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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions

Assigned Judge: Darrell Scott Fisher, Circuit Court Judge  
Disposition Judge: G.D. Morgan, Jr., Circuit Court Judge

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Appellate Case Nos. 2023-000182 and 2023-001149

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The State of South Carolina,

Respondent,

v.

Luis Armando Alvarez,

Appellant.

AND

The State of South Carolina,

Respondent,

v.

Juan Carlos Alvarez,

Appellant.

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FINAL REPLY BRIEF OF THE APPELLANTS

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES..... ii

REPLY TO RESPONDENT’S STATEMENT OF FACTS .....1

ARGUMENT

    I.    The trial court erred in denying the Appellants’ request to charge self-defense where there was evidence in the record from which it could be reasonably inferred that the Appellants acted in self-defense.....2

    II.   The trial court erred in charging the jury on accomplice liability for attempted murder, a specific intent crime.....9

    III.  The trial court erred in failing to charge the jury that the Appellants had the right to remain silent, and this error was not cured by charging the jury on this instruction after it reached its verdict.....12

    IV.  The State failed to disclose information and evidence in violation of *Brady* and Rule 5, SCRCrimP, requiring reversal.....16

CONCLUSION.....20

**TABLE OF AUTHORITIES**

**CASES**

*Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012)  
(Toal, C.J., dissenting) .....13

*Carter v. Kentucky*, 450 U.S. 288, 305, 101 S. Ct. 1112, 1121–22, 67 L. Ed. 2d 241 (1981) .....15

*Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d at 266, 268 (1993).....17, 18

*Gibson v. State*, 334 S.C. 515, 525, 514 S.E.2d 320, 325 (1999) .....16, 17

*Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000).....17

*Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) .....18

*Miller v. Schmid Laboratories, Inc.*, 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992).....10

*People v. Bray*, 99 A.D.2d 470 (N.Y. App. Div. 1984) .....9

*S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903,  
907 (2007).....14

*Sharma v. Nevada*, 118 Nev. 648, 656-57, 56 P.3d 868, 873 (Nev. Sup. Ct. 2002).....10

*Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021).....13

*Specht v. Indiana*, 838 N.E.2d 1081, 1090 (Ind. Ct. App. 2005) .....10

*State v. Arther*, 290 S.C. 291, 297–98, 350 S.E.2d 187, 191 (1986) .....8

*State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).....3

*State v. Bowers*, 436 S.C. 640, 647, 875 S.E.2d 608, 611 (2022).....14

*State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) .....11, 15

*State v. Day*, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000) .....3, 4, 5, 6

*State v. Douglas*, 411 S.C. 307, 327, 768 S.E.2d 232, 243 (Ct. App. 2014).....6

*State v. Geter*, 434 S.C. 557, 563-67, 864 S.E.2d 569, 572-73 (Ct. App. 2021), *cert. granted*,  
*State v. Geter*, Order (S.C. Sup. Ct. filed September 7, 2022).....9

<i>State v. Guderyon</i> , 438 S.C. 476, 492, 884 S.E.2d 202, 210 (Ct. App. 2022), <i>reh'g denied</i> (Mar. 22, 2023), <i>cert. granted</i> (Feb. 7, 2024) .....	5
<i>State v. Hendrix</i> , 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978) .....	3
<i>State v. Jackson</i> , 384 S.C. 29, 35, 681 S.E.2d 17, 21 (Ct. App. 2009) .....	3
<i>State v. Jones</i> , 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021).....	14, 16
<i>State v. King</i> , 422 S.C. 47, 810 S.E.2d 18 (2017).....	9
<i>State v. Middleton</i> , 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) .....	11
<i>State v. Peer</i> , 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996).....	14
<i>State v. Ross</i> , 322 N.C. 261, 265, 367 S.E.2d 889, 891 (N.C. 1988) .....	14
<i>State v. Starnes</i> , 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000).....	5
<i>State v. Sutton</i> , 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000).....	11
<i>State v. Taylor</i> , 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998) .....	18
<i>State v. Thompson</i> , 374 S.C. 257, 262-264, 647 S.E.2d 702, 705-706 (Ct. App. 2007).....	9
<i>State v. Washington</i> , 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000) .....	10
<i>State v. Williams</i> , 400 S.C. 308, 315, 733 S.E.2d 605, 609 (Ct. App. 2012) .....	3
<i>State v. Williams</i> , 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019).....	3, 5, 9, 19
<i>State v. White</i> , 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018) .....	4, 8
<i>Stone v. State</i> , 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1998).....	3
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).....	13
<i>Williams v. Indiana</i> , 737 N.E.2d 734, 740 (Ind. 2000) .....	11
<i>Wilson-Bey v. United States</i> , 903 A.2d 818, 843-44 (D.C. 2006) .....	10, 11

