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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
The Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JHARAUN WASHINGTON,

APPELLANT.

Appellate Case No. 2023-000468

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the state bears the burden of producing competent evidence on each of the elements of mutual combat when electing to use mutual combat as the theory supporting a murder charge in its indictment?

STATEMENT OF THE CASE

On April 22, 2020, in Jasper County, appellant Jharaun Washington ("Washington") murdered Donovan Hay by shooting him with a firearm. The murder occurred during a shootout between Washington and Xavier Rivers. On February 24, 2022, the Jasper County grand jury indicted Washington for the murder and possession of a weapon during a violent crime. (Ind #s 2020-GS-27-528, 2022-GS-27-79). Xavier Rivers was also indicted for the murder. Washington and Rivers proceeded to a joint jury trial before the Honorable Robert J. Bonds from March 6 – 9, 2023. (Tr. 1). Washington was represented by Patrick Hall. Rivers was represented by Carolyn Carmody. The case was prosecuted by Assistant Solicitor Trasi Campbell. At the conclusion of the trial, Washington was found guilty of murder. Rivers was acquitted. Judge Bonds sentenced Washington to 34 years for murder and 5 years consecutive on the weapon charge for an aggregate sentence of 39 years. This appeal follows raising 1 issue. This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

Brief Statement of the Crime

On April 22, 2020, appellant Jharaun Washington ("Washington") using a semi-automatic pistol shot Donovan Hay in the head killing him. The killing arose out of a shootout between Washington and his co-defendant Xavier "Zay" Rivers that occurred in an apartment complex in Hardeeville, S.C. in broad daylight. The shooting was captured on surveillance video. (Tr. 353-83; 209-38; 176-86; 261-304; 311-33; 248-60; 384-401; 402-16; 421-54; 455-79; 482-500; State's Ex. 11-15).[1]

How the Crime came about

On April 22, 2020, Donovan Hay ("Victim") and 3 of his friends drove from Ridgeland, S.C. to Walsh Drive Apartments in Hardeeville, S.C. to see Victim's sister who lived there. Victim and his friends rode together to Walsh Drive Apartments in a silver Chevrolet Malibu driven by Victim. One of the men in the car with Victim was Xavier "Zay" Rivers, Washington's co-defendant. Rivers was seated in the back seat directly behind Victim. (Tr. 353-83; 421-54; 149-62; 170-76).

On the aerial photographs of the apartment complex and the surveillance video of the crime, one can see the street that runs through Walsh Drive Apartments is in the configuration of a block "U" with duplex apartments on both sides of the street and parking spaces perpendicular to the apartments. The parking spaces are part of the asphalt street which runs through the apartment complex. Cars can go both directions in the apartment complex and exit from either entrance/exit at the top of the "U". (Tr. 149-62; 189-200; 200-08; 209-38; State's Ex. 9-17).

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[1] State's Ex. 15 is a composite of what several different surveillance cameras captured at approximately the same time.

Once Victim and his friends arrived at the apartment complex, about 11:30 a.m., still in the silver Chevy Malibu, they proceeded down the street which runs through the apartment complex toward Victim's sister's apartment. As they proceeded down the street, on their left, Victim and his friends saw a group of men including Washington standing on the front porch and in the yard of 1 of the duplex apartments.[2] The men on the front porch and in the yard were leaning over and looking into the silver Chevy Malibu at Victim and the men with him. While this was occurring, the men on the front porch and in the yard were making gestures with their hands and acting like they were reaching for guns. One of the men in the yard and near the porch later admitted he was armed with a 9mm pistol which he later turned over to police. (Tr. 353-83; 209-38; 176-86; 261-304; 311-33; 248-60; 384-401; 402-16; 421-54; 455-79; 482-500; State's Ex. #s 11-15).

Upon seeing the men in the yard and near the porch looking in their car and making gestures, one of Victim's friends in the Malibu testified he became apprehensive and fearful something bad was about to happen, i.e. their car was going to get shot up, and so he got down in the back seat behind the front passenger and curled up in a ball. While still in the silver Chevy Malibu, Victim and his 3 friends proceeded down the street of the apartment complex and passed the group of men standing in the yard and near the porch on their left. As this was occurring, one of the men with Washington on the porch recognized Xavier "Zay" Rivers in the back of the silver Chevy Malibu. He stated out loud within hearing of all of the men, "that's Zay in the back seat" of the silver Chevy Malibu. (Tr. 353-83; 209-38; 176-86; 261-304; 311-33; 248-60; 384-401; 402-16; 421-54; 455-79; 482-500; State's Ex. #s 11-15).

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[2] The duplex apartment, located at 183 Walsh Drive, belonged to Robin Washington. Robin Washington is Washington's mother, who lived in the same complex as Victim's sister. Washington did not live at the apartment with his mother but elsewhere.

After the silver Chevy Malibu passed by the group of men in the yard and on the porch, and after this friend of Washington stated that's Zay in the back seat, Washington walked immediately and hurriedly to a car, a white Cadillac, parked in the parking lot immediately in front of his mother's apartment, got in the car, and obtained a 9mm pistol. After retrieving a 9mm pistol from the white Cadillac, Washington got out of the car and positioned himself between the open driver's door and the body of the Cadillac and had his 9mm pistol in his hands pointed forward. (Tr. 353-83; 209-38; 176-86; 261-304; 311-33; 248-60; 384-401; 402-16; 421-54; 455-79; 482-500; State's Ex. #s 11-15).

