them pussy motherfuckers at?" (R. 616, ll. 1-25). A burgundy Crown Vic pulled up and someone got out of it. When Victim asked Brannon who was he talking about, that is when the shooting started from the direction of Brannon. (R. 616-20). As shown, there was no objection to Barnes testifying Brannon was on the dance floor with a group doing things with his hands. (R. 608). There was no objection to Barnes testifying when he saw Brannon doing this, it caused him to leave the club. (R. 608-09).

The next eyewitness to testify was O'Brian Gilliam ("O.B."). O.B. testified similar to the other eyewitnesses. Victim's group went to the club in 2 different cars. There were 5 people in all. They parked in the upper parking lot and walked down to the club. O.B. thought the entire group entered the club together. O.B. eventually went onto the dance floor. O.B. knew Brannon because he had seen him a couple of times before and saw Brannon in the club that night with other people. He then testified as follows:

Q. When you were on the dance floor, did you see what he [Brannon] was doing?

A. They was on the dance floor dancing.

Q. Okay did you see them doing anything with their hands?

A. Yes, moving their hands.

Q. Okay. Making signs with their hands?

MR. WILLIAMS: Objection, Your Honor.

A. Yes.

MR. MAULDIN: Join in.

THE COURT: Overruled.

BY MR. MCNAIR:

Q. When that was going on, were you out on the dance floor with them?

A. Yes.

Q. What happened at that point?

A. At that point, everybody was dancing. Then Pedro - - not Pedro. But they shook all our [sic?] hands in the club.

Q. Did Pedro, Brandon Jeffrey, come out to where you were at any point?

A. Yes. He came and got me after that.

Q. Came and got you out of the group?

A. Yes.

Q. Okay. And when you said Fresh [Brannon] was out there, he was out there with other people that had he appeared to be with?

MR. WILLIAMS: Objection to leading.

A. Yes.

Q. So you saw Fresh and you saw other people with Fresh?

A. Yes.

Q. Now, after Pedro, Brandon Jeffery, came to get you, what happened after that?

A. After Pedro [Jeffrey] came and got me, we left the club.

Q. Why did you leave the club at that point?

A. He said it's time to go.

Q. Did he appear to be concerned about something?

MR. WILLIAMS: Objection to that, Your Honor.

THE COURT: Let me speak to y'all real quick.

(Sidebar conference.)

BY MR. MCNAIR:

Q. When Brandon Jeffrey came to get you, how did he appear to you,?

A. Like he was worried.

Q. Okay. And after that, y'all left the club?

A. Yes.

(R. 805, ln. 24 -807, ln. 21). O.B. then testified to the group walking up the hill, Brannon and others following them to their cars, the Grand Marquis pulling up and someone getting out, Brannon stated" "where they at?", and Victim was shot after he asked Brannon who he was talking about, and Jeffrey was shot as well. (R. 808-812).

The first objection in the record to any statement by the Solicitor about hand signs or question to any witness about whether Brannon and his group were making signs with their hands was to the 3rd eyewitness, **and** it was a general objection to a leading question and a question that had been asked and answered. (R. 806, ll. 2-9). The witness then testified he was out on the dance floor when that happened, and Jeffrey came and got him off the dance floor and they left the club. (R. 806-07). These were the same facts stated in opening that was not objected to and the same facts testified to by 2 previous eyewitnesses not objected to. And, the objection here was a general objection to a leading question and one previously asked and answered. (R. 806, ll. 2-9).

Lack of Preservation of the Issue

This issue is not preserved for appeal.[13] A pre-trial objection in a pre-trial motion *in limine* does not preserve an issue for appeal, whether granted or denied. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988); Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 219 (Ct. App. 1997); State v. Mueller, 319 S.C. 266, 460 S.E.2d

[13] Respondent would note for the Court, although Brannon and his co-defendant Robertson were tried together, Robertson is not raising this issue on direct appeal. State v. Santrez Alejandro Robertson, Appellate Case #2021-001405.

409 (Ct. App. 1995).[14] The objection to the challenged testimony must be made at the first available opportunity when the evidence is offered. Id., 312 S.C. 502, 435 S.E.2d 859; Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992); State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)(in order to preserve a trial error for appellate review, the appellant's objection must be contemporaneous to the introduction of the objectionable evidence); Medlock v One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996).