## RULES AND STATUTES

41 C.J.S. <i>Homicide</i> § 179.....	11
--------------------------------------	----

42 U.S.C. § 1983.....17  
Rule 5, SCRCrim.P. ....16

**OTHER AUTHORITIES**

Jean Hofer Toal et al., *Appellate Practice in South Carolina* 183 (3rd ed. 2016) .....13

**CONSTITUTIONAL PROVISIONS**

S.C. Const. Art. I, § 12.....18  
U.S. Const. amend. V.....18

## REPLY TO RESPONDENT'S STATEMENT OF FACTS

The Respondent does not dispute the vast majority of the facts as set forth in the Appellants' Statement of Facts. Rather, it refrains from including facts in its brief that are beneficial to the Appellants. The Appellants request that this Court accept the Appellants' Statement of Facts in its entirety. The fact that the Respondent disputes, the fact that this case involves a four man on two man ambush, is addressed below. *See* Respondent's Brief at 15, fn. 6.

Orlando Lopez left Club Vibe and was outside in the parking lot for approximately five minutes before the Appellants came out. (R. p. 220, lines 16-24). Jhefrey Colorado had left the Club "just after" Lopez and stayed in the parking lot. (R. p. 230, lines 10-15). One of Lopez's friends was also in the parking lot at the time. (R. p. 212, lines 17-25; p. 245, lines 20-21). The Appellants did not follow Lopez, Colorado, and Lopez's friend out of the Club. Rather, they stayed inside, and left sometime later when Bladimir Acosta (the Club owner who was friends with Lopez, Javier Solis, and Javier Solis's wife) told them that they had to leave. (R. p. 306, lines 24-25). The Appellants did not want to leave the Club by themselves and urged Acosta to make everyone leave at the same time. (R. p. 307, lines 19-21). Acosta refused and told the Appellants that they (alone) had to leave. (R. p. 308, lines 18-20).

The Appellants left the Club, only to find Lopez, Colorado, and one of Lopez's friends lying in wait. The Appellants could not turn around and go back inside, as Acosta had locked the Club's door. (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5). Although Solis's wife could not see anything that was happening outside, she knew that the men planned on attacking the Appellants, as she told Solis not to leave the Club. (*See* R. 293, lines 14-17; p. 319, lines 1-6). Solis went outside despite his wife's pleas. (*See id.*; *see also* R. p. 263, lines 2-4, 8-11).

The Respondent incorrectly asserts that “[w]hen Solis exited the bar, he saw Appellants assaulting Lopez.” Respondent’s Brief at 10. It then incorrectly concludes that “the testimony consistently indicated Solis came out of the club after the incident between Appellants and Lopez began.” Respondent’s Brief at 15, fn. 6.<sup>1</sup> Solis testified that when he left the Club, he saw Lopez and Colorado standing next to each other, and Lopez was arguing with the Appellants:

Q: ... When you walked out the door, what did you see? Did you see the defendants outside?  
A: Yes. ...  
Q: ... And what did you see the defendants doing when you walked outside?  
A: They were kind of arguing with the person next to [Colorado]. ...

(R. p. 263, lines 2-4, 8-11). At this point, the Appellants were facing four men: Lopez, Lopez’s friend, Colorado, and Solis, with the Club’s door locked so that they could not get back inside. (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; 303, lines 13-15; p. 309, lines 4-5). At some point, Colorado armed himself with what was described as a club, a tube or stick, and a metal tube or pole. (R. p. 237, lines 13-14; p. 342, lines 13-14). The Appellants tried to escape, running to their work van. (R. p. 237, lines 21-23) (Colorado testimony, “Q: And when [the Appellants] ran away, did you follow them? A: Yes. I went after them, and they tried to get into a van used for work”). Law enforcement testified there was a trail of blood going to the driver’s side door of the Appellants’ work van. (R. p. 393, lines 21-24). In the light most favorable to the Appellants, this was a four man on two man ambush, facilitated by Acosta.

## ARGUMENT

**I. The trial court erred in denying the Appellants’ request to charge self-defense where there was evidence in the record from which it could be reasonably inferred that the Appellants acted in self-defense.**

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<sup>1</sup> The Respondent uses the terms “bar” and “club” interchangeably. *See, e.g.*, Respondent’s Brief at 10.

The Respondent incorrectly asserts that “[i]t is axiomatic all four elements of self-defense must be established” for the trial court to charge self-defense. Respondent’s Brief at 23 (citing *State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010)). All four elements must not be “established.” Rather, if there is “any evidence” in the record to support a self-defense charge, the Appellants are entitled to a self-defense charge. *State v. Williams*, 400 S.C. 308, 315, 733 S.E.2d 605, 609 (Ct. App. 2012) (citing *State v. Jackson*, 384 S.C. 29, 35, 681 S.E.2d 17, 21 (Ct. App. 2009)).

