STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge
Appellate Case No. 2011-203566

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether Appellant (Carter)'s argument on direct appeal is properly before this Court because he failed to present the same argument to the trial judge?

II. Whether the trial judge did not abuse his discretion by denying Appellant (Carter)'s motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or, if the fatal shot was fired by his co-defendant, Maurico Stevens, that Carter was guilty under a theory of accomplice liability?

STATEMENT OF THE CASE

Appellant, Anthony Rodriekus Carter (Carter), is currently incarcerated in the Lee Correctional Institution, of the South Carolina Department of Corrections, as the result of his Lancaster County murder conviction. The Lancaster County Grand Jury indicted Carter in 2009 for possession of a pistol by a person convicted of a violent crime (2009-GS-29-1167). The Grand Jury indicted him in August 2010 for murder (10-GS-29-1000) and possession of a firearm during the commission of a violent crime (10-GS-29-1001.). **R. pp. 669-74**. The latter two charges stemmed from the May 3, 2010 shooting death of three year old J.J. (the victim). Sixth Circuit Public Defender Michael H. Lifsey represented Carter in the trial court, and Sixth Circuit Solicitor Douglas A. Barfield, Jr., prosecuted the case.

On November 7-10, 2011, Carter received a jury trial before the Honorable Ernest J. Kinard. At the close of the State's case on November 9, 2011, Carter pled guilty to possession of a pistol by a person convicted of a violent crime and Judge Kinard deferred sentencing. **R. p. 572, line 14 - p. 574, line 5**. Judge Kinard charged the jury on the lesser included offenses of voluntary and involuntary manslaughter; self-defense; transferred intent and accomplice liability. The jury convicted him of murder and possession of a firearm during the commission of a violent crime. **R. p. 639, line 2 - p. 641, line 24**. On November 17, 2011, Judge Kinard sentenced Carter to thirty-two years imprisonment for murder and to five years, concurrent, for possession of a firearm during the commission of a violent crime. Judge Kinard imposed a sentence of time served for possession of a pistol by a person convicted of a violent crime. **R. p. 662, line 8 - p. 667, line 23**.

Carter timely served and filed a notice of appeal.

ARGUMENTS

I. Carter's argument is not properly before this Court on direct appeal because he failed to present the same argument to the trial judge.

Carter moved for a directed verdict at the close of the State's case. In its entirety, he argued that:

> MR. LIFSEY: All right. Judge, I would move for a directed verdict. I could cite State versus Dickey and I would leave that matter to your discretion which is the self-defense defense for the jury.

R. p. 58, lines 22-25. The trial judge denied his motion, finding that Carter could be guilty of various crimes under a theory of accomplice liability. **R. p. 586, lines 1-3**.

The case to which Carter was apparently referring is *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011). In *Dickey*, the Supreme Court held that the defendant, who had been convicted of voluntary manslaughter, was entitled to a directed verdict in his homicide trial because the prosecution had failed to disprove self-defense. *Id* at 499-503, 716 S.E.2d at 101-03. The case does not deal in any fashion with questions of transferred intent and accomplice liability, as now being argued. Further, Carter did not object to the trial judge's decision to charge accomplice liability (**R. pp. 576-77**) or the subsequent jury instruction on this legal theory. **R. pp. 649-50**. Instead, he reasonably conceded that this charge was supported by the evidence, stating, "I understand. I can't argue with your reasoning on that." **R. p. 577, lines 2-3**.

It is a well settled rule of appellate practice that a party cannot argue one theory at trial and a different theory on appeal. *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same). It is equally well settled that "[t]o be preserved for appellate review, an issue must be both presented

to and passed upon by the trial court." *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996). *See also State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler's concurrence in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled"). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Here, Carter not only did not advance the same argument at trial, he affirmatively conceded the existence of evidence supporting a jury charge on accomplice liability. *Cf. State v. Nathari*, 303 S.C. 188, 200, 399 S.E.2d 597, 605 (Ct.App. 1990) (even assuming that recklessness was an element of felony D.U.I. and should have been charged to the jury, defense counsel conceded appellant's "recklessness in his closing argument and thereby has waived any objection to the trial court's charge in this regard"); *State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) ("One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered"). Thus, his present argument is not properly before this Court on appeal.

II. The trial judge did not abuse his discretion by denying Carter's motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or that, if the fatal shot was fired by his co-defendant, Maurico Stevens, Carter was guilty under a theory of accomplice liability.