The Solicitor told the jury in opening argument the evidence would show Victim's group entered the club and 1 of their group, O.B., got into the middle of Brannon's group while Brannon's group was jumping around and flashing signs, and in doing so O.B. crossed a line he did not know he had crossed. And, as a result of seeing what was going on, Jeffrey went and pulled O.B. out of Brannon's group. And, while they did not mean any disrespect to Brannon and his group, it almost cost them their lives. (R. 202, ll. 4-15). There was no objection to the opening statement. (R. 199, l. 9-12). Then, after 2 responding officers testified, and other witnesses, 2 different eyewitnesses, Jeffrey and Barnes testified to the same thing as the Solicitor stated in her opening argument. Both witnesses testified Brannon and his group were on the dance floor jumping around and making or flashing signs with their hands and this caused Victim's group to become concerned and to leave the club. (R. 266-67; 607-609). There was no objection to this testimony. (R. 266-67; 607-09). When O.B. testified to the same thing, there was only a general objection to the question which

[14] This not a case where a *motion in limine* was held and then the witness was immediately called. This is not a case where the trial judge ruled and stated counsel did not need to renew their objection. Not only was the pre-trial hearing on the Friday before trial, but numerous witnesses were called before any type of objection was raised. Several witnesses testified to the same thing without objection before an objection was raised, and there is no evidence in the record the trial court told counsel they did not have to object at the time the evidence was offered. *See* Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997); Mizzell v. Glover, 339 S.C. 567; 529 S.E.2d 301 (Ct. App. 2000); State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Humphries, 346 S.C. 435, 551 S.E.2d 286 (Ct. App. 2001). This issue is simply not preserved.

was leading and had been asked once and answered. And, there was no objection to O.B. testifying Brannon and his group were doing things with their hands. (R. 806, ln. 3). As a result, the issue is not preserved for appeal. Schumpert, 312 S.C. 502, 435 S.E.2d 859; Floyd, 295 S.C. 518, 369 S.E.2d 842; Samples, 329 S.C. 105, 495 S.E.2d 219; Mueller, 319 S.C. 266, 460 S.E.2d 40; Parr, 309 S.C. 477, 424 S.E.2d 515; Aldret, 333 S.C. 307, 509 S.E.2d 811; Medlock, 322 S.C. 127, 470 S.E.2d 373.

Further, Brannon failed to have the Court place its' ruling on the challenged evidence set forth in the record. (See R. 128 – end; R. Nov. 12, 2021, 127). At no time did Judge McCleod place on the record what his holding was as to the evidence challenged in the pre-trial conference on Friday. (See R. 128 – end; R. Nov. 12, 2021, 127). No e-mail to counsel was included in the record, and Judge McCleod nowhere states what his holding was, except the mention of an apparent agreement not to mention any specific gangs. (See R. 128 – end; R. Nov. 12, 2021, 1-127). For all we know, an agreement may have been reached between the parties before opening argument and witnesses were called, to limit the testimony to the fact Brannon and his group were making signs with their hands, but no mention of gangs. Finally, it is impossible to determine whether the trial court abused its discretion or erred, when this Court does not know what the trial court specifically ruled; if it ruled at all. (See R. 128 – end; R. Nov. 12, 2021, 127). State v. Sterling, 396 SC. 599, 608-09, 723 S.E.2d 176, 181-82 (2012)(it is appellant's burden to present a sufficient record for appellate review); State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005).

Finally, the issue is not preserved by a general objection. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969)(a trial judge commits no error in overruling a general objection); Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)(to preserve an issue for appeal, specific grounds in support of the objection must be clearly stated); State v. Ivey, 325 S.C. 137, 481 S.E.2d

125 (1997)(an objection to testimony is unpreserved because the objection was too general and did not present any specific grounds to the trial court.); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(same). It appears appellant argues Rule 103(a)(1), SCRE, however the argument is unpersuasive. Why Brannon objected to O.B.'s testimony is not apparent from the record where Brannon did not object to the same matter or testimony 3 different times before this witness testified, Brannon did not object to the question prior to this specific question which could have elicited the same testimony, and the question here posed and objected to was a leading question and also one that had been asked and answered. The objection here could have been to the Solicitor asking a leading question or that the question had been asked and answered. (R. 806, ll. 2-9). *See* Wilder Corp. v. Wilkie, *supra*; State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).

ARGUMENT II.

