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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MUANAH A. FORTUNE, JR.,

APPELLANT.

Appellate Case No. 2021-000569

FINAL BRIEF OF RESPONDENT

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victims were found in the vehicle or discarded along the road during the chase?

IV. Was the court's decision to admit the hooded sweatshirt and subsequent GSR evidence absent a sufficient chain of custody entirely harmless and cumulative in light of Appellant's confession to being at the scene of the crime where the other assailants fired their guns?

STATEMENT OF THE CASE

Muanah A. Fortune, Jr. (hereinafter "Appellant") was indicted for murder (2019-GS-18-0416), attempted murder (2019-GS-18-0417), first degree burglary (2019-GS-18-0418), possession of a firearm during the commission of a violent crime (2019-GS-18-0420), and the ill-treatment of animals (2019-GS-18-0421). Appellant was tried alongside co-defendant Polo K. Salazar (hereinafter "Salazar") who carried the same charges, with the additional charge of possession of a stolen vehicle. Appellant proceeded to a jury trial before the Honorable Diane S. Goodstein on May 11, 2021 through May 19, 2021. Appellant was represented by attorneys Michelle R. Hubrich and Pierce L. Wehman. The State was represented by Assistant Solicitors David L. Osborne and Chelsea A. Glover, of the First Judicial Circuit Solicitor's Office.[1]

At the conclusion of the trial Appellant was found guilty for all indicted charges. Judge Goodstein sentenced Appellant to 40 years for murder, 30 years for attempted murder, 40 years for first degree burglary, and 5 years for ill treatment of animals.[2] These sentences were ordered to be served concurrently. Judge Goodstein then sentenced Appellant to 5 years imprisonment for possession of a firearm during the commission of a violent crime, to be served consecutively to his other sentences. (R. p. 1322). This appeal now follows.

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[1] Co-defendant Salazar was represented by attorney Ashley B. Cornwell.

[2] There appears to be a typographical error in the transcript. Appellant received 40 years for burglary, not four.

STATEMENT OF FACTS

The Crime

In the late night hours of January 27, 2019, four black males wearing masks forcibly entered the home of roommates Marcus Porter (hereinafter "Mr. Porter") and David Swibaker (hereinafter "Mr. Swibaker") by kicking in their backdoor. (R. p. 435; p. 417; p. 573). The men were armed with pistols and instructed Porter and his friend, victim J.B. Weaver (hereinafter "Mr. Weaver"), to get down on the floor. Upon their entry Porter's dog attempted to attack the assailants. Mr. Porter recalls hearing two shots at the dog, but could not be certain which of the men shot his dog. (R. p. 441, line 1 through p. 442, line 22). The men then started to demand Mr. Porter give up his marijuana. (R. p. 443, line 23 through p. 444, line 2). Mr. Porter testified that he was a small time dealer at that time, but did not have any weed to give to the assailants. (R. p. 435, lines 1-10; p. 449, lines 8-14).

At this point, two of the men stayed with Mr. Porter and Mr. Weaver, while the other two went to another part of the home. Mr. Weaver complied with the demands that he get on the floor. (R. p. 444, lines 12-24). Mr. Weaver also tried to diffuse the situation by offering to find them weed elsewhere and by offering the men his wallet. The men took Mr. Weaver's wallet, but were not satisfied. (R. p. 445, lines 2-23). Mr. Porter then saw Mr. Weaver inching closer to the men in an effort to thwart them, but his progress was stopped when they saw him and shot him. Mr. Porter added that one of the men kicked Mr. Weaver in the face, ultimately knocking him unconscious. (R. p. 445, line 25 through p. 446, line 15; p. 448, line 1-2).

Mr. Porter was then escorted to the master bedroom by two of the suspects. (R. p. 448, line 21 through p. 449, line 3). He then showed them the mason jar where he kept weed to prove to them that he was out. (R. p. 449, lines 6-14). They walked him back to the living room, but tripped

him up and he fell facing Mr. Weaver. At this point they threatened to kill people if he did not give up the weed. (R. p. 451, lines 11-21).