Assuming *arguendo* that the Court finds his procedurally barred argument nevertheless preserved for appellate review, Carter contends that the trial judge erred by denying his motion for a directed verdict because the State did not prove the identity of the shooter and it failed to present any evidence that Carter and his co-defendant, Marico Stevens, joined to accomplish an illegal purpose, so as to make both men culpable under a theory of accomplice liability. The State disagrees and submits that the trial judge did not abuse his discretion by denying Carter's motion for a directed verdict because the State's direct and circumstantial evidence reasonably tended to prove that Carter fired the bullet that killed his three year old victim or that, if the fatal shot was fired by Stevens, Carter was nevertheless guilty under a theory of accomplice liability. Further, Carter affirmatively conceded below that there was sufficient evidence of accomplice liability to warrant a jury charge on that theory. **R. p. 577, lines 2-3.**

A. The prosecution's evidence.

This case was prosecuted under a theory of accomplice liability. As can be reasonably expected in a homicide case with eyewitnesses, there were varying accounts offered as to what occurred. The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the prosecution, was as follows.

Rondriana Lanisha "Nisha" Cunningham testified that she was the victim's mother and that her daughter was three years old on May 3, 2010. She and the victim shared an apartment along with Nisha's boyfriend of over a year, Marico Stevens. Nisha

had met Green, who worked with Stevens, on one occasion and she told Stevens that she did not like him. **R. pp. 125-28.**

On Monday, May 3, 2010, Stevens picked Nisha up from York Tech, where she was going to school, around 6:15 p.m. He was driving their only vehicle, Nisha's blue, 1998 Chevrolet Malibu, and the victim was with him.[1] They got home at 6:30 and Nisha remained there. However, Stevens and the victim left the apartment later that evening, with Stevens telling Nisha that he was going to his father's house to get some money. Nisha got a phone call from Stevens at approximately 9:49 p.m., and she immediately went to the emergency room of Springs Memorial Hospital, in Lancaster. **R. pp. 128-32.** Nisha identified a gun for the Sheriff's Department as one that Stevens kept. **R. pp. 133-61.**

The victim was treated for a gunshot wound to her head at the hospital. Eventually, she was airlifted to Carolinas Medical Center, in Charlotte, North Carolina, that same night or early in the morning of May 4, 2010. Doctors treated her there, but Dr. Thomas D. Owens, medical examiner from Mecklenburg County, North Carolina, pronounced her dead at 6:15 a.m. **R. pp. 132-33; 340-41.**

The forensic pathologist who performed the autopsy of the victim, Dr. Janice Ross, opined that the cause of death was "[a]noxic encephalopathy," meaning that the victim's "brain was damaged enough to be actually dead due to laceration of the brain due to the gunshot wound of the head." Dr. Ross explained that "the bullet entered the right side of the head towards the back and it went forward and to the left slightly

[1] He had picked her up from daycare.

upward, and it came out of the head, the left side of the head just above the left ear." Otherwise, the victim had been a healthy little girl. **R. pp. 342-45.**

Emmie Amanda Coats testified that she lived in a Lancaster County mobile home park in May of 2010. Although they were not "boyfriend and girlfriend," she and Carter - who was known by the nickname of "Ant" - were romantically involved. Before May 3, 2010, Coats had never met or heard of either Stevens or the victim. Sometime after the shooting, Coats became romantically involved with Beneco "Neco" Ganson. **R. pp. 176-81.**

At the time of the murder, Coates worked as a nursing assistant from 11:00 p.m. until 7:00 a.m. each day. Coats described the trailer park in which she lived as a place where "[l]arge groups of people just hang[] out in the road or at someone's house" almost daily. Stevens, Ganson, J.D. Hemphill and John Jerrod "John John" Hill, routinely hung out there. Also, Coats regularly heard gunfire in the trailer park. **R. pp. 181-84; 187.**

On the night of May 3, 2010, Coates walked over to Carter's residence, after they had corresponded by text messages. Several minutes later, Stevens arrive at Carter's residence. The victim was with him and he was driving the Malibu. Then, "[t]they told me they were going to take me home." So, they all piled into the car. Stevens was driving, Carter was in the passenger seat, the victim was sitting in a car seat behind him and Coates was on the rear, passenger side. **R. pp. 187-92.**

Following a brief stop at a convenience store, they headed to Coates' trailer. Carter had previously told Coates about a dispute that he had with Ganson, Hemphill, and Hill over something he had stolen from them. However, he did not tell her any details.