If Judge McCleod did rule on this issue, and it was not an agreement between the parties, Judge McCleod did not abuse his discretion in admitting the limited testimony of what occurred inside the club that caused Victim's party to leave and resulted in the shootings as it was relevant and admissible evidence of motive and intent and *res gestae* of the crime, and its probative value was not substantially outweighed by any prejudicial effect where the objected to testimony was limited, cumulative to other evidence not objected to, and the defense claimed in its opening there was no evidence of motive; and finally the admission of this testimony was harmless beyond a reasonable doubt because it was cumulative to other evidence and Brannon's guilt was conclusively proved by other evidence.

Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974). 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. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997).

ARGUMENT

Petitioner argues that pursuant to Johnson v. State, *supra*, the trial court erred in admitting gang affiliation evidence. Petitioner is simply wrong. As pointed out above, there was no objection to the Solicitor's opening statement, the first 2 eyewitnesses' testimony, or the 3rd eyewitness' testimony prior to a leading question that had already been asked. As a result, this issue was waived. State v. Somerset, 276 S.C. 220, 277 S.E. 2d 593 (1981).

Further, Petitioner is wrong because there was no gang or gang affiliation evidence admitted. The only testimony the jury heard was Brannon and his group were making signs on the dance floor with their hands. The State did not introduce any evidence Brannon and his group were members of a criminal gang, which gang they were a member of, what their ranks or status was in any gang, and the inner workings of any such gang. Apparently, from an argument to the trial court on another issue, the parties had agreed not to mention any "gangs" in any testimony or Judge McCleod prohibited any mention of any "gangs." The State did not mention any gangs. That is why there was no objection to the State's opening, or to Jeffrey's or Barnes' testimony about what led to the shooting. And, again, why there was no objection to O.B.'s testimony until a leading follow-up question was asked. As will be explained below, this case is neither Johnson v. State, *supra* nor the recently decided State v. Robinson, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023). Finally, the admission of this limited testimony is harmless as it is cumulative.

This was clearly res gestae of the crime evidence

This evidence was "*res gestae* of the crime evidence" that was properly admitted. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258

(2001); State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000); State v. King, 334 S.C. 504, 514 S.e.2d 578 (1999); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997). Under the law of "*res gestae* of the crime," evidence as admitted here is proper when it furnishes part of the context of the crime or is necessary for a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the "res gestae" or is "…so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without the other." Adams, 322 S.C. at 122, 470 S.E.2d 370-71 (quoting United States v. Masters, 622 F.2d 83 (4th Cir. 1980); Benjamin, 345 S.C. 470, 549 S.E.2d 258; State v. Hough, 319 S.C. 104, 459 S.E.2d 863 (Ct. App. 1995), *affirmed* 325 S.C. 88, 480 S.E.2d 77 (1997); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). This is true, especially **in this case**, where the defense **claimed in opening statement that there was no evidence of any motive for the crime.** Even if this limited testimony about Brannon's group making signs with their hands constituted "bad act" evidence, South Carolina has long recognized when it occurs contemporaneous with the crime and is related to the crime, it is admissible as *res gestae* of the crime to fully explain the crime to the jury. State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997)(evidence defendant had stolen a car he was driving at time of felony DUI was admissible as *res gestae* of the crime); Hough, 319 S.C. 104, 459 S.E.2d 863 (Ct. App. 1995*, affirmed*, 325 S.C. 88, 480 S.E.2d 77; State v. Jiles, 230 S.C. 148, 94 S.E.2d 891 (1956); State v. Carson, 131 S.C. 42, 126 S.E. 757 (1925); State v. Martin, 94 S.C. 92, 77 S.E. 721 (1913); State v. Thrailkill, 73 S.C. 314, 53 S.E. 482 (1906)(victim's knowledge of his brother's murder was relevant to his

state of mind; further the transactions narrated in the testimony were closely connected with the homicide, and led up to it, were explanatory of it, and **tended to show the mental attitude of defendant acting in concert and sympathy with his co-defendant**); State v. Smalls, 72 S.C. 516, 53 S.E. 976 (1906)(conduct of defendants short time before crime which showed they were intoxicated, boisterous, threatening, and shot off guns several times was admissible and so closely connected to crime as to fall within *res gestae*). This is a separate method to admit the evidence than 404(b), SCRE. State v. Bolden, 303 S.C. 43, n. 1, 398 S.E.2d 494, 495, n. 1 (1990; *see also* State v. Smith, 309 S.C. 442, 451, 424 S.E.2d 496, 501 (1996)(Toal dissenting)(*res gestae* of the crime is a separate and independent method by which other evidence of possible bad acts can be admitted in evidence).