One of the men then shot Mr. Weaver for a second time while he was on the ground, and then began to ransack the home. (R. p. 452, line 12 through p. 453, line 11). During the commotion, the light-skinned suspect tripped over Mr. Weaver on the floor. Mr. Porter surmised that it must have angered the assailant because he responded by shooting Mr. Weaver six more times. (R. p. 455, lines 1-4; p. 1166, lines 14-15). Porter attempted to get up and flee through the front door, but was shot in the chest in the effort. He was only shot once, as the assailants were at that time beginning to flee out the backdoor. Porter survived and ran to his neighbor's home to call 911 immediately after the assailants left. (R. p. 455, line 20 through p. 456, line 19). On his way to his neighbor's house Mr. Porter heard the assailants jumping the chain-link fence outside his house and then heard a car leave the area.[3] (R. p. 456, line 20 through p. 457, line 5). Records show that the 911 call was placed at 12:03:23am. (R. p. 806, lines 15-20).

Mr. Porter testified that he was confident that there were four assailants involved in the burglary. (R. p. 425). One was in his late 20s, tall with a medium build, and was a lighter-skinned African American. Another was a heavier individual who was only slightly taller than Mr. Porter, who stands at 5'9"; this individual was in his mid-twenties and was wearing purple Nikes with heavy gloves and a coat. He testified that he recalled seeing one of the assailants wearing clothing with camouflage print, and one assailant was wearing black and white Nikes. (R. p. 462-464).

Mr. Swibaker was also home at the time of the burglary. When he saw the door busted in

[3] This was corroborated by the testimony of Corporal Cramer who recalled finding fresh footprints in the mud near Mr. Porter's residence. (R. p. 643). The assistant solicitor used this information and connected to the fact that the shoes of all four defendants were muddy and dirty. (R. p. 1191-1192).

he ran out of fear and initially hid from the assailants. (R. p. 766). Though he initially only saw two men before he turned the corner to hide, he likewise testified to seeing a total of four masked men during the home invasion. (R. p. 773; p. 769). He confirmed the killing of the dog when it attacked, the fact that they drug Mr. Porter to his room demanding drugs, hearing numerous gunshots, and seeing multiple guns during the burglary. (R. p. 769; p. 775). The first guy he recalled was wearing white Nike shoes; he was tall and thin framed. The second was shorter, but he could not describe him with any more detail. (R. p. 767-768). Mr. Swibaker was ultimately discovered by the assailants, struck in the head, and ordered to get on the ground as well. (R. p. 770-771). He recalled seeing one assailant wearing "colorful" shoes. His testimony at trial suggested they had orange, blue, purple, and black. However, his initial statement to police suggested they were red, white, and blue. (R. p. 776).

The Chase

Following the 911 call, officers started responding to the scene to conduct an investigation of the crime. One such officer, Deputy Joshua Scarborough, was in route to the scene when he encountered a black Honda CR-V while driving down Fripp Lane. He saw four people in the vehicle, all black males. The back left passenger had his eyes wide open, with his jaw dropped, while looking at the Officer Scarborough's vehicle as he drove by. He then saw the driver check the police car in his rear view mirror, and watched as the back seat passengers turned around to look at him. Officer Scarborough also testified that upon passing the vehicle he was able to see in his mirror that the car had no license plate. (R. p. 609-610). Officer Scarborough called in the suspicious vehicle, but at the time was not certain it was related and chose to proceed on to the scene. The CAD report shows that Officer Scarborough's call-in of the CR-V took place at 12:07:04am – 3 minutes and 41 seconds after the 911 call was placed – and testimony was entered

by Detective Davis that the approximate drive time between the scene of the crime and Fripp Lane was slightly under three minutes in duration. (R. p. 615; p. 1058-1059). Upon arriving at the scene and finding sufficient officers onsite, Officer Scarborough and Officer Jesse Kerr drove back out to pursue the CR-V. (R. p. 615).