As this was occurring, after the silver Chevy Malibu passed by the group of men in the yard and near the porch, it turned a corner left and stopped in the street in an area immediately behind two bushes. Xavier "Zay" Rivers got out of the back seat behind the driver of the Chevy Malibu and went to the trunk, opened it, and got out an assault rifle. While Zay Rivers was obtaining the assault rifle, which was seen by the group of men on Robin Washington's apartment porch and in her yard, one of the men in Washington's group hollered out: "He's getting a chopper [or] a stick." This person testified a "chopper" or a "stick" is slang for a rifle. Washington was standing in the doorway of the white Cadillac with the 9mm semi-automatic pistol and positioned himself so that the 9mm semi-automatic pistol was pointed over the hood of the Cadillac in the direction the silver Chevy Malibu would travel when it started moving again from behind the bushes. (Tr. 353-83; 209-38; 176-86; 261-304; 311-33; 248-60; 384-401; 402-16; 421-54; 455-79; 482-500; State's Ex. #s 11-15).

Xavier "Zay" Rivers then got back in the back seat of the silver Chevy Malibu behind the driver with the assault rifle. The Chevy Malibu then proceeded forward headed in the direction of leaving the apartment complex. As this was occurring, Rivers rolled down the driver's side back

window and stuck the barrel of the assault rifle out of the window. The barrel was pointed in the general direction of Washington and the group of men with him. Washington would have been able to see the assault rifle as the State introduced a surveillance video photograph of the barrel of the gun sticking out of the back passenger window of the Chevy Malibu as it proceeded down the street headed in the direction of leaving the apartment complex. Washington was still positioned between the open car door and the white Cadillac with his gun visible and pointing over the hood of the white Cadillac and toward the silver Chevy Malibu as it moved down the street. Rivers would have been able to see Washington armed with the pistol as Washington can be seen on the surveillance video pointing his gun in the direction of the Chevy Malibu. Further, Lucretia Jordan, an eyewitness was coming in the opposite direction of the Chevy Malibu in her vehicle and passed Washington and saw him armed with a gun with a large clip and heard her sister state out loud: "They are about to shoot."[3] Both Washington and Rivers began shooting at each other. Washington with the 9mm pistol. Rivers with the assault rifle. This was captured on the surveillance video. Lucretia Jordan also witnessed Washington shooting at the Chevy Malibu. (Tr. 353-83; 209-38; 176-86; 261-304; 311-33; 248-60; 384-401; 402-16; 421-54; 455-79; 482-500; State's Ex. #s 11-15).

It appears from the surveillance video that Washington fired first.[4] Washington fired a total of 22 shots at the Malibu that was driving away but still in the apartment complex. The Malibu

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[3] Lucretia Jordan described Washington as Robin Washington's son. She had seen Washington over at his mother's apartment before. Washington's little brother Tye was on the front porch when the shooting started and was pulled inside the apartment as soon as the shots were fired. (Tr. 311-33).

[4] Washington's first shot can be heard on the surveillance video as well as many of his successive shots. However, as testified to at trial, there was no sound with the surveillance video of the silver Chevy Malibu. Some of Rivers' shots can be heard on the surveillance video of Washington. The first gunshot heard on the surveillance video is Washington's first shot. (State's Ex. 15).

stopped after Washington fired at it initially, and Rivers got out of the back seat of the car and started shooting at Washington and his group with the assault rifle. Rivers fired 5 shots with the AK-47 in the direction of Washington and the men with him while Rivers was still inside the apartment complex.[5] One (1) of the 22 bullets that Washington fired struck Victim in the head eventually killing him. It was forensically determined that Victim was not killed by the assault rifle that Rivers fired. Rivers ran into some nearby woods with the other back seat passenger who had fled the car when the shooting started. The Chevy Malibu turned right out of the apartment complex and eventually crashed into another building where it came to rest. (Tr. 149-76; 176-86; 209-38; 261-304; 311-33; 353-83; 384-401; 402-16; 482-500; 502-11; State's Ex. 11-15; State's Ex. 16).

Washington then fled the crime scene in the white Cadillac driven by a friend of his who was also armed with a 9mm that did not fire any of the bullets during the shooting. Lucretia Jordan followed them and called 911. Washington and his friend fled to a neighboring county, Beaufort. He eventually disposed of the 9mm pistol he was firing. Other members of Washington's group also fled in another car. When police processed the crime scene, they recovered the 22 fired shell casings Washington fired and the 5 fired shell casings where Rivers fired. The assault rifle was found in the woods where Rivers fled immediately after the shooting. Police never recovered the gun that Washington was firing. It was forensically determined the silver Chevy Malibu was struck by gunfire including the driver's side post between the front and back seat. Two other vehicles, not involved in the shootout, parked in the apartment complex were also struck by bullets.