The Respondent erroneously relies on *Stone v. State* for its argument that, [u]pon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of the defense.*” Respondent’s Brief at 23 (quoting *Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1998) (italics that of the Respondent). However, *Stone* is a post-conviction relief case, where “[t]he burden is on the applicant ... to prove the allegations in his application.” *Stone*, 294 S.C. at 287, 363 S.E.2d at 903. If a defendant “establishes” all four elements of self-defense at trial, he is entitled to a directed verdict. *State v. Hendrix*, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978) (“Based upon the prior decisions of this Court, in order to establish self-defense, a defendant must ordinarily show [the four elements of self-defense]. We conclude that self-defense was established in this case and, as a matter of law, the appellant herein was entitled to a directed verdict of acquittal.”).

“[I]f there is some evidence to support each element of self-defense—whether found in the State’s presentation of evidence or produced by the defendant—it becomes the State’s burden to persuade the jury beyond a reasonable doubt that at least one element of the defense does not exist.” *State v. Williams*, 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019) (citations omitted). In other words, “[i]f there is any evidence in the record from which it could reasonably be inferred

that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Day*, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000).

The Respondent argues that the first element of self-defense, that the Appellants were without fault in bringing on the difficulty, was not "established" because "all the trial testimony established Appellants followed Lopez from the club and attacked him with box cutters, then attacked Solis when he intervened to try to render aid to Lopez." Respondent's Brief at 23. The Respondent similarly asserts that "[n]o testimony was presented to establish a contrary version of events in which Appellants were not the persons responsible for the violence outside the club." Respondent's Brief at 23-24. The issue is not whether there was "testimony" "presented to establish a contrary version" of the State's theory of the case. *See Day*, 341 S.C. at 416–17, 535 S.E.2d at 434. In the light most favorable to the Appellants, there was much more than "some evidence" from which it could reasonably be inferred that the Appellants were not at fault in bringing on the difficulty. *See State v. White*, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018).

The Appellants were actively trying to avoid any difficulty outside the Club. In fact, a reasonable inference is that the Appellants were the victims of a deliberate ambush facilitated by Acosta, the Club's owner. Lopez, Colorado, and Lopez's friend were all outside the Club, waiting in the parking lot for five minutes, when Acosta forced the Appellants outside and locked the door behind them. (R. p. 212, lines 17-25; p. 220, lines 16-24; p. 230, lines 10-15; p. 245, lines 20-21). Again, Acosta was friends with Lopez, Solis, and Solis's wife. Although Lopez and Colorado had past difficulty with the Appellants inside the Club, they chose to wait in the parking lot rather than leave the premises. The Appellants did not "follow" Lopez outside the Club as claimed by the

Respondent. *See* Respondent’s Brief at 23. The Appellants only left the Club when Acosta told them that they had to leave. (R. p. 306, lines 24-25). The Appellants did not want to leave the Club, especially by themselves. The Appellants urged Acosta to make everyone leave at the same time. (R. p. 307, lines 19-21). Acosta refused this request and told the Appellants that they (alone) had to leave. (R. p. 308, lines 18-20). Acosta forced the Appellants out of the Club by themselves, and then locked the door behind them. (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, 4-5). Although Solis’s wife could not see anything that was happening outside, it reasonably can be inferred that she knew the men planned on attacking the Appellants, as she told Solis not to leave the Club. (*See* R. p. 293, lines 14-17; p. 319, lines 1-6). Solis went outside despite his wife’s pleas. (*See id.*; *see also* R. p. 263, lines 2-4, 8-11). When Solis stepped outside, Lopez was arguing with the Appellants. (R. p. 263, lines 2-4, 8-11). The Appellants then faced four men: Lopez, Colorado, Lopez’s friend, and Solis.

The Respondent implies that, for the Appellants to be entitled to a self-defense instruction, they had to testify at trial. Respondent’s Brief at 24 (stating “due to the absence of any testimony from Appellants regarding their account of the incident, there was no evidence or testimony presented establishing Appellants stabbed Lopez and Solis in order to defend themselves ...”). This is not the law. The Appellants are not required to “establish” self-defense through their own testimony. *See Williams*, 427 S.C. at 250, 830 S.E.2d at 906.

As stated in the Appellants’ Opening Brief, they had the right to act on appearances, and they were not required to wait for a person to be actually attacked before acting. *State v. Guderyon*, 438 S.C. 476, 492, 884 S.E.2d 202, 210 (Ct. App. 2022), *reh’g denied* (Mar. 22, 2023), *cert. granted* (Feb. 7, 2024); *see also State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). The Respondent takes issue with this, claiming that “no testimony was offered to explain what the

purported ‘appearances’ were, or how those appearances created a *reasonable* fear of bodily injury from a group of people.” Respondent’s Brief at 25 (italics that of Respondent). However, a reasonable fear of bodily injury from a group of people does not need to be “explained” by “testimony.” *See Day*, 341 S.C. at 416–17, 535 S.E.2d at 434 (“[i]f there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge’s refusal to do so is reversible error.”).