Corporal Jacob Cramer was also in route to the scene of the crime when he heard over the police radio another officer identify a dark colored SUV leaving the area that was possibly involved. Shortly thereafter he passed a dark in color Honda CR-V occupied by four people. (R. p. 622, lines 1-21). Corporal Cramer was accompanied by Officer Reynolds. He instructed Officer Reynolds to turn around and pursue the vehicle as it turned onto Highway 78. He noted that in the time it took to turn around the CR-V was able to gain some ground up the highway, resulting in a few moments where he and Officer Reynolds did not have eyes on the vehicle. (R. p. 624, line 2 through p. 625, line 14). As they caught up to the CR-V, Corporal Cramer already had their emergency equipment activated and confirmed that this vehicle did not have a license plate. At the time the car was being driven slowly, and Corporal Cramer was using his siren and spotlight to try and get the vehicle to pull over to the shoulder of the road. However, the vehicle responded by accelerating to a high speed. A police chase ensued that lasted for 30 minutes, exceeded speeds of 100 miles per hour, and required the use of stop-sticks to puncture the vehicle's tires to end the chase. Salazar was identified as the driver of the vehicle, Appellant was the front passenger, and Green and Major were seated in the back. (R. p. 625, line 15 through p. 632, line 4). The car had been reported stolen. (R. p. 830).

Over the course of the police chase Officer Reynolds informed Corporal Cramer that the suspects had tossed out a wallet from the car window. (R. p. 629, line 2 through p. 630, line 15). Soon after, Corporal Cramer witnessed a blue clothing item and an orange clothing item still

tumbling down the roadway. These items were collected after the chase ended and identified as an orange ski mask, blue coveralls, and a wallet belonging to victim J.B. Weaver.[4] [5] (R. p. 631, lines 2-9; p. 635-636; p. 639-640). Additionally, a pocketknife and broken lighter were found inside the pocket of the blue coveralls. (R. p. 898-900; p. 974).

The investigation did not turn up any firearms near the scene of the crime. Corporal Cramer surmised that the suspects may have dumped other items out the window on the portions of Highway 78 they drove before Corporal Cramer and Officer Reynolds were able to catch up to them. They took a k-9 unit to that section of highway to investigate further and were able to locate four pistols on the shoulder of the road of 504 and Highway 78. (R. p. 643, line 1 through 644, line 8). These included a 9 millimeter Taurus pistol (State's Exhibit 13), a .38 caliber Smith & Wesson revolver (State's Exhibit 14), a .38 caliber Jimenez pistol (State's Exhibit 15), and a 9 millimeter Springfield pistol (State's Exhibit 16). (R. p. 644; p. 905-908).

The Investigation

Law enforcement's investigation demonstrated that Mr. Swibaker introduced a man named Jaquavious Washington (aka "Q") to Mr. Porter for the purpose of selling drugs. The investigation revealed that Marcus Porter had sold drugs in the past to an individual named "Little brh", whom he also knew as "Q" and that this individual had called recently asking Mr. Porter to front him some drugs. Mr. Porter also identified Jaquavious Washington by his photograph at trial. (R. p. 780; p. 570-571; p. 577-580; p. 557).

Upon being taken in for booking, Detective Davis had an opportunity to question Appellant about the crime with Captain Kenneth Driscoll in attendance. (R. p. 1064). The

[4] Often referred to as a jumpsuit during trial.
[5] There was no objection from either defendant as to the admission of the Mr. Weaver's wallet and driver's license.

interview was video recorded and Appellant initially denied having anything to do with the crime. He pitched a story that he was in the area to visit with his friend and cousin, Jaquavious Washington. (R. p. 1065-1070). Detective Davis had not mentioned this name to Appellant prior, and at the time of the interview Detective Davis did not yet know of Washington's connection to both Mr. Porter and Mr. Swibaker. (R. p. 1070, lines 4-19). Appellant's initial story was that after visiting with Jaquavious he was told he could not stay the night and went out to find a ride home. Coincidentally, according to Appellant he happened to find three other individuals who lived in his Seabrook area who agreed to give him a ride. (R. p. 1073, lines 5-11). Detective Davis ended the first interview after approximately an hour.

Shortly thereafter Detective Davis was in the booking area when he and Appellant made eye contact. He again asked Appellant if he was sure he did not want to talk to him. Appellant responded: "If I talk, they're going to kill me." Detective Davis invited Appellant back for a second interview lasting 40-45 minutes. (R. p. 1076, lines 23-24; p. 1078, lines 1-9). Appellant was still hesitant to disclose the truth. He continued to deny having a gun, but soon conceded that he was in possession of the Taurus 9 millimeter and described it as being silver and black. The brand and description of the 9 millimeter gun was not mentioned to Appellant prior to this statement. Such information was not even known by Detective Davis and Captain Driscoll at the time of the interview. He further testified that the gun had not been fired, which appeared corroborative to the fact that it was found loaded to the full magazine capacity. (R. 1078, line 19 through 1080, line 21). *Appellant later confessed that he was there when the victims' door was kicked in, that he was the last of the four assailants to enter the home, and that he ran to the back room while the others were yelling for people to get on the ground.* (R. p. 1082, lines 1-10).