Along the way to her residence, Carter told Stevens "about an incident that had happened between them earlier in the trailer park a few days before that came from the dispute that they had," in which the group had chased Carter out of the trailer park.[2] **R. pp. 192-22; 221; 223.**

She described their conversation as a "hyped up situation" and she explained that Carter was not talking like he was worried or he did not want to go to the trailer park. To the contrary, Coates got the impression that "he wanted to see them on the way over there, like it kind of excited him that he was going into the trailer park." Although there was no discussion about whether anyone from the other group was at the trailer park, Stevens "reach[ed] down ... under his seat and he passed Ant the gun." Carter laid the gun in his lap. **R. pp. 192-95; 221; 224; 231-32.**

As they approached her trailer, Coates saw Ganson, Hemphill and some other people crowded around an older model, light colored car that was parked near the roadway.[3] This group was across the street and some distance from Coates' trailer. Carter also saw the group and said, "There they go." When they reached Coates' residence, Stevens parked the Malibu close to the trailer and not completely in the driveway, so that the front of the vehicle was closest to the trailer. **R. pp. 197-203; 217-18; State's Exhibits 9-10.**

As soon as the car stopped, Carter jumped out of it and began walking toward the roadway. He had the weapon at his side, covered by his shirt. Coates did not want any

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[2] On cross-examination, she testified that she was only aware of one incident. On that occasion, Ganson ran Carter out of the trailer park and told Carter, if he ever saw Carter again, Carter "better have a gun." Carter was reluctant to come to the trailer park for about a week after this incident. **R. p. 223.**

[3] Hill was not present. **R. pp. 199-200.**

trouble at her residence. So, she got out of the driver's side rear door and ran to the passenger side, pleading with Carter "Don't do this, don't do this near my house." Carter and Hemphill[4] met "in the middle like they were facing off." (Sic). **R. pp. 203-205.**

Stevens was standing by the front passenger side of the car and near the front of the car, while the victim remained in the unbuckled child seat. Although Carter and Hemphill spoke, Coates could not hear what was said. By then, she was on the steps to her residence. After other members of Hemphill's group joined in the argument, Carter "turned and walked ... back towards the car on the passenger side." **R. pp. 205-06.**

By the time "[h]e got between the end of the car and probably the back passenger side door," Coates heard a shot and she "saw a flash from across the street." When Carter turned as if he was going to fire back at the group and Stevens was yelling for him to "squeeze," Coates ran into her trailer and heard "eight or nine" more gunshots. As soon as the shooting stopped, she looked out of a window, and she saw the Malibu backing out of her driveway and "people running" into nearby woods. **R. pp. 206-09; 228.**

Coates did not know that anyone had been shot until Carter telephoned her from the hospital and told her that his "baby cousin" had been shot.[5] Coates went to work that night. She spoke to police on the night of May 3rd and again the following morning. Even though she was aware that the victim had been shot by that time, she was not completely honest about what she had seen until she gave a second written statement on the 4th,

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[4] Coates did not see Hemphill, Ganson or anyone, other than Carter, with a weapon. **R. pp. 204-05.**

[5] It was her understanding that Stevens was the victim's father and that Stevens and Carter were cousins. Also, she and Carter later exchanged text messages that night. **R. p. 210.**

because she did not want to be involved. She found three .40 caliber shell casings in the yard, close to her residence on the morning of the 4th (**State's Exhibit 11**), which she gave to Inv. Danny Bennett, of the Lancaster Sheriff's Department, when he came to her residence looking for them. **R. pp. 184-86; 209-14; 219-20; 236-39; 396.**

Beneco Ganson testified that he knew Carter, or Ant, from school, and that he was good friends with both J.D. Hemphill and John Jerrod Hill. He also confirmed that he and Coates had been romantically involved. However, he denied knowing Stevens. **R. pp. 276-78; 305.**

Ganson and many of his friends hang out in the trailer park where Coates lived and he agreed that it was "a hangout place." A dispute arose between Hill and Carter roughly two months before the murder. While Ganson was not present when the transaction leading to the dispute occurred, he was told that Carter owed Hill money. On the night of May 3, 2010, he was with the mother of his child, Jennifer Morris, at the home of Morris' mother where he also lived. Eventually, he went to the trailer park in question "around 7:30 or 8:00." **R. pp. 278-81; 307.**

Subsequent to the initial dispute but before the shooting, Ganson, Hemphill and Hill accosted Carter as he was leaving Coates' trailer. Also, they beat up Carter's brother on another occasion. **R. pp. 299-306.**

Ganson had planned to meet Hemphill and did not know if anyone else would be there. Ganson was unarmed. He saw Hemphill, who was likewise unarmed at the time, but he did not see Hill. Carter was not there when he first arrived. He and Hemphill were talking as they stood near the Honda owned by Hemphill's girlfriend, across the street

and two or three trailers from Coates' trailer. An unfamiliar car pulled into Coates driveway and three people got out of it. At first, Ganson could not see the faces of these people, but he soon saw Carter walking across the street and headed in the direction of Ganson and Hemphill. **R. pp. 281; 285-89**.