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[5] From viewing the surveillance video and based on where Rivers' fired shell casings were found, it appears Rivers shots were fired when Rivers got out of the silver Chevy Malibu and fired at Washington. Again, there is no sound on the surveillance video of the Chevy Malibu, so it is possible Rivers fired before leaving the Chevy Malibu; however, no fired shell casings were found in the Malibu when police seized it. (State's Ex. 15 & 16).

Apartment buildings in Walsh Drive Apartments were also struck and an apartment at another nearby apartment complex, Deer Creek Apartments, was struck as well. (Tr. 189-200; 209-08; 176-86; 241-47; 248-60 261-304; 402-16; 421-54; 455-79; 482-500; State's Ex. 11-15; State's Ex. 16).

ARGUMENT

Judge Bonds did not err in denying the motion for a directed verdict.

Standard of Review

On appellate review, the denial of a directed verdict motion in a criminal case is reviewed under the any evidence standard of review. State v. Cain, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Harris, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015)(emphasis added). "When reviewing a denial of a directed verdict, this [c]ourt views the *evidence and all reasonable inferences* in the light most favorable to the state." Id. (emphasis added).

What Occurred Below

At the close of the State's case, both defendants, including Washington, moved for a directed verdict on the basis the State had not proven mutual combat. (Tr. 519). Specifically, Washington argued that prior to Rivers getting out of the car and arming himself with an assault rifle, the State failed to produce any evidence of pre-existing animosity or ill-will between the parties, a willingness to fight, or that anyone was armed. (Tr. 520).

The State asserted the video itself was sufficient evidence supporting mutual combat, based upon the two parties arming themselves. (Tr. 523, l. 13-52, l. 18). The State also argued the language from State v. Brown, 108 S.C. 490, 95 S.E. 61, 63 (1918), "[t]hat, to constitute mutual combat, it is not necessary that there should be a positive agreement between the participating parties to enter the combat; it is sufficient if they willfully enter into the conflict, *upon the impulse of the moment*. Brown, 108 S.C. 490, 95 S.E. at 63 (emphasis added). (Tr. 525, ll. 21-24). The

State also argued extensively that it had met each and every element of mutual combat as set forth in State v. Young, 429 S.C. 155, 166, 838 S.E.2d 516, 522 (2020). (Tr. 522-29).

After hearing extensive argument on the matter, and considering the record and evidence submitted in the case in the light most favorable to the State, which he was required to do, Judge Bonds denied the motion for a directed verdict. (Tr. 538, ll. 9-14). Judge Bonds noted that while the case law spoke in terms of prior difficulties or a prior dispute between the parties those cases did not specify whether the prior difficulty or dispute was 6 minutes ago, 18 minutes ago, 32 minutes ago, or the previous day. (Tr. 536, ll. 8-11). Judge Bonds specifically held that based on the case law, for mutual combat to exist there did not have to be an express stated agreement to fight but that the agreement could be upon the impulse of the moment and there was evidence from which the jury could find that occurred here. (Tr. 537, ll. 6-13). Judge Bonds also found the mutual intent and willingness to fight could be proven by the acts and conduct of the parties, and the circumstances intending and leading up to the combat. (Tr. 535, ll. 11-17). Judge Bonds also found that there was sufficient evidence of each of the requirements of mutual combat and the resulting death of the victim from which the jury could find each defendant guilty under the doctrine of mutual combat. (Tr. 537-38).

Issue Raised on Appeal

Washington now appeals arguing Judge Bonds erred in not granting a directed verdict because he alleges a required element of mutual combat was missing; there was no evidence of prior hostility, animosity, ill will, or a prior dispute or difficulty between the parties. (BOA, pp. 10-13).[6] As will be shown, Judge Bonds correctly denied the motion for a directed verdict.

[6] Washington also mentions in a footnote in his brief that at the close of the State's case Washington also moved for a directed verdict alleging there was no evidence proving his identity as a shooter in the mutual combat. This argument, if raised here has no merit. Washington was identified as

Law/Analysis

Under South Carolina law, a person may commit the crime of murder by engaging in mutual combat where the death of an individual results.

> Today, we extend our jurisprudence and hold that each participant who willingly engages in mutual combat may be held accountable for the death or injury of an innocent bystander resulting from that confrontation. As each combatant aids and encourages the others to fire and continue firing the hail of bullets that results in a victim's death or injury, each may be found guilty under the "hand of one is the hand of all" theory of accomplice liability. Accordingly, we affirm the court of appeals' decision upholding Young Jr.'s convictions and sentences.

State v. Young, 429 S.C. 155, 166, 838 S.E.2d 516, 522 (2020). The Young Court made clear that mutual combat *is not a crime*, but a theory of liability already recognized by the South Carolina Supreme Court, "the hand of one is the hand of all." Id., at 166, 838 S.E.2d at 522.