A total of 7 fired shell casings were found at the scene of the murder (State's Exhibit 17).

All of these casings were of the same brand ammunition found in the Springfield 9 millimeter: FC Luger and Blazer. (R. p. 907-908). Based on ballistics analysis, they were all determined to have been fired by the Springfield 9 millimeter recovered by police. (R. p. 600, line 10 through p. 601, line 15). Another three (3) fired shell casings were found still inside the cylinder of the Smith & Wesson revolver.[6] Police recovered two (2) fired projectiles at the scene of the crime, and three (3) more from Mr. Weaver's autopsy. Based upon the ballistics analysis, one of the projectiles from the scene was determined to have been fired from the .38 Smith & Wesson revolver.[7] (R. p. 598, lines 10-24). Two of the projectiles recovered from the autopsy were also determined to have been fired by the .38 Smith & Wesson revolver. (R. p. 601, lines 16-24).

A Gucci bag found inside the Honda CR-V contained four (4) live rounds of .380 ammunition that matched the brand of ammunition found in the Jimenez pistol: Hornady and Tulammo. (R. p. 915, lines 16-25). Three wrist watches were found in the vehicle; Mr. Porter was able to identify two of them as his property. (R. p. 478-481; p. 914; p. 916-917). Also found in the vehicle was the other matching orange and black glove, and a knit cap. (R. p. 924). Law enforcement also confiscated each of the defendant's articles of clothing, including their shoes. Of note, Salazar was arrested wearing a camouflage print jacket and Nikes (R. p. 638), Devonte Major was wearing purple shoes (R. p. 812), and Appellant was wearing colorful shoes that the State argued at trial matched the description offered by Mr. Swibaker. (R. p. 1192). [8]

Certain items recovered by law enforcement were sent for GSR testing and DNA testing

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[6] As these fired casings were all still in the firearm, ballistics analysis was not conducted.
[7] The other fired projectile in State's Exhibit 18 recovered from the scene was too damaged for conclusive analysis.
[8] Mr. Porter testified to seeing one culprit wearing camouflage clothing (R. p. 464), one culprit was wearing black and white Nikes (R. p. 463), and another culprit had on purple Nikes (R. p. 464).

by SLED.[9] The results of these tests were set forth by "likelihood ratio" comparisons of the given defendant (if any) contributing to the DNA mixture (if any and only up to a maximum of four contributors) versus the DNA mixture being comprised of up to four unidentified and unrelated individuals.

- Major's jacket, Salazar's camo hoodie, Appellant's American Eagle hooded sweatshirt, Green's Chaps jacket, and Green's North Face jacket all tested positive for gunshot residue. (R. p. 1036-1041);
- The DNA analysis from the orange ski mask recovered from the road demonstrated it was 370 trillion times more likely that Devonte Major and three unidentified individuals contributed to the DNA mixture found on the mask, as opposed to four unidentified contributors. (R. p. 1018);
- The DNA analysis from the pocketknife found inside the tossed blue jumpsuit was 340 septillion times more likely to be J.B. Weaver and an unidentified contributor, as opposed to two unidentified contributors. (R. p. 1020);
- The DNA analysis of scrapings from the inside of the black and orange glove was 260 sextillion times more likely to be Salazar and three unidentified contributors, as opposed to four unidentified contributors. (R. p. 1020);
- The DNA analysis of scrapings from the inside of the other black and orange glove was 12 octillion times more likely to be Salazar and three unidentified contributors, as opposed to four unidentified contributors. A hair found in the glove was 440 sextillion times more likely to be Salazar as the sole contributor, as opposed to an unidentified contributor. (R.