This evidence is also admissible under Rule 404(b), SCRE

Furthermore, even if this Court were to characterize this limited testimony as "gang evidence" it was not propensity evidence barred by Johnson. It was not offered to show Brannon was a bad person, but to establish the motive and intent for the murder and attempted murder which is allowed. In Johnson this Court stated:

> Our holding that in appropriate cases, Rule 404(b) authorizes admissibility of logically relevant gang evidence to prove motive and intent aligns with the decisions of numerous state and federal appellate courts. *See, e.g.*, United States v. Jackson, 918 F.3d 467, 483 (6th Cir. 2019) (gang evidence admissible to show motive and to explain how defendant ordered subordinate gang members to commit carjacking so stolen car could be used in retaliatory attack on rival gang); United States v. Dillard, 884 F.3d 758, 766 (7th Cir. 2018) (discussing probative value of gang membership evidence in conspiracy cases); Armstrong v. State, 310 Ga. 598, 852 S.E.2d 824, 830–32 (2020)(evidence of defendant's gang membership relevant, admissible, and not unduly prejudicial because it explained **motive actuating otherwise senseless shooting**); Smith v. Commonwealth, 454 S.W.3d 283, 286–88 (Ky. 2015) (gang evidence relevant and not unduly prejudicial when it "**offered a possible motive for what would otherwise appear to be an inexplicable massacre"**)[emphasis added]; State v. Legere, 157 N.H. 746, 958 A.2d 969, 981–82 (2008) (same); State v. Nieto, 129 N.M. 688, 12 P.3d 442, 450 (2000) (same); Commonwealth v. Reid, 537 Pa. 167, 642 A.2d 453, 461 (1994) (gang evidence

> admissible to prove motive and conspiracy); Utz v. Commonwealth, 28 Va.App. 411, 505 S.E.2d 380, 384–86 (1998) (affirming expert evidence about gang affiliation and culture as probative of motive and intent; collecting cases).

Johnson v. State, 433 S.C. at 557–58, 860 S.E.2d at 700 (emphasis added). Here the testimony was not even offered as gang evidence. There was no mention of Crips, Bloods, Folk Nation, or any other known gang. No one testified that any of the shooters were a member of any organized criminal gang or what their rank was. There was no testimony as to what activity any criminal gang was involved in. What the eyewitnesses testified to was what Victim's group saw Brannon's group doing on the dance floor, making signs with their hands, it frightened and concerned Victim's group, especially after O.B. was pulled out of the group by Jeffrey, and as a result of that and the looks they received and 1 of them, Jeffrey, being shown a gun, Victim's group left the club and headed for their cars. They were immediately followed up the hill by Brannon and his group armed with weapons and Brannon stated: "Where them pussy mother-fucker's at?" or something similar. When Victim asked who he was talking to, Brannon briefly responded, and Brannon and his co-defendants immediately opened fire murdering Victim, wounding Jeffrey, and almost hitting several other members of Victim's group.

Judge McCleod was aware of this Court's opinion in Johnson v. State*, supra* and carefully reviewed it. He was aware of Rule 404(b) and its limitations and Rule 403, SCRE. Johnson v. State, 433 at 556-58; 860 S.E.2d at 699-701, *citing* State v. King, 424 S.C. 188, 2000, n. 6, 818 S.E.2d 204, 210, n. 6 (2018)(defendant's burden is to show probative value of evidence is substantially outweighed by the danger of unfair prejudice); State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). Whatever his decision was, if there was one and not an agreement of the parties, gang affiliation or gang evidence was not admitted. The testimony of the eyewitnesses was carefully circumscribed and limited to what caused them to flee the club and what caused Brannon and his

group to follow with guns and shoot Victim and Jeffrey and almost shoot other members of Victim's group. *See* Johnson v. State, 433 S.C. at 559, 860 S.E.2d at 701, *referencing* United States v. Gartmon, 146 F.3d 105, 1021 (D.C. Cir. 1998)("Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone.")