> Today, we hold mutual combat can properly serve as the basis for a murder charge for the death of a non-combatant under the "hand of one is the hand of all" theory of accomplice liability. When two or more individuals engage in combat via a reckless shootout, they collectively trigger an escalating chain reaction that creates a high risk to any human life falling within the field of fire. In that type of gunfight, *all* individuals are willing to use lethal force and display a depraved indifference to human life. More importantly, an innocent bystander would not be shot but for the willingness of all combatants to turn an otherwise peaceful environment, often a residential or commercial setting, into a battlefield. In a real sense, each combatant aids and encourages all of the other combatants—whether friend or foe—to create the lethal crossfire. We therefore find the law sanctions holding Young Jr. responsible for the actions of Robinson in causing the victim's death. Both men were equally

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the shooter of the 9mm pistol at trial through both direct and circumstantial evidence including testimony of eyewitnesses, text messages, and the surveillance video. (Tr. 311-333; 209-38l; 241-47; 384-401; 402-16; 421-54; 455-79; State's Ex. 11-15). Washington admitted to his girlfriend in a text that day that he had gotten in a shootout earlier that day and everyone was mad at him. (Tr. 455-79). A co-defendant texted Washington after the crime that he told police Washington was one of the shooters, but Washington saved all of their lives. (Tr. 440-42). Defense counsel admitted in his closing argument that Washington was the shooter of the 9mm but argued he was guilty only of voluntary manslaughter because of the actions of Rivers. (Tr. 619-23).

> culpable. As a result, we affirm Young Jr.'s murder conviction and sentence.

Young, 429 S.C. 155, 157–58, 838 S.E.2d 516, 517 (2020). In Young, the defendants were charged with murder after a running gun battle [mutual combat] between them on Hilton Head Island that resulted in the death of a small child. In Young, to further emphasize the point, the Court stated: "Of course, mutual combat is not a stand-alone crime in South Carolina. Rather, it is a theory of criminal liability that underlies a recognized crime such as murder or manslaughter." Young, 429 S.C. at n. 1, 838 at n. 1.[7]

Since mutual combat is not a crime, but a theory of liability, it is not a required element of murder. Id. Murder is the unlawful killing of another with malice aforethought, express or implied. S.C. Code Ann. 16-3-10.

Washington argues that because the State alleged mutual combat in the indictment of each defendant for murder, the State was required to prove each requirement of mutual combat citing Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011). However, in Bailey, a PCR case, in an indictment, the State alleged homicide by child abuse *by specific injury* to the child and the trial judge charged *neglect* as a possible element of the offense as well. In fact, the Supreme Court pointed out that "the jury focused on the terms of the indictment and recognized **the alternative elements in the homicide by child abuse statute, *i.e.*, an 'act' versus an 'omission.'"** Bailey, 392 S.C. at 436, 709 S.E.2d at 678 (emphasis added). During deliberations, the jury informed the trial court it found no evidence Bailey intentionally injured the child as alleged in the indictment

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[7] Although not relevant to this case, the doctrine of mutual combat is also instructed to the jury, where appropriate, where the defendant asserts self-defense, because one engaging in mutual combat, cannot be without fault in bringing on the difficulty. *See* State v. Taylor, 356 S.C. 227, 233-34, 589 S.E.2d 1, 4-5 (2003). Thus, in a case where the defendant asserts self-defense but there is evidence of mutual combat, the jury is instructed that mutual combat, if it exists, would negate self-defense. Id.

and asked if it could convict under neglect which the Court charged from the statute. Id. The South Carolina Supreme Court held counsel was ineffective because he failed to object to the trial judge creating a material variance in the indictment by instructing the jury on neglect as an element of the offense and enlarging the indictment. Id. Washington does not raise on appeal that Judge Bonds erred in instructing the jury on mutual combat and murder. (IBOA, pp. 2-14). Such an objection would not be valid in any event. Again, mutual combat is not an element of murder. S.C. Code Ann. Section 16-3-10. Mutual combat is accomplice liability. Young, *supra*. Even Bailey recognized that a variance in an indictment is not material if it is not an element of the offense. Bailey, 392 S.C. at 433, 709 S.E.2d at 677; State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993); State v. Hiot, 276 S.C. 72, 276 S.E.2d 163 (1981); State v. Dent, 442 S.C. 38, 897 S.E.2d 46 (Ct. App. 2023); State v. Green, 406 S.C. 589, 753 S.E.2d 259 (Ct. App. 2014).

Washington also argues State v. Smith, 406 S.C. 215, 219-20, 750 S.E.2d 612, 614 (2013), but in Smith our Supreme Court held that an indictment for homicide by child abuse under S.C. Code Ann. 16-35-85(A)(1)(abuse or neglect causing death of a child) did not provide notice of a section (A)(2) charge (aiding and abetting abuse or neglect resulting in death of a child), two completely different crimes. Further, Washington does not challenge his indictment on appeal either. (IBOA, pp. 2-14). The State did not allege two different crimes but one crime, murder.

Washington was indicted for *the crime of murder*. The prosecution is not required to plead its evidence in the indictment, rather an indictment is sufficient for the purposes of the court exercising jurisdiction if the elements of the crime are fully alleged, and if the date of the offense, the place of the offense (county where the case is being tried), and the name of the defendant are also alleged. State v. Jones, 333 S.C. 6, 507 S.E.2d 324 (1998); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). *See also* State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001)(where murder

indictment did not specifically allege that defendant killed the victim with malice aforethought, it did state that defendant killed the victim in violation of S.C. Code Ann. Section 16-3-10, and that by specific reference to the statute in the body of the indictment provided appellant with notice of the elements of murder). It is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of *the particular offense* charged in the bill of indictment. State v. Castineira, 341 S.C. 618, 535 S.E.2d 449 (Ct. App. 2000), *affirmed on writ of certiorari*, State v. Castineira, 351 S.C. 635, 572 S.E.2d 263 (2003); State v. Cody, 180 S.C. 417, 186 S.E.2d 165 (1936); *see also* S.C. Code Ann. Section 17-19-20 & 30(sufficiency of indictments including murder). Washington was charged with murder. Further, if the indictment alleges the killing was done with malice aforethought, it is unnecessary that the indictment allege feloniously and willfully. Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002).