The Respondent incorrectly defines, without any citation, that “past difficulties” “means a prior incident that would cause a defendant to have a reasonable belief of imminent danger from the victim to support the defendant’s version of an incident.” Respondent’s Brief at 24. Then, ignoring many of the past difficulties between the parties as set forth in the Appellants’ Brief, the Respondent claims that the only potential past difficulty here was the argument between Lopez and the Appellants regarding a song played at the Club. Respondent’s Brief at 25. The Respondent concludes that this was not “sufficient evidence to justify a jury charge on self-defense.” Respondent’s Brief at 25.

Despite the Respondent’s argument, “past difficulties” do not need to be a singular, past event, that alone supports a reasonable belief of imminent danger. Rather, the question is whether there was “any evidence” in the record from which it could reasonably be inferred that the Appellants were in actual imminent danger, or they had a reasonable belief of imminent danger. There was such evidence, including evidence that the Appellants were the victims of a deliberate ambush facilitated by the Acosta (*see supra*); evidence of the victims’ intoxication (*see State v. Douglas*, 411 S.C. 307, 327, 768 S.E.2d 232, 243 (Ct. App. 2014); (R. p. 185, lines 6-13; p. 231,

lines 12-14; p. 217, lines 14-24; p. 281, line 22-p. 282, line 1)); and evidence of the past difficulties between the parties (*see infra*).

The past difficulties, individually and combined with each other and with the other evidence set forth herein, is “any evidence” from which it could reasonably be inferred that that the Appellants were in actual imminent danger, or they had a reasonable belief of imminent danger: Evidence that Lopez was arguing with the Appellants inside the bar (R. p. 231, lines 4-6); evidence that Solis was upset at the Appellants for speaking to Paula Patina, and although Solis did not hear the conversation, he confronted the Appellants inside the Club (R. p. 287, line 25-p. 288, line 4; p. 288, line 25-p. 289, line 6); evidence that Solis was angry at the Appellants because the Appellants passed him when they used the bathroom (R. p. 289, line 20-p. 290, line 3; p. 290, line 23-p. 292, line 9); evidence that Lopez was arguing with the Appellants in the parking lot when Solis walked outside to confront the Appellants (R. p. 263, lines 2-4, 8-11); evidence Lopez and Solis sued the Club and its owners because the fight “started there” (R. p. 213, lines 11-22; *see also* R. p. 321, lines 14-18); evidence that Acosta forced the Appellants to leave the Club on their own, despite the Appellants not wanting to leave and urging Acosta to make everyone leave together (R. p. 306, lines 24-25; p. 307, lines 19-21; p. 308, lines 18-20); evidence that Acosta locked the Club door, actively preventing the Appellants from going back inside (R. p. 206, lines 17-22; 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5); evidence that when Lopez, Colorado, and Lopez’s friend left the Club, they waited for the Appellants’ in the parking lot until Acosta forced the Appellants to leave the Club by themselves (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5); evidence that it was known that Lopez, Colorado, and Lopez planned on attacking Appellants in the parking lot, as Solis’s wife (who could not see anything that was happening outside) told Solis not to go outside (R. p. 293, lines 11-13;

p. 319, lines 1-6); evidence that Colorado armed himself with what was described as a club, a tube or stick, and a metal tube or pole (R. p. 237, lines 13-14; p. 342, lines 13-14); and evidence that the Appellants were bleeding, and they tried to escape the attack in their work van, however the van door would not open (R. p. 238, lines 8-10; p. 393, lines 20-24).

The Respondent does not dispute that there was “any evidence” from which it could reasonably be inferred that the Appellants had no other probable means of avoiding the danger (the fourth element of self-defense). To confirm, there was ample evidence, *e.g.*, evidence that the Appellants could not stay inside the Club and were forced to leave the Club alone (R. p. 306, lines 24-25; p. 307, lines 19-21; p. 308, lines 18-20); evidence that the Appellants could not get back inside the Club, as the door was locked (R. p. 206, lines 17-22; p. 267, lines 14-16; 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5); and evidence that the Appellants tried to leave in their van, but were unable to do so (R. p. 238, lines 8-10; p. 393, lines 20-24).

The Respondent does not dispute that the jury, having been told in opening statements that the Appellants acted in defense of their own lives, had an expectation that was never met. *See* Appellants’ Opening Brief at 20. It does not dispute that the State exacerbated the trial court’s error by commenting in its closing on the lack of self-defense and how the Appellants “put up no evidence.” (R. p. 509, lines 20-p. 510, line 6; p. 510, lines 10-24; p. 532, lines 6-9); *see also State v. Arther*, 290 S.C. 291, 297–98, 350 S.E.2d 187, 191 (1986) (“This Court has repeatedly admonished that the prosecution must not comment directly *or indirectly* on a defendant’s failure to take the stand.”) (emphasis added). The Respondent also does not dispute that the trial court engaged in weighing the evidence rather than applying the proper “any evidence standard.” *See* Appellants’ Opening Brief at 12; Respondent’s Brief at 22-26.