This limited testimony did not violate Rule 403

Because the evidence was carefully limited, relevant, and necessary to present to the jury what actually happened, it did not violate Rule 404(b) or Rule 403, SCRE, either. Great deference is granted a trial judge's decision regarding the probative value and prejudicial effect of evidence, with the trial judge only being reversed in exceptional circumstances. State v. McCleod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004); State v. Adams, 354 S.C. 261, 580 S.E.2d 785 (Ct. App. 2003). As stated in Johnson:

> Probative evidence always prejudices the opposing party by building a case against them; however, Rule 403 only forbids "unfair prejudice," and its balancing test enables the trial court to temper the risk that evidence will exert such a pull on the jurors' emotions that it overwhelms their ability to rationally and impartially weigh the evidence and apply the law to the facts. Mention of gangs summons a stigma of lawlessness, and Rule 403 requires exclusion of gang evidence if the prejudicial risk substantially outweighs the evidence's probative value. But the criminal docket is not crowded with cherubs, and the rules of evidence are not designed to airbrush all of human nature out of the picture presented to juries. *See* United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1998) ("Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone.").

Johnson v. State, 433 S.C. at 560, 860 S.E.2d 701 (affirming admission of "gang evidence" over 404(b) and 403, SCRE objections); State v. King, *supra* (*res gestae* evidence is also subject to 403 analysis); Bolden, *supra* (same).

Brannon's other arguments are without merit and not actually raised on appeal

Brannon also argues in support of this issue that the State admitted other gang evidence, vaguely disguised; however, the record does not support this argument. There was no testimony in this case that Brannon was in a gang, what kind of gang he might have been in, how that gang operated, or his rank in any criminal gang. *See* Johnson v. State, *supra* (extensive gang evidence about make-up of gang, who was in the gang, and defendant's power in the gang was relevant and not unduly prejudicial where he ordered the hit on the victim); Robinson, 438 S.C. 421, 882 S.E.2d 883 (extensive gang evidence, make up of gangs, crimes committed by gangs, defendant's membership in criminal gang, and gang warfare was not relevant to crime committed and unduly prejudicial to defendant). In the present case, the State did offer a diagram, outside the presence of the jury. that the defense objected to, and the State changed a color scheme on part of the diagram from red to burgundy, the same color as the car the perpetrators came to the club in. The Solicitor stated on the record she did not mean to convey any gang affiliation or evil by the use of red on this diagram. The jury never saw the diagram until the color of that portion of the diagram was changed to burgundy. Victim's group was also portrayed in 2 different colors because they came in 2 different cars. Brannon also ignores pictures were admitted of him wearing a red shirt and red shoes; however, this is exactly what Brannon wore to the club as shown in the surveillance videos at the truck stop before the crimes, as described by eyewitnesses at the time of the shooting, as shown in the police cam video at Creekview Apartments, and in a photo of Brannon at the Sheriff's Office taken after his arrest. This showed Brannon's identity as 1 of the shooters, and Brannon chose to wear that particular clothing to the crime scene not the State. This evidence was relevant, and its probative value outweighed any prejudice as it identified Brannon as 1 of the perpetrators. Defense counsel also objected to the color red on any diagram for other reasons than

possibly inferring gang affiliation; defense counsel claimed red was the color of blood, evil, and danger To protect Brannon or any co-defendant from any prejudice, photographs that were admissible for some specific reason, such as holding a gun consistent with that used at the crime scene, were redacted so that no gang reference, or any other prejudicial information was removed. Finally, Brannon does not raise the admission of any of this evidence on appeal to this Court. Brannon's argument in this regard is simply off base.[15]

Recent authority supports Respondent's position

Finally, since this trial, this Court issued its opinion in State v. Robinson, 438 S.C. 421, 882 S.E.2d 883 (2023); however, this present case is clearly distinguishable from Robinson. In Robinson, the State called numerous witnesses, including gang members, police officers, and gang experts in an attempt to establish Robinson was a gang member; there was a gang war going on between the defendant's gang and another gang; and, the shooting of the victim was related to this gang war. The State introduced extensive evidence of this gang war including crimes committed by others in which Robinson had no apparent connection and other crimes committed by Robinson. The evidence of Robinson's gang membership was tenuous at best. Many witnesses called by the State testified the defendant was not in fact a member of the gang. This Court reversed Robinson's conviction finding the gang evidence was irrelevant, where 3 co-defendants involved in the shooting testified the crime was not in retaliation for the gang war and the evidence of Robinson's gang membership was slight. The Court also found the prejudice to the defendant outweighed any probative value based on the record where there was so much gang evidence *and* his connection to the gang was slight. Robinson, 438 S.C. at 435-39, 882 S.E.2d at 890-92.