It is also well-settled law that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him as a principal first. State v. Batchelor, 377 S.C. 341, 661 S.E.2d 58 (2008); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000): State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987). This is because under South Carolina law all are guilty whether a principal 1st or a principal 2nd; it makes no difference, the act of one is the act of all. Dickman, *supra*; State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971); State v. Langley, 335 S.C. 72, 515 S.E.2d 101 (1999); State v. Cox, 258 S.C. 114, 187 S.E.2d. 525 (1972); State v. Blackwell, 220 SC. 342, 67 S.E.2d 684 (1951); State v. Luster, 178 S.C. 199, 182 S.E.2d 427 (1935); State v. Hunter, 79 S.C. 73, 60 S.E2d. 240 (1908); State v. Anthony, 1 McCord 285 (1821); State v. Fley, 2 Brev. 338 (1809).

Again, a variance in an indictment is not material where the matter alleged *is not an element of the offense*. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993). The allegation of mutual combat

in the indictment was not an element of the offense, was unnecessary, was surplusage. *See* State v. Adams, 430 S.C. 420, 433, 845 S.E.2d 217, 223–24 (Ct. App. 2020)("As long as the jury unanimously agreed the State had proven that the defendant killed the victim with malice aforethought, constitutional guarantees do not require unanimity as to what weapon the defendant used; six could believe it was the gun, the other six the knife. Because the means of the killing is not an essential element, unanimity *as to the means* is not essential. It is undeniable that "when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.") *quoting* Schad v. Arizona, 501 U.S. 624, 649 (1991) (Scalia, J., concurring), *abrogated on other grounds*, Edwards v. Vanoy, 593 US. 255, n. 4 (2021). This analytical model is serviceable when the defendant is charged with a single offense such as murder. Id. To the extent Washington argues he was entitled to a directed verdict because of a material variance in his indictment, he is wrong. Gunn, *supra*. The State proved all the elements of murder. And, regardless of the above discussion, as will be shown below, the State also proved all of the requirements of mutual combat.

South Carolina had long recognized that mutual combatants are liable for the death of one of the participants to the mutual combat. *See, e.g.*, State v. Brown, 108 S.C. 490, 499, 95 S.E. 61, 63 (1918) ("[E]very one [sic] is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and *death results to one of the participating parties*, every one [sic] engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not. And regardless of whether he was on one side or the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences." (emphasis added)). Young, 429 S.C. at 166, 838 S.E.2d at 522, extended mutual combat liability to an innocent bystander. Id.

There is no question that mutual combat requires the following:

> To constitute mutual combat, there must be a mutual intent and willingness to fight, "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Graham, 260 S.C. at 450, 196 S.E.2d at 495[8]; *see also* Taylor, 356 S.C. at 235, 589 S.E.2d at 5 ("The mutual combat doctrine is triggered when both parties contribute to the resulting fight."); Brown, 108 S.C. at 499, 95 S.E. at 63 ("[T]o constitute mutual combat, it is not necessary that there should be a positive agreement between the participating parties to enter the combat; it is sufficient if they [willfully] enter into the conflict, upon the impulse of the moment."). The State is required to prove the rival combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed. Taylor, 356 S.C. at 233–34, 589 S.E.2d at 4–5. Mutual combat may be the basis of either a murder or manslaughter conviction depending on the combatant's state of mind at the time of the killing, i.e., whether the combatant acted with malice aforethought. Id. at 232, 589 S.E.2d at 3–4 (quoting State v. Andrews, 73 S.C. 257, 260, 53 S.E. 423, 424 (1906)).

State v. Young, 429 S.C. 155, 160–61, 838 S.E.2d 516, 518–19 (2020). In addition, there must be an antecedent agreement to fight, which may be shown by evidence establishing a pre-existing dispute or ill will between the combatants. *See* State v.Taylor, 356 S.C. 227, 233-34, 589 S.E.2d 1, 4-5 (2003).