There was extensive evidence in the record from which it could be reasonably inferred that the Appellants acted in self-defense, and the trial court's failure to charge self-defense is reversible error.

**II. The trial court erred in charging the jury on accomplice liability for attempted murder, a specific intent crime.**

The Appellants' reliance on *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017) is not misplaced. *See* Respondent's Brief at 28. The Appellants cite *King* for the assertion that attempted murder is a specific intent crime and set forth the Supreme Court's reasoning in *King* as context for specific intent. Appellants' Opening Brief at 14. The Appellants do not rely on the *Williams* case, 427 S.C. 148, 829 S.E.2d 702, to "deal with transferred intent." *See* Respondent's Brief at 28. Rather, the Appellants rely on an out-of-state case to support the statement that "[t]ransferring the intent to kill from Appellant Juan Alvarez to Appellant Luis Alvarez, or vice versa, does not satisfy the necessary mens rea." Appellants' Opening Brief at 15 (citing *People v. Bray*, 99 A.D.2d 470 (N.Y. App. Div. 1984) ("Defendant is correct in his contention that the convictions for attempted murder in the second degree charged in count one of the indictment and assault in the first degree charged in count six of the indictment must fall. Both these crimes require the specific intent to inflict actual harm to another person (i.e., intent to cause death or intent to cause serious physical injury). The People did not prove such intent on the part of defendant and his accomplices' intent should not be imputed to him")). As the Respondent acknowledges, "this Court has concluded that the doctrine of transferred intent is inapplicable as to an attempted murder charge." Respondent's Brief at 28-29 (citing *State v. Geter*, 434 S.C. 557, 563-67, 864 S.E.2d 569, 572-73 (Ct. App. 2021), *cert. granted*, *State v. Geter*, Order (S.C. Sup. Ct. filed September 7, 2022)).

The Appellate Courts of this State have not decided whether a defendant can be guilty of accomplice liability for attempted murder. *See* Respondent's Brief at 29 (citing *State v. Thompson*,

374 S.C. 257, 262-264, 647 S.E.2d 702, 705-706 (Ct. App. 2007). Even assuming that the Appellants could (generally) be guilty of accomplice liability for attempted murder, the trial court's jury instructions here were erroneous "when considered as a whole" and when "focusing on the accomplice liability charge in isolation." *See* Respondent's Brief at 29.

With respect to the charges as a whole, the trial court instructed the jury on negligence, recklessness, and indifference to duty, as applicable "in this case":

In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State **in this case** for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence.

... Criminal - - **criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or indifference to duty** or to consequence that is considered by the law to be the equivalent of criminal intent.

(R. p. 572, lines 7-12; p. 573, lines 9-13) (bold added).

The Respondent does not dispute that these various types of criminal intent were irrelevant and inapplicable to attempted murder and accomplice liability for attempted murder. They were clearly erroneous. *See State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000); *Miller v. Schmid Laboratories, Inc.*, 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992).

With respect to the accomplice liability charge itself, the trial court instructed the jury that it could find the Appellants guilty as a principal "who is present aiding, abetting, or assisting in the crime" or as an accomplice upon proof that attempted murder was a "natural and probable consequence" of acts done in carrying out a common plan or scheme. (R. p. 575, line 10-p. 577, line 6). The Respondent does not dispute that this approach has been rejected by courts across the country. *See Specht v. Indiana*, 838 N.E.2d 1081, 1090 (Ind. Ct. App. 2005); *Wilson-Bey v. United States*, 903 A.2d 818, 843-44 (D.C. 2006); *Sharma v. Nevada*, 118 Nev. 648, 656-57, 56 P.3d 868, 873 (Nev. Sup. Ct. 2002).

The Respondent argues that the errors in the jury instructions were harmless because “the jury could have reached no other conclusion but that both Appellants had a specific intent to kill the victim.” Respondent’s Brief at 30. In support of its argument, the Respondent relies on footnote 5 in *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (stating “[a] specific intent to kill **may** be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and the nature and extent of the victim’s injuries”) and 41 C.J.S. *Homicide* § 179 (listing circumstances in which “intent to kill **may** be inferred”). Respondent’s Brief at 30-31 (bold added). However, what “may” be inferred by a jury does not mean that “beyond a reasonable doubt [] the error complained of did not contribute to the verdict.” *See State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

As stated by the Indiana Supreme Court, “[i]t is difficult if not impossible to see how [the defendant] received a fair trial when the jury could have convicted him of knowingly (rather than intentionally) aiding the principal in knowingly (rather than intentionally) attempting to kill [the victim]. As such, we now hold that the trial court committed fundamental error in not instructing the jury that it had to find that [the defendant] possessed the specific intent to kill when he knowingly or intentionally aided, induced, or caused his backseat accomplice to commit the crime of attempted murder.” *Williams v. Indiana*, 737 N.E.2d 734, 740 (Ind. 2000); *see also Wilson-Bey*, 903 A.2d at 843-844 (“even where the evidence against the defendant was strong[] a juror may have had reasonable doubt as to whether the defendant formed the intent to kill the victim, and under the trial court’s instruction, a juror who believed that the defendant’s intent was merely to join in an assault on a victim could nevertheless reasonably find the defendant guilty of aiding and abetting ...”).