[9] The one DNA likelihood ratio comparing Appellant to unidentified contributors was voluntarily excluded by the assistant solicitor due to a typographical error on the report that might have impacted the numerical comparisons. (R. p. 1006).

p. 1024);

- DNA analysis from two cuttings from the gloves were determined to be 1.2 octillion times more likely to include J.B. Weaver and one unidentified contributor, as opposed to two unidentified contributors. (R. p. 1025);
- The DNA analysis of the knit hat was 1.4 septillion times more likely to be Salazar and three unidentified contributors, as opposed to four unidentified contributors. (R. p. 1023);

STANDARD OF REVIEW

"The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." *State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007)(citing *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.* (citing *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

"It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). "The trial court is required to charge only the current and correct law of South Carolina." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). "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, 394 (2001). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given." *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011). "The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." *Id.*

ARGUMENT

I. Appellant has failed to demonstrate he was denied a public trial as a result of the virtual attendance by his family in a separate room and the virtual attendance limitations were a consequence of courtroom capacity restrictions stemming from Covid-19 safety protocols.

Appellant's first argument suggests that Appellant possesses a constitutional right to a public trial and that the failure to permit Appellant's family to be *physically* present in the courtroom was a violation of that right. Appellant provides no authority to demonstrate that the physical absence of his family–or even the total absence of his family–is a violation of a right to public trial. Moreover, the record makes clear that the need to have Appellant's family attend the trial virtually in a separate room was entirely due to the social distancing and capacity limitations mandated in courtrooms as a result of Covid-19, and the constitutional guaranteed right for victims to be present. Moreover, Appellant cannot demonstrate that he was actually prejudiced as a result of his family watching virtually. Appellant has failed to present any colorable argument for relief.

First and foremost, the circumstances of in-person court attendance were dictated to the

circuit court by Chief Justice Beatty's Amended 2021-03-04-01 Order concerning the Operation of the Trial Courts During the Coronavirus Emergency, which was in effect at the time of Appellant's trial. Judge Goodstein's lengthy discussion of the matter in both the pretrial hearing and during trial demonstrate that the she took every effort to be as accommodating to Appellant's family as possible, but noted that the restrictions upon the courtroom capacity made it impossible to have Appellant's family present. (R. p. 492-495; May 7, pretrial R. p. 174-176). Judge Goodstein went to extraordinary lengths to accommodate Appellant and his family by ensuring that his family could view the proceedings and that Appellant could view his family for comfort during the trial. (R. p. 494, lines 6-17).

The *Waller* standard relied upon by Appellant is both satisfied and ultimately irrelevant. First, *Waller* does not contemplate the prevented attendance of a defendant's family members as even constituting a "non-public" trial, and as the record demonstrates, no authority to that issue was provided to the court. Moreover, the general purpose of a public trial is to ensure a just prosecution, not abide the comfort of the defendant. As set forth in *Waller*, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...." ' " *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984)(Citing *Ibid.* (quoting *In re Oliver*, 333 U.S. 257, 270, n. 25, 68 S.Ct. 499, 506, n. 25, 92 L.Ed. 682 (1948), in turn quoting T Cooley, Constitutional Limitations 647 (8th ed. 1927))).

Next, *Waller* holds that the discretion and decision making rest with the trial court in choosing when and to what extent a closed proceeding should be utilized. Chief Justice Beatty's Order explicitly demonstrates that discretion in this matter was extremely limited. This was

especially so given the trial court's need to heed the explicit language of Section 24(3) of Article I of the South Carolina Constitution which guarantees a right to victim's family members to attend a criminal trial, juxtaposed by the lack of authority offered by defense counsel. Fourth, *Waller* was decided before technology existed that permits virtual attendance of a trial. As such, it is arguably a failed point to even argue that Appellant endured a "non-public" trial; *Waller* is ultimately rendered irrelevant in this case. Fifth, to the extent that *Waller* is applicable, it also instructs that any remedy for an improperly closed trial should be commensurate with the violation that took place. *Id.* at 50. While Respondent argues that there is no violation to consider, even if this circumstance constituted a violation, a new trial is an obscenely overreaching form of relief for what is at best a minimal and unavoidable concern that lacks evidence of prejudice.

There is no legal, factual, or practical argument to suggest a new trial should be ordered because of the Covid restrictions placed upon the court in conducting Appellant's trial. Appellant's first issue is entirely without merit.

II. Appellant's argument that the trial court erred in failing to grant a mistrial is not preserved for appellate review, and alternatively is lacking merit to demonstrate a basis for reversal.