[15] Brannon's argument is the trial judge erred only in allowing Barnes' testimony to the question objected to. (IBOA, p. 1 Statement of Issues on Appeal, Issue 2 & IBOA p. 21, ll. 1-5).

As previously stated, in the present case the State did not call 1 single witness to testify Brannon was in a gang or was a member of a gang. The State did not introduce any evidence his co-defendants were in a gang. The State did not introduce evidence of prior crimes committed by criminal gangs as in Robinson. The State did not introduce any evidence there was a gang war going on. No expert was called to describe the structure of any gang and what rank or power Brannon or his co-defendants had in any gang. Simply put, what was offered here was simply what occurred inside the club that caused Victim and his group to flee the club and try to leave the upper parking lot in their cars and Brannon and his co-defendants to follow them and shoot them, i.e. the motive and intent for the shooting. This evidence is relevant to the issues on trial, probative to a relevant issue in the case, and its probative value was not substantially outweighed by any prejudice or danger of prejudice to Brannon. King, *supra*. If Judge McCleod actually ruled on this issue, and it was not an agreement of the parties, it is clear he carefully followed this Court's admonition in both Johnson and Robinson to carefully consider gang evidence before admitting such. Robinson, 438 SC. at 438, 882 SE.2d at 892; Johnson v. State, 433 S.C. at 560. Robinson actually supports Respondent's position because the only *limited evidence* testified to was what occurred in the club that triggered the tragic events that followed.

Harmless Error/Lack of Prejudice

Even assuming *arguendo* error by Judge McCleod, it would be harmless where this minimal testimony was cumulative and the same to other unobjected to testimony of 2 eyewitnesses properly admitted and the unobjected to testimony of the last eyewitness. State v. Brewer, 411 S.C. 401, 409-410, 768 S.E.2d 656, 660 (2015)(*citations omitted*); State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008)(admission of improper evidence is harmless where it is merely cumulative to other evidence); *see also* State v. Williams, 321 S.C. 455, 463,

469 S.E.2d 49, 54 (1996)(error in admission of evidence is harmless where it is cumulative to other evidence which is properly admitted). Here, even if this Court somehow considered this issue preserved for appeal, the answer to this specific question was cumulative to the eyewitness testimony of Jeffrey and Barnes that was not objected to.[16] Both witnesses testified to the fact they left the club because of what occurred on the dance floor with O.B. where he found himself in the middle of Brannon's group making signs with their hands. Further, the jury heard the Solicitor's opening statement which referenced the very same testimony without objection. The Solicitor explained Victims group left the club immediately before the crimes because Brannon and his group were making signs with their hands. And, the last eyewitness, O.B. testified before the objected to question, that Brannon was on the dance floor doing things with his hands. Putting all of this together, the jury would have known based on un-objected to testimony that Victim's group left the club because Brannon and his group were making signs with their hands and Brannon showed Jeffrey a gun in the bathroom when Jeffrey tried to apologize for O.B.

An appellate court will affirm a conviction if it concludes a trial error was harmless. *See* State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996); State v. Benning, 338 S.C 59, 524 S.E.2d 852 (Ct. App. 1999). An error is harmless only when it could not reasonably have affected the result of trial. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995); State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993). Even an error of constitutional magnitude, which this would not be, may be harmless if, considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. State v. Clute, 324 S.C. 584, 480

[16] In his brief, Brannon admits he only objected during trial to the admission of the last eyewitness' testimony in response to 1 specific question. (IBOA, pp, 21-22). He did not object to the Solicitor's opening statement or to Jeffrey's or Barnes's testimony on the very same topic, or O.B.'s testimony to the preceding question. (IBOA)