Rightly or wrongly, our case law has evolved to where our appellate courts interpreting State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003)[9] have found that prior hostilities, animus, ill

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[8] State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)

[9] In State v. Taylor, 356 S.C. 227, 232–35, 589 S.E.2d 1, 4–5 (2003), the South Carolina Supreme Court actually held that the State must prove an antecedent agreement to fight, the parties were armed with deadly weapons, and the combat did not arise merely out of a fist fight. The Court noted the evidence of prior hostilities, animus, or a dispute was evidence which creates an inference of the antecedent agreement to fight. Id. Taylor specifically recognized that in that case there was no evidence of a prior dispute or ill will **or** a willingness to engage in an *armed* encounter with the other party. Taylor, 356 S.C. 227, 234, 589 S.E.2d 4-5. In fact, one party did not know the other party was armed. In State v. Young, 424 S.C. 424, 432-33, 818 S.E.2d 486 (Ct. App. 2018), *affirmed*, Young, 429 S.C. 155, 838 S.E.2d 516, this Court did not define mutual combat as containing a requirement of proof of pre-existing hostilities, difficulties, a prior dispute, or animus between the combatants, but instead held that the requirement of an antecedent agreement to fight

will, or a prior difficulty or dispute between the parties is required to prove the theory of accomplice liability using mutual combat. State v. Bowers, 436 S.C. 640, 648, 875 S.E.2d 608 (2020);[10] State v. Young, 429 S.C. 155, 838 S.E.2d 516, n. 7 (2020); State v. Bowers, 428 S.C. 21, 32–34, 832 S.E.2d 623, 629–30 (Ct. App. 2019), aff'd, 436 S.C. 640, 875 S.E.2d 608 (2022); Campbell v. State, 441 S.C. 361, 366–67, 893 S.E.2d 492, 494–95 (Ct. App. 2023).

However, these cases do not define or discuss how long the prior hostility, animus, ill-will, dispute, or difficulty must have occurred before the actual crime. In fact, in State v. Brown, 108 S.C. 490, 95 S.E. 61, 63 (1918), quoted approvingly in Young, *supra*, there was no pre-existing ill-will or a prior dispute until moments before the slayings occurred. The mutual combat in Brown arose out of one textile worker on strike being offended by something another textile worker not on strike said that day and the mutual combat erupted immediately upon the impulse of the moment and others joined in knowing one or more of the participants were armed. Brown, 108 S.C. 490, 95 S.E. 61. All participants were held liable for the 2 slayings that occurred. Id. The Supreme Court in Young citing Brown, *supra*, held the law is clear that it is not necessary that there be a positive agreement between the participating parties to enter the combat. Rather it is sufficient if they willfully enter into the conflict **upon the impulse of the moment**. Young, 429 S.C. at 160–61, 838 S.E.2d at 518–19 (citing Brown, 108 S.C. at 499, 95 S.E. at 63 ("[T]o constitute mutual combat, it is not necessary that there should be a positive agreement between the participating parties to enter the combat; it is sufficient if they [willfully] enter into the conflict, upon the impulse of the moment.")). "*The relevant frame of reference, however, is [the defendant's] participation*

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may be shown **by evidence of prior hostilities, a pre-existing dispute, animus, or ill will between the combatants**. Respondent submits this is consistent with the actual holding in Taylor.

[10] Bowers was a 2-1-2 decision, with only 2 Justices discussing mutual combat. Chief Justice Beaty concurred in result only, and 2 Justices dissented who accepted the concession of both parties that mutual combat should not have been charged below to negate self-defense.

in the gun battle." Young, 429 S.C. at 162, 838 S.E.2d at 520 (2020)(emphasis in original), quoting Alston v. State, 662 A.2d 247, 252 (Md. 1995), aff'g 643 A.2d 468 (MD.Ct. Spec. App. 1994). This is the correct, reasonable, and rationale approach as many mutual combat situations arise on the spur of the moment, or as in this case, the participants in the mutual combat or their associates may be unwilling to cooperate and testify, or feign ignorance, to the prior hostilities, dispute, animus, or ill will that brought on the mutual combat.[11] Resultingly, the State must prove the prior animus, ill-will, or hostilities by circumstantial evidence, which was done in this case. Additionally, one prior difficulty that triggered hostility, animus, or ill-will leading to this mutual combat occurred just moments before the shooting erupted.

Here, viewing the evidence and all inferences in the light most favorable to the State, there was evidence of each of the requirements of mutual combat not only from the surveillance video of the shootout and the still photographs, but also from eyewitness' testimony. State v. Harris, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015)("When reviewing a denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the state.").

There were two groups of men involved in this crime. Washington's group was standing on the porch and in the yard of a duplex apartment. One of Washington's group admitted at trial he was armed with a 9mm pistol. (Tr. 402-16). Victim's group including Rivers was in the silver Chevy Malibu that drove through the apartment complex. Rivers had an assault rifle in the trunk.

As the silver Chevy Malibu was driving down the street approaching where Washington and his group were standing, one of the men with Washington, Cameron Hatfield, stated out loud

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[11] The members of the two groups that testified in this case were anything but cooperative witnesses. Many of them feigned ignorance about matters which they clearly knew. This is clear from viewing the surveillance video of the crime. (State's Ex. 11-15). Members of Washington's group refused to identify him as the person shooting the 9mm even though several of them were standing near Washington while he was firing the gun.