Appellant argues that various State's exhibits were lacking a complete chain of custody and that consequently the trial court's failure to grant the motion for mistrial for their admission was in error. There are a number of fatal flaws to Appellant's arguments.

The argument is not preserved for appellate review as defense counsel failed to actually obtain a ruling on the motion. Nevertheless, the majority of the identified items are non-fungible evidence that under the law does not require a complete chain of custody to establish that the item is what it purports to be, and the alleged gaps in the chain of custody are simply potential witnesses who did not testify, as opposed to unaccounted for handling of the evidence in question. Lastly,

the State concedes that a gap in the chain of custody exists as to Appellant's clothing, which was later identified as the source for GSR testing results. However, the sheer volume of both direct and circumstantial evidence demonstrating Appellant's guilt in this case would render any argument for prejudice severely deficient. This matter cannot be reached on the merits. But even so, the totality of the record demonstrates that there is no meritorious basis to overturn the convictions or sentences of Appellant in this case.

The record shows that following the arguments regarding Appellant's motion for mistrial, the court took the matter under advisement over the lunch break. However, upon return, the parties engaged in a discussion regarding the potential DNA evidence linking Appellant to the recovered orange and black glove. The parties proceeded to elicit additional in-camera testimony on that topic and nowhere does the record indicate that the court or the parties ever returned to the topic of the mistrial motion. (R. p. 992-993; p. 1005, lines 1-4). When trial testimony continued, defense counsel continued their various chain of custody objections, but no ruling was provided by the court. At the conclusion of the State's case-in-chief, motions for directed verdict were made and pretrial motions and objections were renewed. However, at no time was there a renewed motion for mistrial or an effort to have a ruling on the motion placed on the record. (R. p. 1174-1176; p. 1187; p. 1288-1291; p. 1300).

The law is clear and voluminous that in order to preserve an issue for appeal it must be raised to and ruled upon by the lower court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 780 (2004); *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate

review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). There is no ruling on the motion for mistrial and consequently the matter is not preserved.

Notwithstanding the lack of preservation, and in the alternative to that argument, there are numerous substantive arguments demonstrating the lack of merit for Appellant's claim. Appellant itemizes the various exhibits of concern to include: State's exhibits 10 (orange ski mask), 11 (jumpsuit), 123-155 (photographs of defendants' clothing), 109 (knit cap and orange glove), 110 (camo glove), 160 (Green's shoes), 162 (Fortune's shoes), 163 (Salazar's shoes), 302 (packaging for jumpsuit and ski mask), and those broadly identified as "Fortune's clothing" and "Container G". As an initial matter, the only forensic evidence admitted at trial that inculpates Appellant is the gunshot residue reports on Appellant's clothing (discussed via State's Exhibits 203 – photograph of Appellant's hooded sweatshirt – and by extension admission of State's Exhibit 195, the actual sweatshirt). (R. p. 634-635; p. 795; p. 1035-1036; 1039). The remaining objections, for purposes of evidence against Appellant, are non-fungible evidence and do not carry a strict chain-of-custody requirement for admission, so long as they are shown to be what they purport to be.[10] *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) ("The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be.").

> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition.

[10] In the case of photographs, there is no need for chain of custody testimony.

State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741–42 (2005) (citing *State v. Glenn,* 328 S.C. 300, 305–306, 492 S.E.2d 393, 395 (Ct.App.1997)). Physical objects such as clothing are non-fungible evidence. See *State v. Glenn*, 328 S.C. 300, 305–306, 492 S.E.2d 393, 395 (Ct.App.1997) (identifying a woman's purse as non-fungible evidence).

Indeed, the arguments raised at trial do not even attempt to argue that the evidence in question is not in fact Appellant's clothing, they only wished to raise suspicion as to the potential for tampering.[11] As they pertain to Appellant, the jumpsuit, the ski mask, the knit cap, the orange and black glove, and the camo glove, and the various shoes of the defendants are all non-fungible evidence because they are not easily alterable or replaceable, and have no forensic purpose. Given the record, there is no argument that any of these items are not the physical items they purport to be and a challenge to their admission by Appellant is without merit.