S.E.2d 85 (Ct. App. 1996). Thus, an insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here the unobjected to testimony from Jeffrey, Barnes, and O.B. establishes the same facts objected to, and the rest of the evidence establishes Brannon's guilt such that no other rational conclusion can be reached. Even if Judge McCleod erred, it would be harmless, because beyond a reasonable doubt it did not affect the verdict. Bailey, *supra.* The evidence established after the incident inside the club, Victim's group was followed up the hill by Brannon and Robertson. Following them was a burgundy Grand Marquis which stopped when Brannon and Robertson stopped. All eyewitnesses identified Brannon as carrying gun and instigating the conflict with Victim's group by walking up the hill swinging a gun and stating to them: "Where them pussy MF's at?" or something similar. This is the same Brannon who witnesses testified earlier was part of the group making signs with their hands on the dance floor and got upset with O.B. and Jeffrey. Brannon also showed Jeffrey a gun in the bathroom after Jeffrey apologized to him for O.B. barging into his group on the dance floor. At the top of the hill, another person Tyrese White got out of the Grand Marquis with a gun. When Victim asked Brannon who he was talking about, it was Brannon who responded, and it was Brannon who opened fire with his gun. It was Brannon's gun, [if the 3 perpetrators did not switch guns], the 9mm Ruger, that shot 5 shots and left 5 shell casings. At the same time, Robertson and White, fired multiple shots as well. Victim was shot 5 times and killed by this group of men including Brannon, Robertson, and White, acting together. Two (2) of the perpetrators walked up the hill together swinging guns, and another followed in the car and got out when it stopped and opened fire at the same time as the other 2 perpetrators. Brannon was captured on video at the truck stop before arriving at the club with his co-defendants

and Stroman and Stroman's car. Brannon was again captured on video after he arrived at Creekview Apts. after the crimes with a wounded Stroman, where Brannon tried hide the 9mm Ruger. Brannon was also arrested there with Stroman who drove the burgundy Grand Marquis until he was shot by Barnes. An eyewitness saw 2 other men get out of the burgundy car and leave Creekview Apts. Stroman admitted Brannon and Robertson left the crime scene in his car with him, and Stroman had to get Brannon to drive to Creekview Apts. after he was shot. The CSLI for the phone Brannon was carrying also placed him at the crime scene at the time of the crime and with his co-defendants. A photo was also posted online before the shooting, where Brannon was displaying a 9mm Ruger. And text messages were introduced showing Robertson advertising a 9mm Smith and Wesson pistol before the crimes. Phone records and texts also showed Brannon, Robertson, White, and Stroman were communicating the day of the crime, stopped communicating by phone at the time they went to the club and during the shooting, and resumed communicating shortly after the crimes were committed. Phone records and texts also showed Brannon's associates communicated with each other after his arrest and discussed hiding out during the investigation. As a result, because of the overwhelming evidence of guilt and the cumulative nature of the objected to evidence, any error in admitting the same was harmless beyond a reasonable doubt. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where it is cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)(same); State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989)(same); State v. Broaddus, 361 S.C. 534. 542, 605 S.E.2d 579, 583–84 (Ct. App. 2004)(error in admission of prior bad acts was harmless where it was cumulative to other unobjected-to testimony at trial regarding the same bad acts); Kirton, 381 S.C. at 38, 671 S.E.2d at 122–23; State v. Richardson, 358 S.C. 586, 596–97, 595 S.E.2d 858, 863 (Ct. App. 2004)(even if improper "character evidence,"

any error in its admission was harmless where it was cumulative to other similar testimony admitted without objection); *see also* State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct. App. 2001); *compare* Robinson, *supra* at 438-39 (evidence not harmless where it was not cumulative, the State introduced voluminous gang evidence, and put defendant on trial for being in a gang and for gang activity in his neighborhood).

Finally, Brannon's admissions at sentencing make any admission of this limited testimony harmless. While he claimed the crimes did not occur as the State's evidence showed, Brannon admitted at sentencing he was present at the time of the shootings, participated in the shootings, and apologized to the family of the deceased victim. (R. 1281, ll. 2-15). State v. Sroka, 267 S.C. 664 (1976)(Defendant's guilt was shown conclusively by the record and any error could not have been prejudicial; and any doubt about the correctness of that conclusion was eliminated by admission of defendant in open court, after conviction, and during presentence inquiry, that he participated in the crime. Further review of the record is unnecessary); State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (2010).

CONCLUSION

For all the above stated reasons, this Court should affirm Brannon's convictions.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DONOVAN TIRRELL BRANNON,

APPELLANT.

Appellate Case No. 2022-000015

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 11th day of September, 2023.

s/ J. Anthony Mabry
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