in the presence of the entire group "that's Zay [Rivers] in the back seat." (Tr. 425, ll. 4-25; 431, 1-11; 450, ln. – 451, ln. 1; 453, ll. 6-25). One of men in Victim's car became apprehensive by the actions of the group of men including Washington who were making threatening gestures with their hands and acting like they were reaching for weapons. (Tr. 353-383). On the surveillance video, as the silver Chevy Malibu passed Washington and his group, Washington can be seen immediately and hurriedly walking to a white Cadillac and getting in the car. He then emerges from the car after arming himself with a 9mm semi-automatic pistol. (State's Ex. 11-15).[12] Washington can be seen looking in the direction of the Chevy Malibu. (State's Ex. 11-15). As the Chevy Malibu passed Washington and his group, the same man who became apprehensive because of the gestures Washington and his group were making curled himself up in a ball in the back of the Malibu anticipating Washington and his group were going to shoot up the Chevy Malibu. (Tr. 353-83). After the Chevy Malibu pulled past the white Cadillac, it turned left behind 2 bushes. The Chevy Malibu stopped. (State's Ex. 11-15). While this was occurring, as discussed, Washington walked directly to the white Cadillac, armed himself with the 9mm, positioned himself between his driver's door and the white Cadillac with his gun pointed forward toward the direction which the Chevy Malibu would travel when it resumed moving again. (State's Ex. 11-15). Rivers got out of the Chevy Malibu after it stopped behind the bushes and went to the trunk, opened the trunk, pulled the assault rifle out of the trunk and armed himself with the assault rifle. (State's Ex. 11-15; Tr. 431-32). On the surveillance video, Washington can be seen looking in the direction of Rivers, and Rivers can be seen looking in the direction of Washington and his group. (State's Ex. 11-15).

[12] In his Brief, Washington admits that upon seeing the Victim's vehicle, "an individual the State claimed to be Appellant armed himself with a handgun from a white Cadillac parked at the apartment complex. State's Ex. 15" (BOA, p. 3, ll. 6-8).

There is circumstantial evidence, or an inference from the evidence, from the actions of both Washington and Rivers upon seeing or recognizing each other that there was prior hostility, animus, ill-will or a difficulty between the two men. (State's Ex. 11-15; Tr. 425-, ll. 4-25). Nothing else can explain their actions that day. (State's Ex. 11-15; Tr. 425, ll. 4:25). While Taylor requires the evidence of the antecedent agreement to fight be plain, circumstantial evidence is good evidence, and nothing could be plainer than the two men's actions that day. Further, what is seen on the surveillance video is plain as well. Upon seeing each other or recognizing each other, both men immediately **and** simultaneously armed themselves with dangerous semi-automatic weapons and engaged in a shootout in broad daylight in an apartment complex resulting in the death of Victim. (State's Ex. 11-15; Tr. 425, ll. 4-25).

Furthermore, as Judge Bonds recognized, the case law does not define how long ago the prior history or difficulty between the combatants must have been, 5 seconds, 5 minutes, 5 hours, or 5 days. (Tr. 536, ll. 8-11). Here, one prior difficulty occurred just seconds before the shootout occurred. Upon seeing Washington and his group looking into the silver Chevy Malibu and making gestures with their hands like they were reaching for weapons, Hays and Rivers stopped the Chevy Malibu and Rivers got out and armed himself with an assault rifle. Simultaneously, upon Washington's group recognizing Rivers in the Chevy Malibu and making the threatening gestures with their hands, Washington immediately walked to the white Cadillac and armed himself with a 9 mm pistol. Washington did not retreat but prepared for battle. Rivers also got back in the Chevy Malibu and prepared for battle. He rolled the window down and stuck the barrel of the gun out the window and pointed it in the direction of Washington and his group.

This is no different than two groups of young men meeting in a crowded mall or at a county fair and exchanging threatening hand gestures, showing each other weapons, and then opening fire on each other and killing an innocent bystander. Mutual combat is self-evident from the circumstances. It would be plain and self-evident on a security video as well. The prior difficulty, hostility, animus, ill-will or dispute can occur seconds or moments before the mutual combat occurs. Young, *supra*, quoting Brown, *supra* (mutual combat may arise upon the impulse of the moment). Like malice, hostility, animus, or ill-will can form long before the crime, minutes before the crime, or seconds before the crime occurs. Id.

Additionally, both men were armed and knew the other combatant was armed. As Rivers armed himself with the assault rifle, one of the men with Washington and his group, Hatfield, called out, "he's getting a shotgun [a chopper] or stick." (Tr. 431-32). This witness explained a "chopper" or "stick" is a rifle. (Tr. 431-32). On the surveillance video, Washington can be seen standing between the driver's door and the white Cadillac armed and looking in the direction of the Chevy Malibu. As a result, Washington knew Rivers was armed. Rivers did not start shooting at Washington or the group of men with Washington. Rivers, armed with the assault rifle, got back into the back seat of the Chevy Malibu with the assault rifle. (State's Ex. 11-15).

The Chevy Malibu started moving again and Rivers rolled down the back window and stuck the barrel of the assault rifle out of the window of the Chevy Malibu pointed in the direction of Washington and his group of friends. (State's 11-15). The State introduced a photograph showing the barrel of the assault rifle sticking out of the window of the Chevy Malibu as the Chevy Malibu was proceeding down the street and the gun barrel is visible and pointed in the direction of Washington and his group. (State's Ex. 12 [Still photo with gun barrel sticking out the window]). Washington already knew Rivers was armed, but now he could see for himself that Rivers was

armed. (Tr. 431-32; State's Ex. 12). Likewise, based on the surveillance video, Rivers would have known Washington was armed because Rivers had pointed his assault rifle toward Washington and on the surveillance video Washington can be clearly seen positioned between his open driver's door and the white Cadillac pointing a large firearm with a clip in the direction of Rivers and the Chevy Malibu. (State's Ex. 11-12). Additionally, Lucretia Jordan, who passed by Washington going in the opposite direction from the Chevy Malibu, saw Washington at the white Cadillac and that he was armed with a pistol with a big clip. (Tr. 311-333).