As Carter got close to them, Hemphill walked toward Carter in the road. Carter had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill. The two men continued to argue with one another. Ganson heard Carter tell Hemphill, "'I ought to shoot you but I ain't want [(sic)] to do the time.'" He also asked, "'What you gone do now?'" Then, Carter turned and walked back into Coates' driveway. The last time Ganson saw Carter, he was "a good little ways" from the car, while he and Hemphill were on opposite sides of the Honda. **R. pp. 289-94**.

According to Ganson,

> When he turned around and walked back to his direction, the girl we was talking to, she had my phone in her car so we walked to the car and I was trying to get my stuff from her and everything, she had moved my phone and everything and the next thing I know I heard the gunshots. When I heard the gunshots I took off running behind this trailer and I hid under the trailer until the gunshots stopped. When the gunshots stopped I laid right there for about an hour or two and ... me and J. D. ran through the woods and met up at Crimson Drive, and when we met up on Crimson Drive I think [Hemphill] walked up toward the store, I went in the woods and hid in the woods because the police and stuff was around.

R. p. 292, lines 3-16.[6] *See also* **R. pp. 294-95**. Also, Hemphill had a gun by the time the shooting occurred but Ganson was still unarmed and he did not see anyone else with a

[6] He did not know if the police were looking for him, but he was on probation and had not reported. **R. p. 292**. He explained that the girl left in her Honda after the shooting. **R. p. 296**. Further, he had not said anything to Carter during the incident. **R. pp. 298-99**. Also, he learned the following day that law enforcement had found his cell phone. **R. pp. 293–94**.

gun. **R. p. 294.**[7]

At some point late that night or early the following morning, Morris picked up Ganson and ultimately took him to Hill's residence where he stayed until later on the morning of the 4th. After receiving a phone call from Hemphill, on the 4th, he had Morris take him to the Lancaster County Sheriff's Department and he gave a statement. He was immediately arrested as the result of a detainer from York County for unrelated charges. **R. pp. 282-84.** Morris corroborated his account with respect to the times he claimed that he had been with her. **R. pp. 264-71.**

Although there had just been a shooting, there was a hole in the rear window and the Malibu had two bullet holes in it, apparently neither Stevens nor Carter bothered to check on the well-being of the three year old victim. This is readily inferrable from evidence that, instead of driving to the hospital immediately, Stevens drove to the apartment of his father's friend, Lawrence Alexander, where his father, Eric Sanders, was playing cards. Stevens excitedly told those present that his car had been shot up. Only when someone inquired about the victim's well-being did he go to the car and Carter handed her to him. Then, he only took her to the hospital after the others who had seen the condition of the car and saw blood coming from her head ordered him to do so. **R. pp. 327-34; 337; 346-51.**

Kayla Estes was Carter's girlfriend on May 3, 2010. Estes knew Ganson, Hemphill and Hill. However, she did not know Stevens. Carter told her that he had a beef

[7] Ken Benson lives across the street and some distance down the street from Coates, in the same trailer park. He was inside his home when he heard the shooting. He immediately told his daughter to go to the back end of the trailer and he ducked when the shooting began. He went outside after the shooting was over and saw the Honda drive away from the area. In all, he heard between five and ten shots. **R. pp. 137–45.**

with the other men she knew "[o]ver money," and he had told her that "he would handle it." Between 9:00 and 10:00 p.m., Carter called her from his residence and told her about what had occurred at the trailer park. **R. pp. 315-20**.

On cross-examination, Carter elicited that Carter had told her that "there was a problem;" that he and Hemphill had met in the roadway; and that both men agreed that the matter was "quashed." Carter also told her that after he had turned and walked away from Hemphill, Ganson said, "'F--- that, I'll get him.'" At that point, Carter heard shots. Stevens wound up with the gun and began shooting. Afterwards, they drove to the hospital. **R. pp. 320-21**.

At 9:53 p.m. on May 3, 2010, Craig Greenlee, then in the patrol division of the City of Lancaster Police Department, was parked in the parking lot of a Main St. restaurant when a late model Malibu passed. The vehicle had its emergency flashers on and was traveling at a high rate of speed. Officer Greenlee pulled in behind the vehicle, which did not stop even after he turned on both his blue lights and siren. As they were driving, he noticed that the car's rear window "had been shot out" and he reported this to dispatch. **R. pp. 93-98**.