Appellant's American Eagle hooded sweatshirt (State's exhibit 195), however, was tested for gunshot residue. It was then articulated to the jury that the sweatshirt contained gunshot residue particles which would be indicative of a person being near a firearm at the time it was fired. Given the record testimony offered, the State failed to identify the officer who collected this sweatshirt from Appellant at the jail cell when Appellant changed into separate clothing, and Detective Brooks was unable to articulate the manner in which this item was handled prior to receiving it from the evidence locker. Such would constitute fungible evidence absent a link in the chain of

[11] It should be noted that the evidence offered by Appellant to suggest the possibility of tampering by Officer Rollings is not a full characterization of the record evidence. Detective Brooks testified repeatedly that he was not certain of the nature of the charges against Officer Rollings that led to his termination, but "believed" it was possibly related to tampering. However, the confident testimony of Detective Davis made clear that Officer Rollings was accused of and terminated for theft, and his conduct had nothing to do with evidence tampering. (R. p. 940; p. 951; p. 1091-1092).

custody, and it was in error to admit the sweatshirt (or in the alternative permit the fungible nature of the GSR testing related to the sweatshirt). However, the error was harmless as it would fall far short of supporting a motion for mistrial, and the Court's decision does not rise to an abuse of discretion for lack of prejudicial effect.

The harmless nature of this evidence is based soundly in the fact that it is cumulative to the evidence against Appellant. Appellant confessed to police that he accompanied the other three assailants, was in the home at the time of the shootings, was armed with a 9 millimeter pistol, and played a role in the crime by initially investigating other rooms of the house while the three other assailants order occupants to the floor. Appellant confirmed that he was at the scene of the crime, therefore it is cumulative to tell the jury that Appellant's cloths are indicative of having been near a discharged firearm (which is all GSR evidence can accomplish). In light of the confession, and the other substantial amount of circumstantial evidence presented in the case, the GSR testimony regarding the sweatshirt was of no consequence, would not have supported a mistrial, and does not satisfy the resulting prejudice standard for reversible error.

Lastly, much of Appellant's arguments regarding chain of custody are simply not reasonable reflections of the record evidence. "Container G" is not evidence, it was merely the sealed box that was used to carry multiple items that were separately packaged and sealed for delivery to SLED. As witness Jamie Hall articulated about containers: "it's just a box". (R. p. 800). For exhibits 10 and 11, the chain of custody demonstrates that they were recovered by Jacob Cramer (R. p. 637), packaged separately and placed into a box (Container G) by Detective Brooks (R. p. 874; p. 892; p. 896-901), transported to SLED by Officer Wade Rollings, received on a "said to contain" basis up front by SLED without evidence of tampering (R. p. 742; p. 748-749), retrieved in properly sealed packaging, numbered, and labeled by SLED forensic serologist Rachel

Nyguyen (R. p. 966-980), and then tested by Ryan DeWane (R. p. 1019-1021). The chain is likewise set for State's 109 and 110 through Wade Rollings (R. p. 984), Jackie Davis (R. p. 747); Rachel Nyguyen (R. p. 977), and Ryan DeWane (R. p. 1022).

> Although Hatcher asserts our cases hold all individuals must be identified without exception, this appears to be an extrapolation of the general observation that where all individuals in the chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial judge to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive. See, e.g., *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205–06; *Taylor*, 360 S.C. at 25, 598 S.E.2d at 738. In a case involving the chain of custody of a blood sample in a paternity case, we reiterated the standard set forth in *Benton v. Pellum* that the chain of custody must be established as far as practicable, and we specifically stated that "we have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case.
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> ...
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> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir.1971). "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '... the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.' " *Id.* (citation omitted). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960).

State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 753–55 (2011). The absence of testimony from Wade Rollings or Chad Smith does not impede the admissibility of the evidence in this matter. Had any of these items demonstrated evidence of tampering packaging upon transfer to SLED they would not have been accepted without notation. No such testimony was offered.

In conclusion, the issue cannot be appropriately reached on appeal, and though the GSR testing for Appellant's clothes would constitute an error in the absence of testimony from the

collecting officer as to the manner in which the clothes were handled, there is no basis for reversal on this issue. Appellant's convictions and sentences should be affirmed.

III. The trial court did not err in giving a "hand of one" charge in light of the "any evidence" standard of review and the extraordinary amount of direct and circumstantial evidence tending to show that Appellant participated in the burglary, but did not personally harm any of the victims on the night of the crime.