The Respondent argues that, beyond a reasonable doubt, the errors did not contribute to the verdict because the State did not tell the jury in closing arguments “that a specific intent to kill was *not* required for accomplice liability” and in closing the State did not “utter[] the phrase” “the hand of one is the hand of all.” Respondent’s Brief at 31. In making this argument, the Respondent ignores the fact that the court charged negligence, recklessness, indifference, “aiding, abetting, or assisting in the crime” and the “natural and probable consequence” doctrine. (R. p. 572, lines 7-12; p. 573, lines 5-13; p. 575, line 10-p. 577, line 6). The court’s instructions to the jury are far worse than what the State (theoretically) did not tell the jury in its closing argument. The errors here were not harmless.

**III. The trial court erred in failing to charge the jury that the Appellants had the right to remain silent, and this error was not cured by charging the jury on this instruction after it reached its verdict.**

This issue is preserved for appellate review. By the time it became apparent that the “no inference charge” was not given, the jury had reached its verdict, completed the written verdict forms, the foreperson certified that “this decision was the unanimous decision of the jury,” and the jury provided notice to the bailiff that it had reached a verdict. (R. p. 579, lines 12-16; p. 582, lines 6-13; *see also* pp. 12-15). The court received notice that the jury reached a verdict, but the clerk had not yet published that verdict in the courtroom. (R. p. 583, lines 13-14). By this point, the trial court had only three options: it could do nothing, it could charge the jury on the Appellants’ right to remain silent, or it could order a new trial. The trial court had a bench conference with trial counsel. (R. p. 582, lines 8-13). Immediately after the bench conference, the trial court announced on the record of what it was going to do:

THE COURT: All right. At the bench conference, we had a discussion that the right to - - or failure of the defendants to testify should not be held against them, and so let me make a couple of comments.

... what we're going to do - - *what I'm going to do*, I'm going to bring [the jury] back in. And I'm going to explain to them that [] part of the charge was not included, and I am going to charge them and have them go back to the jury room to deliberate if that makes any difference.

Anything from the State on that?

MR. RICHARDSON: That's the way we think it should be done.

THE COURT: All right. And same from the defense? Anything from the defense?

MS. GORSKI: No, thank you, Your Honor.

MR. WATSON: That's fine.

(R. p. 582, lines 9-12, 16-25; p. 583, lines 1-3).

By that point, the jury did not want to deliberate further. The jury wanted to go home. The trial court had made its decision in the bench conference of “what I’m going to do,” and that ruling was clearly final. “[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of ‘gotcha,’ where form is elevated over substance.” *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) (citing Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 183 (3rd ed. 2016); *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting); *Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021)).

“Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal.” *Jones*, 435 S.C. at 145, 866 S.E.2d at 561 (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). It was clear to all concerned that Appellants’ trial counsel argued that a new trial was appropriate. The Appellants’ trial counsel filed post-trial motions on this very issue. (*See* R. p. 5; R. p. 9). As the Respondent recognizes, if Appellants’ trial counsel had not made an argument for a new trial, they would not have been able to make the same argument in post-trial motions.

Respondent's Brief at 33; *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). However, it was clear to the State that this issue was preserved, as it never filed a response to the Appellants' post-trial motions or otherwise objected on issue preservation grounds. *See Jones*, 435 S.C. at 145, 866 S.E.2d at 561 (The "purpose [of preservation rules] is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion not suppress"). This issue is clearly preserved for appellate review.

The Respondent argues, without any authority, that charging the jury on the defendant's right to remain silent *after* the jury had reached its verdict is part of the "overall instructions" given to the jury and was "entirely proper." Jury instructions given after a jury has reached its verdict are not part of the "overall instructions." By their very nature, jury instructions instruct the jury on the law so that the jury can reach a verdict. *State v. Peer*, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996) ("[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached."). Here, the "no inference charge" was given after the jury had already reached its verdict, completed the written verdict forms, the foreperson certified that "this decision was the unanimous decision of the jury," and the jury provided notice to the bailiff that it had reached a verdict. (R. p. 579, lines 12-16; p. 582, lines 6-13; *see also* pp. 12-15). It was not part of the "overall instructions" as the Respondent now claims. *See State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (N.C. 1988) ("It is beyond any question that the trial judge's failure to give the requested and subsequently promised jury instruction concerning defendant's decision not to testify in his own defense constitutes error. The State in fact explicitly concedes as much in its written brief to this Court in this matter").