Officer Greenlee ultimately followed the Malibu to the emergency room driveway at Springs Memorial Hospital, where it stopped. Carter and Stevens got out of the vehicle and Carter carried a smaller person into the emergency room. Both men were yelling and both had blood on their clothing. Officer Greenlee had to force both men out of the emergency room, so that the medical personnel could treat the victim. Both men told him

that Ganson was responsible for the victim's condition and that the incident had occurred on Mcilwaine Rd. **R. pp. 98-102**.

Because Mcilwaine Rd. is not in the City of Lancaster, he reported this information to dispatch and asked for assistance from the Lancaster County Sheriff's Department. He then helped secure the vehicle until members of the Sheriff's Department arrived. While there, he not only saw the damage to the rear window, he also saw two bullet holes in the roof of the car. **R. pp. 103-04**.

A few minutes after Officer Greenlee arrived at the hospital, then-Deputy Joseph Catalano, with the Lancaster County Sheriff's Department, also got there. He had been informed of a report of "shots fired" on Athena Rd., where the trailer park is located, and he was asked to go to the hospital to determine if that incident was connected to the reported shooting. At the hospital, Deputy Catalano spoke to both Stevens and Carter, as the men sat on the curb outside of the emergency room. Both men had blood on their shirts and Catalano learned that Stevens was the victim's father. When Carter was asked about what had occurred, he said that they had been driving down Athena Road when "someone started shooting into the vehicle." **R. pp. 106-10**.

Carter, however, denied knowing who had shot at the car. Deputy Catalano observed the same defects to the car that Officer Greenlee had described. Both Stevens and Carter were allowed to leave the hospital that night because the Sheriff's Department did not have any information that either had committed a crime. **R. pp. 110-12**.

Inv. Mike Adams, of the Lancaster County Sheriff's Department, also went to Springs Memorial Hospital on the night of May 3, 2010. After being briefed about the

matter and learning about a shooting on Athena Rd., Inv. Adams saw the Malibu with the cracked rear window and the bullet holes in the roof. He then spoke to Carter and Stevens, who were not then suspects. When Inv. Adams questioned Carter in the parking lot about what had happened, all Carter told him was that Beneco Ganson had shot at them on Athena Rd. and Carter did not elaborate. Because Carter's shirt was bloody, Inv. Adams obtained it from him even though Carter was reluctant to give it to him. **R. pp. 113-18; 123.**

After that conversation, Inv. Adams went into the emergency room and spoke to Stevens. He also obtained Stevens' bloody t-shirt.[8] The Sheriff's Department was, at the time, unaware of any reason to arrest Carter or Stevens. **R. pp. 118-19; 122.**

Sgt. Mike Miller and Deputy Caleb Graffam were dispatched to the "shots fired" call, and they arrived at 9:54 p.m. Along their way to that location, they heard the transmissions from Officer Greenlee and the City of Lancaster Police Department. However, there was not yet any known connection between the cases. When they reached the Athena Rd. area, they drove slowly through the area with their windows down. **R. pp. 147-49; 159-63.**

The officers came across a black male walking in the roadway, alone, and they stopped him. They patted him down and he was unarmed. The officers then obtained his identification. The man was John Jarrod Hill. As soon as they had confirmed that Hill did not have any outstanding warrants, a woman "came out into the yard close to where we [were] ... screaming that a child had been shot." **R. pp. 152-56; 164.**

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[8] Expert testing of the t-shirts by a member of SLED's trace evidence department did not reveal the presence of gunshot residue. **R. pp. 485-91.**

Hill left at this point. The officers learned that this woman was Coates and this was the first suggestion that the victim's injury may be connected to this shooting. The officers began looking around in the area and they soon discovered some spent shell casings between her trailer and the trailer across the street. Immediately, they blocked off the roadway, secured the area and waited on other officers to arrive. The other officers came shortly. **R. pp. 155-59; 164-65.**[9]

John Jarrod "John John" Hill was not living in the same trailer park as Coates on May 3, 2010, although he frequently went there. He spent the whole day at the home of his girlfriend's grandmother. Unlike the other witnesses, he knew all of the participants, including Stevens. He had seen Ganson and Hemphill during the day of May 3rd. However, he did not see them that night and he did not see Stevens anytime that day or night. **R. pp. 241-44; 246-48; 256.**

Hill's dispute with Carter arose about a month and a half before the murder. It started when he gave Carter $450.00 with which to buy him some cocaine. Instead of getting him the cocaine or returning the money, Carter "jumped the fence" or robbed him. Following that date, the men had two confrontations. About a week later, Hill approached Carter as Carter was visiting a man in the trailer park. Carter claimed that he had been in a wreck and that he would pay Hill after he got a check from that. **R. pp. 251-54.**