The two men, Washington and Rivers then started shooting at each other in an occupied apartment complex with people on the street and in their homes. (State's Ex. 11-15; 311-33).[13] In the surveillance video, it appears Washington fired first. (State's Ex. 11-15). Lucretia Jordan also testified she saw Washington shooting at the Chevy Malibu right after her sister exclaimed "they are about to shoot." (Tr. 311-33). Rivers fired back at least 5 times with the assault rifle. Washington fired a total of 22 rounds during shootout with 1 bullet striking the driver of the Chevy Malibu, victim Donovan Hays killing him. Washington also struck the Chevy Malibu, other cars, other apartments in the apartment complex, and another apartment complex nearby. Washington then fled the complex in the white Cadillac and eventually disposed of the 9mm pistol. Lucretia Jordan followed the Cadillac and called 911. (Tr. 149-76; 176-86; 189-200; 209-38; 241-304; 311-33; 353-83; 384-401; 402-16; 421-54; 455-79; 482-500; 502-11; State's Ex. 11-15). Flight is evidence of guilt. Destruction of evidence is also evidence of guilt. State v. Beckham, 334 S.C. 302, **314-16**, 513 S.E.2d 606 (1999).

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[13] Washington also admits in his brief that that after Rivers got back in the Chevy Malibu, as Victim's vehicle began to drive down the street, shots were fired between Washington's group and Victim's vehicle. (BOA, p. 3, ll. 8-11). Actually, from the surveillance video it appears Rivers fired his 5 shots after he exited Victim's vehicle. (State's Ex. 15; See also State's Ex. 16).

Based upon the above evidence, including the surveillance video, the still photographs and the testimony of witnesses, and all of the reasonable inferences therefrom, considered in the light most favorable to the State, the State produced evidence that there was a mutual intent and willingness to fight, "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Graham, 260 S.C. at 450, 196 S.E.2d at 495; *see also* Taylor, 356 S.C. at 235, 589 S.E.2d at 5 ("The mutual combat doctrine is triggered when both parties contribute to the resulting fight."). The State proved there was an antecedent agreement to fight, based on the conduct of the parties after seeing or recognizing each other, including arming themselves with weapons in broad daylight, not immediately shooting at each other, pointing their weapons in the direction of each other, waiting to shoot as the Chevy Malibu proceeded down the street, and opening fire on each other in a crowded apartment complex with dangerous semi-automatic weapons and continuing to fire upon one another. While the State did not prove the parties sat down and agreed to fight, it did not have to; the State proved the parties, Washington and Rivers, willfully agreed to enter into the conflict upon the impulse of the moment. Young, 429 S.C. at 160–61, 838 S.E.2d at 518–19 (citing Brown, 108 S.C. at 499, 95 S.E. at 63 ("[T]o constitute mutual combat, it is not necessary that there should be a positive agreement between the participating parties to enter the combat; it is sufficient if they [willfully] enter into the conflict, upon the impulse of the moment."). The State proved the rival combatants, Washington and Rivers, were armed for the mutual combat with deadly weapons and there is direct and circumstantial evidence each combatant knew the other was armed. Taylor, 356 S.C. at 233–34, 589 S.E.2d at 4–5. And, based on the circumstantial evidence of the conduct of the parties upon seeing each other, arming themselves, and engaging in a shootout, there was circumstantial evidence or an inference from the evidence there was hostility, a prior dispute, ill will, animus, or difficulties between

Washington and Rivers. Id. This is plain from the security video. Further, a prior hostile difficulty or act had just occurred moments before when Washington and his group made threatening gestures with their hands triggering both combatants to arm themselves and engage in a shootout in a crowded apartment complex in broad daylight resulting in the death of Victim. This is supported by both direct and circumstantial evidence.

Mutual combat may be the basis of either a murder or manslaughter conviction depending on the combatant's state of mind at the time of the killing, i.e., whether the combatant acted with malice aforethought. Id. at 232, 589 S.E.2d at 3–4 (quoting State v. Andrews, 73 S.C. 257, 260, 53 S.E. 423, 424 (1906)). Here, the jury was instructed on mutual combat and both murder and manslaughter. (Tr. 640-45). Washington admitted he was guilty of voluntary manslaughter. (Tr. 622-23). Here, Washington fired a total of 22 rounds at the Silver Chevy Malibu killing the victim, striking the victim's vehicle, nearby apartments and another apartment complex. The trial judge appropriately sent the case to the jury and the jury appropriately found Washington acted with malice and was guilty of the crime of murder.

CONCLUSION

For the above stated reasons, the convictions and sentences of Washington for the murder of Donovan Hay and for possession of a weapon during a violent crime should be affirmed.

[Signature Page to Follow]

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