In arguing that any error was harmless, the Respondent argues that this Court “must attempt to determine how the jury understand the instruction.” Respondent’s Brief at 35-36. Relying on *State v. Bowers*, 436 S.C. 640, 647, 875 S.E.2d 608, 611 (2022), the Respondent asserts that “[t]he appropriate test involves determining what a reasonable juror would have understood the charge to mean.” Respondent’s Brief at 35-36. However, the issue here is not that the trial court gave an erroneous instruction, but rather the trial court gave *no* instruction prior to the jury reaching its verdict, although it was required to do so.

As held by the United States Supreme Court, the trial court must give a no inference charge if requested. *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S. Ct. 1112, 1121–22, 67 L. Ed. 2d 241 (1981) (“[A] state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify”). With respect to harmless error, the Court “must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.” *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (citations omitted).

Without citation to authority, the Respondent tries to distinguish the verdict that the jury reached (complete with written verdict forms, certification, and notification to the court) with what the Respondent now calls “the final verdict.” Respondent’s Brief at 36 (stating that the no inference charge was given “before the final verdict was reached”). Despite the Respondent’s use of “final” before the word “verdict,” the fact remains that the trial court failed to give the “no adverse inference” instruction prior to the jury reaching its verdict.

The Respondent does not dispute any specific portions of the Appellants’ brief that sets forth why this error was not harmless beyond a reasonable doubt. *See* Appellants’ Opening Brief at 20-21; Respondent’s Brief at 35-36. Rather, without citation to any authority, the Respondent

argues that giving the “no adverse inference” instruction after the jury reached its verdict benefited the Appellants because it “served to highlight or emphasize Appellants rights.” Respondent’s Brief at 36. If this were the case, instructions concerning constitutional rights would routinely be given after the jury reaches its verdict or would otherwise be “highlighted” in a similar manner. They are not. The fact remains that the jury reached its verdict without being instructed on the no inference charge. For the reasons set forth at length in the Appellants’ Opening Brief, the error here was not harmless beyond a reasonable doubt. Appellants’ Opening Brief at 20-21.

**IV. The State failed to disclose information and evidence in violation of *Brady* and Rule 5, SCRCrimP, requiring reversal.**

The Respondent incorrectly asserts that the Rule 5, SCRCrimP, portion of the Appellants’ argument is not preserved for appellate review because “[a]t trial, Appellants argument focused entirely on *Brady* and due process, with no mention of Rule 5, SCRCrimP.” Respondent’s Brief at 37, fn 7. Appellants’ trial counsel extensively argued both *Brady* and Rule 5 (and explicitly referenced “Rule 5” throughout their argument). *See, e.g.*, (R. p. 94, lines 11-19; p. 97, lines 3-8; p. 99, lines 1-5; p. 100, lines 12-14; p. 126, lines 18-119; lines 132, lines 1-4; p. 137, lines 7-20). This is far more than what is required to preserve the issue for appellate review. *See Jones*, 435 S.C. at 144-145, 866 S.E.2d at 561.

This case involved a four man on two man fight where self-defense was clearly an issue at the outset. *See supra, see also* (R. p. 340, line 19-p. 342, line 17) (Officer Cassel testified that when he arrived at the scene, he saw Lopez and Solis with stab wounds, and Colorado told him that he had a “club or a stick” that Colorado used against the Appellants). The Respondent erroneously relies on *Gibson*, a post-conviction relief case, when asserting “our supreme court has noted, the burden is clearly on the Appellant to establish the evidence was favorable and material such that there existed a reasonably probability he failed to receive a fair trial.” Respondent’s Brief

at 40 (citing *Gibson v. State*, 334 S.C. 515, 525, 514 S.E.2d 320, 325 (1999)). However, in the context of *Brady*, the *Gibson* Court uses the phrase “fair trial” to contrast it with prosecutorial misconduct:

It does not matter whether the prosecutor’s misconduct in failing to reveal *Brady* evidence is due to negligence or an intentional act because a court may find a *Brady* violation irrespective of the good faith or bad faith of the prosecutor. *Brady* is based on a sense of fairness, and a belief that society gains when a defendant is accorded a fair trial. The focus is not on the misconduct of the Prosecutor, but on the fairness of the procedure. As the Supreme Court explained in *Brady*, the principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

*Gibson*, 334 S.C. at 528, 514 S.E.2d at 326–27 (internal citations and quotations omitted).