[9] Hill corroborated the officers' testimony about the stop. The only discrepancy in his account was that he was not patted down. **R. pp. 244-46.** Hill gave the Sheriff's Department a statement on May 3rd or on the morning of the 4th, and he voluntarily submitted to gunshot residue testing that later was determined to be negative. **R. pp. 167-69; 172; 248-49; 486; 491-93.**

Then, about two weeks before the murder, they ran into each other on the road on which Coates lived. The men were about twenty feet from one another. Hill "told him to pay me and stuff like that when I seen him and he just took off running." Hill claimed that neither Ganson nor Hemphill were there and that no one had chased Carter on the second occasion. No guns were involved in either confrontation. **R. pp. 254-56.**

Lancaster County Sheriff's Department crime scene Inv. Jeff Steele processed the trailer park crime scene on May 3, 2010, where he was later joined by crime scene Inv. Ken Taylor.[10] They found a fired bullet jacket fragment at the edge of the driveway of the residence across the roadway from Coates' residence (**State's Exhibit Number 74**). On the side of the roadway, they found a .380 caliber cartridge casing; two .22 caliber cartridge casings; Ganson's Samsung cell phone; and a tan hat. In the roadway, they found two 7.65 millimeter casings and an unfired 7.65 millimeter bullet. **R. pp. 390-92; 394-99; 407-08; 416-21.**

Investigators Steele and Taylor processed the Malibu on May 4th. When they did so, they discovered a fired bullet jacket fragment on the passenger's side floorboard (**State's Exhibit 75**); two pieces of a copper fragment from the seat cushion of the headrest on the back of the seat (**State's Exhibit Number 80**); and a lead core fragment under the spare tire in the trunk (**State's Exhibit Number 77**). From their review of the items seized, they determined that the would have been parked so that the front of it was closest to Coates' trailer and the rear of the car was closest to the roadway, which was consistent with eyewitness descriptions. Also, there were no defects in the car on the

[10]Both were qualified as experts in crime scene investigations and shooting reconstruction, without objection. **R. pp. 385-89; 415-18.**

driver's side or rear that would have been consistent shots hitting the car from those directions. **R. pp. 379-402; 393-95; 401-02; 422-28.**

Investigators Steele and Taylor also attempted to determine what they could conclude from examination of the bullet holes in the car's roof and the bullet hole in the car's rear window. **R. pp. 402-03; 423; 427.** As Inv. Taylor explained,

> Typically when I get to the scene I want to try to if possible reconstruct it to the point of determining where the shots came from, and if possible, how many were actually fired that would have affected that target near the car, house or whatever. In this particular case after finding out that the car had been moved from the initial scene other than just determine the directionality of how things impacted the car it really didn't have any relevance to anything at the hospital parking lot, so that again was another reason that we felt impressed to go ahead and get it to a secure area so we can go ahead and process the car. But typically again we're going to look at the bullet holes that we find, the defects as we referred to and we're going to try to match those up if any of them are corresponding. If a bullet entered on one spot and created a second or third or whatever we are going to try to match those up. And again, at the same time one of the key things is determine directionality and possibly an angle of impact to show whether it came from a downward angle or at an upward angle.

R. p. 426, line 24 - p. 427, line 18. He explained that he usually uses dowel rods to make these determinations. **R. pp. 427-28.**

In this case, there were two defects on the roof of the car. The first defect was toward the front and passenger side of the car's roof, while the second defect was "[a] little more toward the mid-section." Inside the car, he found that the defect to the rear window corresponded to the second defect in the roof. Because the larger hole was to the outside of the tempered glass (or, as he described it, "outward [cratering]"), he opined that the shot was not fired from the outside of the rear window. Further, both defects in the roof and the defect to the rear window "came from the front of the car toward the

back of car at the passenger side moving toward the [mid-section] of the car at a downward angle." **R. pp. 428-36; 440-41; 459.**[11]

He explained that the front window on the passenger side was completely down, but the driver's window was rolled up completely. On the other hand, the two rear windows were down several inches. None of these windows had defects in them. "The hole that I referred to as defect number one [in the roof] that was toward the front of the car, closest one up toward the front, we tracked it ... into the back seat cushion." This was represented by a photograph, **State's Exhibit 69. R. pp. 436-39; 456-58.**

SLED Agent Carl Kenley, a crime scene investigator, also processed the Malibu to determine the angles at which the shots had been fired into the roof of the vehicle. He was assisted by Agents Ricardo Prince and Scott Hardy. He corroborated Inv. Taylor's findings. **R. pp. 475-83.**