There is overwhelming evidence of accomplice liability evidence against Appellant in this matter. The State more than satisfied the "any evidence" standard to warrant the hand of one charge. The trial court's decision to instruct the jury on the hand of one is the hand of all was entirely proper.

The South Carolina Supreme Court in *State v. Mattison* provided a fairly comprehensive explanation of the law and circumstances for instructing a jury as to accomplice liability under the hand of one is the hand of all charge. Therein, the Court stated:

> "It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Under the 'hand of one is the hand of all' theory, 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." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002). "Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999) (quoting *Austin*, 299 S.C. at 459, 385 S.E.2d at 832). "In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987); see *Wilson v. Wilson*, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime."). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." *Leonard*, 292 S.C. at 137, 355 S.E.2d at 272; *State v.*

> *Barroso*, 328 S.C. 268, 272, 493 S.E.2d 854, 856 (1997) (stating that mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy). 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 principle." *State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." *State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct.App.2005).

State v. Mattison, 388 S.C. 469, 479–80, 697 S.E.2d 578, 584 (2010). To support an accomplice liability charge, the question is whether there is any evidence that another co-conspirator was the shooter and defendant in question was acting with him during the criminal act. *Barber v. State,* 393 S.C. 232, 237, 712 S.E.2d 436, 439 (2011) (citing *State v. Dickman*, 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000)). To the extent the argument is even preserved for review, the facts of this case more than warrant the accomplice liability charge given by the court.

First, it does not appear from the record that defense counsel ever objected to the trial court giving a hand of one hand of all instruction in this case. As set forth above, an issue cannot be raised on appeal unless it is raised to and ruled upon by the trial court. (*Supra*). Notwithstanding procedural limitations, Appellant argues that the trial court erred in giving an accomplice liability "hand of one is the hand of all" charge to the jury. In support of the argument, Appellant relies on the premise that the evidence of the case does not establish Appellant was ever in the victims' home. (Brief of Appellant, at 27). Appellant references the fact that the evidence does not tend to show that Appellant fired a weapon, injured a victim, drove the getaway car, or created any forensic connection to the home. Appellant then offers the conclusory claim that the confession given by Appellant was "inconsistent and inadmissible." However, the trial court conducted a *Jackson v. Denno* hearing and found the statement admissible. (May 7, Pretrial R. p. 153-154).

Moreover, Appellant has not sought to challenge that ruling on appeal. Such evidence cannot simply be discounted by Appellant in this case.

Support for the charge is simple and robust. Appellant's confession is irrefutable evidence that he was armed with the Taurus 9 millimeter, that he accompanied the other three assailants, was present when they kicked in the door, came in last, and proceeded to other rooms of the house while his codefendants ordered instructions to victims. Evidence in the record *does* corroborate the likelihood that he never fired his weapon, which is precisely the purpose of the accomplice liability charge. Even if he did not harm anyone during the crime, Appellant was aware of the crime to take place, participated in the crime, and carried a gun during the process. He is just as guilty for the foreseeable murder of an occupant of the residence under the circumstances of this case and the jury was entitled to hear a charge explaining the law on that subject.

The lack of evidence demonstrating that he actually fired his weapon is the most compelling factor warranting the charge; it is not an argument against giving the charge. The confession more than satisfies the any evidence standard, but the other circumstantial evidence also demonstrates his knowledge and participation in the crime. Appellant first attempted to claim that he was visiting his friend and/or cousin, Jaquavious Washington, which was the circumstantial evidence link between how these assailants wound up at Mr. Porter's address demanding marijuana at the point of four pistols. It is also compelling circumstantial evidence that during the police chase, the fleeing car, which contained the same number of assailants that fled just minutes earlier, dropped the wallet of Mr. Weaver out the window during a prolonged high speed chase. That piece of evidence cannot possibly come to exist except by way of a burglary committed by the occupants of the vehicle.

The accomplice liability charge was entirely proper and there is more than enough evidence within the record to uphold the trial court's decision. As such, the arguments of Appellant under Issue III are entirely without merit. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MUANAH A. FORTUNE, JR.,

APPELLANT.

Appellate Case No. 2021-000569

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 9th day of November, 2022.

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