Similarly, the Respondent erroneously relies on *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) for the assertion “instructing bad faith in the context of the loss or destruction of evidence ‘requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of use of that evidence during his criminal trial’”). Respondent’s Brief at 43 (quoting *Jean*). However, *Jean* is a 42 U.S.C. § 1983 case. As explained by the Fourth Circuit:

A *Brady* violation that resulted in the overturning of the § 1983 plaintiff’s conviction is a necessary, but not a sufficient, condition for § 1983 liability on the part of the police. It is a necessary condition because the *Brady* violation establishes the requisite threshold of constitutional injury (a conviction resulting in loss of liberty) below which no § 1983 action can lie. It is not a sufficient condition, however, because the *Brady* duty is a no fault duty and the concept of constitutional deprivation articulated in both *Daniels* and *Youngblood* requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial.

*Jean*, 221 F.3d at 663. The intentionality and purposeful requirements of Section 1983 cases are not relevant here.

Relying on *Clark v. State*, the Respondent advocates for a sufficiency of evidence test, arguing that given the “overwhelming” evidence against the Appellants in this case, the withheld

evidence is not material. Respondent's Brief at 43-44 (citing *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d at 266, 268 (1993)). This approach has been rejected by the United States Supreme Court. *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) (*Brady* "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict"). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1566, 131 L. Ed. 2d 490. "Reasonable probability" looks at the "net effect" of the evidence withheld. *Kyles*, 514 U.S. at 421, 115 S. Ct. at 1560, 131 L. Ed. 2d 490; *see also State v. Taylor*, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998) ("For *Brady* purposes, in determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. However, the court should not consider the sufficiency of the evidence. The court's function is to determine whether the appellant's right to a fair trial has been impaired") (internal citations omitted).

The Respondent turns the Constitution on its head, faulting the Appellants for failing to preserve evidence and introduce it at trial. Respondent's Brief at 41 (stating that the "Appellants had the opportunity to document or record any injuries they received during the incident at any time between that incident and their arrest. They also could have had any such injuries fully recorded or documented had they: (1) remained at the scene rather than fleeing into the woods after stabbing Lopez and Solis or (2) promptly turned themselves in to law enforcement after initially fleeing. ... Appellants were the ones with the opportunity to obtain evidence related to their seeking medical treatment between the time of the incident and their arrests"). The Appellants

had no duty to obtain, preserve, or introduce evidence. U.S. Const. amend. V; *see also* S.C. Const. Art. I, § 12.

The Respondent similarly claims that the undisclosed evidence of the Appellants' injuries "would have been inconsequential at trial" because "[n]either Appellant testified in his own defense nor offered any other evidence that could have supported a conclusion they acted in self-defense during the incident." Respondent's Brief at 42. As discussed at length in Section I, *supra*, there was substantial evidence in the record from which it could be reasonably inferred that the Appellants acted in self-defense. The Appellants were not required to testify or introduce any evidence to support a "conclusion" that they acted in self-defense. *See Williams*, 427 S.C. at 250, 830 S.E.2d at 906.

The Appellants do not rely "solely on their argued speculation" of what the withheld evidence contained. *See* Respondent's Brief at 41. It is clear that the Appellants were injured, and the withheld evidence of their injuries. Colorado told Officer Cassel that he used a "club or a stick" against the Appellants. (R. p. 340, line 19-p. 342, line 17). This was described throughout the trial as a club, a tube or stick, and a metal tube or pole. (R. p. 237, line 13-14; p. 342, lines 13-14). The Appellants tried to get away from the four man on two man attack, running to their work van. (R. p. 237, lines 21-23) (Q: And when [the Appellants] ran away, did you follow them? A: Yes. I went after them, and they tried to get into a van used for work"). Law enforcement testified there was a trail of blood going to the driver's side door of the Appellants' work van. (R. p. 393, lines 21-24). It was undisputed that the withheld law enforcement records contained medical information related to the Appellants' injuries. (R. p. 129, lines 5-7; p. 131, lines 4-19; p. 132, lines 5-6). These injuries would have also been depicted in the withheld or destroyed videos. The Respondent tries to minimize these facts by stating that the trail of blood leading to the Appellants' van "likely dripped

from the box cutters Appellants used to stab Lopez and Solis before they ran to the van in an attempt to flee after the assault.” Respondent’s Brief at 41. This is purely speculation, and the Respondent cites no record evidence to support its statement.<sup>2</sup>

### CONCLUSION

The Appellants respectfully request that this Court reverse their convictions and remand for a new trial.

Respectfully submitted,

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<sup>2</sup> The Respondent also incorrectly states that “every bit of evidence presented at trial established Appellants followed Lopez from the club and attacked him with box cutters, then attacked Solis when he intervened to try to render aid to Lopez.” Respondent’s Brief at 42. As demonstrated at length in Section I, *supra*, this statement is completely inaccurate. The Appellants did not follow Lopez, Colorado, and Lopez’s friend out of the Club. Rather, they stayed inside, and left sometime later when Acosta told them that they had to leave. (R. p. 306, lines 24-25); *see also* Section I, *supra*.