When Stevens returned to Mr. Alexander's apartment and talked to his father after the shooting, Mr. Alexander did not see a gun. Later that night, however, Mr. Alexander saw Mr. Sanders "had a gun on the hood of his truck." There were some angry "young guys" present and they were talking about trying to get some .40 caliber bullets. Mr. Sanders thereafter put that weapon in his truck. **R. pp. 336-37.**

With the assistance of the Sanders, law enforcement found the weapon. Ms. Sanders retrieved this weapon (**Court's Exhibit 4**) from a man named Derrick, and she turned it over to Inv. Mike Howell. **R. pp. 352-55; 360-65; 369-75; 383-84.** SLED tested this Hi-point .40 caliber weapon for "touch DNA" and compared swabs from it to known

[11] A copper-jacketed fragment found at the scene was consistent with having passed through the window. **R. pp. 441-42.**

standards from the victim, Carter, Stevens, and Coates. Testing revealed a mixture of DNA from more than one person. Everyone was excluded as a possible contributor to the DNA mixture, except for Stevens, and he could not be excluded. "[T]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 65." **R. pp. 498-05; 509-12; 514-15.**

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats (**State's Exhibit 11**), the bullet jacket fragment found in the passenger side floor board of the car (**State's Exhibit 75**), the copper fragment from the headrest in the backseat of the car (**State's Exhibit 80**) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (**State's Exhibit 74**) were all fired by **Court's Exhibit 4**, the recovered .40 caliber weapon. **R. pp. 523-530.**

Carter gave law enforcement two statements in this case. He gave the first statement on May 4, 2010, before he was arrested and he gave the second statement on May 6th, after he was under arrest. Each statement was long and was videotaped. A DVD of each statement was introduced an published to Carter's jury as **State's Exhibits 98** and **99**, respectively. *See* **R. pp. 531-72.**

In the first statement, he initially denied knowing Coates, he inaccurately described Coates as a "skinny white girl" when she is a larger woman, and he claimed that Stevens must have known her. He admitted getting out of the vehicle at Coates' residence after seeing the people with whom he had a dispute, but he claimed that he had been unarmed. By the end of this interview, however, he admitted knowing Coates; he

admitted that she had been to his residence; and he stated that Coates had hugged him when he got out of the car. He likewise finally admitted that he had handled the weapon that day, but he denied that there had been any return fire from his side of the road. **State's Exhibits 98.**

In the second interview, he first repeatedly denied having a weapon on May 3rd, but eventually changed his story. He indicated that he knew the people with whom he had the dispute would be at the trailer park before he went there and that he placed the gun that he had gotten from Stevens in his lap. **State's Exhibit 99.**

He also admitted that he had gotten out of the car with the weapon after he saw the persons with whom he had the dispute, and that he had displayed the weapon to Hemphill. Further, he claimed that Hemphill was likewise armed. Yet, he did not say that Hemphill had pointed a weapon at him, and he ultimately claimed that Stevens had been the shooter. **State's Exhibit 99.**

B. Discussion.

There was no error. South Carolina has defined the crime of murder as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

"[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another." *State v. Fennell*, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000). This doctrine has been consistently recognized in South Carolina cases. *See State v. Gandy*, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds*, *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993); *State v. Horne*, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that the State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); *State v. Williams*, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him).

The applicable law on review of motions for a directed verdict is set forth in *State v. Bostick*, 392 S.C. 134, 139-40, 708 S.E.2d 774, 776-77 (2011):

> A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); *see also State v. Williams*, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452–53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing *State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270 S.C.

> 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

See also State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006).[12]

Here, the State's evidence, as discussed above, reasonably tended to establish that Carter fired the fatal shots that struck the victim in the head and killed her. Specifically, the record shows that:

- Carter created the dispute with Hill, Ganson and Hemphill, by robbing Hill of $ 450.00;

- Carter had at least one, if not two run-ins with these men following the robbery and before the murder;

- Carter had told his girlfriend at the time, Kayla Estes, about a beef with the other men "[o]ver money," and he had told her that "he would handle it;"

- Carter was aware that there may be a difficulty with these men if he encountered them at the trailer park, but he and Sanders agreed to take Coates home on the night of May 3rd;

- following a "hyped up" conversation with Sanders on the way to Coates' residence, in which he apparently was looking forward to seeing his rivals at the trailer park, Sanders gave him the .40 caliber semi-automatic pistol (**Court's Exhibit 4**) and he kept it in his lap;

- he saw Hemphill and Ganson as they approached Coates' trailer, and he said, "There they go;"

- Carter jumped out of the car as soon as it stopped, and he began walking toward the roadway, with the weapon at his side, covered by his shirt;

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[12] This standard is consistent with *Jackson v. Virginia*, 443 U.S. 307 (1979) (evidence is sufficient to send a case to the jury if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). *See State v. Stokes*, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989).

- he then met Hemphill in the roadway, and the men argued;[13]

- Ganson testified that Carter had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill;

- Carter and Hemphill continued to argue and Ganson heard Carter tell Hemphill, "'I ought to shoot you but I ain't want [(sic)] to do the time.'" He also asked, "'What you gone do now?'"

- Carter walked back toward the passenger side of the Malibu after this confrontation, but when a shot was fired from the other side of the road, he turned as if to shoot, with Stevens repeatedly encouraging him to "squeeze;"

- then, a number of shots were fired, inferably by him;

- following the crime, neither Carter nor Stevens checked on the three year old victim, until Stevens spoke to family and friends shortly after the shooting and they inquired about her;

- all of the shots that hit the car, including the shot that took the life of the innocent three year old victim, were fired from the passenger side of the vehicle and none could have been fired from the other side of the roadway; and

- ballistics testing confirmed that the three .40 caliber cartridges collected by Coats (**State's Exhibit 11**), the bullet jacket fragment found in the passenger side floor board of the car (**State's Exhibit 75**), the copper fragment from the headrest in the backseat of the car (**State's Exhibit 80**) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (**State's Exhibit 74**) were all fired by **Court's Exhibit 4**, the recovered .40 caliber weapon.

Standing alone, this evidence - based upon the two eyewitness accounts - was sufficient to submit the charge of murder to his jury, separate and apart from potential guilt under a theory of accomplice liability.

Carter's contention that he lawfully armed himself ignores that he could not lawfully arm himself because he was a previously convicted felon, and that he pled guilty at the close of the State's case to the offense of possession of a pistol by a person

[13] From Ganson's testimony, it does not appear that Hemphill was armed, yet. However, Hemphill was armed after the shooting began.

convicted of a violent crime. **R. p. 572, line 14 - p. 574, line 5**. More importantly, his unlawful possession of the weapon was the proximate cause of the homicide because he knowingly brought it to a confrontation with Hemphill, which he instigated. Thus, he was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty. *Accord State v. Slater*, 373 S.C. 66, 70-71, 644 S.E.2d 50, 52 (2007) ("the instant case, Slater fails to meet the first requirement for the self-defense charge: specifically, Slater was not without fault in bringing on the difficulty. ... Slater's actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim"). Instead, Carter went looking for trouble and, unsurprisingly, he found it. *Id.*

Alternatively, the trial judge properly submitted the case to the jury because there was evidence, albeit emanating from Carter's self-serving statements to Estes and law enforcement, that Stevens shot the victim. Because this point was conceded in the lower court, the State will not argue it in detail. However, the State would note that Stevens' act in shooting the weapon that he had just reacquired from Carter, after Carter had initiated the confrontation with the other group, clearly occurred while both men were present at the scene and "intentionally, or through a common design, aid[ing], abet[ting], or assist[ing] in the commission of [the murder] through some overt act." *See State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010).

As the Court explained in *Gibson*,

> 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. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] 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).

> "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. *Id.* 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).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70. Because of the discrepancy as to who fired the shots that killed the victim, the matter was properly submitted to the jury. *Id*; *See also Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438-39 (2011) ("Like a lesser-included offense, 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. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

Respectfully submitted,

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August 5, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
J. Ernest Kinard, Jr., Circuit Court Judge
Appellate Case No. 2011-203566

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ANTHONY RODRIEKUS CARTER,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 5th day of August, 2013.

WILLIAM E. SALTER, III
Senior Assistant Attorney General
ATTORNEY FOR RESONDENT

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THE STATE OF SOUTH CAROLINA,

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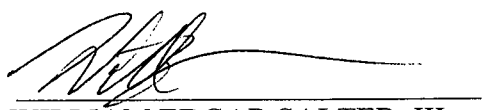
APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served three (3) copies of the within Final Brief of Respondent and Certificate of Compliance on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Kathrine H. Hudgins, Esq.
SCCID - Division of Appellate Defense
1330 Lady St., Ste #401
Columbia, SC 29201

This 5th day of August, 2013.



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August 5, 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *The State v. Anthony Rodriekus Carter*
Appeal from Lancaster County
Appellate Case No. 2011-203566

Dear Ms. Kitchings:

Enclosed please find an original and nine (9) copies of the Final Brief of Respondent regarding the above matter.

By copy of this letter I am forwarding three (3) copies of same to counsel for Appellant.

Thank you for your attention to this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: Kathrine H. Hudgins, Esq. (w/three (3) copies of encls.)
The Honorable Douglas A. Barfield, Jr. (w/encls.)
Sandi Wofford, Victim Services (w/encls.)